

APPENDIX:

INDIGENOUS BENEFITS MANAGEMENT STRUCTURES AS SOCIAL ENTERPRISES: KEY CHALLENGES FOR ECONOMIC DEVELOPMENT

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Indigenous benefits management structures (BMSs) manage and distribute assets arising from land use agreements. Land use agreements between Indigenous groups and resource proponents seek to achieve practical recognition of Indigenous peoples' rights, culture and significance, as well as certainty over land rights. They thus present key social, economic and cultural opportunities and risks for Indigenous people and for resource proponents. This article focuses on key challenges (and potential policy responses) to pursuing Indigenous economic development through BMSs that arise from their social enterprise nature, as reflected in the Australian context by the pervasive use of for-purpose charities within BMSs.

Keywords: benefits management structure; social enterprise; economic development; Indigenous communities; charities; land use agreement; prescribed body corporate

1. Introduction

Australia has seen extensive resources projects affecting Indigenous land, along with ongoing recognition of Indigenous interests via the Native Title Act 1993 (Cth) (NTA). Agreements formed in relation to that NTA framework between Indigenous communities and others present key social, economic and cultural opportunities and risks for Indigenous people and for resource proponents.¹ This is especially true for many long-life resource projects that involve long-term relationships between Indigenous communities and resource companies.² Therefore, management of the benefits provided under such agreements is critically important.

A significant result of these agreements has been the formation and operation of 'Benefits Management Structures' (BMSs). BMSs are structures that receive payments under land use agreements and that hold, manage and distribute assets for Indigenous peoples and groups. As the nomenclature BMS is widely adopted in Australia by resource proponents

* Associate Professor, University of Western Australia Law School. While this article is separate from an earlier University of Western Australia research project examining BMSs, thanks are due to the numerous stakeholders and participants in that earlier project for their insights that continue to illuminate this research. My thanks also to participants at the Melbourne University Native Title – Industry Invitation Seminar Series 2019; the San Diego 2019 Law Reform for Indigenous Economic Growth workshop; and the Honolulu 2020 Law Reform for Indigenous Economic Growth conference.

¹ See, eg, Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Taylor and Francis 2015); M Limerick, K Tomlinson., R Taufatofua, R Barnes and D Brereton, *Agreement-making with Indigenous Groups: Oil and Gas Development in Australia* (Centre for Social Responsibility in Mining, University of Queensland 2012); Marcia Langton, 'From Conflict to Cooperation' (Minerals Council of Australia 2015); Rio Tinto, *Why Agreements Matter A Resource Guide for Integrating Agreements into Communities and Social Performance work at Rio Tinto* (Rio Tinto 2016); Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and the Mining Boom' (2008) 26(1) *Journal of Energy & Natural Resources Law* 31.

² Cf Ian Murray, Joe Fardin and James O'Hara, *Co-designing Benefits Management Structures* (UWA Centre for Mining, Energy and Natural Resources Law 2019) 18-19.

and Indigenous communities, it has been used in this article even though it is controversial to label payments connected with acts that impair native title rights as ‘benefits’.

This article outlines the typical characteristics of and challenges faced by BMSs (Part 2). It does so by drawing on a mixed methods research project undertaken between 2016 and 2019 at the University of Western Australia (**UWA Project**).³ Part 3 then builds on this base by exploring the economic development challenges for BMSs posed by their ubiquitous use of for-purpose entities: charities. Part 4 analyses policy responses to these economic development challenges based on a view of BMSs as social enterprises. Successfully addressing the challenges is fundamental not only to Indigenous communities but to all stakeholders in land-use agreements, including resource proponents and governments.

2. BMS characteristics and challenges

Land use agreements frequently involve a range of different recipients of benefits. They include corporations established under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (**CATSI Act**), proprietary limited companies, companies limited by guarantee, discretionary or fixed trusts, charitable trusts and, sometimes, incorporated associations.⁴ Trusts are not legal entities, but rather relationships involving obligations owed by the trustee in relation to property that the trustee holds for the benefit of certain persons or (in the case of a charitable trust) purposes. However, for brevity, trusts are referred to as ‘entities’.

BMSs are comprised of these related entities that receive, manage and distribute land use agreement benefits. Typically, BMSs include one or more trusts, a trustee and a representative incorporated entity.⁵ Where a determination of native title has been made, this incorporated entity may be the prescribed body corporate (**PBC**)⁶ which holds the native title rights on trust⁷ or as agent⁸ for the common law native title holders. The trusts do the ‘funding’, while the corporations engage in the ‘doing’ of activities. There can be multiple BMSs per Indigenous community or multiple Indigenous communities per BMS. The following schematisation, adopted from Murray, Fardin and O’Hara,⁹ shows one possible BMS model:

³ UWA Project findings are available at: <https://www.uwa.edu.au/able/research/cmenrl>. The project involved theoretical, doctrinal and empirical research and included a series of interviews and focus groups with relevant stakeholders being Aboriginal community members and corporation executives, trustee officers, resource proponents and professional advisers.

⁴ Miranda Stewart, Maureen Tehan and Emille Boulot, ‘Transparency in Resource Agreements with Indigenous People in Australia’ (2015) ATNS Working Paper Series No. 4/2015, 17-20 <https://www.atns.net.au/atns/references/attachments/atnswp4_2015_stewarttehanboulot.pdf> accessed 24 June 2020.

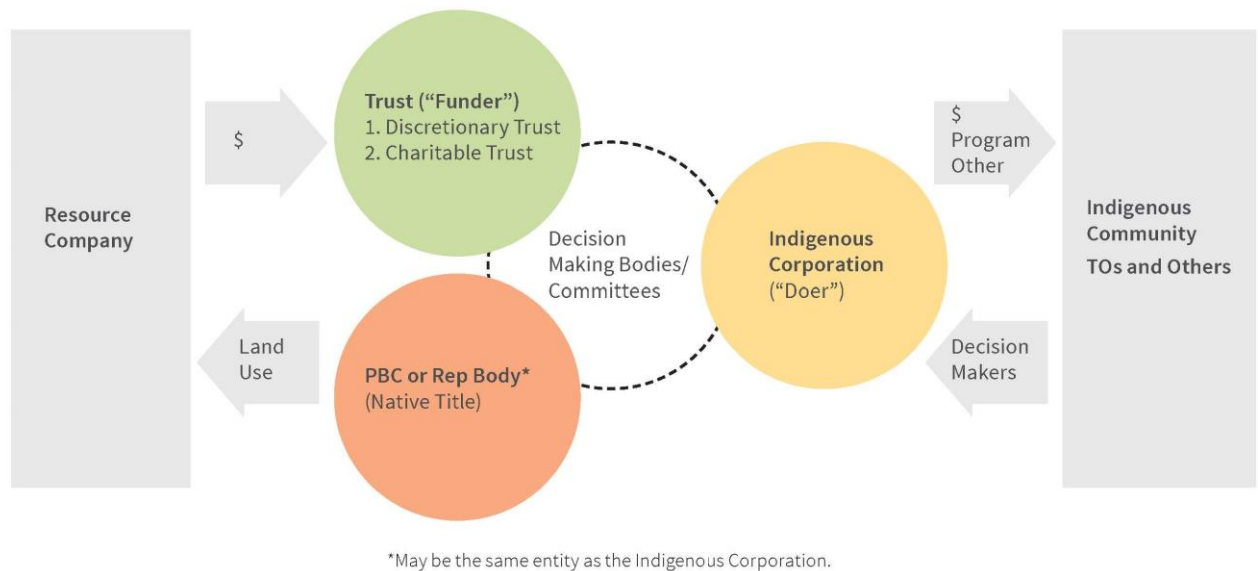
⁵ Murray, Fardin and O’Hara (n 2) ch 2.

⁶ For convenience, the term PBC is used in this article to cover both PBCs and registered native title body corporates (RNTBC). A PBC becomes an RNTBC when it is entered onto the National Native Title Register. As to the use of prescribed bodies corporate in BMSs, see, eg, Andrew Morgan, Plan B, ‘Native Title Trusts’ (Legalwise Native Title Conference, Perth, 13 June 2014) 7-10.

⁷ NTA s 56; Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) r 6.

⁸ NTA s 57; Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) r 7.

⁹ Murray, Fardin and O’Hara (n 2) 8.



The UWA Project looked in detail at a number of recently established BMSs in the Pilbara region of Western Australia,¹⁰ which generally reflect this structure. Each of the Pilbara BMSs typically comprised a charitable trust, a discretionary direct benefits trust, a professional trustee company and an Indigenous corporation. A portion of the funds received also had to be retained in a ‘future fund’. The Pilbara BMSs also generally contemplated a Traditional Owner Council that makes strategic decisions, such as approving BMS distribution policies and strategic plans. The Council is envisaged as the primary representative body for the local Aboriginal community. In addition, the BMSs featured a Decision-Making Committee that consults with the trustee in relation to trust administration and can also issue binding directions on matters such as distributions of assets and the preparation of annual and strategic plans.

2.1. Decision-making and asset protection

Fundamentally, the entities that constitute a BMS are private associations, albeit that some, such as PBCs, also have statutory functions,¹¹ or that others, such as charities, may be subject to a degree of public oversight and be expected to produce a public benefit. There is therefore significant flexibility in structuring BMS entities.

¹⁰ The BMSs reviewed were those of the Banjima, Eastern Guruma, Kuruma Marthudunera, Ngarlawangga, Ngarluma, Nyiyaparli, Puutu Kunti Kurrama and Pinikura, Yinhawangka and Yindjibarndi traditional owner groups.

¹¹ NTA and Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) functions include: receiving future act notices; exercising procedural rights under the NTA; negotiating, implementing and monitoring native title land use agreements; and bringing native title compensation applications and revised determination applications in the Federal Court. See, eg, Lisa Strelein and Tran Tran, ‘Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment’ (2007) AIATSIS Native Title Research Report 2/2007, Appendix 2, 29; Attorney-General’s Department, *Structures and Processes of Prescribed Bodies Corporate* (Commonwealth of Australia 2006) [4.3]-[4.8].

For example, decision-making can be restricted to members of the Indigenous community, or broadened to include other stakeholders or independent persons (eg requiring a certain number of resource proponent or independent board members). Even under a trust, powers can be given to members of an Indigenous community or to smaller groups to make certain decisions, or to render trustee actions subject to consents. The role of non-Indigenous decision-makers can also be tailored to determine the weight of their 'vote'. For instance, an independent board or committee member could be given the power to veto decisions, or veto decisions on certain grounds. Alternatively, the role of an independent person or entity may be advisory only. That is typically the case for advisory trustees,¹² with whom the trustee may be required or permitted to consult on certain matters, although not compelled to follow the advisory trustee's advice. Further, different approaches can be adopted for different classes of decisions. Decisions could be classed according to significance, eg O'Faircheallaigh's 'fundamental', 'strategic' and 'day to day administrative' decisions.¹³

In addition, it is possible to carve out asset holding and protection obligations to some extent from the obligations that would otherwise apply to BMS decision-makers. For instance, a capital (and potentially income) protected endowment fund, or 'future fund', is an asset protection device.¹⁴ It essentially provides an asset lock for a portion of BMS funds by restricting the use of those funds and a proportion of income earned on those funds, with the intent that a certain capital base be built up and then preserved so as to provide income in perpetuity.

2.2. BMS purposes

The above discussion highlights certain functions that a typical BMS would incorporate: Indigenous community decision-making, some asset protection and accountability to the Indigenous community through information flows. These functions go to the way in which a BMS operates, rather than to any fundamental purposes that BMSs are intended to achieve. However, BMSs typically comprise common entities that have particular purposes, such as PBCs (statutory purpose of holding and/or managing native title rights and interests for the benefit of native title holders)¹⁵ and charitable trusts (charitable purposes include the relief of poverty and sickness, advancement of education and advancement of religion).¹⁶

These roles of managing assets and applying surpluses for the benefit of the Indigenous community 'owners' and the pursuit of community purposes were reflected in interview and focus group data from the UWA Project. All groups of stakeholders (Indigenous

¹² As to the role of advisory trustees, see, eg, Trustees Act 1962 (WA) s 14; Adam Levin, 'Observations on the Development of Native Title Trusts in Australia' (2016) 22(2) *Trusts & Trustees* 241, 251.

¹³ Ciaran O'Faircheallaigh, 'Registered Native Title Bodies Corporate and mining agreements: capacities and structures' in Toni Bauman, Lisa Strelein and Jessica Weir (eds), *Living with Native Title: The Experiences of Registered Native Title Corporations* (AIATSIS 2013) 283-8.

¹⁴ See, eg, Levin (n 12) 255-6.

¹⁵ See n 11.

¹⁶ For a discussion of charitable trusts in a native title setting, see, eg, Miranda Stewart, 'The Income Taxation of Native Title Agreements' (2011) 39(3) *Federal Law Review* 361, 391-2.

community and corporation representatives, resource proponents and trustees) emphasised that BMS purposes include:¹⁷

- building capability of community members in support of autonomy for individual members and self-determination for the community; and
- social, economic and cultural development for an Indigenous community and its individual members.

However, resource proponents and trustees tended to emphasise the latter, while Indigenous community and corporation representatives stressed the former.

Pertinently, Aboriginal corporation executives and trustees also strongly identified the goal of BMSs as providing transparent, robust and well-governed systems for Indigenous communities to manage and distribute benefits.¹⁸ Resource proponents and their professional advisers also flagged the role of BMSs in maintaining a long-term relationship between a resource proponent and an Indigenous community and the role of BMSs in receiving, managing and distributing compensation and other payments in support of that relationship.¹⁹ In addition, resource proponents noted the critical importance of achieving good governance within a BMS so as to safeguard corporate reputation and aid compliance with international best practice and with anti-corruption legislative regimes around the world.²⁰

2.3. BMS challenges

The literature on BMSs and on Indigenous organisations that often form part of BMSs raises a range of issues or challenges that are likely to be faced by BMSs.²¹ Challenges include the need to support autonomy; appropriately recognising that every community, family and individual has different needs and desires; incorporating traditional law and custom; the need for capacity building; achieving robust governance; achieving communication with community members and their participation in decision-making; overlapping decision-making bodies; filling boards/committees and succession planning; administration costs and the scale of compliance activities; achieving equity; the timing of funding for Indigenous corporations; geographical remoteness and dispersion; professional trustees and inherent conflicts of interest; managing interactions with pre-existing structures and with government; the need for greater strategic planning; the need for flexibility to deal with change over long periods; recognising the connections

¹⁷ Murray, Fardin and O'Hara (n 2) 16-19.

¹⁸ *Ibid* 17-19.

¹⁹ *Ibid* 18.

²⁰ *Ibid*. International best practice is reflected in: International Council on Mining & Metals, *Indigenous Peoples and Mining: Good Practice Guide* (2nd edn, 2015).

²¹ See, especially, Murray, Fardin and O'Hara (n 2) ch 4; Sarah Prout Quicke, Alfred Michael Dockery and Aileen Hoath, *Aboriginal Assets? The Impact of Major Agreements Associated with Native Title in Western Australia* (Report 2017); Benedict Scambary, *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia* (ANU E Press 2013); Rob Heferen et al, *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government* (Treasury 2013); Langton and Mazel (n 1); Christos Mantziaris and David Martin, *Native Title Corporations: a Legal and Anthropological Analysis* (The Federation Press, 2000); Ian Murray and Stephen Wright, 'The Taxation of Native Title Payments for Indigenous Groups and Resource Proponents: Convergence, Divergence and Reform' (2015) 39(2) *University of Western Australia Law Review* 99.

between, but also requirements for separate resourcing for, implementation and the legal structure; and the tendency for activities to take place in silos, along various dimensions.

All of these challenges to the operation of BMSs can affect Indigenous economic development indirectly in the sense that socio-economic development is typically a goal of BMSs. The UWA Project proposed a number of general design considerations in response to those challenges and outlined practical approaches to a number of the challenges.²² However, this article focuses on the specific challenge of economic development restrictions as it has recently been highlighted by an Australian Productivity Commission draft report as an area of concern involving ‘legal ambiguity’.²³

3. Economic development challenges

BMSs typically include charities.²⁴ This may be because resource companies perceive charitable trust governance structures to be more rigorous or that the section of the public that must be benefited might be broader than, solely the native title holders, resulting in a wider social licence to operate.²⁵ Charitable trusts also have potential tax advantages that Indigenous communities may wish to access, such as income tax exemption on accumulated income.²⁶ Some subsets of charities, such as ‘public benevolent institutions’ can also access additional tax concessions, such as donation concessions and concessions on inputs such as wages.²⁷ More fundamentally, charities are for-purpose organisations and hence can act as institutional vehicles for furthering community goals, such as those identified in Part 2.2.²⁸

However, there are several technical charity law difficulties with the pursuit of economic development, as well as challenges for administrative practice even where there is no clear legal impediment (see Part 3.1). These are not the only challenges to economic development. Increased complexity resulting from the use of charities and non-charities within BMS structures is examined in Part 3.2, along with a broader perspective on this complexity in Part 3.3. That is: BMS entities are non-standard and reflect forms of social enterprises, bringing all the complexity of the social enterprise space to bear also.

3.1. Charity law technical and administrative challenges

Australian charity law and tax rules do not prohibit charities from conducting business activities or seek to tax income from unrelated business activities. The focus is predominantly on an entity’s purpose, though activities may be relevant to the

²² Murray, Fardin and O’Hara (n 2).

²³ Productivity Commission, *Resources Sector Regulation* (Draft Report, March 2020) 298-305.

²⁴ See, eg, Stewart (n 16) 369; Adam Levin, Jim O’Donnell and David Murphy, ‘Tax and Native Title’ (Tax Institute National Resources Tax Conference, Perth, 14-15 October 2008) 22; Treasury (Cth), *Native Title, Indigenous Economic Development and Tax* (Consultation Paper, October 2010) 2, 5-6; Lisa Strelein, ‘Taxation of Native Title Agreements’ (2008) AIATSIS Native Title Research Monograph No 1/2008, 32.

²⁵ Murray and Wright (n 21) 106. Indeed, Levin notes that resource companies tend to require that a portion of payments be made to a charitable trust (n 12) 245.

²⁶ Fiona Martin, *Income Tax, Native Title and Mining Payments* (CCH 2014) [5.1.1]; Murray and Wright (n 21) 106.

²⁷ The input concessions take the form of a capped fringe benefits exemption on a range of benefits provided to employees in place of wages. See, eg, Productivity Commission (n 23) 299-300.

²⁸ Cf Martin, *Income Tax* (n 26) [5.1.12]; Murray, Fardin and O’Hara (n 2) 123-9, 199-204.

construction of purpose.²⁹ There is, accordingly, no prima facie issue with a charity conducting or funding commercial activities and it is accepted that such activities can further its charitable purpose. Thus, the commercial activities might directly effect the entity's purpose (eg sale of cultural heritage survey services; providing employment to long-term unemployed Indigenous community members),³⁰ facilitate activities that directly effect an entity's purpose (eg cultural awareness training for resource proponent employees),³¹ or merely generate funds for the charitable purpose.³² Nevertheless, as explained below – and consistent with the Productivity Commission's draft report – there is some uncertainty about what the charity law technical boundaries are in each specific economic development activity context.³³ Attempting to deal with that uncertainty under the existing regulatory settings in turn raises a range of administrative challenges.

Charitable purpose

To be a charity under the federal Charities Act 2013 (Cth), or at common law in each state, entities must be not-for-profit, have purposes that are all 'charitable' purposes (such as relieving poverty, advancing education, advancing religion, or advancing other purposes beneficial to the community)³⁴ and be for the public benefit.³⁵ Relieving human distress or disadvantage and, strikingly, the promotion of commerce, are recognised charitable purposes.³⁶ The current Australian context, in which Indigenous Australians – as a whole – fare worse on a range of socio-economic outcomes, has meant that numerous cases indicate that relieving Indigenous disadvantage comes within the former purpose.³⁷ Though, of course, not all Indigenous persons or groups will be in need of assistance,³⁸ nor will disadvantage last indefinitely.³⁹ Accordingly, there is material scope for economic development within Indigenous communities. For example, the Australian Charities and Not-for-profits Commission (ACNC) has issued a Factsheet which appears to accept that Indigenous corporations can advance social or public welfare by providing

²⁹ *FCT v Word Investments Ltd* (2008) 236 CLR 204 (HCA) [17]-[18], [25]-[26]; Charities Act 2013 (Cth) note 1 to s 5(b).

³⁰ Chia and Stewart describe these categories as 'core business: where the charitable purpose itself involves the provision of goods or services' and 'business as a mechanism for charity: where the charitable purpose is advanced through business activity': Joyce Chia and Miranda Stewart, 'Doing Business to do Good: Should we Tax the Business Profits of Not-for-profits?' (2012) 33 *Adelaide Law Review* 335, 350-1. Cf *Gull Bay Development Corp v R* [1984] 2 FC 3, in which lumber mill activities were undertaken to provide employment and training to Indigenous community members, as well as to raise funds for socio-economic purposes, with the corporation being held to be charitable.

³¹ Chia and Stewart (n 30), 350-1.

³² *Word Investments* (n 29).

³³ Cf Productivity Commission (n 23) 301.

³⁴ Under the Charities Act 2013 (Cth), charitable purposes have been reworded under 12 heads of charity that broadly reflect the scope of the general law heads. The reworded heads include, amongst others, advancing health, advancing education, advancing social or public welfare, advancing religion and advancing culture: s12(1).

³⁵ Charities Act 2013 (Cth) ss 5, 6; *Aid/Watch Incorporated v FCT* (2010) 241 CLR 539 (HCA), [18]. The entity must also not have any disqualifying purposes, such as purposes that are unlawful or contrary to public policy: Charities Act 2013 (Cth) s 11; *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396 (HCA), 426 (Dixon J).

³⁶ See, eg, G E Dal Pont, *Law of Charity* (2nd edn, LexisNexis 2017) [11.10], [11.45]; Charities Act 2013 (Cth) ss 12(1)(k), 15(1)(a) (relieving distress or disadvantage as a means of advancing social or public welfare); Martin, *Income Tax* (n 26) [6.5].

³⁷ Dal Pont (n 36) [11.11]. Cf Martin, *Income Tax* (n 26) [6.3.2], [6.4.2], who opines that some of the cases potentially permit a broader range of purposes for the advancement of Indigenous Australians.

³⁸ *Aboriginal Hostels Ltd v Darwin City Council* (1985) 33 NTR 1 (NTSC), 16–18 (Nader J).

³⁹ *Re Bryning* [1976] VR 100 (VSC), 101 (Lush J).

employment opportunities to disadvantaged Aboriginal people.⁴⁰ A number of cases dealing with purposes of addressing Indigenous disadvantage or promotion of commerce also suggest that business start-up and development advice and general assistance would often be consistent with charity status and that financial support by way of seed-funding grants might often be possible too.⁴¹ So too might loans to assist Indigenous businesses, at least if made on commercial terms such that the loan can be treated as an exercise of investment powers,⁴² and – if seed funding is permissible – potentially also social impact loans which are intended to achieve both investment returns and the more direct achievement of charitable purposes.

However, the key issue is that these activities involve the provision of economic benefits to individual members of an Indigenous community. The question is whether the provision of economic benefits to individuals is itself a purpose, or instead a means to an overarching purpose of promoting commerce or relieving Indigenous disadvantage. Some Australian charities cases suggest that the general promotion of industry and commerce within a geographic area, with incidental benefits to individuals/individual businesses, is permissible.⁴³ The New Zealand decision of *Canterbury Development Corporation v Charities Commission*, though, suggests that an economic development purpose primarily achieved by benefitting private individuals, such as providing debt or equity capital to a person to help establish a business, may not be a charitable purpose.⁴⁴

In the context of identifying a purpose of ‘community capacity building’ in economically and socially disadvantaged communities, the Charity Commission for England and Wales also suggests caution about in-depth assistance to establish a particular business, as opposed to assistance with more discrete matters or more generic and transferrable skills, although no absolute prohibition is proposed.⁴⁵ The outcome in *Canterbury Development* was partly due to a finding that there was insufficient evidence of disadvantage in the Canterbury area. The result can be contrasted with that in *Trustee of the Indigenous Barristers’ Trust v Federal Commissioner of Taxation*, where an Australian court identified the entrenched disadvantage faced by Indigenous Australians and held that the provision of education, equipment, premises and seed-funding to an Indigenous individual to help him establish practice as a barrister was consistent with a charitable purpose of relieving disadvantage. Thus, especially where the charitable purpose is the relief of disadvantage, there are likely to be additional questions. First, whether the Indigenous community as a whole is disadvantaged. Second, whether the assistance

⁴⁰ ACNC, ‘Aboriginal and Torres Strait Islander Corporations – Applying for Charity Registration with the ACNC’ (Factsheet, 20 May 2019) <www.acnc.gov.au/tools/factsheets/aboriginal-and-torres-strait-islander-corporations-applying-charity-registration> accessed 24 June 2020.

⁴¹ As to addressing Indigenous disadvantage, see, eg, *Shire of Derby/West Kimberley v Yungngora Association Inc* (2007) 157 LGERA 238 (WASCA), 252-3; (PBI cases are also relevant in that PBIs are a subset of charities) *Trustees of the Indigenous Barristers’ Trust v FCT* (2002) 127 FCR 63 (FCA), 67, 79 (Gyles J); *Northern Land Council v Commissioner of Taxes* [2002] ATC 5117 (NTCA), 5126 (Mildren J). As to promotion of commerce, see, eg, *Tasmanian Electronic Commerce Centre Pty Ltd v FCT* [2005] FCA 439; *FCT v Triton Foundation* [2005] FCA 1319; *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue* [2012] WASAT 146 (‘CCIWA’), [98]. See also, Ian Murray, ‘Public Benevolent Institutions for Native Title Groups: an Underappreciated Model?’ (2015) 43 Federal Law Review 424.

⁴² See, eg, *Flynn v Mamarika* [1996] NTSC 16.

⁴³ *Tasmanian Electronic Commerce* (n 41); *Triton Foundation* (n 41).

⁴⁴ [2010] NZHC 331, [66]-[68], [84] (start-up funding as well as advice and general support).

⁴⁵ Charity Commission for England and Wales, *The Promotion of Community Capacity Building* (RR5, November 2000) 7-9.

provided to the community is sufficiently targeted to persons in need, for the means adopted to amount to the relief of disadvantage.⁴⁶

Further, the New Zealand case of *Re Queenstown Lakes Community Housing Trust*⁴⁷ also suggests that if there are multiple ways of pursuing a purpose and if one of those ways results in materially greater economic benefits for individuals, then this may indicate that there is a separate purpose of providing economic benefits to individuals.

It is possible to make sense of these decisions by returning to the Australian High Court decision of *Word Investments*. In that case, when considering when activities might evidence a separate non-charitable purpose, the High Court accepted that activities can indirectly achieve a charitable purpose and quoted from an earlier charity case, stating:⁴⁸

In *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* [(1945) 26 TC 335 at 348] MacDermott J said:

‘the charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than in its immediate and expressed objects.’

Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.

The emphasis in this statement is on the consequences of activities in setting the contours of the range of activities that are in furtherance of an overarching charitable purpose.⁴⁹

If an entity has mechanisms in place to ensure that economic development benefits are targeted toward persons who are suffering disadvantage, then the natural and probable consequence of providing those benefits would be to relieve disadvantage, up to the point that the individual assisted is no longer disadvantaged. If the purpose is to promote commerce for an Indigenous community or to relieve the disadvantage of an Indigenous community (rather than the specific person who receives a benefit), then for the natural and probable consequence of the assistance to link to those broader purposes, there is likely to be a need for some mechanism to link the benefit to the broader community. For instance, using the assisted business as a case study example and providing associated training materials and other support as in *Triton Foundation*. Relying on trickle-down economics is likely to be insufficient as indicated in *Queenstown Lakes* (and the trickle-down argument would be even harder to make where those who benefit are in some way members (eg of the PBC)).⁵⁰ It should not, however, generally matter that a lesser form

⁴⁶ A fairly permissive view of the degree of targeting has been adopted in some cases such as *Northern Land Council* (n 41); *Maclean Shire Council v Nungera Cooperative Society Ltd* (1994) 84 LGERA 139 (NSWCA) (acknowledging that these are public benevolent institution cases, involving a potentially stricter test).

⁴⁷ [2011] NZHC 617.

⁴⁸ *Word Investments* (n 29) [38].

⁴⁹ *Ibid* [26]. See also Ian Murray, ‘Looking at the Charitable Purposes/Activities Distinction through a Political Advocacy Lens: A Trans-Tasman Perspective’ (2019) 19(1) Oxford University Commonwealth Law Journal 30, 36-8.

⁵⁰ *South Australian Employers’ Chamber of Commerce and Industry Incorporated v Commissioner of State Taxation* [2019] SASCFC 125, [254].

of assistance could have been provided (eg seed grant versus loan), except where the resources lost would otherwise have meant a material difference in the support for the whole community such that questions might arise about whether the desired consequence is individual enrichment as opposed to community benefit.

Public benefit

What was not at issue in *Canterbury Development Corporation* and *Queenstown Lakes*, but which is often at issue in the promotion of commerce cases, is whether members of an organisation receive economic benefits in their capacity as members – thus amounting to breach of the not-for-profit requirement or characterisation of the entity’s purpose as being for the benefit of a private group rather than the public.⁵¹ This actually appears a greater risk than the charitable purpose risk. That is because the Indigenous corporation in a BMS is often in the form of a charity and it has members, typically comprising most adult members of the Indigenous community, or else key representatives of most families that form the community.⁵²

Charities must be for the benefit of a sufficient section of the public.⁵³ While a sufficient section of the public, at least at the federal level, may be interpreted to countenance a native title claim group, there are limits on the relevant provisions and they do not apply at the state and territory level, such that charitable trusts, to be valid, must meet the more restrictive test at common law.⁵⁴ There are common law authorities which accept that Indigenous groups can amount to a section of the public, in contradistinction to traditional Western family groups, including groups of biological descendants from one or two named ancestors, potentially on the basis of being members of a group that holds communal rights in land.⁵⁵ However, the authorities do not appear to include examples of very close family groupings as a section of the public. Many of the authorities are also relatively recent and the Australian Taxation Office had historically viewed single native title claim/holding groups as not comprising a sufficient section of the public.⁵⁶

Accordingly, it has been common for charities and public benevolent institutions that benefit Indigenous persons to phrase their objects as the pursuit of purposes in respect of Indigenous persons (including, but not limited to a native title group) in a particular geographic area.⁵⁷

⁵¹ Cf *ibid*; *CCIWA* (n 41).

⁵² Murray and Wright (n 21) 107; Murray, Fardin and O’Hara (n 2) 9-10, 13, 55-6, 148.

⁵³ There are exceptions in some circumstances, for instance, for charities for the relief of poverty or of necessitous circumstances. However, BMS charities would typically be for a broader range of purposes.

⁵⁴ Charities Act 2013 (Cth) s 9. For a discussion of the relevant provisions and the common law, see, eg, Murray, ‘Public Benevolent Institutions’ (n 41) 435-40; Fiona Martin, ‘Convergence and Divergence with the Common Law: The Public Benefit Test and Charities for Indigenous Peoples’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (CUP 2014) 159; ACNC, *Commissioner’s Interpretation Statement: Indigenous Charities* (CIS 2013/02, 19 May 2015).

⁵⁵ See, eg, Murray, ‘Public Benevolent Institutions’ (n 41) 435-40; *Groote Eylandt Aboriginal Trust Inc v Deloitte, Touche Tohmatsu* (No 2) [2017] NTSC 4, [153]-[155], [202], [222]-[227], [239]-[243] (14 clans descended from apical ancestors, comprising in total 800 to 1500 people); cf *Plan B Trustees Ltd v Parker* (No 2) [2013] WASC 216 [118]-[119] (single native title claim group).

⁵⁶ See, eg, *Plan B Trustees* (n 55).

⁵⁷ See, eg, *Strelein* (n 24) 33.

The non-distribution question has not, however, been much examined for Indigenous BMSs. It is of most risk for Indigenous corporations, due to Indigenous community (or community representative) membership, as noted above. Charitable trusts do not have members, but BMS charitable trusts do have numerous Indigenous community officeholders and the case law on the non-distribution constraint is unclear about the extent to which the principles apply beyond owners. There is some risk that they apply to distributions to (or for the benefit) of officeholders and employees to the extent that those distributions can be said to go beyond reasonable remuneration for services rendered.⁵⁸ Alternatively, distributions to officeholders/employees might be characterised as being made because they are officeholders/employees rather than because they are potential recipients under the charitable trusts' objects, thus being viewed as giving rise to a separate, non-charitable purpose.⁵⁹

Administrative practice

Some of the difficulties do not reflect the boundaries of charity law, but rather represent psychological, administrative and other practical difficulties in obtaining certainty about new ways of doing charity. In particular, there are dire consequences of failing some of the requirements set out above. For example, failing to meet the charitable purpose test or the section of the public test would render a charitable trust invalid, let alone ineligible for tax concessions such as income tax exemption.⁶⁰

Yet, given the incomplete state of the law, uncertainty is likely to arise for key issues. In particular, narrowing the group who potentially benefits to a relatively small native title group would raise real questions about whether a valid charitable trust exists. In addition, many economic development activities are fairly novel. This novelty is likely to fuel desire for certainty about the specific means adopted, even if it is broadly true that charity law permits economic development activities that address disadvantage or promote commerce. An example of the circumstance-specific distinctions that might be made (and difficulty in providing generally applicable guidance) is provided by the ACNC Commissioner's Interpretation Statement on the provision of housing to those in need of housing assistance, which, while accepting that the provision of housing may come within a number of charitable purposes, states:⁶¹

It is possible that a charity could operate rent-to-buy or shared equity housing purchase schemes. However, such housing schemes would be assessed on a case-by-case basis to ensure that the solely charitable purpose of the charity remains.

Certainty could be provided through various mechanisms. For instance, the trustees of a charitable trust could seek a declaration from the relevant court as to the validity of a charitable trust soon after its creation. However, this would be a very expensive and slow process, especially if the court determined that the trust was invalid so that the Indigenous community would need to start over. A test case funding programme to help determine

⁵⁸ Charities Act 2013 (Cth) s 6(3); *Re Resch's Will Trusts* [1969] 1 AC 514, 540-1 (PC); *Dal Pont* (n 36) [3.23]-[3.24]. See also, *Re Delius* [1957] Ch 299, 308; *Lloyd v FCT* (1955) 93 CLR 645 (HCA), 670-1 (Kitto J). Cf *IRC v Oldham Training and Enterprise Council* (1996) 69 TC 231, 250 (Lightman J, referring to 'members').

⁵⁹ *Latimer v IRC* [2004] 1 WLR 1466, [34] (PC).

⁶⁰ The Productivity Commission notes only the latter: (n 23) 301.

⁶¹ ACNC, *Commissioner's Interpretation Statement: Provision of Housing by Charities* (CIS 2014/02, 1 December 2004) 12.

validity or permissibility under a valid charity of carrying out economic development activities might help address the costs issue (though it would still absorb the time and energy of trustees or directors). Such a programme was instrumental to Australia's previous de-facto charity regulator, the Australian Tax Office, pursuing many charity cases in Australia's highest and senior appellate courts,⁶² and has been proposed in a recent review of Australia's new chief charity regulator, the ACNC.⁶³ Interestingly, the government has so far rejected proposals for test case funding in favour of 'legislative options to address uncertainty in [charity] law'.⁶⁴

Obtaining administrative guidance from the relevant regulator, at the federal level, the ACNC, could also help⁶⁵ and the ACNC has issued such guidance, in the form of a 'Commissioner's Interpretation Statement' relating to Indigenous Charities.⁶⁶ However, the Commissioner's Interpretation Statement does not explore the range of permissible Indigenous economic development activities. Nor would it or any further Commissioner's Interpretation Statement generally be binding on the ACNC.⁶⁷ Guidance from state or territory Attorneys-General would likely be even harder to obtain, since they do not typically have administrative practices of providing such public guidance, and similar issues with reliance would arise. This presents a stark contrast with the Australian Taxation Office, for which a statutory regime provides a process of binding public and private administrative rulings.⁶⁸

Further, quite apart from obtaining legal certainty, if Indigenous charities engage in novel economic development activities, additional resources would also be required to develop and implement internal policies and procedures.

3.2. Complexity

The inclusion of a discretionary trust (see Part 2) addresses charitable trust disadvantages to some extent, permitting distributions to Indigenous community members or others without any charitable purpose limit – eg in pursuit of economic development – as well as the ability to distribute assets only to native title holders/claimants, rather than a broader section of the community.⁶⁹ Using a discretionary trust also enables BMSs to fulfil dual functions of managing and distributing assets and financial returns for individual native title group members, as well as pursuing community purposes (see Part 2.2).

⁶² For instance, *Word Investments* (n 29); *Aid/Watch* (n 35); *FCT v Hunger Project Australia* (2014) 221 FCR 302 (FRC).

⁶³ Patrick McClure, Greg Hammond, Su McCluskey and Matthew Turnour, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018* (Report and Recommendations, Treasury 2018) 82-3.

⁶⁴ Commonwealth of Australia, *Government Response to the Australian Charities and Not-for-profits Commission Legislation Review 2018* (Treasury, March 2020) 16.

⁶⁵ See, eg, Productivity Commission (n 23) 301, 303.

⁶⁶ ACNC, *Commissioner's Interpretation Statement: Indigenous Charities* (n 54).

⁶⁷ See, eg, Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action* (5th edn, LexisNexis 2018) [12.6.1]-[12.6.13]. However, Commissioner's Interpretation Statements may give rise to natural justice requirements.

⁶⁸ Taxation Administration Act 1953 (Cth) sch 1, pt 5-5.

⁶⁹ *Murray and Wright* (n 21) 107-8.

This use of both charitable and non-charitable trusts or entities within BMSs is a material factor exacerbating complexity. To be sure, there are also other causes of complexity. As identified by Murray, Fardin and O’Hara, customisation of BMSs to each Indigenous community is critical in order to take account of community differences such as capacity, size, geographical dispersion, aspirations, organisational culture and funding of groups and variations in the content and distribution of native title rights.⁷⁰ Logically, this entails some complexity.⁷¹ Further, partitioning decision-making and asset-protection functions in order to strengthen capacity building and governance whilst maintaining autonomy (as outlined in Part 2.1), can result in a number of overlapping decision-making bodies, which itself can entail significant complexity.⁷²

It may therefore be unreasonable to expect that many BMSs could be simple structures. Nevertheless, the existence of two separate trusts adds significant administration costs; generates additional potential for conflicts of interest; increases sites of contestation for power; requires more Indigenous community members with the requisite skills to be involved in trust administration; and generally adds to the length and overlap of BMS constituent documents.⁷³

3.3. *Non-standard and social enterprise nature of BMSs*

As suggested in Parts 2.1 and 3.2, the entities that form part of a BMS are highly customised. Indeed, the Pilbara BMSs examined by Murray, Fardin and O’Hara typically involved trusts with trust deeds of around 125 pages, plus associated sub-fund agreements which attached additional conditions as contemplated by the trust deeds.⁷⁴ The trusts envisaged a quasi-membership role for Indigenous community members and provided for a range of different oversight and decision-making committees. This poses issues for the degree to which regulators understand the arrangements and the extent of application of their regulatory powers; as well as the degree to which officeholders understand their BMS powers and duties.

To some degree this reflects the need to satisfy the law and culture of Indigenous communities as well as the Australian legal system. However, as has been discussed by Young, Murray, Fardin and O’Hara, it also frequently reflects the nature of BMSs as social enterprises that pursue community purposes as well as asset pools that are intended to achieve and distribute financial returns to community members.⁷⁵ The lack of settled and well-understood legal mechanisms or forms that help to guide how to balance these competing objectives is an issue in the social enterprise space, albeit views differ as to whether certainty can be obtained through new standardised uses of existing forms or new forms.⁷⁶ Attempts to resolve this tension have seen legislative amendment in jurisdictions

⁷⁰ Murray, Fardin and O’Hara (n 2) 52-3.

⁷¹ Cf *ibid* 52-3, 160.

⁷² Cf *ibid* 72-9.

⁷³ See, eg, *ibid* 61-7, 72-81, 191; Alan Sefton, ‘Report on Njama People’s Trust’ (Inquiry under Section 20 of the Charitable Trusts Act 1962 (WA), 1 November 2018) 477-81.

⁷⁴ Murray, Fardin and O’Hara (n 2) 141-58, 183-4.

⁷⁵ Frankie Young, ‘Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance’ (2020) McGill International Journal of Sustainable Development Law and Policy (forthcoming); Murray, Fardin and O’Hara (n 2) 93, 123-9.

⁷⁶ Dana Brakman-Reiser and Steven Dean, ‘The Social Enterprise Life Cycle’ in Benjamin Means and Joseph Yockey (eds), *The Cambridge Handbook of Social Enterprise Law* (CUP 2019) 223; Bronwen Morgan, ‘Transcending the Corporation: Social Enterprise, Corporations and Commons-based Governance’ in Thomas Clarke,

such as England and Wales, as well as in various parts of Canada and the US.⁷⁷ The legislative responses focus, to differing degrees, on clearly articulated - and potentially prioritised - duties of charity controllers in relation to pursuit of social purposes and distribution of profits; restrictions on alteration of social purposes; restrictions on profit distributions; and more extensive reporting and disclosure requirements in relation to the achievement of social purposes.⁷⁸

4. Potential responses

This Part examines several proposed responses to the challenges explored in Part 3, with particular emphasis on BMSs as social enterprises.

4.1. Remove the discretionary trust and broaden the charitable trust role

There has been some questioning of the continued need for discretionary trusts (in addition to BMS charities),⁷⁹ particularly as Australian taxation reforms in 2013 mean that land use payments can frequently now be made directly to native title holders in a tax-free manner,⁸⁰ to be used for economic development or other activities. As well, over the last decade, charity law has developed such that it is now more likely that a native title group will be considered a sufficient section of the community (Part 3.1), reducing the need for a discretionary trust focussed solely on the native title group. Case law has also confirmed that charities can undertake business activities (Part 3.1).

There may thus be scope to consider replacing some or all of the discretionary trust's functions through an expansion of the charitable trust's role and direct payments to individual community members. Potentially, this could materially reduce the complexity posed by BMSs.

However, direct payments to community members would be a relatively radical departure from some stakeholder perspectives about the benefit of an intermediary to help manage funds, maintain relationships and achieve good governance.⁸¹ If the charitable trust or BMS corporation is envisaged as adopting this intermediary funds management role, this would require investigation of the technical and practical bounds on the trustee of a charitable trust or the BMS corporation playing a funds management facilitation role for the funds paid directly to community members. That said, such a funds management facilitation role is potentially consistent with charity status as it is arguably within the

Justin O'Brien and Charles O'Kelley (eds), *The Oxford Handbook of the Corporation* (OUP 2019) 667, 671 Johanna Mair, 'Social Entrepreneurship: Research as Disciplined Exploration' in Walter W Powell and Patricia Bromley (eds), *The Nonprofit Sector: A Research Handbook* (3rd edn, Stanford University Press 2020) 333, 340.

⁷⁷ Community interest companies in England and Wales (Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK) c 27, pt 2); low-profit limited liability companies in a few US states (eg 11 VSA §§4161-4163); benefit corporations in many US states (typically based on Model Benefit Corporation Legislation available at <https://benefitcorp.net/attorneys/model-legislation>); and in several Canadian provinces, community interest companies (Community Interest Companies Act, SNS 2012, c38) and community contribution companies (Business Corporations Act, SBC 2002, c57 pt 2.2). For a discussion of several of the various legislative models, see, eg, Dana Brakman-Reiser and Steven Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (OUP 2017).

⁷⁸ For a useful overview, see, eg, Brakman-Reiser and Dean, *Social Enterprise Law* (n 77) 52-76; Young (n 75).

⁷⁹ Law firm professional adviser cited in Murray, Fardin and O'Hara (n 2) 191.

⁸⁰ Tax Laws Amendment (2012 Measures No 6) Act 2013 (Cth); Murray and Wright (n 21) 135-42. As to non-charities acting as intermediary recipients of native title benefits, cf Productivity Commission (n 23) 303.

⁸¹ Murray, Fardin and O'Hara (n 2) 191. See also Part 2.2.

type of economic development activities accepted in the promotion of commerce and relieving Indigenous disadvantage cases.⁸²

If the charitable trust is to expand its role into economic development activities, the technical and practical issues with economic development discussed in Part 3.1 remain and would need to be resolved. Further, an expanded role for the charitable trust might only deliver some of the hoped for simplicity gains, in that added functions will require their own administrative supports and processes.⁸³ Nevertheless, there should be some gains in that using the for-purpose charity form should provide guidance that the primary orientation of duties and purpose is toward the charitable community purpose rather than asset management and distribution. However, this gain is likely to be affected by the relatively unique role being filled by such a charitable trust, which may mean that the precise duties of various committee members are difficult to articulate.

4.2. PBC Economic Vehicle Status

Recognising the need to pursue both asset investment and distribution functions, along with the pursuit of a broad range of purposes (including economic development), the National Native Title Council and Minerals Council of Australia have made several reform proposals over the last decade. In 2010, they proposed an Indigenous Community Development Corporation (ICDC), with this basic model being endorsed by the then Labor Government's Native Title & Tax Working Group.⁸⁴

The ICDC was to be a new tax concession category and not necessarily a new legal entity, so that, despite its name, the category could potentially apply to trusts as well as incorporated bodies.⁸⁵ ICDC status was intended to come with a raft of sui generis governance and regulatory requirements.⁸⁶ The requirements included that an ICDC be not-for-profit and have purposes of promoting sustainable Indigenous community and socio-economic development.⁸⁷ An ICDC was intended to have a wider range of purposes than a charity due to a change in focus from 'charity and welfare' to 'community and socio-economic development'.⁸⁸ In particular, this would permit 'community-focused' economic development and 'support and promotion of individual Indigenous entrepreneurs'.⁸⁹ Further, the ICDC was intended to have an express ability to accumulate native title payments for the long-term benefit of an Indigenous community.⁹⁰ Given the expanded purposes and ability to accumulate, it was also hoped that use of an ICDC might permit fewer entities and hence a reduction in the complexity of BMSs.⁹¹

⁸² See, especially, *Tasmanian Electronic Commerce* (n 41); *Northern Land Council* (n 41) 5133-4 (Thomas J). And in the context of 'community service' organisations, see *FCT v Wentworth District Capital Ltd* [2011] FCAFC 42 (facilitation of banking services).

⁸³ As to the potential administrative costs of attempting to provide benefits and services to individuals rather than delivering community projects, see Law firm professional adviser cited in Murray, Fardin and O'Hara (n 2) 191.

⁸⁴ Heferen (n 21).

⁸⁵ *Ibid* 25, 28-9.

⁸⁶ *Ibid* 27-9.

⁸⁷ *Ibid* 9, 15, 25.

⁸⁸ *Ibid* 5, 25. Although difficult to reconcile with not-for-profit status, it also appeared that an ICDC was to have a limited ability to make non-purpose, direct payments to individuals: at 27.

⁸⁹ *Ibid* 9. See also at 15, 21.

⁹⁰ *Ibid* 5, 15.

⁹¹ *Ibid* 10, 14.

In 2019, the ICDC proposal was refined to PBC ‘economic vehicle status’ (**PBC EVS**), applying only to PBCs.⁹² The refined approach is somewhat narrower than the ICDC. It involves amending existing legislation (the CATSI Act) to introduce an additional schedule of governance and reporting requirements for PBCs, rather than seeking to apply a suite of governance requirements to a range of different legal forms. Like the ICDC though, the model would involve a broader range of permitted purposes and activities (than for charities), expressly including economic development to address Indigenous disadvantage through provision of finance to businesses. This would involve amending the CATSI Act and PBC regulations and a model constitution, or model provisions to be inserted into a PBC constitution, would help with this process. The PBC EVS would also require legislation at the state and federal level to:

- Provide for a new income tax exemption category.
- Provide for some input tax concessions (eg on employee taxes).
- Deal with legacy structures, ie rolling pre-existing charitable trusts and charitable corporations into the PBC EVS.

Addressing the Part 3 challenges

By providing a legislative response, the PBC EVS could largely address the technical charity law and administrative practice issues experienced by charities engaging in economic development activities,⁹³ though rolling over funds from legacy charity structures would also require additional steps (see below). At the same time, many of the key benefits from using a charity could be retained, such as the existence of a robust governance structure and the ability to accumulate income exempt from tax.

A further benefit is the move away from the language of ‘charity’ to ‘development’.⁹⁴ While the Productivity Commission has suggested that there is no real issue since Indigenous communities may freely choose whether to use charities or non-charities to manage benefits,⁹⁵ this misses two fundamental points. First, as noted above, resource proponents have historically negotiated very strongly for the use of charitable trusts due to their perceived robust governance controls; such that an alternate governance structure is potentially necessary. Second, charities are currently and, given accumulation tax concessions, likely to continue to be very widely used by native title groups. Yet, as every elementary textbook on charity law notes,⁹⁶ the popular meaning of ‘charity’ does not accord with its technical legal meaning. The popular meaning of charity is aptly set out in the Macquarie Dictionary (online):

almsgiving; the private or public relief of unfortunate or needy persons; benevolence

⁹² Matthew Storey, ‘Economic Vehicle Status for Prescribed Bodies Corporate’ (National Native Title Council, Minerals Council of Australia and University of Melbourne Native Title Seminar Series, Melbourne, 9 April 2019).

⁹³ Note that generally applicable, rather than Indigenous community-focussed, social enterprise legal forms have not always resolved the section of the public issue discussed in Part 3.1. See, eg, Community Interest Companies Act, SNS 2012, c38, s2(1)(c); Young (n 75).

⁹⁴ Cf Heferen (n 21) 15, 25; Martin, *Income Tax* (n 26) [7.4.1.5].

⁹⁵ Productivity Commission (n 23) 303-4.

⁹⁶ Dal Pont (n 36) [1.5]-[1.6].

A perception of almsgiving is likely to be the way that BMS charities are viewed by Indigenous and non-Indigenous Australians, rather than mechanisms that empower Indigenous communities and help celebrate their cultures.⁹⁷ Thus, this is a key advantage as compared with merely providing certainty for a broader range of charity activities.

If a PBC EVS is able to pursue both asset investment and distribution as well as a range of purposes (including economic development), then it should also be possible to use one entity rather than multiple entities, reducing the complexity discussed in Part 3.2.

However, the unique, social enterprise nature of the BMS remains and is only partially addressed by the PBC EVS proposal.⁹⁸ The issue here is trust on the part of stakeholders in a PBC EVS that it will meaningfully pursue its Indigenous community and socio-economic development mission; ie not change its purposes away from that mission or distribute assets in a way that does not support the mission.⁹⁹ It is true that PBCs have a regulator, ORIC, with a focus on and modest resource base for regulating PBCs,¹⁰⁰ as well as a relatively clear set of duties and a degree of accountability to members and the broader public.¹⁰¹ However, the CATSI Act regime is subject to a range of criticisms about whether it sufficiently meets aspirations for good governance and accountability, whilst also permitting customisation to the cultural and other circumstances of each Indigenous community.¹⁰² Several reviews had culminated in proposed amendments to the CATSI Act that would increase accountability and transparency, yet simultaneously ‘reduc[e] regulatory burden’,¹⁰³ but those changes have now been put on hold pending a more comprehensive review of the CATSI Act, which includes examining ‘whether it can better support economic and community development opportunities’ for Indigenous Australians.¹⁰⁴

It is unclear how the PBC EVS rules will help guide directors about the priority to be accorded community purposes versus asset management and distribution; unlike the charity form which gives a primary focus to community purpose goals. The lack of a clear prioritisation mechanism is contrary to the recommendations of Brakman-Reiser and Dean and contrary to the approach for several of the new social-enterprise vehicles noted above, such as community interest companies and low-profit limited liability companies.¹⁰⁵ Relying solely on reporting and transparency to act as the mechanism for

⁹⁷ Allowing that state of affairs to remain on foot when something could be done about it is inconsistent with the most recent intergovernmental statement on closing the gap for Indigenous Australians: Council of Australian Governments, *COAG Statement on the Closing the Gap Refresh* (12 December 2018) 2.

⁹⁸ As to difficulties for Canadian Indigenous peoples in utilising several hybrid social enterprise legal structures in Canada, see, eg, Young (n 75).

⁹⁹ As to the role of trust and the use of mission and asset-locks, along with reporting and disclosure, to achieve trust, see, eg, Brakman-Reiser and Dean, *Social Enterprise Law* (n 77).

¹⁰⁰ KPMG, *Regulating Indigenous Corporations* (Final Report, 15 December 2016); Australian National Audit Office, *Supporting Good Governance in Indigenous Corporations* (Report No 3 2017-18, Commonwealth of Australia 2017) 7-8; Nigel Scullion, Minister for Indigenous Affairs, ‘Extra \$4 million for ORIC to increase support for Indigenous corporations’ (Media Release, 5 July 2017) <<https://ministers.pmc.gov.au/scullion/2017/extra-4-million-oric-increase-support-indigenous-corporations>>.

¹⁰¹ KPMG (n 100) 63-6; Australian National Audit Office (n 100) 7-10.

¹⁰² Murray, Fardin and O’Hara (n 2) 21-5; KPMG (n 100) 65-6.

¹⁰³ Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) (lapsed due to proroguing of Parliament for the 2019 election and not yet reintroduced).

¹⁰⁴ National Indigenous Australians Agency, ‘Review of the CATSI Act’ <www.niaa.gov.au/indigenous-affairs/economic-development/review-catsi-act> accessed 24 June 2020.

¹⁰⁵ Brakman-Reiser and Dean, *Social Enterprise Law* (n 77); n 77.

prioritising different purposes has proven difficult for benefit corporations in the US¹⁰⁶ and, relatedly, for standard companies in the UK, for which section 172(1) of the Companies Act 2006 (UK) c46 requires directors to consider a range of stakeholder interests.¹⁰⁷

Further, while the PBC EVS proposal would presumably provide a form of mission-lock (it appears that PBCs would elect into the regime by adopting Indigenous community and socio-economic development purposes, which would then be protected by the additional governance requirements), it does not appear to contain an asset-lock. That is because PBCs are currently permitted to make distributions to members¹⁰⁸ and the PBC EVS approach does not appear to contain any constraints, such as capping distributions to members at a percentage of surplus or profits as for some of the social enterprise legal forms in England and Wales and Canada.¹⁰⁹

Legacy structures

Adopting the PBC EVS proposal may ease challenges for new structures, but there remains the matter of the large number of existing BMSs. There are likely to be two key dimensions to this issue: first, transferring funds from legacy charitable trusts to a new PBC EVS; and, second, permitting existing PBCs to transition into the PBC EVS arrangements.

Transfer of funds from a legacy charitable trust to a PBC EVS raises the complication that trustees are obliged to apply charitable trust assets for the charitable purposes of the trust and not for broader PBC EVS purposes.¹¹⁰ Without legislative amendment, any asset transfer would need to be on the basis that the assets would be used for the trust's charitable purposes by the PBC EVS. This would detract from the benefits of the PBC EVS and would likely require the charitable trust to remain in existence to monitor and enforce the contract or other basis for the asset transfer.

As charitable trusts are created under state law, legislative amendment would generally¹¹¹ have to occur at the state level to permit the transfer of assets to a non-charity to be used for non-charitable purposes. For instance, in Western Australia, an amendment to the Charitable Trusts Act 1962 (WA).¹¹² Such legislative amendments should also enlarge

¹⁰⁶ Brakman-Reiser and Dean, *Social Enterprise Law* (n 77) 59-61.

¹⁰⁷ Department for Business, Energy & Industrial Strategy, *Corporate Governance Reform: The Government response to the green paper consultation* (UK Government 2017) 4-5, 24-35.

¹⁰⁸ Office of the Registrar of Indigenous Corporations, *The CATSI Act and the Corporations Act – Some Differences* (Commonwealth of Australia 2010) 2.

¹⁰⁹ The Community Interest Company Regulations 2005 (UK) SI 2005/1788, r 22 (the percentage cap is 35% of distributable profits); Community Interest Companies Act SNS 2012, c38, s 15(1); Community Interest Companies Regulations NS Reg 121/2016 r 5 (percentage cap of 40% of distributable profits); Community Contribution Company Regulation BC Reg 63/2013 r 4 (percentage cap of 40% of distributable profits).

¹¹⁰ For a recent, high profile, case about the need to apply assets solely for charitable trust purposes see, eg, *Re New South Wales Rural Fire Service & Brigades Donations Fund* [2020] NSWSC 604.

¹¹¹ The Australian Federal Parliament has a head of power that may potentially be applicable. The 'races power' under the *Australian Constitution* section 51(xxvi) permits the Federal Parliament to pass laws with respect to people of any race, including Indigenous Australians, but its precise ambit is the subject of ongoing debate: George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory* (7th edn, Federation Press 2018) ch 23.

¹¹² For exemplar provisions see, eg, Charitable Trusts Act 1962 (WA) pt VA . See also Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020 (NSW).

the scope of any winding-up clause in Indigenous charitable trust deeds that might otherwise require assets to be distributed only to another charity.

Many charitable trusts are also registered at the federal level with the ACNC. There ought to be no need to amend the ACNC legislation provided the ACNC Commissioner grants permission for legacy charitable trusts to deregister immediately before transferring assets to the PBC EVS.¹¹³ While there is no general income tax claw-back for a charity that deregisters, there would likely need to be amendments to state and federal tax legislation to ensure that non-cash asset transfers do not crystallise tax liabilities. For instance, this might arise because a deregistered charitable trust that is no longer income tax exempt is deemed to realise transferred property at its market value under generally applicable capital gains tax rules,¹¹⁴ or because a new PBC EVS does not qualify for exemption from state stamp duties legislation on acquisition of such property.¹¹⁵

If the legacy trust is a discretionary trust, it might be anticipated that the PBC being converted to the PBC EVS is already a discretionary object and so it should be possible to distribute assets to it. If the PBC EVS needs to be added as a new object, consideration will be required to ensure that this does not cause a trust resettlement and corresponding taxation event.¹¹⁶

Transitioning a current PBC to a PBC EVS involves some alternative issues. While the CATSI Act already permits amendment of a PBC constitution,¹¹⁷ if the PBC is a charity, then any proposal to change its purposes to include non-charitable purposes potentially involves the directors breaching their statutory or fiduciary duties.¹¹⁸ Further, it is unclear whether attorney-general or court approval might be required,¹¹⁹ but certain that ACNC permission would be required to deregister. As PBCs are federally created entities, these issues could be resolved by way of federal legislation that expressly permits a charitable PBC to opt into the PBC EVS and to cease being a charity, confirming that this does not cause directors to breach their duties.¹²⁰

5. Conclusion

BMSs are typically established to enable management and distribution of funds to Indigenous communities whose land rights are affected by resource and agricultural developments, as well as to pursue socially important purposes such as supporting autonomy and self-determination, as well as enhancing social, economic and cultural development for Indigenous communities. Pursuing economic development highlights the tension between pursuing a social mission and providing funds to individuals by way of distribution of amounts received for acts affecting Indigenous land rights. Existing legal frameworks provide some response to this challenge, but leave material uncertainty and complexity in place.

¹¹³ Australian Charities and Not-for-profits Commission Act 2012 (Cth) s 35-10(1)(e).

¹¹⁴ Income Tax Assessment Act 1997 (Cth) s116-30.

¹¹⁵ See, eg, Duties Act 2008 (WA) ch 2.

¹¹⁶ See, eg, ATO, *Taxation Determination TD 2012/21* (31 August 2016).

¹¹⁷ CATSI Act subdiv 69-B.

¹¹⁸ Dal Pont (n 36) [17.67]-[17.72].

¹¹⁹ *Ibid.*

¹²⁰ If the PBC holds BMS assets on charitable trust, then the legacy trusts discussion is pertinent.

The PBC EVS would go some way to expressly permitting economic development and the pursuit of dual purposes as it would eliminate unresolved charity law questions and remove the need to obtain administrative certainty in these grey areas. It would also reduce ongoing complexity (although legacy issues would arise) and provide a degree of mission-lock. Its current form would not, however, provide PBC EVS controllers with direction about whether they should prioritise the social mission or economic development for the benefit of individuals. This lack of guidance is accentuated by the lack of any asset lock under the PBC EVS model. Without further refinement, this is an area where using a charity to pursue economic development in pursuit of the social mission has some advantages in that priorities are clearer. Nevertheless, the continued existence of technical and administrative issues for charities, the complexity of multiple entities and the sui generis nature of omnibus BMS charitable trusts, means that there is value in seeking to use and refine the PBC EVS model.