Native Title Services Victoria Ltd

ABN 27 105 885 149
Level 2 642 Queensberry Street (PO Box 431) North Melbourne VIC 3051
ph (03) 9321 5300 fax (03) 9326 4075 www.ntsv.com.au

30 November 2010

asweeney@ntsv.com.au

The General Manager
Business Tax Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: nativetitle@treasury.gov.au

and

The First Assistant Secretary
Social Inclusion Division
Attorney-General's Department
3-5 National Circuit
National Circuit
Barton ACT 2600

By email: native.title@ag.gov.au

Dear General Manager/First Assistant Secretary,

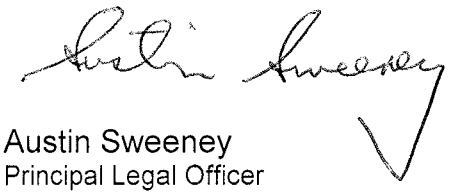
NTSV Submission - Native Title, Indigenous Economic Development and Tax

Native Title Services Victoria Ltd (NTSV) is the recognised native title services provider for the state of Victoria. NTSV with the assistance of Freehills lawyers provides for your consideration its submission in response to the May 2010 consultation paper titled "Native Title, Indigenous Economic Development and Tax".

The structure of our submission is to directly answer the consultation questions which are contained within the consultation paper. We have included at Attachment 1 a table comparing the proposed Indigenous Community Fund to a charitable entity, including features and recommendations.

If you have any queries, please do not hesitate to contact me on (03) 9321 5300.

Yours faithfully,



Austin Sweeney
Principal Legal Officer

Native Title Services Victoria

Submission of 30 November 2010 - Native Title, Indigenous Economic Development and Tax

CONSULTATION QUESTIONS:

Tax treatment of benefits received for different reasons

(a) In the context of your experience, when do the potential income tax implications of an agreement arise in an agreement making process?

In our experience the potential income tax implications arise at the completion of the agreement when the issue of distribution of benefits to beneficiaries arises. We assume that the payments are tax exempt.

The tax treatment of the structure and timing of funds which pass to native title holders under resource and native title settlement agreements are subject to significant uncertainties.

(b) What has been your experience in seeking advice or guidance, either privately or from government agencies, on the interaction between the income tax system and native title?

In recent times NTSV has sought advice on the treatment of monies which arise from native title agreements. There is a general lack of guidance and clear understanding regarding the treatment of native title payments and how these payments are affected by the taxation system.

Our experience in the past has been that advice is often too generalised, ie not specific to a particular native title group's circumstances, or the advice is not sufficiently holistic. For example, it may be possible to obtain advice in relation to how to deal with GST, and separate advice about how to establish a charitable structure, but it is not easy to obtain holistic advice on the best way to structure and manage a native title group's activities, taking into account the group's aspirations, income from native title agreements, and the potential income from other sources.

(c) How could government agencies assist to provide greater clarity regarding the tax treatment of payments made under a native title agreement?

Greater clarity can be provided by ensuring in the Income Tax Assessment Act 1997 that all payments under native title agreements are exempt. This in fact reflects the underlying assumption in many existing agreements and addresses the confusion and inconsistencies of the analysis of payments in relation to native title agreements that

has been well documented for many years.

Further assistance could be provided by clarifying the GST status of payments. For example, how GST should be treated and processed in the context of native title groups who are not registered for GST and whether this compliance work can be undertaken by native title representative bodies as agent for the native title group.

On the assumption that native title payments are tax exempt, it should therefore follow that such payments are exempt from GST for similar reasons.

Limitations on the use of charitable trusts

(d) What has been your experience in the use of charitable trusts as a means of managing payments received under native title agreements?

Charitable trusts offer some valuable benefits to native title groups however they are rarely a "perfect fit" for the activities and aspirations of native title groups. In particular, the following limitations exist:

- *the public benefit test may require the beneficiaries of the trust to be broader than the native title group whose rights the agreement arose from (despite the fact that native title groups are significantly wider than the traditional concerns of the public benefit test with families);*
- *the charitable purposes test is not well understood and it is difficult to readily obtain guidance about the test. The uncertainty as to what activities do validly fall within the definition of charitable leads many groups to avoid certain activities, such as community development activities, which would have meaningful community benefits;*
- *the presumed limits on accumulation of income by a charity may be contrary to the aspirations of native title groups in terms of achieving intergenerational equity from the benefits arising out of native title agreements. There is a lack of understanding of the limits on accumulation and it is difficult to readily obtain guidance on this; and*
- *for many smaller payments an umbrella or regional charitable trust may be useful but no such trust currently exists in Victoria.*

The management of charitable trusts can also be difficult for native title groups due to a lack of clear guidance and information on what can and can't be done. The aspirations of some native title groups may be restricted by charitable trust structures, which are chosen in order to gain tax benefits, rather than other structures which might more readily allow the native title group to be proactive in generating economic development opportunities for their community.

(e) Within the context of your experience, what structures or arrangements are used to manage the use of payments received under native title agreements?

A range of options from charitable trusts, bank accounts (bare trusts) and discretionary trusts are currently used. There is a lack of clarity as to the range of options available and why one would be chosen rather than another – tax is often a motivator rather than focusing on the needs over time and the likely use and application of the payments.

Income Tax Exemption

(f) How would an upfront tax exemption for payments made in respect of a native title agreement impact on the negotiation of agreements?

Based on the above comments, the exemption will not change the negotiation of resources agreements but will greatly assist in the holding of, determination of structures for, and application of the payments. We anticipate it will greatly assist a more straight forward review of the application of the payments.

As mentioned previously, native title groups and future act proponents negotiate and finalise future act agreements on the assumption that benefits provided under native title agreements are income tax exempt.

*In the negotiation of settlement agreements, an upfront tax exemption for payments would ease the uncertainty that confronts parties negotiating such agreements. The new Traditional Owner Settlement Act 2010 (Vic) (**TOSA**) promotes the settlement of native title claims in Victoria by providing additional options for settlement. Difficult questions of the tax treatment of these options would be removed by an upfront exemption. An example is the policy intention of the legislation to settle all claims by a single native title group including by the provision of a lump sum settlement amount. The status of that lump sum, and income upon it, would not present tax complexities if an upfront tax exemption were available.*

(g) How should the concept of a native title agreement be defined? Should this concept be defined with respect to the NTA?

'Native title agreements' should be defined as broadly as possible to ensure that the term captures not only agreements reached under the Native Title Act (for example, section 31 and ancillary agreements under subdivision P, or by way of an Indigenous Land Use Agreement), but also includes other commercial agreements which are reached between traditional owner groups and third parties, as well as agreements reached or recognised under other related legislation (eg Victoria's TOSA). The relevant indicator is that a native title group is a party to the agreement.

It is the experience in Victoria that commercial agreements are often negotiated, outside of the Native Title Act, to allow for an expedited settlement of negotiations between land developers and the native title group. These agreements relate to activities on crown land but are not necessarily agreements under the Native Title Act. Similarly with the practice in other jurisdictions, a commercial agreement may operate

in parallel to a Native Title Act s.31 agreement.

NTSV believes that the alternative approach – allowing an independent decision maker to decide case by case whether an agreement is a native title agreement to which the exemption applies – is not ideal, because:

- *such an approach would involve applying a restrictive view of native title agreements and the payments made under them;*
- *it would undermine the intention of the Native Title Act which is to provide benefits to those who can demonstrate they hold native title rights and interests – restricting certain benefits (ie tax concessions) to only some native title holders may not be equitable;*
- *such a regime would create substantial bureaucratic and regulatory burden; and*
- *it would incentivise agreements being negotiated and drafted in a constricted manner in order to meet the criteria for being categorised as a "native title agreement" by the decision maker.*

(h) Should the purposes for which an exempt payment may be used be prescribed? For example, should there be a restriction on an exempt payment being used for purely private consumption?

No. Current practice demonstrates that the vast majority of agreements are designed towards community benefit. Imposing a regime such as proposed would therefore duplicate existing practice. It would also undermine the autonomy of groups that native title is intended to recognise.

Furthermore, there is the difficulty of defining what purposes are "purely private consumption". Payment to an individual of $1000 which is used to purchase a car may be so categorised; however if this car is used to enable the individual to travel to employment, the payment may alternately be viewed as in support of economic opportunity. Attempting to distinguish certain types of payments from other types may therefore be problematic. Imposing such distinctions also presumes an understanding of the reasoning behind certain payments being approved by a native title group. From an equity perspective, the distinction is unable to be supported.

Exempting some payments and not others is contrary to the intention of the native title system. The NTA recognises that those who hold native title rights and interests should receive some benefit in compensation for the historical and potential future impact on those rights and interests. All benefits flowing from an agreement arising out of a group's native title rights and interests should be seen as benefits flowing directly from those native title rights and interests. These rights and interests are unique to any other type of rights and interests and should be recognised as such in their treatment under the tax system.

The intergenerational attention of many native title agreements limits the ability of

present day decision makers to predict community needs of future generations. And the admixture of capital and revenue amounts in many native title agreements – necessary for economies of scale and ease of administration – means that a use constraint on funds would align the treatment of capital amounts with income. This would effectively compel the disaggregation of capital and revenue amounts and remove the benefits admixture brings. An example is the proposed trust fund for lump sum settlement amounts under the TOSA.

Leading Practice Agreements – governance arrangements

Our comments above also apply to the proposal in the discussion paper 'Leading practice agreements: maximising outcomes from native title benefits' that any income tax exemption relating to native title payments be conditional on the adoption of the governance measures and leading practice principles proposed in that paper.

It would be inequitable to require native title groups that already satisfy community standards of corporate governance under the Corporations Act, CATSI Act or comparable regimes to also satisfy additional requirements that may not be appropriate to their circumstances and are not imposed on other parties to agreements, in order to secure a tax exemption that would maximise the benefit that native title groups and the broader community achieve from native title agreements.

Indigenous Community Fund

Please note that this submission includes at Attachment 1 a comparative table comparing the proposed ICF to a charitable entity, including features and recommendations.

(i) If development of a new tax exempt vehicle is progressed further:

(i) What payments should such a fund be able to receive? Should the fund only be allowed to receive payments made under a native title agreement or should it be allowed to receive other payments?

The ICF should not be restricted to receiving payments from native title agreements and should be open to receive any payments which are directed to it by the traditional owner group. For example, traditional owner groups may currently have monies which derive from non-agreement sources, but which they wish to put into the ICF.

(ii) Do you agree with the proposed permitted uses of the fund? What other uses could be considered?

The ICF proposal appears to be largely based on a charitable purposes model. By specifying permitted uses as proposed it runs the risk of restricting activities to a narrower range than those that would be permitted under a normal charitable purposes model. This type of discussion has been documented in relation to the 2001 Report on the Inquiry in to the Definition of Charities (the

Sheppard Inquiry).

If the intention is for the ICF to be able to perform additional activities to that of a normal charitable entity, then it would be preferable to identify any objectives which may be outside the charitable purposes definition, and list these individually as additional purposes to the primary charitable purpose.

An alternate option is to amend the law relating to charities to allow benefits to be restricted to native title groups, as has been done in New Zealand and Canada (this would require amendment to the ITAA 97 to maintain tax exemption as a charity and State and Territory Act amendments for recognition as a charity at law) and to provide specific guidance to explain what is currently permissible and/or set up an expert advisory or review panel.

A further alternative would be to substitute a definition based on the classic charitable foundation (with its four-fold elements based on the Statute of Elizabeth 1601 (UK)) with a broad based definition of 'Indigenous Economic Development'.

Economic development is a crucial part of effectively applying native title payments and must be part of the purposes and activities of the ICF or a charitable entity with deemed public benefit for native title groups. Clear guidance needs to be provided as to the extent economic development can be pursued through a charitable or exempt ICF, and linkages should be made with existing programs. For example, development of social enterprises for training and employment can be charitable purposes; assistance for these activities is currently provided through the Social Enterprise Development and Investment Fund established by DEEWR.

Funding to individuals can also take place in the context of charitable purposes and the ICF should not limit this.

If the ICF is more restrictive than a charitable entity with less concessions and abilities to receive charitable funding it will be not seen as a viable alternative. Either a charitable entity should be used (deeming the public benefit for native title groups) or an ICF should have charitable purposes plus additional activities such as for profit economic development. In either case a great deal more explanation and information as to the permissible activities will need to be provided.

(iii) <u>What legal form should the fund be required to take?</u>

A company is the simplest form for governance, but there is a need for a variety of options from which native title groups can select the most suitable. Where payments are too small or the native title group is not cohesive enough to establish its own entity there must be a regional alternative available.

A regional structure would be required to carry out the same activities as the ICF (or charitable entity, whichever has the greatest range of activities) and would have an appropriate mechanism to ensure each regional native title group can participate, with independent directors governing by a set of rules. An 'auspice'

arrangement, whereby a regional entity administers the funds on a regional basis, would have a system to ensure decision making by a native title group in respect of the group's fund (eg. an allocation committee, a power of appointment etc).

The policy underpinning the TOSA is an example of a regional fund. The policy proposes a State-wide trust fund to hold lump sum settlement amounts, an appropriate amount of the income of which would fund each traditional owner group's corporation.

(iv) What kinds of governance requirements should the fund be subject to?

NTSV believes that there should be different governance models for both a community model and a regional model. A community model (such as the ICF or charitable entity) could be used for a community/native title group where there are sufficient funds, skills and consensus for the proposed entity.

The skills required for governance of the community entity should include

- *investment management or financial planning;*
- *knowledge of needs in the community;*
- *knowledge of effective programs already operating;*
- *program evaluation;*
- *cross-cultural communication skills;*
- *business evaluation if funding start up social enterprises and economic development;*
- *program development and management if undertaking activities directly;*
- *if charitable, understanding of what can be funded or undertaken;*
- *reporting, compliance and accountability including managing conflicts of interest.*

A regional model could be used where any of the community model elements are missing or a community prefers to utilise the independent entity.

The skills for the directors of the trustee of the regional entity include:

- *investment management*
- *grant review against the terms of the trust*
- *program evaluation*
- *business evaluation if funding start up social enterprises and economic development*
- *understanding of charitable purposes*
- *reporting, compliance and accountability including conflicts of interest*
- *an understanding of Aboriginal and Torres Strait Islander people*

The governance requirements will be different for the two options. The community model will involve representatives from the native title group and possibly others but it may not be essential (or practical) to require independent directors. The regional model will be all independent but separate native title groups will have advisory committees who can direct the trustee as to the application of the trust funds.

A community entity – an appropriate corporation (can be referred to as an Indigenous Community Development Company) incorporated under CATSI, the Corporations Act or other appropriate vehicle with a model constitution clearly showing options for governance ie members, election of directors, consultation processes, list of sample purposes kept within the charitable purposes.

A regional entity – an appropriate entity (eg. corporation or statutory body) with independent directors as the corporate trustee of a charitable trust with clear purposes and ability for native title groups to establish advisory committees to direct trustee as to application of funds within the terms of the trust. Government funding would need to be provided to enable the trustee or a separate body to assist communities in determining application to funds within the terms of the trust to enable current and future native title holders to benefit and to reflect the communal nature of native title.

Another essential governance requirement is financial transparency. Every native title group should receive accurate financial information about the state of their funds, whether held by a community entity or a regional entity.

The proposed State-wide trust fund for the TOSA is a useful example of an attempt to create appropriate governance arrangements for a regional fund for native title groups.

(v) <u>How would the establishment of a new tax exempt vehicle impact on existing agreements?</u>

This will depend on the terms of the agreements and in particular whether there is a requirement to establish a particular trust or whether the payments are to be provided to an entity as notified by the native title group. Many agreements will refer specifically to a trust.

This question should be qualified by the following question about transitional arrangements. However, special attention should be given to native title agreements, and arrangements thereunder for managing funds, which will not qualify under any new arrangements for a tax exempt vehicle. It may be necessary to consider hardship arrangements to ensure that the transition to a new tax exempt vehicle for native title payments does not disadvantage established native title groups with limited capacity to reform their financial arrangements (for example, because their counterparties have a controlling authority for restructuring or funds decision making – a not uncommon feature of native title agreements in some jurisdictions).

(vi) What kinds of transitional arrangements would be required?

It will be complicated to allow a charitable trust to transition to a non charitable trust as this is currently not permitted under charity trust law. Further analysis will be required as to what State and Territory legislation will be required to allow charities to transfer to the ICF, if it is not charitable.

It may be that a native title group would wish to 'migrate' to a new tax exempt vehicle. In NTSV's view, it is essential that appropriate transitional provisions enable native title groups to restructure their existing entities so as to benefit from any new tax beneficial arrangement or exemption. It would be unjust to deny them access merely because the option was not available at the time they entered a native title agreement.

Transitional provisions should also 'capture' existing arrangements which effectively comply with the requirements of any tax exempt vehicle. For example, the proposed State-wide trust fund for the TOSA should qualify under the new arrangements.

(j) Within the context of your experience, what difference would a new tax exempt vehicle make to native title groups and Indigenous communities?

A real issue is the lack of assistance and support in people and in available information to assist native title groups to make a decision as to the holding and application of the payments. The difference tackling this issue will make will be very significant and increase effective and timely use of payments.

Creating a new tax exempt vehicle that caters for native title groups and community development in Indigenous communities more generally would provide numerous benefits, in particular:

- *providing certainty about the status of payments and therefore the funds available to groups/communities*
- *achieving equity by recognising Indigenous community development as a cause worthy of similar tax concessions as numerous other non-charitable causes.*

Many native title groups suffer from intergenerational disadvantage which means the marginal costs of managing their funds, which are held collectively, are greater than those faced by non-Indigenous people. A tax exempt vehicle would be an appropriate means of addressing this disadvantage.

Native Title Withholding Tax

(k) Within the context of your experience, how would a NTWT affect:

(i) the negotiation of native title agreements?

(ii) the form of benefits provided under native title agreements, if a NTWT only applied to monetary payments?

(iii) the management of benefits received under a native title agreement?

Providing benefits to native title groups under native title agreements offers an opportunity to make a valuable investment in a worthy cause. Such investment is likely to be lessened or discouraged by the imposition of a withholding tax.

The NTWT proposal is falsely grounded on a presumption that current payments are subject to tax. In fact in most cases agreements are negotiated on the basis that payments are not subject to tax, due to their unique nature.

Therefore, applying a NTWT is likely to result in lower payments to native title groups, as a result of the parties' focus being redirected to structuring agreements and payments to minimize the amount of NTWT, rather than concentrating on maximizing the amount in a form that will best benefit the native title group given the nature of native title.

Indigenous Economic Development

(n) How would a new DGR general category for Indigenous organisations that carry out activities across multiple DGR categories impact on the ability of such organisations to obtain DGR status?

The most important issue to tackle in the context of native title payments is establishing the exempt nature of the payments and the continuing holding of the money for intergenerational and communal benefit. Creating a new DGR category that covers the range of existing possible DGR categories is a great concept not just for indigenous organizations. But on its own it does little to nothing to assist native title groups – whose most pressing concern is the inability to get income tax exemption (on a charitable basis) as a result of the ancestral relatedness necessary for a native title claim. The issue in this context is not tax deductibility but the 'artificiality' of a charitable entity for native title purposes.

For indigenous communities relying on philanthropic funding rather than native title payments, or other rural or remote communities, the creation of a new DGR category would make a significant difference to the ability to raise funds and conduct programs to assist their local community.

ATTACHMENT 1: ICF / Charitable Entity Comparative Table

Features	Indigenous Community Fund	Charitable Entity	Comments/ Recommendations
Structure	Proposed options: Aboriginal Corporation (incorporated under CATSI) or discretionary trust. Treasury open to submissions on structure. No consideration of options for community model vs regional model.	Structure depends on activities: Must be a trust if it is only going to give grants and not undertake its own activities/programs. Can be a company or a trust if it is going to undertake activities and programs as well as distribute funding. Trust structure may be required for regional funds as these are unlikely to undertake activities.	Company incorporated under CATSI is simple and familiar and has a number of recommended features built in ie relating to assistance available, governance, accountability. Model constitution and rule book available. Trust with model deed for regional funds with a company or statutory body as trustee.
Governance	Statements in the consultation paper include: Ensure groups for whom the fund is established play an active role in directing the uses of the fund. Possible requirement for qualified independent directors. No proposals on how this could be done on a regional model. Submissions requested on governance requirements.	A company or Aboriginal corporation could be the charitable entity or trustee of a charitable trust. This requires identification of members of the company and a board of directors – there are no current requirements as to processes within this framework. ORIC is useful for assistance on this and could use the kit it has for PBCs. Would need a different model for the regional entity. Governance of the trustee should be independent directors with required skills and the members either the government or the directors from time to time. Trust would need to allow community advisory committees to direct as to grants within the terms of the trust.	Further development of options is required with more detail for consultation. Options must include the 2 models: • a community model for a community/native title group where there are sufficient funds, skills and consensus for the proposed entity • a regional model where any of those elements are missing or a community prefers to utilise the independent entity. The governance requirements will be different for the 2 options. The community model will involve representatives from the native title group and possibly others but it may not be essential (or practical) to require independent directors. The regional model will be all independent but separate native title groups will have advisory committees who can direct the trustee as to the application of the trust funds.

Purposes	For the benefit of a native title group, a number of such groups and/or Indigenous Australians more generally. This general purpose includes more specific activities such as: • accumulation of assets for current and future generations of specified native title holders • protection of the environment • protection, maintenance and advancement of Indigenous cultural heritage • supporting education and training • other purposes beneficial to all of those for whom the fund was established • administration and governance of the fund. Payments can be made to individuals or other entities. Treasury requests further input into the activities the ICF may undertake and how this can be built into the legislative statement of purpose.	Purposes for a charitable company are potentially extremely wide covering the activities suggested in the ICF models. The difficulties are the lack readily accessible information on what may be charitable and the restriction on limiting those who benefit to an ancestral grouping. Social and cultural activities can be charitable where they relieve isolation and build community – further parameters can be provided. Private benefits could not be provided unless it was relief of poverty. Support for aged care and community housing and other activities relating to closing the gap are likely to be charitable as the closing the gap policy relates to bringing indigenous Australians to the same standard of living as the rest of Australia. Poverty is not destitution. Relief of poverty can be assisting where a person's financial resources are insufficient for a modest standard of living in Australian community.	The ICF proposal runs the risk of restricting activities from charitable purposes by defining the purposes and activities. This type of discussion has been documented in relation to the 2001 Report on the Inquiry in to the Definition of Charities. It may be better to identify any objectives which may be outside the charitable purposes definition. If it is intended there are, the purposes may be better listed as charitable purposes plus, so it does not become more restrictive. An alternate option is to amend the law relating to charities to allow benefits to be restricted to native title groups as it has been done in NZ and Canada (this would require amendment to the ITAA 97 to maintain tax exemption as a charity and State and Territory Act amendments for recognition as a charity at law) and to provide specific guidance to explain what is currently permissible and/or setting up an expert advisory or review panel.
Economic Development	Economic development is not referred to as one of the activities of ICF in spite of the current FaHCSIA consultation on 'Indigenous Economic Development Strategy" which refers, at part 5.3, to "Native title agreements can generate financial assets that could be used more effectively to support economic development	Many of the activities for economic development in indigenous communities will be charitable provided it is structured principally for the community benefit eg employment, training. This is a difficult area and expert assistance will be needed to evaluate what is required to ensure such activity or support is charitable. It may be that this difficulty can be	Economic development for the public benefit and undertaking a commercial activity with charitable purposes is all permissible in a charitable company framework. Further consultation may be required to identify the range of activities desired to come under 'economic development'. Where the community benefit is the principal purpose and any

	and provide sustainable investment for current and future generations." This is also in the Native Title Discussion Paper and numerous other reports, emphasising the need for economic development to flow from native title benefits. Treasury notes that the use of tax incentives for economic development risk promoting tax benefits of the investor rather than the underlying viability of the business and could result in a range of undesirable consequences.	assisted by better information from the ATO or other expert advisory or review panel.	private benefit is incidental then it is likely to be possible as a charitable purpose. Further information and explanation should be provided as to the type of acceptable activities and funding. A specific indigenous social enterprise fund could be established under the Social Enterprise Development and Investment Fund initiative currently open to consultation by DEEWR. This could then enable additional funding to be provided for specific communities and development of social enterprises.
Money to Individuals	The purpose would not necessarily rule out a payment to an individual. The consultation paper gets confused at this issue as to the tax treatment of any payment to an individual in the hands of the individual. The ability to pay an individual is within the proposed purposes and the ICF will only be able to make such a payment if it is within the purposes of the ICF. The statements relating to the tax treatment to the recipient is not dependent on whether a payment is supported by the ICF's purposes.	Money can be provided to individuals under a charitable entity where the purposes include general charitable purposes or relief of poverty. Relief of poverty does not require providing only the bare necessities but can include assisting where a person's financial resources are insufficient for a modest standard of living in the Australian community.	Money to individuals where it is relief of poverty within the closing the gap policy is within charitable purposes. Money can also be paid to individuals for use for charitable purposes, such as education, medical needs, cultural activities. Further information and explanation should be provided as to the range of granting that is currently permissible.
Accumulation	Accumulation is required for future generations. If the ICF is a trust then it does not deal with the rule against perpetuities referred to (incorrectly) on page 6 of the consultation paper which limits trusts generally to 80 years unless it is charitable.	In a charitable trust or company accumulation is only limited to ensure the entity carries out its charitable purposes in each year. In the ICF model it is not proposed that no activities would be carried out in any particular year as the benefits are for current and future native title	Dependent on the amounts being received and likely to be received a balance must be sought between the current and future needs. Money can also be used in a way that is designed to provide benefits in the future such as for closing the gap, infrastructure, education,

		holders. A charitable trust is perpetual and can allow accumulation. This could be another area where clearer information and explanation is provided by the ATO or an expert advisory panel.	economic development. Further information and explanation should be provided as to current acceptable limits including approval from the ATO of accumulation plans.
Specific to native title payments?	Consultation question. Paper refers to payments from native title agreements and investment.	Could receive funds from any source. Private and philanthropic funding is only likely if it is also a DGR but at the moment that would be too restrictive on activities. It may be possible to use a conduit DGR such as FRRR for funding which requires DGR status.	If a new entity is created and it is not specific to native title payments, should it be restricted to indigenous communities? Will that provide a backlash by other disadvantaged communities whether rural or urban? Extending the charitable definition to allow ancestral groups will benefit all indigenous communities but will predominantly benefit those with native title claims. There are at least 2 issues: • improvement of the options for structuring and applying of native title benefits • improvement for all indigenous Australians. This review of options has arisen in the context of native title but does not have be restricted to native title. Adoption of models which rely more on existing available structures but provides greater information and support will not disadvantage other sections of the Australian public.
Taxation	ICF is to be income tax exempt. Consultation on whether indigenous organisations which carry out activities over multiple DGR categories should be DGR. It is not suggested the	Charitable entity with wide charitable purposes will be income tax exempt. It will only be able to be DGR if it restricts its purposes and activities to one of the categories in ITAA 97. This is unlikely to be suitable though the	The main issues with a charitable company are: • inability to limit beneficiaries to an ancestral grouping • lack of guidance as to what is possible or permissible, particularly in the areas of

	ICF which can have purposes wider than multiple DGR purposes could be DGR. This would require the establishment of another entity.	Harm Prevention Charity has been used to cover a number of programs which together have the effect of controlling abusive behaviours and have been used in indigenous communities. A Harm PC is more flexible than a PBI.	accumulation, relief of poverty in granting to individuals, economic development • inability to 'do nothing' (eg in the first few years after establishment to allow for assessment of the needs and best uses of the benefits to be received) and accumulate money received without undertaking specific activities or funding programs. Is DGR status required in the context of native title benefits or does it unnecessarily delay and complicate the analysis? DGR funds could flow through a conduit body such as FRRR.
Transition	Anticipates that existing funds, charitable or otherwise, may want to transition to an ICF. It will complicated to allow a charitable trust to transition to a non charitable trust – this is not permitted under charity trust law.	If the law is widen to allow charitable entities to operate effectively in the native title area, these amendments can be drafted to allow retrospective operation.	Further analysis is required as to the possibility and State and Territory legislation required to transition charities to non charities as contemplated under the ICF and ICDC proposals.