



# Central and Northern Land Councils

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## Central and Northern Land Council Submission to the Board of Taxation

### Charities Bill 2003

#### Definition of Charity

##### Summary

In response to the Report of the Inquiry into the Definition of Charities and Related Organisations the Commonwealth Government has released an exposure draft of the *Charities Bill 2003*. The purpose of the Bill includes to codify the existing common law meaning of a charity.

The Board of Taxation has sought submissions regarding:

- the workability of the proposed legislative definition of a charity;
- whether the public benefit test in the Bill should require the dominant purpose of a charitable entity to be optimistic as recommended in the Report.

The Central and Northern Land Councils generally support the submission made by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) dated 1 October 2003.

The Land Councils are particularly concerned regarding cl 4(d) (read with cl 8) which specifies that political advocacy which is "more than ancillary or incidental to the other purposes of the [charitable] entity" is a disqualifying purpose. Such an exclusion is not specifically included regarding the test at common law, although the issue may be considered under the dominant purpose test. In these circumstances the specific inclusion of political advocacy as a disqualification, where "more than ancillary or incidental" to other purposes, may unintentionally restrict the common law definition or result in litigation regarding the issue. The specific exclusion appears, at least, redundant and should be deleted.

#### Functions and character of Land Councils: public benevolent institution

The Land Councils are established under the *Aboriginal Land Rights (Northern Territory) Act 1976* and their functions under that Act include:

- to express the wishes and opinion of Aboriginal persons regarding the management of Aboriginal land (s 23(1)(a));
- to protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land (s 23(1)(b));
- to assist in the protection of sacred sites on land (whether or not Aboriginal land) (s 23(1)(ba));
- to consult with traditional Aboriginal owners (and obtain their consent, as a group) and other interested or affected Aboriginal persons or groups in relation to exploration and mining, or other development proposals, on Aboriginal land (s 23(1)(c));
- to assist Aboriginal persons to carry out commercial activities (without the Land Councils incurring financial liability or receiving a financial benefit) (s 23(1)(ea));
- to facilitate legal representation and arrange associated anthropological and other research for the prosecution of traditional land claims on behalf of Aboriginal persons claiming to be traditional Aboriginal owners of land (s 23(1)(f));
- to conciliate for the settlement or prevention of disputes in relation to land (whether or not Aboriginal land, s 25(2)).

Since 1994 the NLC has been determined or recognised as native title representative Aboriginal/Torres Strait bodies under the *Native Title Act 1993*, and their native title functions include (ss 203B to 203BK):

- to facilitate research, prepare and provide representation in relation to the lodgement of native title applications and in relation to consultations, mediations, negotiations and proceedings concerning those applications, future acts, agreements or related matters (s 203BB);
- to certify applications and agreements as having been properly authorised by the native title group (on the basis of traditional or otherwise agreed decision-making processes) (ss 203BE and 251B);
- to assist in the resolution of disputes between Aboriginal people or associations regarding native title matters (s 203BF), to ensure (as far as reasonably practicable) that notices concerning minerals exploration, mining or other development proposals are brought to the attention of potential native title holders (s 203BG(a)) including by identifying persons who may hold native title relevant to the notices (s 203BG(b)).

The Northern Territory Supreme Court of Appeal recently confirmed that a Land Council is a public benevolent institution in relation to Northern Territory laws.<sup>1</sup> The Land Councils have long been recognised as public benevolent institutions by Commonwealth taxation authorities, however this position had not been accepted by the NT Commissioner of Taxes in relation to Territory legislation (ie the *Pay-roll Tax Act 1978*).

In rejecting the NT Commissioner's position (and that of the NT Supreme Court (Angel J) who agreed with the Commissioner) that a Land Council's functions were "not designed to relieve

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<sup>1</sup> *Northern Land Council v Commissioner of Taxes* 2002 NTCA 11, Martin CJ, Mildren and Thomas JJ, 28 November 2002.

poverty, sickness, destitution, helplessness or distress, or to provide relief designed to overcome or reduce disadvantage” Mildren J stated:<sup>2</sup>

“In the light of the Minister's second reading speech, it is clear that [the *Land Rights Act*] was not merely about addressing the wrongs of the past, but that it was designed to enable a class of people with strong spiritual affiliations and responsibilities to a site to live a traditional lifestyle, according to their cultural and spiritual beliefs if that is what they choose to do.

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In some cases, the core functions of Land Councils may be seen and recognised as designed to relieve poverty: for example the provision of legal aid advice and assistance in making land claims, native title claims and in negotiating contracts, etc: see the oft cited observations of Nader J in *Aboriginal Hostels Ltd v Darwin City Council* (1985) 75 FLR 197 at 211; c.f. *Legal Aid Commission of Victoria v Commissioner of Pay-roll Tax* (1992) 92 ATC 2053. In other cases, the needs are more fundamental and lie in the preservation of Aboriginal spirituality, culture and tradition and protecting Aborigines from the cultural dominance of non-Aboriginal society. This cultural dominance is well known and has been recognised by the Courts, particularly in relation to authority figures (see for example *R v Anunga* (1976) 11 ALR 412), but there is also a well recognised need to ensure that advantage is not taken and misunderstanding is avoided by others not familiar with Aboriginal culture of common cultural traits such as gratuitous concurrence (see *Dumoo v Garner* (1997) 7 NTLR 129 at 142). Many traditional Aborigines do not speak English well and have had little formal education. Most non-Aborigines have little understanding of what is and what is not offensive to many Aboriginal people. It is for these reasons that the Act envisaged that a Land Council was necessary to provide the support and assistance traditional Aboriginal owners and other Aboriginal persons living on Aboriginal land in accordance with s 71 of the Act clearly needed if their culture, spirituality, traditions and freedom of choice were to be respected and protected. Those needs are recognisably beneficial in relieving distress and helplessness and in my opinion, that is the essential nature to which the core functions of the appellant are directed.”

The Bill does not seek to codify the definition of public benevolent institution, although the Report also recommended to that effect. The Land Councils, given the clarification by the NT Court of Appeal, do not consider it necessary that this definition be codified

#### **Disqualifying purpose (cl 4(d))**

The Land Councils are concerned regarding cl 4(d) (read with cl 8) which specifies that political advocacy which is "more than ancillary or incidental to the other purposes of the [charitable] entity" is a disqualifying purpose.

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<sup>2</sup> *Northern Land Council v Commissioner of Taxes* 2002 NTCA 11 para 33 to 34.

Such an exclusion is not specifically included regarding the test at common law, although the issue may be considered under the dominant purpose test. In these circumstances the specific inclusion of political advocacy as a disqualification, where "more than ancillary or incidental" to other purposes, may unintentionally restrict the common law definition or result in litigation regarding the issue.

In particular, only one instance of political advocacy which is not "ancillary or incidental to the other purposes of the [charitable] entity" is necessary for an entity to have a purpose which is "more than" ancillary or incidental. Encouraging an inquiry as to whether a particular instance of political advocacy constitutes a disqualifying purpose, notwithstanding that all other examples of such advocacy are acceptable, is not desirable and may have unintended consequences.

In that regard it is noted that one of the reasons initially expressed to justify refusing the Land Councils their status as public benevolent institutions under NT law was that they engaged in political advocacy. Including a specific exemption regarding political advocacy, rather than as at common law relying on the dominant purpose test, may unintentionally restrict the common law position or lead to litigation. The specific exclusion appears, at least, redundant and should be deleted.