

## USE OF A CHARITABLE TRUST FOR PROCEEDS FROM NATIVE TITLE CLAIMS

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### INTRODUCTION

The use of a charitable trust for holding and dispersing of funds obtained from native title claims by Aboriginal groups is relatively new.<sup>1</sup>

This paper outlines the structure of an operating charitable trust designed to hold and disperse the proceeds arising from a native title claim. A unique feature of this charitable trust is that it has been drawn or "molded" to conform with the structure of the Aboriginal groups in the Broome region of Western Australia.

Charitable trusts have been established by various Aboriginal groups in the past.<sup>2</sup> These trust deeds proved to be inadequate and unsuitable in form and required considerable modification for the purposes of a charitable trust for native title proceeds.

### THE ABORIGINAL GROUPS IN THE BROOME REGION

In the Broome area of Western Australia there are three main Aboriginal groups; the Yawuru, the Djugun and the Goolarabooloo. In September 1994 these three groups met at the headquarters of the Kimberley Land Council in Broome to discuss their native title rights and interests. At the end of the meeting it was agreed that each of the three groups was made up of people and families who have native title rights in the Broome region. It was agreed that the best way to deal with native title claims in the region was for the three groups to come together as one group and to speak with "one voice" on all issues concerning both native title and Aboriginal heritage. It was decided that the name for this new group should be Rubibi, which refers to an important water place near Kennedy Hill and was a name traditionally used to refer to the Broome area.<sup>3</sup>

In June 1995, some six native title applications had been lodged with the NNTT claiming native title rights in land and sea which runs along the coast from Willie Creek in the north to Yardoogarra in the south. The native title rights and interests claim included the right to go onto country, and to hunt, fish, take bush tucker and perform ceremonies as well as the right to look after the country, use the resources of the country for economic benefit and live on the country. The applications claimed these rights for all the Aboriginal people of the Broome region who are entitled to them under Aboriginal law.

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1. A charitable trust will be used in NSW to hold and disperse the proceeds of the recently negotiated native title claim by the Dungutai people of Crescent Head on the mid-north coast of NSW against the State government of NSW. It is proposed that a foundation, the Murrin Murrin Foundation with some \$50m will be established by Anaconda Nickel for native title claimants of its nickel deposit at Murrin Murrin in WA.
2. For instance, the Deed of Settlement or Trust of Centrecorp Aboriginal Investment Corporation Pty Ltd, the trustee of the Central Australian Aboriginal Charitable Trust, settled 6 March 1986.
3. The above paragraph has been taken from Rubibi New Edition No 1, June 1995.

During this time, discussions were taking place with the developer of a caravan park which, if the project had gone ahead, would have resulted in native title holders owning part of the business. Under the proposal the Aboriginal people would have been entitled to a say in the way the caravan park was built and run, would have received business training and half the proceeds of the business. Also, under discussion with the State Department of Fisheries, was a proposal to build an aquaculture farm in Broome. This project offered the potential of employment and the possibility of some satellite business ventures which could be run by younger Aboriginals. If possible the structure of the charitable trust had to be sufficiently flexible to allow for such businesses to be conducted under the trust.

### **THE NEED FOR THE TRUST AND FUNDING THE TRUST**

Long standing residents of Broome, the Paspaley family, conducted a company called Pearls Pty Ltd. The company proposed to build a large multi-level shopping centre in Chinatown at Broome. Part of the land on which the shopping centre was to be built was the subject of a native title claim by the Rubibi Group. An agreement was reached between Pearls Pty Ltd and the Rubibi Group whereby the Rubibi would excise that part of the shopping centre then subject to native title claim in return for which the Rubibi people would receive a substantial sum of money. The money received was sufficient to fund the charitable trust.

### **Structure of the Rubibi Community**

The structure of the Rubibi community, which was created when three Aboriginal groups combined, is most easily set out as a series of concentric circles. The outer circle represents the general Aboriginal community. It is with this group only that developers and miners may communicate. Inside the outer circle representing the general community is a smaller circle representing the "Lawmen". The Lawmen are selected by the community elders and hold a significant position of trust. It is the Lawmen who consult with the "Council" or the elders of the group who make up the inner most circle. It is also with the Council that individuals or groups of the community must lodge any complaints. The kind of complaints envisaged include inadequate funding, funding cut-off, funding not as much as other people's groups. These complaints were directed to the Council to avoid "overload" of the directors of the corporate trustee of the charitable trust.

The Rubibi Aboriginal Land Heritage and Development Council is the peak body of the combined community structure and innermost of the three concentric circles. The Council is given this name as it was proposed to incorporate that body under the *Aboriginal Councils and Associations Act 1976* (Cth). The Council is also the registered body under the *Native Title (Prescribed Bodies Corporate) Regulations 1994* (Cth). Under the Regulations the Kimberley Land Council (KLC) is the Representative Aboriginal/Torres Strait Body. The Council must consider the views of the KLC in regard to the surrender of native title and any other acts affecting native title interests in common with the native title holders.

## Structure of the Charitable Trust

The Council appoints the directors of the corporate trustee of the charitable trust.

There are to be 15 directors of the corporate trustee consisting of two lawmen, two men and two women from each of the Yawuru, the Djugun and the Goolarabooloo and one nominee from the Kimberley Land Council. The reason two men and two women from each group were included as directors was to reflect community wishes that one position should be for older men and women and one position for younger men and women. The younger members would obtain "training" or guidance from the older members. Initially it was proposed to have only seven directors with two representatives, an older and a younger person, from each of the three groups. The structure settled upon met community wishes and all affirmative action requirements.

The charitable trust was called the Rubibi Aboriginal Charitable Trust. In drawing the charitable trust deed particular care was taken in defining the beneficiaries to ensure that it included:

- all the native title holders in the traditional country;
- other Aboriginal residents within the traditional country;
- any Aboriginal organisations within the traditional country which included compatible objects and purpose; and
- companies wholly or partly owned by the trust.

The trust deed contains powers to invest and accumulate funds for the perpetuity period (21 years). The trustee has power to accept other funds, such as payments or royalties from native title claims, and power to distribute funds for "community purposes". It is envisaged that community purposes include community projects for the improvement of education and the relief of disadvantage, distress, poverty, ill-health and suffering. There is a discretion to use this power within the perpetuity period. The structure of the trust was such that various businesses that would be conducted by the younger Aboriginal people could be run under the trust and possibly benefit from the tax-exempt status of "charitable trust".

A clause of the trust deed required to keep proper accounts and to have the trust fund audited annually.

## CONCLUSION

In practice it proved difficult to have members of the three groups comprising Rubibi understand the intricacies of trust law and the obligations placed on trustees. The issue that the funds must be used for "community purposes" took some time to be understood. Considerable pressure was placed on the trustees to expend money immediately to demonstrate to all beneficiaries that Rubibi had brought about a material change.

The process of incorporation under the *Aboriginal Councils and Associations Act 1976* (Cth) proved to be a slower process than initially envisaged. In future, if charitable trusts are to become the vehicle for holding payments arising from native title claims the Commonwealth administration of the above Act and the procedure of incorporation will need to be streamlined.

The need to have a corporate trustee and not to have the Council or the members of the Rubibi community as the trustee was to remove the possibility that the council members or each member of the Rubibi community may be liable, personally, in the unlikely event, that there was any maladministration of the trust.<sup>4</sup>

The trust deed and all modifications to it have been approved by the Australian Taxation Office.

The charitable trust structure has proved to be a flexible legal structure that can be adapted to suit the structure of complex Aboriginal groups. The charitable trust may soon become the main vehicle for holding the proceeds of native title claims in Australia.

4. This point was overlooked by some advisors on native title issues.