Groote Eylandt Aboriginal Trust Inc & Anor v Deloitte, Touche Tohmatsu & Ors [No 2] [2017] NTSC 04

PARTIES:	GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (NT 00142C) THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY v DELOITTE TOUCHE TOHMATSU (A Firm) and KPMG (A Firm) and MINTER ELLISON (A Firm)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	89 of 2014 (21441221)
DELIVERED:	20 January 2017
HEARING DATES:	5, 6, 7 and 8 December 2016
JUDGMENT OF:	HILEY J

CATCHWORDS:

INTERPRETATION – trusts – trust deeds – same approach as for construction of contracts – intention as revealed in the words used – resort to extrinsic evidence

TRUSTS – charitable trusts – legal principles – *Pemsel* categories – trusts for purposes not persons

TRUSTS – charitable trusts – benefit of the public or section of the public – class of potential beneficiaries – tests in *Re Compton* and *Oppenheim* – whether potential beneficiaries are defined by reference to a single propositus or several propositii – Aboriginal clans are a section of the public – no difference where non residents are excluded

TRUSTS – charitable trusts – trusts for the relief of poverty – trusts must be solely for the relief of poverty if not for the benefit of the public or a section of the public – *Dingle* exception

TRUSTS – charitable trusts – public benefit – sport and social facilities – may fall within advancement of education category in some cases – trust must not permit gifts that are not charitable

ABORIGINALS – clans – trusts for the benefit of traditional clans of Aboriginals residing in a particular area – clans are a section of the public for the purposes of charitable trusts – nothing arbitrary or capricious about the membership of Aboriginal clans – appreciably important class of the community

Aboriginal Land Rights Act 1983 (NSW)

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) sch I, s 4(2A)
Charities Act 2013 (Cth), s 9
Income Tax Assessment Act 1997 (Cth)

Statute of Charitable Uses 1601 (43 Eliz 1 c 4)

Native Title Act 1993 (Cth)

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531, *Re Scarisbrick Cockshott v Public Trustee* [1951] 1 All ER 822 CA, *Verge v Somerville* [1924] AC 496, applied

Aboriginal Hostels Ltd v Darwin City Council (1985) 33 NTR 1, *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* [1997] NTCA 78, 115 NTR 25, 139 FLR 236

Dareton Local Aboriginal Land Council v Wentworth Council (1995) 89 LGERA 120, *Davies v Perpetual Trustee Co Ltd* [1959] AC 439, *Dempsey*

on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2) [2014] FCA 528, *Dingle v Turner* [1972] AC 601, *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640, *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157, *Plan B Trustees Limited v Parker* [2013] WASC 216, *Shire of Ashburton v BindiBindi Community Aboriginal Corporation* [1999] WASC 108, *Shire of Derby-West Kimberley v Yungngora Association Inc* [2007] WASCA 233, *Thompson v Federal Commissioner of Taxation* [1959] HCA 66; (1959) 102 CLR 315, considered

Compton, In re; Powell v Compton [1945] 1 Ch 123, *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, distinguished

Flynn v Mamarika (1996) 130 FLR 218, *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195, followed

Anglican Trusts Corporation of Diocese of Gippsland v Attorney-General for the State of Victoria [2008] VSC 352, *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455, *Attorney-General (NSW) v Cahill* [1969] 1 NSWR 85, *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, *Attorney-General v Ross* [1986] 1 WLR 252, *ASIC v Carey (No 6)* (2006) [2006] FCA 814; (2006) 153 FCR 509, *Australian Executor Trustees Ltd (as trustee for the Martu Banyjima Charitable Trust) v Attorney-General (WA)* [2015] WASC 439, *ASIC v Carey (No 6)* (2006) 153 FCR 509, *BSH Holdings Pty Ltd v Commissioner of State Revenue* [2000] VSC 302; (2000) 2 VR 454, *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253, *Cant v Kirby* [2011] NSWSC 1193, *Commissioner of Taxation of the Commonwealth of Australia v Bargwanna* [2012] HCA 11; (2012) 244 CLR 655, *FCT v Vegners* (1989) 90 ALR 547, *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, *Gibson v South American Stores (Gath & Chaves) Ld* [1950] Ch 177, *Grain Growers Ltd v Chief Commissioner of State Revenue* [2015] NSWSC 925, *Inland Revenue Commissioners v Baddeley* [1955] AC 572, *Inland Revenue Commissioners v City of Glasgow Police and Athletic Association* [1953] AC 380, *Inland Revenue Commissioners v McMullen* [1981] AC 1, *In Re Hilditch* (1985) 39 SASR 469, *In Re Income Tax Acts [No 1]* [1930] VLR 211, *Re Wilson's Grant; Fidelity Trustee Co Ltd v Johnson* [1960] VR 514, *Kostka v The Ukrainian Council of NSW Inc* [2013] NSWSC 222, *McGarvie Smith Institute v Campbelltown Municipal Council* (1965) 11 LGRA 321, *Mabo v State of Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1, *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*

[2015] HCA 37; (2015) 256 CLR 104, *Re Best* [1904] 2 Ch 354, *Re Clifford* [1912] 1 Ch 29, *Re Coulthurst* [1951] Ch 661, *R (Independent Schools Council) v Charity Commission* [2012] Ch 214, *Re Gillespie* [1965] VR 402, *Re Mair* [1964] VR 529, *In Re Patten*[1929] 2 Ch 276, *Re Evans; Union Trustee Co of Australia Ltd v Attorney-General for Queensland* [1957] St R Qd 345, *In Re Tree* [1945] Ch 325, *In Re Wallace v Fatt* [1908] VR 636, *Royal National Agricultural and Industrial Association v Chester* (1974) 3 ALR 486, *Said v Barrington* [2001] NSWSC 576, *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138, *State of Western Australia v Graham on behalf of the Ngadju People* [2013] FCAFC 143, *Strathalbyn Show Jumping Club Inc v Mayes* [2001] SASC 73; (2001) 79 SASR 54, *Union Trustee Co of Australia Ltd v Federal Commissioner of Taxation* [1962] HCA 52; (1962) 108 CLR 451, *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447, *Wybenga v Mandandanji Ltd (as trustee for the Mandandanji Charitable Trust)* [2014] FCA 861, referred to

REPRESENTATION:

Counsel:

1st Plaintiff:	R Whitington QC B Doyle D McConnel
2nd Plaintiff:	G Macdonald
1st Defendant:	No appearance
2nd Defendant:	No appearance
3rd Defendant:	R Derrington QC T Anderson

Solicitors:

1st Plaintiff:	Roussos Legal Advisory, town agents for Johnson Winter & Slattery
2nd Plaintiff:	Solicitor for the Northern Territory
1st Defendant:	Paul Maher Solicitors, town agents for Thomson Geer
2nd Defendant:	Hunt & Hunt Solicitors, town agents for Clifford Chance
3rd Defendant:	Halfpennys, town agents for Lander & Rogers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Groote Eylandt Aboriginal Trust Inc & Anor v Deloitte, Touche Tohmatsu & Ors [No 2] [2017] NTSC 04

No. 89 of 2014 (21441221)

BETWEEN:

GROOTE EYLANDT ABORIGINAL TRUST INCORPORATED (NT 00142C)
First Plaintiff

THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY
Second Plaintiff

AND:

DELOITTE TOUCHE TOHMATSU (A FIRM)
First Defendant

AND:

KPMG (A FIRM)
Second Defendant

AND:

MINTER ELLISON LAWYERS
Third Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 20 January 2017)

Introduction

[1] On 18 July 2016 I made orders that the following questions be tried as preliminary questions ahead of the trial of the other issues in these proceedings:

(1) Do the matters alleged in paragraph 13 of the Defence of the Third Defendant to the Amended Statement of Claim filed 2 October 2015 filed on 29 January 2016, or any of them, deny to the Groote Eylandt Aboriginal Trust (as established and continued under the deeds of trust identified in paragraphs 7, 10, 19, 25 and 30-32 of the Amended Statement of Claim)[1] the status of a valid charitable trust at law? For the avoidance of doubt, this question includes whether the matters alleged are established.

(2) Does the Plaintiff have standing to bring these proceedings against Minter Ellison in the capacity of trustee given that the Plaintiff:

(a) has not been found liable for breach of trust; and

(b) has not been found responsible for the loss and damage it now claims against Minter Ellison?

[2] In its Response to the Plaintiff's Statement of Facts Issues and Contentions,[2] the third defendant withdrew its challenge to the plaintiff's standing. Its defence is to be amended accordingly. As no party is now challenging the plaintiff's standing the second question no longer needs to be answered.

Pleadings and Submissions

[1] Referred to in these reasons as the **Trust**.
[2] "Minter Ellison's Response to the Plaintiff's Statement of Facts, Issues and Contentions dated 9 September 2016" dated 23 September 2016 (**Third Defendant's Response)**.

[3] Pursuant to the orders made on 11 August 2016 the plaintiff, Groote Eylandt Aboriginal Trust Incorporated (**GEAT**), filed and served a detailed Statement of Facts, Issues and Contentions.[3] The first defendant, Deloitte Touche Tohmatsu, responded by not admitting that the Trust is a charitable trust and indicating that it did not intend to be heard on the Separate Questions. The third defendant, Minter Ellison, put in issue a significant number of the detailed factual assertions made in the Plaintiff's Statement of Facts, Issues and Contentions by not admitting facts and declined to respond to the plaintiff's contentions because they comprised submissions and because it was awaiting further material that had been requested of the plaintiff and the plaintiff's evidence.[4]

[4] Written submissions were filed and served on behalf of GEAT,[5] the third defendant,[6] and the Attorney-General of the Northern Territory.[7] The Attorney-General, who was added as a plaintiff, maintains that the Trust is a valid charitable trust.[8]

Question to be answered

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[3] "Plaintiff's Statement of Facts Issues and Contentions" dated 9 September 2016 (**Plaintiff's Statement of Facts Issues and Contentions**).
[4] Third Defendant's Response.
[5] "Plaintiff's Submissions on Questions of Law" dated 30 November 2016 (**Plaintiff's Written Submissions**).
[6] "Written submissions of the Third Defendant" filed 1 December 2016 (**Third Defendant's Written Submissions**).
[7] "Submissions on behalf of the Attorney-General" dated 6 December 2016 (**Attorney-General's Written Submissions**).
[8] In these reasons Groote Eylandt Aboriginal Trust Incorporated shall be referred to as **GEAT** or as **the plaintiff**.

[5] In short, the plaintiff sues the defendants in relation to conduct that occurred from 1 January 2009 in relation to monies held by the plaintiff as trustee for the Trust.

[6] The plaintiff alleges that by Deed of Trust dated 7 March 1989 and with the effect from 25 May 1965, a trust fund was established for royalty payments received and to be received from Groote Eylandt Mining Co Ltd (**GEMCO**) and/or Broken Hill Co Pty Ltd (**BHP**). The plaintiff, GEAT, was appointed as trustee to administer the fund. This was referred to in the pleadings as "**the Old Trust**". The terms of the Old Trust were amended in accordance with a new deed of trust dated 25 June 1996 and the Trust was then referred to as "**the New Trust**". The terms of the Trust were further amended by deeds of trust dated 21 September 1998, 31 July 2000, 21 December 2004, 26 October 2005 and 12 August 2008 (referred to in these proceedings as "**the Trust Deed**" or **"the 2008 Trust Deed"**).[9]

[7] In paragraph 13 of the Statement of Claim the plaintiff alleges that:

> As a charitable trust, the Trust is and was at all material times entitled to protection and enforcement by the Attorney – General of the Northern Territory as *parens patriae*.

[8] Paragraph 13 of Amended Defence pleads as follows:

> Minter Ellison denies paragraph 13 of the SOC and says that the Trust was not a valid charitable trust at law in that:

[9] Statement of Claim [7], [10], [19], [25] and [30] – [32].

(a) thetrust deed at all material times permitted the charitable grant fund to be applied toward *inter alia* sport and social facilities, which purposes are not charitable purposes;

(b) the class of "beneficiaries" is restricted to those members of specific Aboriginal clans which are permanently residing at 3 geographical locations and thus the purported benefit is not of a public nature and is not for the community as a whole or for an appreciable, but unascertained or indefinite, portion of it; and

(c) even if the "beneficiaries" may rightly be recipients of charitable grants at a particular point in time, the possibility that they were not rightly recipients in the past or the possibility that they may not rightly be recipients in the future is inconsistent with the public benefit test.

The 2008 Trust Deed

[9] It is common ground that the questions are to be answered primarily by reference to the 2008 Trust Deed, namely the deed dated 12 August 2008 as initialled by GEAT's public officer.[10] That is the deed that defined the Trust at the time of the conduct which is the subject of the main litigation. However it will be relevant to consider previous versions of that Trust Deed because the Trust is said to have existed since 25 May 1965.

[10] On page 2 of the Trust Deed the plaintiff, GEAT, is described as being the Association/Trustee and the Church Missionary Society Trust Ltd (**CMS**) is described as the Settlor. The Settlor did not execute the

[10] Statement of Claim [31] – [33].

Deed. Rather it was executed as a deed by the affixing of the common seal of GEAT in the presence of its Public Officer, Rosalie Lalara.

[11] The Trust Deed contains a number of Recitals including the following:

> A. On 25 May 1965, the Settlor became beneficially entitled to the Royalty Payments and these payments were paid to the G.E. Trust.
>
> B. It is and always has been the desire and intent of the Settlor that all Royalty Payments to which it is or may become entitled be used to establish a permanent Trust for the education, benefit welfare, comfort and general advancement of certain Aboriginal people resident upon Groote Eylandt and Bickerton Island.
>
> C. On 28 August 1969, the Groote Eylandt Aboriginal Trust Incorporate ('**Association/Trustee**') was formed for the purpose of acting as trustee of the Trust.
>
> D. On 7 March 1989, the Settlor and the Trustee entered into a deed of trust ('**the Old Trust**') to give effect to the charitable trusts originally contemplated with the establishment of the Trustee on 28 August 1969 (with effect from 25 May 1965).
>
> E. The Settlor, for the purpose of giving effect to such desire, has throughout transferred to the Trust all Settled Property and the Trustee consented to become the trustee thereof subject to the powers and provisions hereinafter expressed.
>
> F. Following consultation, recommendation and discussion amongst the people of Groote Eylandt and Bickerton Island, certain amendments to the Old Trust were made to better reflect the then present day circumstances of the Trust. During 1995 the Members of the Trustee agreed to amend the terms of the Old Trust to those contained in a new deed of trust dated 25 June 1996 ('**the New Trust**').
>
> G. Pursuant to clause 14 of the New Trust, the Trustee may by instrument in writing (for example, by deed or by resolution) revoke, add to or vary all or any of the terms of

the New Trust subject to certain restrictions contained within the said clause 14.[11]

H. On the 13 August 1998, in accordance with the provisions of the New Trust and in accordance with the Association's rules, the Trustee held a special community meeting (SCM) at Angurugu to consult with the Aboriginal people of Groote Eylandt and Bickerton Island and to discuss the financial viability of the Trust for future generations of Beneficiaries.

I. At the SCM, the Beneficiaries of the Trust agreed with the Trustee that the recent financial decline of the Mothership Fund posed a significant threat to the future of the Trust.

J. A majority (in excess of two-thirds) of the beneficiaries present at the SCM voted in favour of the Trustee amending the provisions of the New Trust (and rules of the Association) so as to effectively and lawfully conserve the then present value of the Trust Fund with a view to achieving long-term growth of the Mother ship fund.

K. The Beneficiaries approved the Trustee's recommendations:

(i) to ensure that the Mothership Fund is not used to pay any costs associated with the administration of the Expenditure Fund;

(ii) to ensure that the distribution of Grant Money is made from the Expenditure Fund and is not made from the Mothership Fund;

(iii) to use the Mothership Fund to pay costs and expenses which are necessary for:

(a) the preservation and maintenance of Trust assets; and

(b) the operation and administration of the Trustee and the Trust;

provided that such costs and expenses do not exceed twenty percent (20%) of the Income of the Trust Fund for the current Financial Year;

(iv) to exercise strict control over investment of Trust Funds;

[11] This was formerly Recital C in the Amending Trust Deed made on 26 October 2005.

(v) to henceforth prohibit the making of loans from Trust Funds (whether secured or otherwise) to Beneficiaries;

(vi) to establish a mothership committee for the purpose of allocating a fixed proportion of the Trust Fund each year to the Expenditure Fund, strictly in accordance with the provisions of the Deed;

(vii) to facilitate the establishment of three independent 'grant committees' to represent each community (namely, Angurugu, Umbakumba and Milyakburra) for the purpose of receiving monies from the Expenditure Fund and distributing the same strictly in accordance with the laws relating to charitable trusts and the charitable purpose test.

L. On 13 August 1998, the amendments were incorporated into the New Trust by the Trustee re-executing the New Trust (as amended) on 21 September 1998.[12]

M. On 19 July 2000, agreement was reached (at a special community meeting of the Trustee) to make further amendments to the terms of the New Trust, to become retrospectively effective as from 1 July 2000. These amendments changed the Financial Year of the Trust from 1 April each year to 30 March the following year and to 1 July each year to 30 June the following year, and were incorporated in the New Trust by the Trustee executing an Amending Trust Deed on 31 July 2000.

N. On 30 November 2004, agreement was reached (at an annual general meeting) to make further amendments to the terms of the New Trust to make provision for a Growth Period and for related purposes. These amendments were incorporated into the New Trust by the Trustee executing an Amending Trust Deed on 21 December 2004.

O. On 19 October 2005, approval was granted by the Attorney-General of the Northern Territory to further amend the New Trust pursuant to clause 20.3(a) of the New Trust, and in accordance with the terms of his letter, dated 19 October 2005. These amendments were incorporated into clause 20 of the New Trust by the Trustee executing an Amending Trust Deed on 26 October 2005.

[12] This was formerly Recital D in the Amending Trust Deed made on 26 October 2005.

P. With effect from 19 October 2005, the provisions of the new Trust were amended, altered, modified, substituted or cancelled to the extent necessary for those provisions to correspond with the amendments approved by the Attorney-General of the Northern Territory on 19 October 2005.

[12] Clause 2 is as follows:

> The Trust
>
> The Trustee shall hold and apply the Trust Fund exclusively for such charitable purposes (in the strict legal sense) as may be served by the provision of money property or other advantages for the benefit welfare and advancement of the Beneficiaries.

[13] Clause 1.1 contains a number of definitions.

> **Beneficiaries** shall mean all Aboriginal people who are members of the traditional clans of and permanently resident on Groote Eylandt or Bickerton Island and their successor generations.
>
> **...**
>
> **Trust Fund** means:
>
> (i) the Settled Property paid or transferred by the Settlor to the Trustee;
>
> (ii) the Royalty payments paid to the Trustee
>
> (iii) all moneys, investment and property paid or transferred to and accepted by the Trustee as additions to the Trust Fund; and
>
> (iv) all income and accretions to the Trust Fund; and
>
> (v) the investments and property from time to time representing the said money, investment property accumulations and accretions or any part or parts thereof respectively.

[14] Clause 3 provides the trustee with powers of investment. Clause 4 defines the "Income of the Trust Fund" for the purposes of clause 6, and clause 5 defines the "Net Income of the Trust Fund".

[15] Clause 6 is entitled "Allocation of the Trust Fund". It provides for the allocation of the Trust Fund into one or other of a Growth Fund, Asset Preservation Fund, Charitable Grant Fund and an Administration Fund. Income of the Trust Fund prior to its distribution to one or other of those funds, and any residue after such distribution and other certain monies is held in the Mothership Fund.[13]

[16] Clause 6.3 is as follows:

> 6.3 **Charitable Grant Fund**[14]
>
> 6.3.1 In each Financial Year the Trustee (as represented by the Trust Committee) shall allocate to the Charitable Grant Fund from the Income of the Trust Fund for the current Financial Year the remainder of the annual Royalty Payments subject to clauses 6.1, 6.2 and 6.4 for the purpose of providing benefits to the Beneficiaries.
>
> 6.3.2 Without limiting the generality thereof, the Charitable Grant Fund may be applied towards the following charitable purposes:
>
> (xi) to provide assistance for funerals and religious activities;
>
> (xii) to provide medical and health benefits to Beneficiaries;
>
> (xiii) to assist in the maintenance of ceremonial activities;

[13] These clauses were footnoted as being formerly clauses 4.1, 4.2, 4.4 and 4.5 in the Trust Deed made on 26 October 2005.
[14] This was formerly clause 4.4.

(xiv) to assist in the maintenance of cultural activities;

(xv) to provide education and sporting and social facilities;

(xvi) to pay the cost of supplying household electricity to Beneficiaries;

(xvii) to relieve extreme poverty by providing essential goods and services for Beneficiaries; and

(xviii) to provide assistance for other charitable purposes.

6.3.4 If in any Financial Year the amount applied in accordance with clause 6.3.2 is less than eighty percent (80%) of the Net Income of the Trust Fund in that Financial Year, the Investment Advisory Committee may, from time to time, invest any uncommitted funds for that year in either the Mothership Fund or in the Growth Fund.

[17] Most of the other provisions were clauses formerly in the 26 October 2005 Deed. These include clauses 14 and 17.

[18] Clause 14 confers broad a discretion upon the trustee in relation to the exercise of its powers:

14. Discretion of the Trustee

Subject always to any express provisions to the contrary herein contained, every discretion vested in the Trustee shall be absolute and uncontrolled and every power vested in it shall be exercisable at its absolute discretion and the Trustee shall have the final discretion in deciding whether or not to exercise any such power. No Trustee shall be responsible for any loss or damage occasioned by the exercise of any discretion or power hereby or by law conferred on the Trustee or by failure to exercise any such discretion or power or for any loss or damage accruing as a result of concurring or refusing or failing to concur in any exercise of any power of discretion.

[19] Clause 17 provides powers for amendment of the deed:

17. Amendments to this deed[15]

The Trustee may by instrument in writing revoke, add to or vary all or any of the terms of the Trust or terms of this Deed provided that:

17.1 it has given twenty one (21) days' notice of its intention to do so to the Attorney-General of the Northern Territory of Australia;

17.2 it reasonably believes that the majority of Beneficiaries agree and that at a general meeting of Beneficiaries two thirds of those present vote in favour of the variation or variations;

17.2.1 fourteen (14) days' notice of the general meeting shall be provided on public notice boards in the communities of Angurugu, Umbakumba and Milyakburra;

17.2.2 the general meeting must have at least 100 persons in attendance and at least 20 persons from each of the communities of Angurugu, Umbakumba and Milyakburra;

17.3 the law against perpetuities is not thereby infringed; and

17.4 the Trust remains a trust for charitable purposes for the benefit of the Beneficiaries for all time.

[20] Clause 18 provides that "[e]xcept as provided by clause 14 (sic) of this Deed, the trusts hereby created shall be irrevocable."

[21] Clause 21 provides as follows:

21. Commencement of the Trust[16]

21.1 This Deed, as varied from time to time, shall be deemed to have commenced on 25 May 1965 and all and each and every power conferred and duty imposed by this Deed shall be deemed to have been conferred or imposed on that date and to have been continually binding upon the GE Trust, the Association, the Interim Trustee and the Trustee from that date.

[15] This was formerly clause 14.
[16] This was formerly clause 18.

21.2 The amendments made to the provisions of the New Trust which incorporate the changes sought by the people at the SCM (as set forth in this Deed), shall be binding upon the Trustee from the Commencement Date.

[22] Although clause 23 is similar to clause 20 of the 26 October 2005 Deed it includes specific references to maximum amounts that could be allocated to the Charitable Grant Fund, the "Charitable Grant Cap", in particular financial years up to 31 March 2012.

[23] By clause 24 an additional power was granted to make advances of money from the Charitable Grant Fund for the establishment of a charitable purpose market garden:

24. Ex gratia Payment

24.1 The Trustee may make a payment up to but not exceeding $200,000 from the Charitable Grant Fund for the leasing of land and the establishment of a charitable purpose market garden.

24.2 The Trustee may pay an annual amount of up to but not exceeding $200,000 per annum from the Charitable Grant Fund for two financial years following the payment in clause 24.1, to be used to develop and maintain the charitable purpose market garden.

Summary of Main Contentions

Written submissions

[24] In its Statement of Facts, Issues and Contentions the plaintiff makes three main contentions:

(a) The plain and obvious intention of the Trust Deed, including in its

various earlier forms, was to create a charitable trust. The governing principle is in clause 2 and in particular the express words: "exclusively for such charitable purposes (in the strict legal sense)".

(b) The Trust is a trust for the relief of poverty and thus a charitable trust of the kind permitted under *Dingle v Turner*.[17] It is presumed to be for the public benefit.

(c) Alternatively, the potential objects of benefaction (loosely referred to as the class of beneficiaries) constitute a section of the public for the purposes of the law of charitable trusts. Accordingly the Trust is still a charitable trust if some of its purposes are not for the relief of poverty but all fall within one or other of the four *Pemsel*[18] categories (or are ancillary to such a purpose).

[25] The third defendant advances two main reasons why it says the Trust is not a valid charitable trust:

(a) the purposes of the Trust include purposes which are non-charitable such as the promotion of sport and social facilities;[19]

(b) the class of beneficiaries who are entitled to benefit from the Trust are of a closed class because the members are defined by reference

[17] *Dingle v Turner* [1972] AC 601 (***Dingle***).
[18] *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (***Pemsel***).
[19] Defence [13(a)].

to their relationship with a single propositus or several propositi such that the Trust does not satisfy the public benefit test.[20]

[26] As to the second point, the third defendant contends that the beneficial objects of the Trust are persons who are identified by reference to their relationship with a propositus or propositi: that is, they need to be members of the traditional clans of Groote Eylandt and Bickerton Island, the membership of which is via a patrilineal connection.

[27] Unless the Trust is limited to the relief of poverty it is and always has been invalid because it does not comply with the principles set out in *Compton,*[21] and *Oppenheim*.[22] Here the Trust is not solely for the relief of poverty. The Trust Deed permits the funds to be used for non-charitable purposes and it is therefore void. In the result, the Trust is not a valid charitable trust.

Oral submissions

[28] At the hearing, senior counsel for the plaintiff placed greater emphasis on the first and last of the contentions noted in [24] above and put the relief of poverty point as an alternative.

[29] Senior counsel for the third defendant contended that the class of beneficiaries did not meet the *Compton-Oppenheim* test and so was not

[20] Defence [13(b)].
[21] *Compton, In re; Powell v Compton* [1945] Ch 123 (***Compton***).
[22] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (***Oppenheim***).

a section of the public. This was not cured by express wording such as that in clause 2.

[30] Senior counsel for the third defendant also submitted that a number of the uses identified in clause 6.3.2 would not be for the relief of poverty, or even a charitable use within one or other of the *Pemsel* categories. The clearest example is clause 6.3.2(xv): "to provide education and sporting and social facilities".

[31] The plaintiff's response to this was that the construction and operation of that and other uses permitted under clause 6.3.2 is limited by the clear intent in clause 2 of the Deed: that the trust fund could only be held and applied "exclusively for such charitable purposes (in the strict legal sense) as may be served by the provision of money, property or other advantages for the benefit, welfare and advancement of the Beneficiaries."

Factual background

[32] In addition to the factual background set out below, I have also been provided with other information of a factual kind that I am able to use if I consider it permissible, necessary and relevant in order to assist with the proper construction of the Trust. I shall refer to that material later, where appropriate.

The Indigenous Inhabitants of the Islands

[33] At the time of European settlement it is likely that Groote Eylandt, Bickerton Island and nearby waters were occupied by a group of people more recently known as Anindilyakwa people under laws and customs pursuant to which they and their successors held rights of possession in the land to the exclusion of all others.[23]

[34] The indigenous language of the islands is Anindilyakwa. The traditional owners of the islands identify themselves, and are identified by their neighbours on the mainland, as Anindilyakwa people.

[35] At all material times:

(a) the Aboriginal people of the islands have belonged to various "clans";

(b) membership of a clan is primarily by patrilineal descent, although matrilineal descent may also attract traditional responsibilities, and there are other ways to become a member of a clan in unusual circumstances, such as where a person's father is European;

(c) upon marriage, a woman does not cease to be a member of her original clan but both husband and wife acquire some rights and responsibilities in connection with each other's clan estates, which are contingent on the maintenance of the relationship;

[23] *Mabo v State of Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at pp 57-62 and 70[6].

(d) identification of clans is by ancestral connection too remote in time to be historically or objectively verifiable, in the sense that the Aboriginal people believe that the clans have existed from time immemorial and are believed to be descended from spiritual ancestors.

[36] The earliest remembered ancestors may be a set of classificatory siblings, who are themselves believed to be descended from an unnamed common ancestor of the past who had interactions with a mythological ancestral being.[24]

[37] Each clan is associated with totems, tracts of country focussed on important mythological sites, and the travels of ancestral heroes (linked by dreaming tracks).[25] The Anindilyakwa people believe that they are connected with mythological beings who interacted with a clan's ancestors and are manifested as features of the landscape.[26] These interactions are believed to have happened beyond living memory.[27] "Clans are totemic groups and each clan has a totemic story."[28]

[38] Each clan is associated with a particular area of land and sea referred to as "country" or by anthropologists as an "estate".[29] A clan is a "land

[24] Ex P17 [30].
[25] Ex P17 [34]. See too Sansom Ex D3A [40].
[26] Ex P17 [36].
[27] Ex P17 [38].
[28] Ex D3A [40].
[29] Ex P17 [39].

owning entity".[30] I take this to mean that the clan holds the primary rights and responsibilities in its "country" or "estate".

[39] According to Turner, "an individual is born with a spirit from another realm of existence in a particular stretch of country – always the country from which the father's spirit came." Individuals of the same generation in the same clan group are spiritually equivalent and refer to members of other groups and members of their own group by the same terms.[31]

[40] Each clan of the islands has one or more names. Additionally, in more recent times, there has been a formalisation of surnames based upon clans, chosen partly for their ease of pronunciation by non-indigenous administrators, which have become common in the way clans are referred to. The clan names all relate to a feature of their mythology and spiritual ancestry, or the physical characteristics or a location in their country. There are approximately 14 traditional clans of Groote Eylandt and Bickerton Island.

[41] There has been a degree of interaction (ceremonial, mythological, marriage and kinship) between the Anindilyakwa peoples and mainland groups (for example, the Warnungwamadada (Lalara) clan has country on Groote Eylandt as well as on the mainland and Bickerton Island).

[30] Ex P17 [31]. See too Sansom Ex D3A [40].
[31] Ex P17 [40] referring to Turner 1974 at [26].

[42] It is common ground that the Anindilyakwa people of Groote Eylandt attempt to live, as much as is possible, a traditional lifestyle, and the maintenance of cultural and traditional practices form an important part of their lifestyle.[32]

[43] Census statistics indicate that the Aboriginal population of the two islands was over 800 in 1969, almost 1000 in 1986, almost 1200 in 1991, about 1500 in 2001, over 1400 in 2006, over 1500 in 2011 and more than that now.

[44] The plaintiff and the third defendant both tendered a lot of evidence about housing, education, employment, wages and earnings for Aboriginal people on the islands. In short that material shows that there has been, and remains to be considerable over-crowding in houses, only about one third of the relevant population having been educated to year 10 or higher, a very low level of employment, and the majority earning less than $21,000 per annum.

Recent history

[45] On 15 May 1920, Groote Eylandt was gazetted as a reserve for Aboriginals under the *Aboriginals Ordinance 1918*.

[46] The first recorded European settlement on the islands was by members of the Church Missionary Society Trust Ltd (**CMS**) which established a

[32] Third Defendant's Written Submissions [23].

mission at Emerald River on Groote Eylandt in 1921. A flying boat base was established near present day Umbakumba in 1935. BHP established a mine and built a township at Alyangula in 1963.

[47] No non-indigenous settlement has occurred on Bickerton Island.

[48] In 1961, CMS obtained Permits to Enter on behalf of the Aboriginal community on Groote Eylandt, entitling it to prospect and apply for Mining Titles in the area of the permit.

[49] By agreement dated 7 June 1963, between CMS and BHP, CMS transferred its rights to BHP in consideration of terms that included the payment of an annuity and royalties (payable to the Anindilyakwa people) for the lifetime of any leases, enabling BHP to mine manganese or other minerals in the area of the permits.

[50] On 25 May 1965, mineral leases on Groote Eylandt were granted to BHP and thereafter transferred to GEMCO, a wholly owned subsidiary of BHP.

[51] The islands were part of a larger number of islands which were described as the Arnhem Land (Islands) in Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (**ALRA**). Accordingly they became Aboriginal land and were vested in an Aboriginal Land Trust "for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land … whether or

not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission."[33]

[52] One effect of that vesting was to restrict access to the islands by non-Aboriginal persons to those issued with a permit under the ALRA or the *Aboriginal Land Act 1979* (NT).

[53] In 1991 the Anindiliyakwa Land Trust (**ALT**) was established as the relevant land title holder for the islands pursuant to s 4(2A) of the ALRA. The ALT's functions are undertaken at the direction of the Anindiliyakwa Land Council (**ALC**) in accordance with the ALRA.

Earlier Trust Deeds

[54] As I have already noted, although the Trust was established on 25 May 1965, the terms of the Trust were first formally recorded in the 1989 Trust Deed. That trust deed was amended from time to time for various reasons. The most significant amendments were made in 1996 by the 1996 Trust Deed (sometimes referred to as the New Trust Deed) following this Court's decision in *Flynn v Mamarika*.[34] Although the relevant trust deed for present purposes is the 2008 Trust Deed, it is convenient at this stage to note relevant parts of earlier deeds, particularly the 1996 Trust Deed as that was a major focus of many of the submissions.

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[33] *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) s 4.
[34] *Flynn v Mamarika* (1996) 130 FLR 218 (***Flynn v Mamarika***).

[55] Is also convenient to note that each deed had a number of features in common. These included that each deed:

(a) related to royalty payments paid and to be paid by BHP or its subsidiary GEMCO into a Trust Fund;

(b) acknowledged a desire for the royalty payments to be used for the benefit welfare comfort and general advancement of certain Aboriginal persons resident on Groote Eylandt and Bickerton Island;

(c) acknowledged GEAT as the trustee;

(d) acknowledged the name of the Trust to be Groote Eylandt Aboriginal Trust;

(e) specified as the objects of the Trust certain Aboriginal persons who were permanently resident on Groote Eylandt or Bickerton Island;

(f) contained a provision stating that the trustee shall hold and apply the Trust Fund "exclusively for such charitable purposes (in the strict legal sense) …";

(g) conferred powers on the trustee to perform various functions including to apply the Trust Fund in various ways;

(h) contained provisions for the trusts to be revoked, added to or varied, but so that the law against perpetuities not be infringed; and

(i) provided that the trusts otherwise be irrevocable.

1989 Trust Deed

[56] The 1989 Trust Deed[35] was executed on behalf of the parties CMS as the settlor and GEAT as the trustee, on 7 March 1989. It is deemed to have commenced on 25 May 1965.[36]

[57] The recitals note, amongst other things, that:

(a) on 25 May 1965 the settlor became beneficially entitled to royalty payments upon the export of manganese ore won on Groote Eylandt by BHP or its subsidiary GEMCO;

(b) the settlor desires that "all royalty payments to which it is or may become entitled in respect of manganese ore or all minerals won upon Groote Eylandt be used for the education benefit welfare comfort and general advancement of certain aboriginal persons resident upon Groote Eylandt and Bickerton Island".

[35] Ex P6 (Tab 14).
[36] Clause 18.

[58] Amongst other things the “Trust Fund” and “Royalty Payments” were defined, and the name of the Trust was Groote Eylandt Aboriginal Trust.

[59] Clause 3 stated that:

> The objects of the Trust shall be all aboriginal persons who are permanently resident on Groote Eylandt or Bickerton Island and who are members of the following clans:

It then listed 10 clans by reference to one or more names.

[60] Clause 4 stated that:

> The Trustee shall hold and apply the Trust Fund exclusively for such charitable purposes (in the strict legal sense) as may be served by the provision of money or property or other advantages for the benefit welfare and advancement of the objects of the Trust. Without limiting the foregoing purposes the purposes of the Trust shall include:
>
> …

[61] Three purposes were then stated, the only one relevant for present purposes being that in paragraph (b):

> To use the Trust Fund and all other payments and donations for the education benefit welfare comfort and general advancement in life of the said objects of the Trusts in such manner and to such extent and upon such terms and conditions as from time to time may seem expedient to the Trustee.

[62] Clause 15 empowered the Trustee to revoke, add to or vary any of the trusts “but so the law against perpetuities is not thereby infringed.”

Clause 16 provided that the trusts are irrevocable except as provided by clause 15.

Flynn v Mamarika

[63] In November 1995 this Court was asked to determine a number of questions arising in the execution of the Trust and to provide directions, mainly in relation to clause 4 of the 1989 Trust Deed. In his reasons for decision[37] Martin CJ set out the agreed facts concerning the history of the Anindilyakwa people and the formation of the Trust,[38] and the relevant provisions of the Trust Deed.[39] His Honour referred to each of the *Pemsel* categories and elaborated on their scope.[40] His Honour proceeded to consider particular grants and loans that were proposed and whether or not they may be for a charitable purpose.[41]

[64] The litigation and the Court's reasons proceeded on the assumption that the trust was a charitable trust. At pp 222-223:

> Most of the cases to which the Court was referred deal with the question of whether a particular bequest or settlement created a charitable trust. Here there can be no doubt about that. What is in question is the purposes for which the trust fund may be applied so as not to breach the duty of the trustee to apply them for charitable purposes.
>
> The trust is a charitable trust. The express words at par 4 of the

[37] *Flynn v Mamarika.*
[38] Ibid at 219-220.
[39] Ibid at220-1.
[40] Ibid at 223.
[41] Ibid at 226-9.

> deed make it so. What are charitable purposes are to be decided in the strict legal sense, as opposed to popular notions of what may be a charity or of a charitable nature.
>
> (underlining added by me)

[65] However that important question was not in issue in that case. All parties proceeded on the assumption that the Trust was a valid charitable trust.

[66] His Honour proceeded to discuss the requirements of a charitable trust "in the strict legal sense" by reference to the four *Pemsel* categories. His Honour then said, at p 223:

> Charitable trusts exist for the benefit of the public or a section of the public as understood in accordance with the law. The section of the public defined in the trust deed, being the Aboriginal persons referred to, is a section of the public for these purposes. (That section of the public is referred to as "the community".) The reference in par 4 to the purposes of the trust as including the use of the trust fund for the education, benefit, welfare, comfort and general advancement in life of the community, is subject to the requirement that the trust funds be applied for charitable purposes. The funds are only to be used in such a way as will benefit the community as a whole. Use of the trust funds for the benefit of a particular Aboriginal person or persons (falling within the description contained within the trust deed), which is not beneficial to the community, will be in breach of the terms of the trust. Those particular enumerated purposes do not extend or over-ride the primary and only purposes of the trust, that is, charitable purposes; they are examples of the way in which the trust funds might be used, provided always that every such use of those funds falls within what is a charitable purpose in the strict legal sense.
>
> (underlining added by me)

[67] His Honour proceeded to discuss the duties of the trustee, the execution of the trust, delegation of powers and then to provide

directions concerning a wide range of proposed trust purposes most of which found their way into the 1996 Trust Deed.

1996 Trust Deed

[68] This deed was executed on 25 June 1996, some three months after the Court's decision in *Flynn v Mamarika*. The parties to the deed were CMS as Settlor, GEAT referred to as "the Association", and John Flynn and others referred to jointly as "the Interim Trustee". It was deemed to have commenced on 25 May 1965. The trust established by the 1989 Trust Deed was defined as "the Old Trust".

[69] The recitals noted a number of things including that:

(a) on 7 March 1989 the Settlor and the Association entered into the Old Trust "to give effect to the charitable trusts originally contemplated with the establishment of the Association in 1969";

(b) by an Interim Deed dated 2nd March 1995 the Interim Trustee was appointed to make recommendations "on appropriate amendments to the Old Trust to better reflect the present day circumstances of the Trust."

[70] Clause 1.1 contained a number of definitions including a definition of "Beneficiaries" and a definition of "Trust Fund". Those definitions are identical to those which have appeared in successive versions of the trust deed including the 2008 Trust Deed. See [13] above.

[71] Clause 2 was exactly the same as Clause 2 in successive versions of the trust deed including the 2008 Trust Deed. See [12] above.

[72] Clause 4 provided for the allocation of monies from the Trust Fund. It stated, inter alia:

> 4. ALLOCATION OF THE TRUST FUND
>
> 4.1 In each Financial Year the Trustees shall allocate from the Trust Fund an amount equal to 80% of the Income of the Trust Fund for the previous Financial Year (the "Expenditure Fund") for the purpose of providing benefits to the Beneficiaries.
>
> 4.2 SUBJECT TO THE REQUIREMENT OF CHARITABLE PURPOSE, but without limiting the generality thereof, the Trustees may use the Expenditure Fund to:
>
> 4.2.1 increase the balance of the Trust Fund;
>
> 4.2.2 make grants for the relief of poverty and for other charitable purposes;
>
> 4.2.3 provide health housing and other benefits;
>
> 4.2.4 provide education sporting and social facilities;
>
> 4.2.5 assist in the maintenance of cultural activities;
>
> 4.2.6 provide services for persons in need;
>
> 4.2.7 make grants to Anglican Churches within the Angurugu, Umbakumba and Milyakburra Communities.
>
> …
>
> 4.5 The Trustee shall appoint an independent committee who may act as a sub-committee of the Trustee who shall include three Beneficiaries, one from each community, and at least an accountant, a legal practitioner and a financial advisor for the purpose of advising the Trustee of the

calculation of the Expenditure Fund and or appropriate strategies for investment of the Mothership Fund.

4.6 The Mothership Fund or any part of it shall not be used directly for any purpose outlined in clause 4.2

[73] Clause 14 related to amendments to the deed. It stated:

14. AMENDMENTS TO THIS DEED

The Trustee may by instrument in writing revoke add to or vary all or any of the terms of the trust or terms of this deed provided that:

14.1 It has given twenty-one (21) days' notice of its intention to do so to the Attorney-General of the Northern Territory;

14.2 It reasonably believes that the majority of beneficiaries agree and that at a general meeting of Beneficiaries two thirds of those present vote in favour of the variation or variations:

14.2.1 14 days notice of the general meeting shall be provided on the notice boards of the towns of Angurugu, Umbakumba and Milyakburra

14.2.2 the general meeting must have a t lease 100 persons in attendance and at least 20 persons from each of the towns of Angurugu, Umbakumba and Milyakburra.

14.3 The law against perpetuities is not thereby infringed.

14.4 The Trust remains a Trust for charitable purposes for the benefit of the Beneficiaries for all time.

[74] I agree with the submissions made on behalf of the plaintiff that this deed continued the trust that had been documented in the 1989 Trust Deed.

[75] In particular the clause which identified the purpose of the Trust(clause 2) was in substance the same as its 1989 predecessor (clause 4).

[76] There were two relevant differences however:

(a) clause 2 of the 1996 Trust Deed (and its successors) described the potential objects of benefaction as “the Beneficiaries” (the definition of that term referring to the clan criterion before referring to the residency criterion) rather than as “the objects of the Trust” (which referred to the residency criterion before identifying the clans); and

(b) clause 2 of the 1996 Trust Deed (and its successors) omitted the additional provisions identifying particular “purposes” of the trust, more properly being powers and uses, and dealt with these separately in clause 4.

[77] Another difference between the two deeds was to describe the potential objects of benefaction, “the Beneficiaries”, by reference to their membership of “the traditional clans” of the islands and “their successor generations” rather than their membership of one or other particular named clan.

[78] I agree with counsel for the plaintiff that the different order of the two criteria as between the two definitions, and the addition of the temporal clause “and their successor generations” in the New Trust Deed, are of no relevant consequence. The changes were plainly effected out of an abundance of caution but not so as to change the intended meaning, that the essential purpose of the Trust is to provide financial assistance (directly or indirectly) to the indigenous residents of the islands at any time and from time to time for so long as the Trust endures. Further, the reference to “successor generations” more clearly reflected the intention to allow for a change in the composition or identity of the clans on the island.

[79] The other main difference between the deeds of 1989 and 1996 was to introduce, by clause 4, a provision that provided for the allocation of a percentage of the income of the Trust Fund and to expressly state how the money could be used. This had the effect of more clearly distinguishing between the purpose of the Trust on the one hand (previously reflected in the first sentence of clause 4 of the 1989 Trust Deed), and the uses to which the trust fund could be put (previously reflected in the remainder of clause 4 of the 1989 Trust Deed).

[80] The opening words of clause 4.2 of the 1996 Trust Deed, capitalised and underlined, emphasised the desire of the drafter of the deed to ensure that despite the various descriptions of potential uses, the Expenditure Fund could only be used for charitable purposes. The

intent that the Trust remains a charitable trust is also manifest in clauses 14.3 and 14.4 of the 1996 Trust Deed.

1998 Trust Deed

[81] The main changes brought about by this deed were to further define the way in which the Trustee was permitted to allocate the Expenditure Fund, and to protect the Mothership Fund from being depleted by requiring that certain monies be paid out of the Expenditure Fund rather than out of the Mothership Fund. The Deed permitted the Trustee to allocate portions of the Expenditure Fund to each of the three communities of Angurugu, Umbakumba and Milyakburra, in certain circumstances, provided they were for charitable purposes.

[82] Clause 4 included the following:

> 4. ALLOCATION OF THE TRUST FUND
>
> 4.1 In each Financial Year the Trustee (as represented by the Mothership Committee) shall allocate from the Trust Fund an amount NOT GREATER THAN eighty per cent 80% of the Income of the Trust Fund for the previous Financial Year (the "Expenditure Fund") for the purpose of providing benefits to the Beneficiaries.
>
> 4.2 SUBJECT TO THE REQUIREMENT OF CHARITABLE PURPOSE (but without limiting the generality thereof) the Trustees may allocate the Expenditure Fund to each of the three (3) communities of Angurugu, Umbakumba and Milyakburra during the Financial Year (in proportions and at intervals which the Trustee shall determine from time to time) PROVIDED THAT a community shall only be eligible to receive a part of the Expenditure Fund during the Financial Year if that community has established and

maintained a community-based organisation which is represented by a committee elected by that community ("the Grant Committee") and is governed by rules which ensure that the part of the Expenditure Fund ("Grant Money") which is allocated to the community-based organisation is distributed and applied towards such charitable purposes (in the strict legal sense) as shall benefit the welfare and advancement of the Beneficiaries of that community.

4.3 To remain eligible to receive Grant Money from the Trustee during the Financial Year, the Grant Committee of each community-based organisation must ensure that the Grant Money is distributed and applied within the community to which it was allocated strictly in accordance with the requirement of CHARITABLE PURPOSE. Without limiting the generality thereof, Grant Money may be applied towards the following charitable purposes:

4.3.1 to relieve extreme poverty by providing essential goods and services for Beneficiaries;

4.3.2 to provide medical and health benefits to Beneficiaries;

4.3.3 to provide education and sporting and social facilities;

4.3.4 to assist in the maintenance of cultural activities;

4.3.5 to provide assistance for funerals and religious activities;

4.3.6 to assist in the maintenance of ceremonial activities;

4.3.7 to pay the cost of supplying household electricity to Beneficiaries;

4.3.8 to pay the administrative costs of operating each community-based organisation which is established and incorporated with objects and powers to receive Grant Money under the terms of this deed, namely:

(a) the Angurugu Charitable purpose fund;

(b) the Umbakumba Charitable purpose fund;

(c) the Milyakburra Charitable purpose fund.

4.3.9 to provide assistance for other charitable purposes.

…

4.6 The Mothership Fund or any part of it shall not be used directly for any purpose outlined in clause 4.3.

[83] There were no other relevant differences between the terms of this deed and its predecessor.

2000 Trust Deed

[84] The main change brought about under this deed was to change the Financial Year of the Trust to 1 July each year to 30 June the following year.

2004 Trust Deed

[85] The main changes brought about under this deed were to introduce the concepts of a "Growth Period" and a "Charitable Grant Cap", and to establish a number of separate funds, namely a Growth Fund, an Asset Preservation Fund, a Charitable Grant Fund and an Administration Fund. This was done by amendments to clause 4 and the introduction of clause 20.

[86] Clause 4.4 referred to the Charitable Grant Fund and was in terms of the identical to clause 6.3 of the 2008 Trust Deed.[42]

[42] Reproduced in [16] above.

[87] Clause 20 provided for the calculation of a Charitable Grant Cap for each financial year and prohibited any expenditure being made under clause 4.4 that exceeded the Charitable Grant Cap for the relevant financial year. The clause was to operate during the Growth Period namely the period commencing 1 January 2005 and expiring 31 December 2012.

2005 Trust Deed

[88] The main effect of the 2005 Trust Deed was to amend clause 20 to further define the maximum amounts that could be allocated to the Charitable Grant Fund.

Interpretation of Trust Deeds

[89] Identification of the character of a trust as charitable, turns upon the interpretation of the instrument creating the trust and potentially, in some cases, upon the circumstances in which the instrument of trust as interpreted is to operate.

[90] In *Byrnes v Kendle,*[43] Heydon and Crennan JJ considered the principles relevant to the construction of trusts. Their Honours said that "the rules for the construction of contracts apply also to trusts."[44]

[91] At [105]:

[43] *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253at 286 – 291 [102] – [118].
[44] Ibid at 286 [102] (Heydon and Crennan JJ).

> The authorities establish that in relation to trusts, as in relation to contracts, the search for 'intention' is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties.

[92] And at [113]:

> … The surrounding circumstances are material to the questions with the words used created a trust and what its terms are. Accordingly, Conaglen[45] was correct to say:
>
> > "The court's focus when construing the terms of [a] bilateral arrangement [creating a trust] is on the objective meaning that those terms would convey to a reasonable person, just as it is when construing contractual arrangements."
>
> The question is what the settlor or settlors did, not what they intended to do.

[93] More recently, in *Commissioner of Taxation v Bargwanna*[46] the High Court adopted the observations of the Judicial Committee in *Latimer v Commissioner of Inland Revenue*[47] as to the identification of the nature of charitable trusts and how a trust deed is interpreted to ascertain whether the charitable nature exists:

> [29] … Whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not, [w]hat was the settlor's purpose in establishing the trust? [B]ut, [w]hat are the purposes for which trust money may be applied?

[94] The High Court recently considered the correct approach to the use of extrinsic evidence in the interpretation of a contract in *Mount Bruce*

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[45] Matthew Conaglen, 'Sham Trusts' (2008) 67 *Cambridge Law Journal* 176, 181.
[46] *Commissioner of Taxation of the Commonwealth of Australia v Bargwanna* [2012] HCA 11; (2012) 244 CLR 655.
[47] *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 at 168 [29].

Mining Pty Ltd v Wright Prospecting Pty Ltd.[48] French CJ, Gordon and Nettle JJ held at 116-117 [48]-[50] that:

> Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.[49]
>
> However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating"[50]. It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.[51]

[95] Kiefel and Keane JJ held at 131-133 [108]-[113]:

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[48] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104.

[49] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352 (***Codelfa***). See also Sir Anthony Mason, 'Opening Address' (2009) 25 *Journal of Contract Law* 1,3.

[50] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35], citing *Codelfa* at 350, in turn citing *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574.

[51] *Codelfa* at 352; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574.

> That regard may be had to the mutual knowledge of the parties to an agreement in the process of construing it is evident from *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[52]. Mason J, with whom Stephen and Wilson JJ agreed, accepted that there may be a need to have regard to the circumstances surrounding a commercial contract in order to construe its terms or to imply a further term. In the passages preceding what his Honour described as the "true rule" of construction[53], his Honour identified "mutually known facts" which may assist in understanding the meaning of a descriptive term or the "genesis" or "aim" of the transaction. His Honour had earlier referred[54] to the judgment of Lord Wilberforce in *Prenn v Simmonds*[55], where it was said that:
>
> > "[t]he time has long passed when agreements … were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations."
>
> In a passage from *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*[56], to which Mason J referred[57], it was said that the object of the exercise was to show that "the attribution of a strict legal meaning would 'make the transaction futile'". In *Electricity Generation Corporation v Woodside Energy Ltd*[58], French CJ, Hayne, Crennan and Kiefel JJ explained that a commercial contract should be construed by reference to the surrounding circumstances known to the parties and the commercial purpose or objects to be secured by the contract in order to avoid a result that could not have been intended.

[96] In the present matter counsel for the plaintiff contend, and the third defendant does not appear to dispute, that the true character of the Trust falls to be determined by reference to the Trust constituted by the Deed of 25 June 1996. For these purposes, it does not matter whether

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[52] *Codelfa*.
[53] Ibid at 351-352.
[54] Ibid at 348-349.
[55] *Prenn v Simmonds* [1971] 1 WLR 1381 at 1383-1384; [1971] 3 All ER 237 at 239.
[56] *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429; [1978] HCA 12, referring to *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384; [1971] 3 All ER 237 at 240.
[57] *Codelfa* at 351.
[58] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35]; [2014] HCA 7.

it might be said that the 1996 Trust Deed (the New Trust Deed) constituted the Trust afresh, or merely reconstituted the terms of a pre-existing trust. That follows either because the 1996 Trust Deed represents an amendment to the 1989 Trust Deed (pursuant to the power of amendment contained in the 1989 Trust Deed), in which case no question of *Codelfa* evidence arises as reference to the former is necessarily permissible for interpretation of the latter, or because the Recitals to the 1996 Trust Deed expressly refer to the 1989 Trust Deed, which directly makes it an instrument which informs the interpretation of the 1996 Trust Deed.[59]

[97] Counsel for the plaintiff also submitted that the "basal trust" has never changed despite the various amendments of the trust deed. Its purposes and its objects have remained the same throughout. It has always been a valid charitable trust.

Charitable trusts – relevant law

[98] Following the Preamble to the *Statute of Charitable Uses*[60] and subsequent amendments, replacements and judicial consideration, the general law requires a valid charitable trust to have purposes which fall

[59] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35], *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46]).
[60] *Statute of Charitable Uses 1601* (43 Eliz 1 c 4) (***Statute of Charitable Uses***), sometimes referred to as the Statute of Elizabeth.

exclusively within one or more of the four "*Pemsel*" categories,[61] namely:

(a) the relief of poverty;

(b) the advancement of education;

(c) the advancement of religion; and

(d) other purposes beneficial to the community not falling under any of the preceding headings.

[99] In order for a trust to be a valid charitable trust:

(a) the trust must be "of a public nature, that is, for the benefit of the public" (or a section of it) as distinct from having a "private" purpose;[62] and

(b) the carrying out of its objects must be of benefit to the public.[63]

[100] Although public benefit is only expressly mentioned in relation to the fourth of the *Pemsel* categories, this element is a necessary prerequisite for valid charitable purposes under the second and third categories. A trust for the relief of poverty is presumed to be for the public benefit.[64]

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[61] *Pemsel* at 583 (Lord Macnaghten).
[62] J. D. Heydon and M. J. Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 8th ed, 2016) (**Jacobs**) [10-04] and [10-06].
[63] Jacobs [10-10].
[64] *Dingle v Turner*.

The relevant question is whether the purpose is "for the benefit of the community or of an appreciably important class of the community".[65]

[101] All charitable trusts are trusts for purposes not persons. This is a fundamental difference between charitable trusts and conventional private trusts.[66] Whereas in the case of a conventional private trust, the persons entitled to benefit either have a fixed interest in the corpus of the trust or rights as discretionary objects of a discretionary trust, in the case of a charitable trust the persons who might benefit are no more than the potential objects of benefaction out of the trust. They are not beneficiaries in the sense in which that expression is used in the discourse of private trusts.[67]

[102] In relation to ascertaining whether the trust is "of a public nature, that is, for the benefit of the public", Jacobs states, at [10-04]:

> The purpose to which the property is devoted is what must be considered in determining whether any particular purpose is charitable. The source of the property or the person of the trustee is not relevant in determining this question.[68] And where the trust rests on writing, the characterisation of the trust as charitable depends on construction of the writing, not on subsequent activities.[69]

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[65] *Verge v Somerville* [1924] AC 496 at 499 (***Verge v Sommerville***).
[66] *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209 at 222; *BSH Holdings Pty Ltd v Commissioner for State Revenue* (2000) 2 VR 454 at 456 [9].
[67] *FCT v Vegners* (1989) 90 ALR 547 at 551-552; *ASIC v Carey (No 6)* (2006) 153 FCR 509 at 515-519 [17]-[30].
[68] *Robinson v Stuart* (1891) 12 LR (NSW) Eq 47; *Perpetual Trustee Co Ltd v Shelley* (1921) 21 SR 426.
[69] *R (Independent Schools Council) v Charity Commission* [2012] Ch 214.

[103] In relation to ascertaining whether the carrying out of the objects of the trust will be of benefit to the public, Jacobs states, at [10-10]:

> The mere belief of the donor of the section of the public said to be benefited that the purpose of the trust is charitable is not effectual in itself to make the purpose charitable in the eyes of the law.[70] The court … must itself decide whether there is any basis for the donor's views. In other words, the court must determine, first, whether the objects of the trust are such that benefit to the public in general must necessarily result from their execution. If the trust meets that first test, the court must decide whether the trust is beneficial to the community in a way which the law regards as being charitable.[71]

Trusts for the benefit of Aboriginals

[104] Counsel for the third defendant acknowledged that a charitable trust may be settled for the benefit of Aboriginal persons generally.[72] Counsel submitted however that this is not such a case.

[105] Counsel also acknowledged that it has been assumed in a number of cases that a trust which benefits indigenous persons who are members of a particular "clan group" or native title claim group (in the sense

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[70] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1947] AC 31; [1947] 2 All ER 217.

[71] *Re Hummeltenberg* [1923] 1 Ch 237 at 242; [1923] AllER Rep 49 at 50; *Re Grove Grady* [1929] 1 Ch 557 at 558; [1929] All ER Rep 158 at 160; *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447; [1947] 1 All ER 513; *Royal Society for the Prevention of Cruelty to Animals, NSW v Benevolent Society of New South Wales* (1960) 102 CLR 629; [1960] ALR 223; *R (Independent Schools Council) v Charity Commission* [2012] Ch 214; [2012] 1 All ER 127 at [42]-[53].

[72] *Aboriginal Hostels Ltd v Darwin City Council* (1985) 33 NTR 1 at 13-8 (Nader J); *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* [1997] NTCA 78, 115 NTR 25 at 40-1, 139 FLR 236 (1997) 139 FLR 236 at 253-4 (Mildren J, Martin CJ agreeing); *Cant (liquidator of Billa Downs Aboriginal Corporation (in liq)) v Kirby* [2011] NSWSC 1193 at [46]-[47] (Gzell J); [18]-[19]; *Shire of Derby-West Kimberley v Yungngora Association Inc* [2007] WASCA 233 [50]-[57] (Newnes AJA, Buss and Miller JJA agreeing).

that they are descended from certain apical ancestors) are charitable.[73] However counsel submitted that none of those cases required judicial consideration of the issue and are therefore not authoritative for present purposes.

[106] Counsel for the third defendant stressed that such an assumption was made in relation to the Trust when the Court gave the directions in *Flynn v Mamarika*.[74] The point in issue here was not raised nor argued in that case. No reference was made to the authorities concerning whether or not the class of beneficiaries was sufficiently wide or not. The conclusion that the Trust was charitable was agreed between the parties. It cannot be relied upon as authority for the purposes of asserting that the Trust was a valid charitable trust as that matter was not in issue. Counsel also pointed out that the decision in that case concerned the operation of a version of the Trust Deed which has been amended on a number of occasions.

[107] While I accept that the validity of the trust was not in issue in *Flynn v Mamarika* it was certainly assumed to be the case, there being no point in that litigation at all if the true situation was otherwise. Further, it is clear, for example from what Martin CJ said at pp 222-223 (quoted in [64] and [66] above), that his Honour was fully aware of the relevant

[73] *Australian Executor Trustees Ltd (as trustee for the Martu Banyjima Charitable Trust) v A-G(WA)* [2015] WASC 439 at [5], [10] (Martin CJ); *Wybenga v Mandandanji Ltd (as trustee for the Mandandanji Charitable Trust)* [2014] FCA 861 at [1]-[2] (Logan J).
[74] *Flynn v Mamarika* at 222-4.

requirements of a valid charitable trust in the course of reaching his conclusions and providing the directions.

Clear wording of clause 2

[108] The plaintiff contends that the predominant and governing provision in the Trust Deed is clause 2, that being the clause which identifies the purpose of the Trust. Counsel stresses the words "exclusively for such charitable purposes (in the strict legal sense) …". The clear purport of clause 2 is to create a charitable trust within the limits of what the law permits to constitute a charitable trust. That is conclusive of the character and status of the Trust in law and does not require reference to any background facts or surrounding circumstances existing at the time of execution of the Trust Deed.[75]

[109] Counsel submitted that clause 2 is, in effect, a self-validating provision: that is to say, it declares the Trust to be a charitable trust to the extent permitted at law. Accordingly the purpose or purposes of the Trust will be read down into validity to the extent necessary, and any specific object such as any of those in clause 4.2 of the 1996 Trust Deed or in clause 6.3 of the 2008 Trust Deed is expressly made subject thereby to a valid charitable purpose.[76]

[75] Plaintiff's Written Submissions at [28].
[76] Plaintiff's Written Submissions at [52].

[110] Counsel also pointed to the clear words of intention expressed at the start of clause 4.2 of the 1996 Trust Deed: "subject to the requirement of charitable purpose".[77] See also, similar express wording in clauses 4.2 and 4.3 of the 1998 Trust Deed.

[111] From 1 January 2005, when the four separate funds were established, in particular the Charitable Grant Fund, the relevant part of the deed commenced with the words: "Without limiting the generality thereof, the Charitable Grant Fund may be applied towards the following charitable purposes: …". See clause 4.4.2 of the 2004 Trust Deed[78] and the 2005 Trust Deed,[79] and clause 6.3.2 of the 2008 Trust Deed.

[112] Counsel for the Attorney-General also referred to clause 14 of the 2008 Trust Deed, which confers very broad discretions upon the Trustee in the exercise of its powers, pointing out that those discretions are confined by the opening words: "Subject always to any express provisions to the contrary herein contained".

[113] I agree that the clear intent of the trust deeds is that the Trust is a trust for charitable purposes and that the trust funds can only be used for such purposes. This is particularly clear not only from the wording in clause 2 but also from the various other provisions that have been included in the trust deeds at various times.

[77] Plaintiff's Statement of Facts Issues and Contentions at [59].
[78] Ex P 10.
[79] Ex P 11.

Class – the potential objects of benefaction

[114] Per Jenkins L.J. in *In Re Scarisbrick; Cockshott v Public Trustee*[80] at 648:

> It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public.

[115] In this, and further paragraphs explaining this general rule, Jenkins LJ referred to several other decisions including the, then recent, decisions in *Compton* and *Oppenheim.*

Legal principles

[116] In their written submissions counsel for the third defendant identified and explained the principles set out in *Compton* and *Oppenheim* and their application in Australia. Counsel also discussed two exceptions to those principles, one in relation to "nationality trusts", and the other in relation to trusts solely for the relief of poverty following *Dingle v Turner*.

<u>"Beneficiaries" defined by reference to a propositus</u>

[117] Counsel submits that the starting point to determine whether or not a putative charitable trust has the requisite public purpose is a

[80] *In Re Scarisbrick; Cockshott v Public Trustee* [1951] Ch 622; [1951] 1 All ER 822 (***Re Scarisbrick***).

consideration of the decisions in *Compton*[81] and *Oppenheim*. The principle to be drawn from these decisions, as stated in *Oppenheim*, is that a charitable trust is not valid if the following qualification describes the class of beneficiaries:

> [a] group of persons may be numerous, but, if the nexus between them is their personal relationship to a single propositus or several propositi, they are neither the community nor a section of the community for charitable purposes.[82]

[118] Counsel submitted that Lord Greene MR in *Compton* illustrated the point by explaining that:

> Persons claiming to belong to the class do so not because they are AB, CD, and EF, but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were the individuals AB, CD, and EF, I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character.[83]

Compton

[119] In *Compton* a testatrix had left money in her will to be held on trust for the education of the lawful descendants of three named persons (Compton, Powell and Montagu). At the date of the testatrix's death there were 26 such descendants.[84] The quintessential question in the case was stated by Lord Green MR as: "Is a trust for the education of

[81] *Compton* at 136 (Lord Greene MR).
[82] *Oppenheim* at 306 (Lord Simmonds); see also 311 (Lord Normand).
[83] *Compton* at 130.
[84] As Lord Green noted, it did not matter for the purposes of validity whether or not the numbers were small or substantial or considerable:*Compton* at 128.

the descendants in perpetuity of three named individuals, irrespective of their means, a valid trust?"[85]

[120] At p 128 Lord Greene MR said:

> The fundamental requirement of a charitable gift is, in my opinion, correctly stated in the following passage in Tudor on Charities, 5th ed., p 11:
>
> > "In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community."

[121] Lord Greene MR identified a number of relevant passages in other authorities in support of this proposition including part of the speech of Lord Wrenbury when delivering the judgment of the Privy Council in *Verge v Somerville:*[86]

> To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public – whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.
>
> (underlining added by me)

[122] Lord Greene MR alluded to the difficulty in attempting to define what is meant by "a section of the public". He pointed out (at p 129) that:

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[85] *Compton* at 127.
[86] *Verge v Sommerville* at 499.

> In the case of many charitable gifts it is possible to identify the individuals who are to benefit, or who at any given moment constitute the class from which the beneficiaries are to be selected.

[123] He then said:

> This circumstance does not, however, deprive the gift of its public character. Thus, if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of the specific class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as individuals does not enter.
>
> (underlining added by me)

[124] This was followed by the passage referred to by counsel quoted at

[118] above.

[125] Lord Greene MR continued (at 130):

> It seems to me that the same principle ought to apply when the claimants, in order to establish their status, have to assert and prove, not that they themselves are AB, CD, and EF, but that they stand in some specified relationship to the individuals AB, CD, and EF, such as that of children or employees. In such a case too, a purely personal element enters into and is an essential part of the qualification which is defined by reference to something, ie, a personal relationship to individuals or an individual which is in its essence non-public.

[126] Lord Greene concluded this part of his discussion at p 131:

> I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present

> however long the chain and the claimant cannot avoid basing his claim upon it.
>
> (underlining added by me)

[127] In the result the trust, which was for the education of descendants of the three named ancestors, was invalid. It was in effect a family trust and not a trust for the benefit of a section of the community.

Oppenheim

[128] The decision in *Oppenheim v Tobacco Security Trust Co Ltd*[87] concerned a trust which was established for the education of children of employees or former employees of British American Tobacco Co Ltd and its subsidiaries. The number of employees of the companies was 110,000 such that the number of potential beneficiaries for the trust would have been significantly higher.

[129] At p 306 Lord Simonds noted that "the establishment of a college or university is beyond doubt a charity" as is "the endowment of a college, university or school by the creation of scholarships or bursaries" notwithstanding that "competition may be limited to a particular class of persons." He then said:

> It is upon this ground, as Lord Greene, M.R., pointed out in *In re Compton* that the so-called Founder's Kin cases can be rested. The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that

[87] *Oppenheim v Tobacco Security Trust Co Ltd* [1951] AC 297 (***Oppenheim***).

> class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit.
>
> (underlining added by me)

[130] Then follows the passage frequently quoted:

> These words "section of the community" have no special sanctity, but they conveniently indicate first, that the possible (I emphasise the word "possible") beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *In re Compton*, of a number of families cannot be regarded as charitable. A group of persons may be numerous, but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.
>
> (underlining added by me)

[131] His Lordship observed, at p 306, that whether the beneficiaries were the children of the employees or the employees themselves, the common quality was the employment by particular employers. He concluded, at p 307, that "there is no justification in principle or authority, to regard common employment as a quality which constitutes those employed a section of the community."

[132] Lord Normand reached a similar conclusion. At p 309 his Lordship referred to the requirement that a valid charitable trust must be a trust beneficial to the community or to a section of the community. He said:

> No general rule has yet been formulated by which to distinguish trusts which have this essential element of public benefit and those which have not … I am, however, satisfied, that the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. … The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined.

[133] His Lordship pointed out, at p 310, that the common attribute of each member of the class was a contract of service with a particular employer.

> A contract of service is in a high degree personal, and it constitutes a personal and private relationship between the parties. Whatever the number of the employees in the service of the same employer each still stands independently in this personal and private relationship to the employer…
>
> In principle I am unable to say that any public element can be born out of the several private contracts between a particular employer and his employees.

[134] Lord Morton implied that if a trust was for the "poor" employees of a business, a different result may arise.[88]

[135] Lord MacDermott disagreed with Lord Simonds' emphasis on the personal element, observing that a gift for the education of the children of the poor or blind would be charitable notwithstanding that attributes such as poverty, blindness or ignorance are very personal attributes.[89]

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[88] *Oppenheim* at 312-313
[89] Ibid at 317.

The adoption of the *Compton-Oppenheim* principles in Australia

[136] As counsel for the third defendant pointed out, what they refer to as the *Compton-Oppenheim* principles have been accepted as applicable in Australia,[90] including by the Privy Council at a time when that Court was the final appellate court in Australia.[91]

[137] *Davies v Perpetual Trustee Co Ltd*[92] was a decision of the Privy Council following an appeal from the Supreme Court of New South Wales. The testator had devised some land "to the Presbyterians, the descendants of those settled in the Colony hailing from or born in the north of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth in the standards of the Westminster Divines as taught in the Holy Scriptures." Their Lordships concluded that the class of persons eligible to attend such a college was defined simply by relationship to one or more of a number of persons living on 21 January 1897. Moreover, a particular youth would only be eligible if three other particular criteria were satisfied. This would lead to "curious results" depending upon the particular circumstances of each youth and his ancestors.

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[90] See *Evans (decd), Re; Union Trustee Co of Australia Ltd v Attorney-General for Queensland* [1957] St R Qd 345 where a trust for an apprenticeship of an employee of a limited company was agreed to be invalid in light of the principle established in *Oppenheim*. See too *Re Mair, deceased* [1964] VR 529 at 534 (Adam J); *Re Gillespie* [1965] VR 402 at 404 (Little J); *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455 at 466 (Lord Wilberforce); *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54 at [93] (Bleby J); *Shire of Derby-West Kimberley v Yungngora Association Inc* [2007] WASCA 233 [50] (Newnes AJA, Buss and Miller JJA agreeing).

[91] *Davies v Perpetual Trustee Co Ltd* [1959] AC 439; 2 WLR 673 (PC) (***Davies***).

[92] Ibid.

[138] Their Lordships noted that whilst the object of the testator's will was prima facie a charitable object within a *Pemsel* category, it was "well established that an element of public benefit must be present even in such gifts, if they are to stand in the privileged position of a charitable gift."[93] Their Lordships quoted what Lord Wrenbury said in *Verge v Somerville* (quoted in [121] above) and much of what Lord Simonds and Lord Normand said in *Oppenheim*.

[139] At p 456:

> Their Lordships find it unnecessary to refer to any other authorities. The principles thus laid down must be applied to the facts of each particular case, and their Lordships have not found it easy to decide on which side of the line falls the trust which the testator desired to establish. They will assume that the college to be established was intended to provide a general education and not only to give education in the standards of the Westminster Divines. Even so, they are unable to hold that the objects of the trust are either the community or a section of the community. They clearly are not "the community", for the testator has been at pains to impose particular and somewhat capricious qualifications upon the persons who are to benefit from this education. Nor can these persons, in their Lordship's opinion, be "a section of the community" in the sense in which these words have been interpreted in the authorities. The facts which must be proved by any boy who claims to come within the class of beneficiaries have already been stated, and it is clear that the nexus between the beneficiaries is simply "their personal relationship to several propositi," namely, certain persons living at the death of the testator. And these persons are not themselves, in their Lordship view, a section of the community. They are certain Presbyterians who can establish a particular descent. Moreover the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator had in mind. … In their Lordship's opinion the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than "a fluctuating body of private

[93] Ibid at 454

> individuals," and the gift must fail because the element of public benefit is lacking.
>
> (underlining added by me)

[140] Counsel for the third defendant also referred to the decision of the High Court in *Thompson v Federal Commissioner of Taxation*[94] and Lowe J in *In Re Income Tax Acts (No 1)*.[95] *Thompson* concerned a testamentary gift to some masonic schools established by the United Grand Lodge of New South Wales of Ancient Free and Accepted Masons. The rules of the Grand Lodge at the time of the death of the testatrix provided that those schools "were for the free education and maintenance of the children of deceased brethren who at the time of death were members of a lodge under the jurisdiction of the Grand Lodge, the children of brethren who whilst such members were prevented by permanent incapacity from supporting the children, and children, admitted by the council in special circumstances, of deceased brethren who had been, but at the time of death were not, members of a lodge under the jurisdiction of the Grand Lodge." The rules of the Grand Lodge also included strict rules for membership of a lodge and conferred discretions upon the committee.

[141] The relevant enquiry was whether the gift was for the benefit of the public or a section of the public and thus for "public educational

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[94] *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315 at 323-4 (Dixon CJ, Fullagar and Kitto JJ agreeing) (***Thompson***).
[95] *In Re Income Tax Acts (No 1)* [1930] VLR 211 (***In Re Income Tax Acts (No 1)***) at 222-3.

purposes" within the meaning of the *Estate Duty Assessment Act 1914* (NSW).

[142] Dixon CJ assumed that the expression "section of the public" was used in the same sense as the words are used in the law of charitable trusts. He considered a number of authorities concerning charitable trusts including *In Compton, Oppenheim* and *Davies*. At 321 he said:

> The tendency of the trust must be to benefit the public, a condition that is satisfied if it tends to the benefit of the public at large, or a class or section of the public. The trusts may be limited in their operations by reference to locality, to conditions of people, to their disabilities, defects or misfortunes and by reference to many other attributes of men and things, yet the trusts may retain their "public" character. Not a little difficulty has been felt in defining the concept of "public", "public charity" or "public benefit" which this involves but the contrast is, of course, to private advantage.
>
> (underlining added by me)

[143] At p 322 Dixon CJ quoted the following statement of Jenkins L.J in *Re Scarisbrick*:

> An aggregate of individuals ascertained by reference to some personal tie (eg., of blood *or contract*, such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, *the members of a particular association*, does not amount to the public or a section thereof for the purposes of the general rule.
>
> (italics inserted by Dixon CJ)

[144] His Honour pointed out that the words that he had italicised applied to the facts in the case at hand. At p 322 he said:

> Large as is the membership of the masonic order in New South Wales it forms part a society of persons bound together as a voluntary association into which members are admitted by the election of the existing members as provided by the rules adopted contractually for the government of the society. The size and importance of the order cannot give it any different character.
>
> (underlining added by me)

[145] Dixon CJ proceeded to discuss the decision of the Full Court of Victoria in *In re Income Tax Acts (No. 1)*[96] a case concerning gifts to a benevolent asylum which could only admit freemasons and their wives or widows. The issue was whether the asylum was a "public benevolent asylum" for income tax purposes.

[146] His Honour quoted and adopted a passage in the judgment of Lowe J which included the following, at pp 222-223:

> It may not be easy or even possible to enumerate in advance the *differentiae* of a "section of the public" within this rule, but I illustrate along what lines a conclusion may be arrived at. Having regard to the composition of the public, certain large groups may readily be recognised, the members of which have a common calling or adhere to a particular faith or reside in a particular geographical area. There is no bar which admits some members of the public to those groups and rejects others. Any member of the public may, if he will, follow a particular calling, adhere to a particular faith, or reside within a particular area. Of the members of such a group it may be said in a real sense that they are primarily members of the public, and such a group may well constitute a section of the public. They stand on one side of the line. Each group, it is true, may consist of many individuals, but number alone is not the criterion by which to determine whether the group constitutes a section of the public. A club, a literary society, a trade union may all have numerous members, but I think that none of these could

[96] *In re Income Tax Acts (No.1)* [1930] VLR 211 at 222-3.

> properly be called a section of the public. They stand on the other side of the line. The distinguishing feature of each of these latter bodies is that it is an association which takes power to itself to admit or exclude members of the public according to some arbitrary test which it sets up in its rules or otherwise. Each of them does oppose a bar to admission within it. It is not one of the groups into which the community as a matter of necessary organization or by convention is divided, but it is in a sense an artificial entity which exists for the benefit of its members as members thereof and not as members of the public.
>
> (underlining added by me)

[147] Fullagar and Kitto JJ agreed with Dixon CJ. However McTiernan and Menzies JJ dissented. After discussing the authorities including *Oppenheim*, *Davies* and *In re Income Tax Acts (No. 1)* Menzies J said, at p 332, that he was "not ready to accept the view that because admission to a group in the community depends upon the consent of existing members, the group cannot be regarded as a section of the public."

[148] Counsel for the third defendant submitted that the principles in *In re Income Tax Acts (No. 1)* and the *Compton-Oppenheim* principles are not two sides of the same coin. Rather, they are two distinct but similar exclusionary principles that demarcate the bounds of what the law of charity treats as being for the "public benefit". It follows that on the *Compton-Oppenheim* principles the Trust is invalid because the beneficiaries are limited by their relationship to a single person or persons.

Section 9 of the Charities Act 2013

[149] Counsel for the third defendant referred to s 9 of the *Charities Act 2013* (Cth) which provides as follows:

> **Purposes of entities that receive, hold or manage benefits that relate to native title etc.**
>
> (1) This section applies to a purpose that an entity has if:
>
> (a) the purpose is directed to the benefit of Indigenous individuals only; and
>
> (b) the purpose is not for the public benefit under this Division (disregarding this section) only because of the relationships between the Indigenous individuals to whose benefit the purpose is directed.
>
> (2) The purpose is treated as being for the public benefit if the entity receives, holds or manages an amount, or non-cash benefit (within the meaning of the *Income Tax Assessment Act 1997*), that relates to:
>
> (a) native title (within the meaning of the *Native Title Act 1993*) or traditional Indigenous rights of ownership, occupation, use or enjoyment of land.

[150] Counsel submitted that this is an acknowledgment that, in equity, such trusts lack the necessary characteristic of meeting the public benefit test. Without that legislative widening of the definition of "charity" in the Commonwealth legislation, such trusts in respect of native title interests would not obtain the generous taxation benefits granted to charities. Such a provision would not have been necessary if a trust of the kind, the subject of this matter, did have the necessary characteristic of meeting the public benefit test. I reject those submissions.

[151] Apart from the fact that s 9 only relates to a purpose that is not otherwise for the public benefit only because of the relationships between the Indigenous individuals to whose benefit the purpose is directed, the deeming applies to a wide range of entities, many of which would not normally satisfy the public benefit requirement because their membership is comprised of a group of individuals who constitute a group solely because of their quasi-contractual relationship with each other.

[152] A common example would be where an applicant has been authorised under s 251B(b) of the *Native Title Act 1993* (**NTA**) to make a claimant application in the Federal Court under s 61 of the NTA on behalf of a "native title claim group". The status of such an applicant is no different in effect to that of an applicant in other litigation, such as in a class action, authorised to bring and maintain a court proceeding on behalf of a group of individuals who would not be a relevant "section of the public". Once a claim is registered the applicant acquires certain statutory rights such as the right to negotiate, the exercise of which may well result in the applicant or some other entity holding money in trust, on some occasions on behalf of those individuals who called and attended the original authorisation meeting and constituted themselves as the native title claim group. The purpose of such a trust would appear to be an obvious example of a purpose "that relates to" native title that might not normally be a purpose for the public benefit.

Such a group or entity would be unlikely to constitute a relevant section of the public for the purposes of charitable trust law.

[153] The situation would be different where the entity comprises all of the native title holders (that is, those who actually hold the native title) or a registered native title body corporate.[97] I consider that the group, comprising all of the native title holders, would constitute a section of the public because its membership comprises those who possess communal rights and interests in the land under their traditional laws and customs and by those laws and customs have a connection with that land.[98]

[154] The same would apply in relation to the members of the traditional clans of Groote Eylandt and Bickerton Island. As a consequence of that status they hold rights in the land pursuant to their traditional laws and customs. They hold those rights irrespective of their relationships with any particular individual or individuals. Moreover those rights are of a communal nature, not personal.

[155] That the members of the traditional clans have traditional and communal rights in the land is also recognised by statute, namely ALRA. As noted previously, the title held by the Anindilyakwa Land Trust is for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land.

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[97] C.f *Native Title Act 1993* (Cth) ss 224 and 193(2)(e)
[98] *Native Title Act 1993* (Cth) s 223.

Two exceptions to the above principles

[156] Counsel for the third defendant referred to two "exceptions" to the *Compton - Oppenheim* principles.

Nationality trusts

[157] Counsel for the third defendant submitted that this exception (conveniently described for present purposes as a nationality exception) arises in some cases because of the reference in Lowe J's decision in *In re Income Tax Acts (No. 1)* to groups into which the community is divided by necessary organisation or by convention seems to countenance and accommodate a class of cases which have allowed charitable trusts to operate for the benefit of people with a particular nationality, provided the requisite charitable purpose is otherwise shown.

[158] For example, charitable bequests limited to persons connected with Ukraine were approved in *Kostka v The Ukrainian Council of NSW Inc*,[99] as was a trust for the benefit of ex-servicemen who were Protestants of Scottish or British descent in *Re Gillespie.*[100] In other words the trusts were defined by nationality. In *Kostka,* at [38], Young AJ adopted the statement in the 9th edition of *Tudor on Charities* that "a trust to relieve the need of members of a particular ethnic group in a

[99] *Kostka v The Ukrainian Council of NSW Inc* [2013] NSWSC 222 (Young AJ).
[100] *Re Gillespie* [1965] VR 402 at 405-6 (Little J).

geographical area is charitable even if the number of members of that group is small".

[159] Counsel for the third defendant submitted that the nationality exception is not relevant in this case. The trusts in this case were not for persons of any nationality, nor even for "Aboriginals" as a group.

[160] I disagree. Just as persons of a particular nationality, for example Ukrainian, Scottish or British, may be regarded as a relevant section of the public, presumably because their status is more than a purely personal relationship with a particular propositus or propositi, so too should be a group of Aboriginal people who reside in a particular place, and more so a group of Aboriginal people who not only reside in a particular area but also have communal rights in that area based on their traditional laws and customs. There is nothing arbitrary or capricious about the membership of the traditional clans. Indeed they are akin to the "groups into which the community is divided by necessary organisation or by convention" referred to by Lowe J in the passage adopted by Dixon CJ in *Thompson* quoted in [146] above.

Trusts solely for the relief of poverty - Dingle v Turner

[161] This exception is not relevant for the purposes of the present discussion.

Authorities concerning trusts for Indigenous People

[162] The question of the validity of certain trusts for groups of Indigenous people has arisen from time to time, albeit often in the context of raising matters where the question was whether or not the land was being used for a "charitable purpose" rather than whether or not the trust itself is charitable. Counsel for the third defendant submitted that where the issue of whether or not the objects of the trust constitute a sufficient section of the public is identified and considered, these authorities consistently apply *Compton-Oppenheim* principles. Counsel referred to the following cases, in particular Northern Territory decisions in *Aboriginal Hostels Ltd v Darwin City Council*[101] and *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*[102].

Aboriginal Hostels Ltd v Darwin City Council

[163] In *Aboriginal Hostels Ltd* the plaintiff company operated a number of hostels for Aboriginal people. It claimed exemption from the payment of rates on the basis that the land was occupied for the purposes of a public benevolent institution or a public charity. It is not clear from the report whether or not the company owned the land in question although it was agreed that it used and occupied the land for the purposes of providing Aboriginal hostels. The purpose of the company, as identified in its constitution, was to provide benefits to Aboriginal persons generally.

[101] *Aboriginal Hostels Ltd v Darwin City Council* (1985) 33 NTR 1 (***Aboriginal Hostels***).
[102] *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* [1997] NTCA 78, 115 NTR 25, 139 FLR 236 (***Alice Springs Council v Mpweteyerre Aboriginal Corporation***).

[164] In relation to the question of whether or not the company (which appeared to own its assets both legally and beneficially) was a public charity, Nader J referred to the orthodox principles concerning the requirements of a valid charitable trust including that, "[t]he potential beneficiaries must not, however, be negligible numerically. The character that marks the potential beneficiary must not be a relationship to a particular person or persons such as one of blood or employment."[103] In support of that statement Nader J cited Lord Greene MR in *Compton*. His Honour also accepted the proposition that the question of validity did not turn on how the trust actually operated but on what were the terms of the enforceable obligations in the trust deed.[104] In determining that the trust was valid his, Honour observed that the persons for whose benefit the trust was established were persons of "Aboriginal" descent. Nader J considered that the provision of places of rest for Aboriginal persons was a charitable purpose which was analogous to the provision of relief against poverty. It is accepted that his Honour also concluded that the class of persons of Aboriginal descent was sufficiently wide so as not to be an invalidly small class.[105] Counsel submitted that that is an orthodox application of the accepted principles where a trust for a charitable purpose is identified to benefit a particular race of persons. I agree.

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[103] *Aboriginal Hostels* at 14.
[104] *Aboriginal Hostels* at 15. See also *McGarvie Smith Institute v Campbelltown Municipal Council* (1965) 11 LGRA 321 at 323, and *Dareton Local Aboriginal Land Council v Wentworth Council* (1995) 89 LGERA 120.
[105] *Aboriginal Hostels* at15.

Shire of Derby-West Kimberly v Yungngora Association Inc

[165] The Full Court of Western Australia in *Shire of Derby-West Kimberly v Yungngora Association Inc*[106] had to consider whether certain land was being used exclusively for charitable purposes and was thus exempt from rates.

[166] The Yungngora Association operated a pastoral lease on land where a pastoral business was being conducted by a company, NRE, controlled by officeholders of the Association. The land was included in the Nookanbah native title claim which appears to have been settled on a basis which permits it to be used for traditional purposes by Aboriginal members of the Association.[107] The objects of the Association included "to support the development of the Community in all ways", "to support education, job training, health services, work and housing for the Community" and "to help and encourage the Community to keep and renew its traditional culture".[108] "Community" was not defined but was assumed to refer to "the (mainly Aboriginal) people in the Yungngora community and within its boundaries", that is, on the land concerned.[109] Approximately 350 people lived in the community.

[167] Newnes AJA, with whose reasons the other two judges agreed, observed that in order to be charitable it must be found that the purpose

[106] *Shire of Derby-West Kimberly v Yungngora Association Inc* [2007] WASCA 233, 157 LGERA 238.
[107] Ibid at [10(5)].
[108] Ibid at [11].
[109] Ibid at [12].

in question is within the spirit and intent of the preamble to the *Statute of Charitable Uses*, and is a purpose beneficial to the public.[110] In relation to the latter issue his Honour said:

> [48] The condition that to be charitable a purpose must tend to benefit the public is satisfied if the purpose tends to the benefit of the public at large, or a class or section of the public: *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315, 321 per Dixon CJ, with whom Fullagar and Kitto JJ agreed.
>
> [49] It is difficult, and probably impossible, to formulate a satisfactory test by which to determine whether in any particular case a particular class of persons constitutes a section of the public in order to establish that the purpose is charitable. The fact that only a limited number of people can benefit does not mean that the purpose is not a public one. A purpose does not lose its public character simply because it is limited 'by reference to locality, to conditions of people, to their disabilities, defects or misfortunes and by reference to many other attributes of men and thing': *Thompson v Federal Commissioner of Taxation*, 321.
>
> [50] But a purpose will not be a public one if it is merely for the benefit of particular private individuals; it must be for the benefit of the community or an appreciably important class of the community: *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447, 457 per Lord Simonds. So while the inhabitants of a parish or town, or any particular class of such inhabitants, may be the objects of such a gift, private individuals, or a fluctuating body of private individuals, as such, cannot: *Verge v Somerville* [1924] AC 496. Thus, if the beneficiaries are defined as descendants of a named person or as employees of a named company, the purpose will not be regarded as one for the benefit of a section of the community: see *Re Compton; Powell v Compton* [1945] Ch 123, *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, cf *Dingle v Turner*.
>
> (underlining added by me)

[110] Ibid at [44].

[168] Newnes AJA then quoted the passage of Lowe J's reasons in *In re Income Tax Acts (No 1)* that had been referred to with approval by Dixon CJ in *Thompson*. His Honour then said:

> [52] The fact that some individuals who do not fall within the class sought to be benefited may succeed in taking advantage of the benefits intended for that class, does not detract from the charitable nature of purposes which are otherwise charitable: *Pemsel*, 583, *Salvation Army (Vic) Property Trust v Shire of Fern Tree Gully*, 174.
>
> [53] It must also be recognised that what constitutes a charitable purpose may change as new social needs arise or old ones cease to exist: see *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* [1968] AC 138, 154 per Lord Wilberforce.
>
> [54] In the present case, while it argued that the Land was not used exclusively for a charitable purpose, I did not understand the Shire to contest that if land is used for the purpose of improving the economic position, social condition and traditional ties of an Aboriginal community, that will generally be a charitable use of the land. I think that that is clearly the case. There is a significant body of authority which supports that view.
>
> [55] Thus, for instance, in *Dareton Local Aboriginal Land Council v Wentworth Council* (1995) 89 LGERA 120, Bignold J held that the provision by the applicant of housing assistance to local Aborigines could be regarded as involving the relief of poverty and other functions of the applicant 'could be accommodated under the fourth head in ***Pemsel***, especially given the widespread recognition in the common law of Australia of the plight of Aborigines in the Australian community in terms of their socio-economic status, opportunities for advancement, and the legacy of dispossession that was the inevitable result of British settlement in this country' (125).
>
> (underlining added by me)

[169] Newnes AJA then quoted passages from that decision including Bignold J's application of what Lord Wilberforce had said in *Scottish Burial Reform and Cremation Society v Glasgow City Corporation* about the evolutionary process of interpreting the *Pemsel* purposes according to societal context to the advancement of Aboriginal people.

[170] Newnes AJA agreed with those dicta. He observed that it could equally well be said that, in general, Aboriginal people living in, among other places, the north of Western Australia are currently in need of special consideration and assistance. His Honour then said:

> [58] I did not understand it to be in issue that the members of the community who are to benefit from the activities of the Association constitute a class of persons sufficient to satisfy the requirement that the purpose be of a public nature. In any event, in my view that is plainly the case.

[171] Ultimately the Court determined that the land was not being used for charitable purposes at all. The use of the land as a pastoral station was not a charitable use, even if the proceeds from the operation of the land as such were to be applied for charitable purposes. Accordingly, says, counsel for the third defendant, Newnes AJA's views concerning the class of potential beneficiaries were obiter. Be that as it may, I respectfully find his Honour's views compelling and quite consistent with authority such as it is.

[172] Counsel for the third defendant also referred to the decision in *Dareton Local Aboriginal Land Council v Wentworth Council.*[111] That decision concerned the rating of land owned by an Aboriginal Land Council, a council established under the *Aboriginal Land Rights Act 1983* (NSW). The Court (Bignold J) discussed the evolutionary nature of the charitable purposes within the meaning of the *Statute of Charitable Uses* and considered that the purposes and objectives of the Land Council were either for the relief of poverty or otherwise analogous to the matters in the preamble of the Act. At p 125 Bignold J concluded that:

> Accordingly it is merely to give due recognition to the evolutionary nature of this process of drawing analogues with those purposes contained within the preamble to conclude that in Australia at the present time, a trust for the advancement of Aboriginal people is a charitable trust within the fourth limb of *Pemsel's case*. This conclusion is supported by authority. Thus *Aboriginal Hostels Ltd v Darwin City Council* Nader J stated: "The fact that the purposes of accommodation are in respect of Aboriginal persons gives a special character to these purposes which renders an otherwise neutral purpose charitable."

[173] Counsel submitted that "the essence of the determination of the Court was that the purposes were for the benefit of Aboriginal persons generally (and specifically for such persons in the local area). There is nothing in the decision which suggests that the use of land for a

[111] *Dareton Local Aboriginal Land Council v Wentworth Council* (1995) 89 LGERA 120.

specific tribe or clan or clans of Aboriginal persons is capable of being a charity."[112]

[174] Whilst this is so, I do not consider any relevant conclusions can be drawn from this fact. It simply did not arise.

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation

[175] Counsel for the third defendant also relied on the decision of Mildren J in the Court of Appeal in *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and others.*[113] Counsel submitted that the Court applied the orthodox principles concerning the requirements for a valid charitable trust. In particular, the Court applied the *Compton - Oppenheim* principles so as to ensure that the trust in question was for a sufficiently wide group of persons and not confined to the members of the association in question.

[176] The case concerned town camps in Alice Springs for Aborigines which were held by a number of associations and corporations under leases from the Crown. Although the lands in question were entered into the rate book the appellants asserted that the land was exempt from rates on the basis that the land fell within the exception of "land used or occupied for the purposes of a public hospital, benevolent institution, or charity". The question before the Northern Territory Court of

[112] Third Defendant's Written Submissions [108].
[113] *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and others* (1997) 115 NTR 25.

Appeal was, inter alia, whether or not the land was being used for the purposes of a charity.

[177] The expressed objects of the associations include the relief of "poverty, sickness, distress, suffering, misfortune and helplessness of Aboriginal people in Central Australia". After referring to what Nader J had said in *Aboriginal Hostels* about Aboriginal persons living in poverty and a dictionary definition of "poverty" Mildren J (with whom Martin CJ agreed) said that it is a notorious fact that most camp residents of Alice Springs are, if not destitute, in a condition of poverty.[114] His Honour also considered that the terms of the relevant "trusts" (or purposes of the Aboriginal corporations) which provided benefits to the members of the associations or other needy Aboriginal people, lead to the conclusion that the trusts were for the relief of poverty.[115]

[178] However, his Honour also concluded that the trusts were established for other charitable purposes such as education and that any other uses were not merely ancillary to the main charitable objects. Given that the trust was not solely for the relief of poverty the Court was required to consider whether the trusts were for the public benefit. His Honour said:

> It is in respect of such of these other objectives which may not be for the relief of poverty that the benefits must be for the

[114] Ibid at 39.
[115] Ibid at 40.

> public or the community, as a whole, or for an appreciable, but unascertained and indefinite portion of it.[116]

[179] His Honour, presumably conscious of the "associations cases" such as *Thompson* and *In re Income Tax (No 1)*, noted that there was "no evidence to show that the beneficiaries were intended to be (or were in fact) limited to the members of the associations, and he considered that the "potential beneficiaries included all needy Aboriginal people in Central Australia, as well as the members."[117] After considering the numbers of people who would use the camps and their various reasons for doing so he said, at p 41:

> Obviously, the total number of persons using the land either as a resident or visitor over many years would be even more significant. In those circumstances, there can be no doubt that the class of beneficiaries is a sufficiently large enough group to fall within the requirement that there be an appreciable, unascertained and indefinite portion of the public, or a section of it. There is nothing in the associations' constitutions which limits the class to persons having a relationship to a particular individual or individuals: cf *Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Thompson v FCT* (1959) 102 CLR 315.

[180] The Court, therefore, found that the associations and corporations were charities and that the relevant land was being used for charitable purposes.

[181] Counsel for the third defendant contended that the essential importance of the above decision is that the Court of Appeal recognised the need to

[116] Ibid at 40.
[117] Ibid at 40.

satisfy the *Compton-Oppenheim* principles, and that the class of persons benefited cannot be limited to persons having a relationship with a particular individual or individuals.

[182] By way of footnote to this contention counsel submitted that "this seems to have been accepted in *Shire of Ashburton v BindiBindi Community Aboriginal Corporation*[118] where it was said that whilst a trust for the benefit of Aboriginal persons generally might be valid (assuming that it was for charitable purposes) but that, 'It would be consistent with those cases to find that a purpose of advancing some particular group of Aboriginal persons might fall outside the scope of a charity'."[119] The rest of that sentence (in [24] of Wheeler J's reasons) stated: "as I understand it, the defendant conceded this proposition and suggested, for example, that the purpose of advancing well-paid Aboriginal football players would at least require close scrutiny. However no such exception arises here."

[183] I consider that the third defendant's contentions that the above cases "consistently apply *Compton - Oppenheim* principles" and that the Court of Appeal "recognised the need to satisfy the *Oppenheim - Compton* principles" place too much emphasis on the relevance of those "principles" to the cases at hand. For example, all that Mildren J was saying in the *Alice Springs* case was that there was nothing in the

[118] *Shire of Ashburton v BindiBindi Community Aboriginal Corporation* [1999] WASC 108
[119] Third Defendant's Written Submissions at 113.

relevant constitutions which limited the class in a way that would infringe those principles.

[184] Nor have I been able to find any reference in those cases to "tribes" or "clans". Those cases provide no support for the contention that a class comprising the members of one or more tribes or clans would conflict with the *Compton - Oppenheim* principles.

[185] I was also referred to the following authorities.

Latimer v Commissioner of Inland Revenue

[186] *Latimer v Commissioner of Inland Revenue*[120] concerned a trust established to administer payments made by third-party commercial purchasers for the sale by the Crown of tree crops on Crown forestry land and by way of rental for the use of the land. The interest earned on the investment of the rental proceeds was to be made available to assist Maori people in the preparation, presentation and negotiation of claims before the Waitangi Tribunal, which involved lands covered by the agreement. If the Tribunal recommended that any such land be returned to Maori ownership, the relevant Maori owners became "confirmed beneficiaries" and the trust was required to pay all of the rental proceeds in respect of the land affected to the successful Maori claimants. If the Tribunal recommended that any particular land not be returned to Maori ownership, the Crown became the "confirmed

[120] *Latimer v Commissioner of Inland Revenue* [2002] NZLR 195 (***Latimer***).

beneficiary" and entitled to the rental proceeds in respect of that particular land.

[187] The trial judge, O'Regan J, held that assisting the particular class of Maori claimants was a charitable purpose, and that the beneficiaries were a section of the public. His Honour found that the case was broadly analogous to cases concerning trusts for Australian Aborigines citing *Re Mathew, deceased*[121] and *Flynn v Mamarika*. However, as the Crown was entitled to some of the monies, the applicant was not successful in obtaining the tax exemption sought because the relevant legislation required that the trust be exclusively charitable.

[188] The applicant appealed against this construction of the legislation and the respondent cross appealed against the finding that the purpose of assisting the defined class of Maori claimants was a charitable purpose.

[189] The judgment of the Court of Appeal was delivered by Blanchard J. The Court agreed that the purpose of assisting Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal involving the relevant land was a charitable purpose, falling within the 4th of the *Pemsel* categories. At [31] Blanchard J quoted what Lord Macnaghten said in *Pemsel* at 593:

> The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as

[121] *Re Mathew, deceased* [1951] VLR 226.

the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

[190] Blanchard J then turned to the question as to whether the prospective beneficiaries, namely successful claimant groups, comprised a section of the public. At [38]:

> Of course there is also a benefit to the claimant groups in having their research funded, but they themselves are, as we have said, a section of the public. It is true that there is a relationship of common descent for each claimant group but not, apart from the fact that they are Maori, for all beneficiaries of the trust taken together. In any event, the common descent of claimant groups is a relationship poles away from the kind of connection which the House of Lords must have been thinking of in the *Oppenheim* case when it said that no class of beneficiaries could constitute a section of the public for the purpose of the law of charity if the distinguishing quality which linked them together was a relationship to a particular individual either through common descent or through common employment. There is no indication that the House of Lords had in its contemplation tribal or clan groups of ancient origin. Indeed, it is more likely that the Law Lords had in mind the paradigmatic English approach to family relations. Lord Normand exemplified this approach in his observation that "there is no public element in the relationship of parent and child" (p 310). Such an approach might be thought insufficiently responsive to values emanating from outside the mainstream of the English common law, in particular as a response to the Maori view of the importance of whakapapa and whanau to identity, social organisation and spirituality. Lord Normand also remarked (at p 309) that "the law of charity has been built up, not logically, but empirically." Furthermore, in *Dingle v Turner* [1972] AC 601 *Oppenheim* was itself subjected to criticism and the approach of the *Oppenheim* dissentient, Lord MacDermott, who also sat, no doubt to his great satisfaction, in *Dingle*, was generally preferred. In the leading judgment Lord Cross of Chelsea said at p 624:
>
> In truth, the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the

> question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.
>
> In the New Zealand context it is, we think, impossible not to regard the Maori beneficiaries of this trust, both together and in their separate iwi or hapu groupings, as a section of the public for the purposes of a trust established by the Crown and Maori in terms of a compact between them and fulfilling the functions of the Crown Forestry Rental Trust.
>
> (underlining added by me)

[191] The Court of Appeal concluded however that the payments of monies to the Crown were not for a charitable purpose. Consequently the trust monies were not exclusively for charitable purposes and thus not exempt from income tax.

[192] Counsel for the third defendant sought to distinguish these conclusions on a number of bases.

(a) The Court of Appeal's decision was overturned by the Privy Council and thus is no authority for what is said in [38] of the reasons.

(b) The only issue resolved by the Court of Appeal was the question of public purpose and what the Court said in [38] was therefore purely obiter.

(c) Blanchard J misstated the test in *Oppenheim* in that he apparently considered that the limitation was upon trusts where the beneficiaries were identified by reference to a common individual or employer. In fact, the limitation is on trusts defined by reference to a common person or persons.

(d) The distinguishing of *Oppenheim* is unsatisfactory and appears to have been tainted by policy considerations, as the mere fact that the Law Lords in *Oppenheim* may not have had tribal or clan groups of ancient origin in mind says nothing of whether those groups should be considered a sufficient section of the public for the purposes of the law of charity. It is difficult to differentiate between the large clans of Scotland or Ireland on the one hand and large clans of Maori on the other. Trusts for either would be invalid under the *Compton - Oppenheim* principles.

(e) Even if the comments of the New Zealand Court of Appeal had some greater authoritative value, the *Compton - Oppenheim* principles have consistently been applied when dealing with "tribal or clan groups of ancient origin" in Australia.

(f) The conclusions of the Court of Appeal presume a commonality of cultural practices amongst the Maori community in New Zealand which cannot necessarily be applied to indigenous communities in Australia. It is only necessary to support this proposition to refer

to the fact that there is vast variation in native title rights and practices across different clans in Australia, including, for instance, whether rights are held entirely communally or individually.[122]

(g) In any event, the Court of Appeal found that the trust in question was not a charitable trust (because of the gift over to the Crown) with the result that its comments on whether or not the groups of Maori would constitute a section of the public were obiter for that reason as well.

[193] I do not agree that these are relevant distinctions between *Latimer* and the present matter.

[194] The issue before the Privy Council[123] was whether the Court of Appeal was correct to conclude that the existence of the ultimate trust in favour of the Crown deprived the trust of charitable status. The Privy Council decided that the monies held by or repayable to the Crown could not be regarded as gifts for some limited purpose. Rather the monies remained tax exempt income of the Crown. At [42]:

> In so far as the income was needed for the purpose of assisting Maori to prosecute their claims it is to be devoted to charitable purposes and so exempt from tax; and in so far as it is not applied for such purposes it remains beneficially the tax exempt income of the Crown.

[122] Citing *Native Title Act 1993* (Cth) s 223(1).
[123] *Latimer v Inland Revenue (New Zealand)* [2004] 3 NZLR 157 (***Latimer PC***).

[195] Consequently the only income that was potentially taxable was the income needed for the purpose of assisting Maori to prosecute their claims and income payable to successful claimant groups. It having been accepted that the relevant trust was for charitable purposes the income was tax-exempt.[124]

[196] Accordingly, although the decision of the Court of Appeal was overturned by the Privy Council, this had nothing to do with the Court of Appeal's conclusions that the trust in favour of the Maori met the requirements of a valid charitable trust, both as to public purpose and benefit to a section of the public. There is nothing in the statements of principle by the Judicial Committee which would suggest any disagreement with what the Court of Appeal had said about those matters, and the conclusions that assisting Maori claimants to pursue their claims was a charitable purpose.

[197] To the extent that the views expressed by the New Zealand Court of Appeal might be obiter and not binding in this Court, I find them extremely persuasive and relevant to the present issue.

[198] Nor can I find any proper basis for the contention that the *Compton - Oppenheim* principles have consistently been applied when dealing with "tribal or clan groups of ancient origin" in Australia. As authority for that contention counsel referred to the Northern Territory decisions

[124] Ibid at [43] – [44].

in *Aboriginal Hostels Ltd v Darwin City Council* and *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation.* But neither of those matters involved tribal or clan groups of the kind the subject of this matter. Rather, they concerned the status of Aboriginal people irrespective of any particular tribal or clan affiliation.

[199] Further, I consider that the submissions regarding the clans of Scotland and Ireland, presumptions of common cultural practices amongst the Maori community in New Zealand and variations "in native title rights and practices across different clans in Australia" are unnecessarily distracting.

[200] Although anthropologists and others use the word "clan" to conveniently describe particular groups of Aboriginal people who hold, inter-alia, rights and interests in land, there is no reason to equate such clans with groups of people in Scotland and Ireland also described as "clans", apparently by reason of their occupation of particular lands previously occupied by a particular known ancestor.

[201] Further, there is no basis for inferring that the fundamental rights held by members of the traditional clans are other than communal. Not only is this clear as a matter of fact[125] but also as reflected in the common law as understood following *Mabo [No 2]* and under ALRA. Like the *iwi* or *hapū* groupings within the Maori, it is the traditional clans which

[125] The reports of the experts refer to the clans as the "land owning" entities, not individuals.

hold and have held the rights and interests in their own lands according to the laws and customs which apply to them. Moreover, in both cases, it is their land which has been used to generate the monies which have been put in trust for their benefit.

[202] Individual members of the Beneficiaries are potentially entitled to receive benefits from the Trust not on the basis of their personal relationship with a particular person or persons, but on the basis of their membership of a section of the public which holds the communal rights in the land, and in particular in the land associated with the generation of the royalties.

[203] As I have said, I find the relevant passages in *Latimer* compelling and particularly relevant to the section of the public issue in this matter.

Plan B Trustees Limited v Parker

[204] Counsel for the third defendant referred the Court to *Plan B Trustees Limited v Parker*[126] a case concerning income which the Martu Idja Banyjima Charitable Trust (**the MIB Trust**) derives from BHP Billiton Ore Pty Ltd (**BHPBIO**). The MIB Trust was to promote "Charitable Objects" defined to include the promotion and protection of Aboriginal culture. The plaintiff, as trustee for the MIB Trust, sought directions as to whether legal proceedings should be brought in respect of three categories of payment from the MIB Trust. An issue likely to arise in

[126] *Plan B Trustees Limited v Parker* [2013] WASC 216 at [117]-[118] (Edelman J).

respect of some of those payments existed as a result of a ruling from the Australian Taxation Office to the effect that the MIB Trust should not be endorsed as a Tax Concession Charity because benefits under the trust were not to be provided to a section of the public in the sense required under the *Income Tax Assessment Act 1997*.

[205] Although the Court did not need to resolve that question for present purposes, Edelman J referred to *Latimer* with apparent approval. At [118]:

> In *Latimer v Commissioner of Inland Revenue*[127] it was held by the New Zealand Court of Appeal, and not challenged in the Privy Council, that assisting Maori claimants to pursue claims before the Waitangi Tribunal was a charitable purpose. In the course of delivering the judgment of the New Zealand Court of Appeal, Blanchard J said that it is "impossible not to regard the Maori beneficiaries of this trust, both together and in their separate iwi or hapu groupings, as a section of the public". His Honour quoted with approval from the leading speech of Lord Cross of Chelsea in *Dingle v Turner*. [Then followed the passage reproduced in [190] above.]

[206] Counsel for the third defendant contends that his Honour's apparent endorsement of that passage does not have any applicability to the trust in question in the present matter. This trust is not for the advancement of native title claims and the issue in *Plan B* was whether or not the use of the land was charitable as opposed to whether or not the trust was a valid charitable trust.[128]

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[127] *Latimer v Commissioner of Inland Revenue* [2002] NZLR 195.

[128] Counsel submitted that to the extent to which Edelman J referred to the New Zealand Court of Appeal decision in *Latimer* it was in the context of a point which did not appear to be in

[207] Even so, the passage reflects the desirability of having primary regard to the purpose of the trust in situations such as these, where the objects of benefaction have rights and interests in the relevant land that are not purely personal, when considering whether or not they comprise a section of the public.

[208] The fact that his Honour, like Blanchard J, quoted what Lord Cross of Chelsea said in *Dingle v Turner*, suggests that the statements in *Compton* and *Oppenheim* should not be narrowly applied in circumstances such as these. Recall too the powerful dissenting judgment of Lord MacDermott in *Oppenheim.*

Contentions

Third defendant

[209] Counsel for the third defendant contended[129] that unlike those charitable trusts which have been held to be valid for the benefit of certain Aboriginal people, this Trust adds the additional qualifier that the beneficiaries be those permanently resident on the islands, *who are members of the traditional clans*, and their successor generations. This expression has the consequence that the *Compton-Oppenheim*

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issue. Indeed, it appears that all parties agreed that the trust was a valid charitable trust [115]; his Honour was not referred to the decision in *Oppenheim* and his discussion was in the context of whether or not "the promotion and protection of Aboriginal culture (by protection of the native title rights of the MIB people) was for Community Benefit" comprises an object that satisfies the requirements of the *Income Tax Assessment Act 1997*. [117].

[129] Third Defendant's Written Submissions at [84] - [88].

principles will apply to invalidate the trust regardless of whether the beneficiaries are identified as either:

(a) members of the traditional clans of, and permanently resident on, Groote Eylandt or Bickerton Island, *at the time of the settlement of the trust*, and the descendants of those individuals; or

(b) members of the traditional clans of Groote Eylandt or Bickerton Island, and their descendants, who permanently live on Groote Eylandt or Bickerton Island.

[210] Although a charitable trust for the benefit of persons in a particular locality and similar to the first interpretation (although, critically, not limited to a clan or family) was held to be valid by Evershed J in *In Re Tree*,[130] that decision was soundly criticised by the House of Lords in *Davies v Perpetual Trustee Co Ltd* (supra) as being only sustainable on the basis that it was a trust for the relief of poverty. *Davies* is instead authority for the proposition that where the beneficiaries are descendants of ascertainable particular persons known at a particular time, the trust lacks the necessary public purpose.

[211] Regardless of which interpretation is correct the class is undoubtedly limited by the objects' relationship to a propositus or propositi and is therefore, invalid.

[130] *In Re Tree* [1945] Ch 325 (Evershed J).

[212] Here the anthropologists are agreed as to the nature and existence of clans on Groote and Bickerton Islands and that membership is personal to each individual. They are closed groups to which entry is restricted by one's relationship with apical members whether directly or through marriage. It follows that in order to be a beneficiary of the trust a person is required to have a relationship with the apical members of the clans and the requirement of that relationship invalidates the trust as a charitable trust. That would be so even were it the case that all that was required was a "substantial degree of ancestral connection"[131] as that implies that those who claim membership of the clan descend from named or ascertainable apical ancestors.[132] This is because a connection with apical ancestors (which the clan groups presumably identify by) implies a personal connection of the beneficiaries to "a single propositus or several propositi". That is, membership was restricted on the basis of traditional law and customs permitting certain persons entry because of some connection with the other members (c.f. an impermissible charitable donation to very extended families),[133] and is a substantially smaller class than all persons of a particular nationality or all Aboriginal people living in a particular area.

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[131] Citing *Western Australia v Ward* (2000) 99 FCR 316 at 379 [232] (Beaumont and von Doussa JJ) which was concerned with the common law notion of Aboriginal clans.
[132] Citing *State of Western Australia v Graham on behalf of the Ngadju People* (2013) 305 ALR 452 at 467 [91]-[92] (Jagot, Barker and Perry JJ) (***Ngadju***); *Dempsey (on behalf of the Bularnu, Waluearra and Wangkayujuru People) v Queensland (No 2)* (2014) 317 ALR 432 at 494 [495] (Mortimer J).
[133] *Laverty v Laverty* [1907] 1 IR 9 (A trust invalid when it was settled for the education of any Roman Catholic boy with the surname O'Laverty, Laverty, O'Lafferty or Lafferty).

[213] It follows that the GEAT is not a valid charitable trust because it fails the *Oppenheim* test and it lacks the necessary public benefit.

[214] Later in their written submissions counsel for the third defendant referred to the Original Trust Deed as providing additional support for their contentions.[134] Counsel submitted that the preferable interpretation of the Trust Deed may be influenced by the Original Trust Deed, as it was amended in 1996 in a relevant respect. That amendment replaced the definition in the Original Trust Deed of the objects with the definition of Beneficiaries set out in clause 1.1 of the 1996 Trust Deed, by removing clause 3, which had provided that:

> The objects of the Trust shall be all Aboriginal persons who are permanently resident on Groote Eylandt or Bickerton Island and who are members of the following clans:–
>
> Amagula
> Mamarika/Herebet
> Bara/Warrabadalamba/Murrungun
> Jarragba
> Nunggumajbarr/Mirnoyowan
> Wurramara
> Wurragwagwa
> Barabara/Durila
> Lalara
> Maminyamanja/Wurrawilya
> Wurramarrba/Amargajiraba
> Nuringi

[215] This descriptor of the objects of the trust by more specific reference to the names of the actual clans (whether or not it includes descendants)

[134] Third Defendant's Written Submissions at [102].

reinforces the existence of an intention to advance the interests of a private group of people rather than a section of the public.

Plaintiffs

[216] Counsel for the plaintiff (whose contentions were adopted by counsel for the Attorney-General) submitted that the fact that membership of the clans is determined by rules adopted, inherited or recognised by indigenous people of the islands does not disqualify the indigenous peoples resident on the islands from relevant status as a section of the public for the purposes of the law of charitable trusts.[135]

[217] Neither the size of the qualifying class, nor the existence of rules endemic to the class for the identification of membership of a clan recognised by the indigenous peoples of the islands according to their customs and traditions, can be preclusionary in the way of the internally generated restrictive rules of membership of a private club in non-indigenous society.

[218] The fact that the clans of the islands are in part identified by reference to some ancestor, apparently mythical, in time beyond memory, is of no significance to the question of public benefit.

[135] Plaintiff's Statement of Facts Issues and Contentions from [76].

Consideration

[219] In short I agree with the contentions made on behalf of the plaintiff and disagree with those made on behalf of the third defendant.

Descent from ascertainable particular persons

[220] The submissions of the third defendant such as those set out in [210]and [212] above, fail to recognise the significant difference between descent from one or more "ascertainable particular persons known at a particular time"[136] (or propositi) and descent of the kind involved in classifying people into definable and practical groups under traditional law and custom.

[221] This distinction is well demonstrated by reference to the discussion by the Full Court of the Federal Court in *Ngadju* in and following the passages to which the third defendant referred in the submissions noted in [212] above.[137] In that matter, a particular person, Hettie Dimer, was identified as an ancestor through whom her descendants derived their (common or group) native title rights as Ngadju people, this being the group of people who had been found to hold the native title. If she were found not to be of Ngadju descent her descendants could not be determined as descendants of a person who held native title at sovereignty, and thus as native title holders. The uncontradicted

[136] Noting the reference by the third defendant to *Davies* in the submission set out in [210] above.
[137] *State of Western Australia v Graham on behalf of the Ngadju People* (2013) 305 ALR 452 at 467-8 [91]-[102].

evidence, being that of an anthropologist Dr Palmer, indicated that Hettie Dimer did not have any Ngadju ancestry.

[222] Whilst one would normally identify one or more particular "ascertainable" persons as ancestors through whom one belongs to the relevant group, whether it be described as a "native title holding group" (under the NTA), a "local descent group" (under ALRA) or a "clan", it is not one's descent from that particular person or persons that permits and defines one's membership of the group.

[223] In the case of the traditional clans the members of which comprise the Beneficiaries under the Trust, the "rules" that define them and their membership are much more complicated than descent from one or more particular ascertainable persons. Not only are the "rules" based upon descent from one or more persons who have belonged to and owned a particular area of land on a communal basis (sometimes referred to as an "estate") from time immemorial (and could never be "ascertainable"), they are also based upon mythical ancestors some of whom are believed to have created the land and its features and bestowed the rights in the land and features to others who are now described as clans.

[224] Unlike the circumstances such as those in many of the cases relied upon by the third defendant, including *Compton*, *Oppenheim*, *Davies*, *Thompson* and *In re Income Tax Act (No 1)*, the description of the class

or the rules for membership of the class cannot be altered arbitrarily, for example by a testator changing his will or by an association altering its membership rules or having the ability to include or exclude particular people from the class.

Clans and context of the Trust

[225] It is clear that the primary aim of the Trust was to provide benefits to those Aboriginal people most likely to suffer as a result of the mining operations and most likely to obtain meaningful benefit from the royalties payable as a result of those mining activities. Of fundamental importance would have been those Aboriginal people who would have been thought to have traditional rights and interests in the land and whose ability to continue to exercise those rights may be affected by the mining activities. A convenient way of describing those Aboriginal people with traditional rights and interests in the land was to use the terms “clan” and “traditional clans”. A convenient way to exclude those whose rights may not be affected by mining activities because they were not living on or using the land, was to confine the potential beneficiaries to those permanently resident on the islands. It also made much more sense to expressly refer to “successor generations” to ensure that the benefits would continue to flow for so long as the mining activities continued and beyond then funds permitting.

[226] The fact that those Aboriginal people with traditional rights and interests in the land affected are conveniently described as clans and their members, and that membership of the clans is described by reference, inter alia, to the ancestors of their members, is relatively incidental. In substance, the Trust was designed to benefit the particular section of the public which was thought to have traditional rights and interests in the land affected by the mining operations. It just so happens that those people are the members of groups, described as clans, which have held those interests from time immemorial. The existence and characteristics of those groups predate the time when any particular person or event can be identified as a "propositus" or "propositi".

[227] Further, contrary to the submissions noted in [214] - [215] above, I consider that the fact that the Original Trust Deed specifically named the clans said to have relevant traditional rights and interests in the islands and that the subsequent deeds simply referred to the "traditional clans" makes no difference to the conclusion that the intention was to advance the interests of a relevant section of the public, not those of a private group of people.

Ambulatory operation of the Trust

[228] In my opinion the Trust was always intended to have, and has had ambulatory effect in relation to the potential objects of benefaction. This is a major feature of any charitable trust.

[229] Until 1996 the potential objects of benefaction were the members of the named clans. The membership of those clans depended upon the laws and customs that applied to those clans at the time when the Trust commenced. There is no evidence or other reason to suggest that there has been any relevant change in those laws and customs since 1965, indeed since Sovereignty.

[230] Nor is there any reason to assume that the class of potential beneficiaries was to be confined to members of those clans who were living at any particular time such as, for example, 25 May 1965 when the Trust began, or on 7 March 1989 when the 1989 Trust Deed was executed. The Trust was to continue to operate for the benefit of any person who became a member of the clan upon birth, adoption or other relevant event at any time in the future.

[231] This is quite different to the kind of cases where the class was defined, expressly or by implication, by reference to a certain event such as the date of death of a testator (as in *Davies*) or the membership of a club or association (as in *Thompson*).

[232] The ambulatory operation of the Trust was made much clearer in the 1996 Trust Deed and its successors, not only by referring to the members of (all) "traditional clans" but also to "their successor generations".[138] This is consistent with the High Court's references to "traditional" (in the context of laws and customs) as being something that has been passed down "from generation to generation" since before Sovereignty.[139]

Effect of excluding non-residents

[233] The fact that the potential objects of benefaction will change where a member of a traditional clan changes his or her permanent residency makes no difference, in particular as to whether the class of beneficiaries is a section of the public. If that were so, cases like *Aboriginal Hostels* and *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* would have been wrongly decided.

Size of the class

[234] I reject any contention that the class of objects of benefaction is too small to comprise a section of the public. It is well established that a particular group may constitute a section of the public notwithstanding that the number of members of that group is small. The only

[138] See also clause 17.4 of the Trust Deed which requires that "the Trust remains a trust for charitable purposes for the benefit of the Beneficiaries *for all time*."
[139] See, for example, *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [46] and [79].

requirement is that the membership is "not numerically negligible".[140] Even the class in *Compton* comprising 26 members was not held to be too small.

[235] In any event, there is no factual basis for the third defendant's contention that the class that was identified in any of the trust deeds was or "is a substantially smaller class than … all aboriginal people living in a particular area", namely Groote Eylandt and Bickerton Island.

[236] Rather, the evidence suggests that a substantial number of the Aboriginal inhabitants of those islands either belonged to or were associated with one or more of the clans. No doubt, over the 50 years or so since 1965, with the assistance of funds provided by the Trust and other sources and with the progress of modern transport, more and more Aboriginal people who have been members of one or other of the clans have been able to leave the islands and reside elsewhere. On the other hand the population records indicate that the indigenous population has increased substantially since 1965.

[237] Further, Dr Sansom's conclusions about marriages of the men within the Warnindilyakawa (Mamarika) clan, the largest of the Groote Eylandt clans, and his opinion that "the marriage community made up

[140] See, for example, the passages referred to above from *Compton*, *Oppenheim*, *Thompson*, *Aboriginal Hostels*, *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* and *Kostka*.

of Groote Eylandt and Numbulwar clans is one of the most endogenous populations in the world", suggests that a large number of the female members of Groote Eylandt clans are married to men from other Groote Eylandt clans. Accordingly it is likely that most of the Aboriginal men, women and children residing on Groote Eylandt at any given time fall within the definition of Beneficiaries.

[238] Whatever the size of the clan populations at any relevant time, I infer that the persons constituting the clans represent a significant section of the community for the purpose of any public benefit test.

Appreciably important class of the community

[239] As I have pointed out above, the clans and their members are much more than a group of people defined by reference to one or more persons or one or more particular events. Not only are they the people whose traditional rights and interests in the land have been recognised since the land become Aboriginal land in 1978 under ALRA, they are the people who have always been regarded as holding the traditional rights and interests in the land from time immemorial.

[240] They are, without doubt, "an appreciably important class of the community" and clearly fall within the scope of the test identified in *Verge v Somerville*.[141]

[141] See the passages quoted and underlined by me at [121] above.

[241] Moreover, the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. They are not constituted and defined by reference to some personal or quasi-contractual attribute. They are nothing like a "fluctuating body of private individuals" receiving some "private advantage".[142]

[242] The clans are a section of the public in much the same way as are the Maori groups discussed in *Latimer's* case.

Conclusions

[243] I conclude that the potential objects of benefaction under the Trust, namely the group of people described in clause 2 of the Trust Deed, is a section of the public of the kind required and contemplated by the authorities and is not a class that falls foul of the principles established and recognised in *Oppenheim*, *Compton* and *Davies*.

Defence paragraph 13(c)

[244] The third ground of challenge to validity in the third defendant's Defence is that:

> even if the "beneficiaries" may rightly be recipients of charitable grants at a particular point in time, the possibility that they were not rightly recipients in the past or the possibility that they may not rightly be recipients in the future is inconsistent with the public benefit test.

[142] See the passages quoted and underlined by me at [123], [125], [130], [139], [142], [144] [146] and [167] above.

[245] No authority was advanced in support of this contention. Rather the contention appears to ignore the fact that it is not necessary for every potential object of benefaction to be eligible for a grant at every point in time, or for that matter ever. It is uncontroversial that there may well be individuals within the relevant section of the public who would never be eligible to receive a grant.[143] There may be others who are entitled to a grant of a particular point in time, for example if they are destitute or in need of medical care, but not at other times, for example if they have acquired a windfall of money or resume good health.

[246] I agree with the following submissions made by counsel on behalf of the plaintiff. If the third defendant's contention were valid, there could never be a charitable trust for the relief of poverty, or at least where the potential objects of benefaction are in any way identified, because it is an inevitable possibility that there will be people within that class who may not be in need of relief from poverty at any particular point in time (including, perhaps, by reason of their receipt of benefaction). The same is true of any trust for other of the recognised charitable purposes. The result would be, on the third defendant's contention, that any charitable trust which extended to the possible benefaction of a person who came into wealth, for instance, at the Darwin casino, would be rendered invalid *in toto*.

[143] See, for example, the words that I underlined at [168] above in the quote from [58] of Newnes AJA's reasons.

[247] Accordingly, any evidence as to the financial position of any particular object of the Trust at any particular time is irrelevant, including evidence which might be sought to be adduced to show that Trust Funds have been paid to a particular person or persons in the past, apparently for the relief of their impecuniosity, in circumstances where such payment was not justified having regard to the charitable nature of the Trust. Any such evidence can have no bearing upon the interpretation of the Trust Deed and the character of the Trust and could only be relevant, if at all, to a subsequent question of breach.[144]

[248] I reject that part of the Defence.

Relief from Poverty

[249] In the event that I am wrong in my conclusion that the Trust is for the benefit of the public or some section of the public, I need to consider the plaintiff's contention that the Trust is a trust for the relief of poverty and thus a charitable trust of the kind permitted under the exception to the *Compton - Oppenheim* requirements acknowledged in *Dingle v Turner*.[145]

[250] The exception, as stated by the House of Lords, is limited to cases where the gift is "for the relief of poverty amongst a particular

[144] See, for example, discussion by Martin CJ in *Flynn v Mamarika* at 224 regarding execution of the trust.
[145] *Dingle v Turner* [1972] AC 601.

description of poor people", but not "a gift to particular poor persons, the relief of poverty among them being the motive of the gift."[146]

[251] A trust which has as its purpose the relief of poverty is presumed to be for the public benefit. This principle has been followed in Australia by the Full Court of South Australia in *In Re Hilditch*.[147] See too *Davies v Perpetual Trustee Co Ltd* [1959] AC 439.

[252] The justification of the exception, from a policy perspective, is that "the relief of poverty is of so altruistic a character that the public benefit may necessarily be inferred",[148] although other decisions have treated the exception merely as one too ingrained, albeit inconsistent, to be overruled.[149]

[253] In order for a trust to be for the relief of poverty the court needs to reach a conclusion, after considering all of the terms of the trust, that there is a connotation in the trust that its sole object is for the relief of poverty.[150]

[254] As the third defendant points out, in this matter there are no words in the Trust Deed which characterise all of the purposes to which the

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[146] Ibid at 617.
[147] *In Re Hilditch* (1985) 39 SASR 469 at 471 (King CJ, Milhouse J agreeing), 479-80 (O'Loughlin J).
[148] *Re Scarisbrick* at 639 (Sir Raymond Evershed MR).
[149] *Compton* at 137-9 (Lord Greene MR); *Gibson v South American Stores (Gath & Chaves) Ld* [1950] 1 Ch 177 at 194 (Evershed MR); *Oppenheim* at 308-9 (Lord Simonds).
[150] *In re Wallace Trustees Executors and Agency Co Ltd* [1908] VR 636, at 638 and 639 where the trust for the payment of passage for immigrants was solely for the relief of poverty on the basis that if the persons needed the fare paid they were undoubtedly poor. That was so even though the word "poor' was not used in the bequest.

money may be put as being for the relief of poverty. The objects are not defined by reference to any impoverished state such as "poor members of the clans" or "persons in necessitous circumstances" or "deserving" or otherwise. In *Re Gillespie*[151] Little J was concerned with a gift which was to a certain defined class of persons who were identified as being "in genuine need of financial assistance and in particular shall or may require such assistance in order to pay a balance of purchase price owing on his or their home or family property or to repay a mortgage on such home or family property". His Honour found that the description "in genuine need of financial assistance" gave rise to a dominant intention to relieve poverty. The third defendant points out that no such description, or anything like it, exists in the present case.

[255] Counsel for the plaintiff advanced a number of reasons why all of the purposes are for the relief of poverty. These include:

(a) the fact that the trust deeds, in their various forms, have contemplated that the funds be used for the education, benefit, welfare, comfort and general advancement of Aboriginal persons resident upon the islands; and

(b) to the extent relevant, the circumstances of many of those people including their impoverishment and disadvantage relative to other

[151] *Re Gillespie* [1965] VR 402 at 405-6 (Little J).

> Australian citizens in a number of respects including education and literacy standards, employment, personal income levels and housing standards.

[256] Counsel acknowledged that the public benefit is to be assessed by the Court having regard to the terms of the trust and the legal effect of the language used, and not by evidence of the settlor's subjective intention. If there is any doubt as to the charitable purposes of the trust, regard may also be had to the circumstances pertaining at the formation of the trust.

[257] As counsel points out, it is not necessary to find an expression of a purpose for the relief of poverty in the trust deed in so many words. The Court will look at the whole of the trust and if it concludes that the relief of poverty was intended, it will give effect to such intent although the word "poverty" is not to be found in the relevant deed.[152]

[258] "Poverty" does not mean destitution. Poverty is a concept of wide and somewhat indefinite import and has been paraphrased as embracing persons who have to "go short" in the ordinary acceptation of that term.[153] In *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation*[154] Mildren J said, at p 39:

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[152] Jacobs at [10-20], citing *Union Trustee Co of Australia Ltd v Federal Commissioner of Taxation* (1962) 108 CLR 451 at 456.
[153] Jacobs at [10-17], citing *Re Coulthurst's Will Trusts* [1951] Ch 661 at 666.
[154] *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* [1997] 115 NTR 25.

> The word "poverty" is the *condition* of having little wealth or material possessions (*Shorter Oxford English Dictionary*), and is not used in any metaphorical sense. One object of the associations is to provide relief from that condition to people who are in need of it. "Poverty" in this sense, is of course, relative, but it is well established that the law does not require that the persons to be benefitted should be destitute or even on the border of destitution: *Re Gillespie* [1965] VR 402 at 406.

[259] Provided that the purpose of the trust is to relieve poverty, the method directed under the instrument to that end is immaterial. Jacobs provides a number of examples, including the purchase of a soup kitchen and cottage hospital, a nursing home for persons of moderate means, religious communities having as their object the relief of poverty, the provision of accommodation for transient Aborigines and the support of psychiatric hospitals.[155] Counsel submits that, for example, the method adopted might be that ordained by clause 4.2.3 of the 1996 Trust Deed in the form of the provision of houses or health centres for the needy.

[260] Counsel also points out that public benefit can reside not just in particular benefits which may be conferred upon eligible individuals, but also in the wider benefit such conferral may create for the community at large. In other words, attention is not confined to the immediate recipient of any benefit advanced pursuant to the trust.

[261] Counsel contended that it can be seen from the foregoing, therefore, that clause 2 of the Trust Deed operates to create a valid charitable

[155] Jacobs at [10] - [19].

trust based upon a purpose of the relief of poverty, even should it be the case that, on some abstract basis, it might be said to embody other purposes not satisfying the test of charitable purposes.

[262] In its written submissions the third defendant identifies a number of reasons why the Trust cannot be construed as a trust solely for the relief of poverty:[156]

(a) The express words of the trust deed authorise the use of funds for purposes other than the relief of poverty. The authorised uses extend to the provision of education and medical assistance, the maintenance of ceremonies, sporting and social facilities as well as poverty.

(b) The circumstances surrounding the creation of the Trust (or the 2008 amendments) indicate that the Trust was never intended to be limited to the relief of poverty. In particular, the major trust asset is the continuing right to receive substantial royalties from commercial mining operations which, as at 2008, amounted to more than $10m per annum. Those continuous funds are to be provided for the benefit of a relatively small number of persons. It could never have been in the contemplation of the trust instrument that such funds were only to be used for relieving poverty. They were intended, as the trust deed provides, for the

[156] Third Defendant's Written Submissions [6].

education, benefit welfare and comfort and general advancement of the clans.

(c) Whilst it is accepted that there are members of the various clans who are living in poor conditions and who may be relieved from the impacts of poverty by the operation of the trust, there are many who have, at least, a modest standard of living. They are employed (some on substantial incomes), have housing (many families in single family accommodation), own or operate businesses and regularly engage in recreational and ceremonial activities. In addition they are supported by governments by way of the provision of education and health care. They are also supported by the Anindilyakwa Land Council which, as at 2008 had been dispensing in excess of $10m to advance the interests of the clan members of Groote Eylandt and Bickerton Island.

(d) Even to the extent to which it might have been contemplated at some point in time that a major purpose of the use the royalty funds would be to relieve against poverty, it must have also been contemplated that the continuous flow of funds would be used for the other authorised purposes as well. Necessarily, it would have been contemplated that the dominant purposes for which funds would be used would change in the future as additional funds flowed into the trust.

(e) Although significant amounts have been paid out of the Fund for the relief of poverty, the trustee has also paid out money for a variety of other purposes authorised under the Trust Deed. These include payments for ceremonies, church grants, educational grants, funeral expenses, medical grants, electricity and sports and recreation. This reflects a belief on the part of the trustee that the Trust is not just for the relief of poverty.

[263] I agree with the submission summarised at [262](a) above .

[264] Counsel for the the third defendant point out that Recital B of the Trust Deed shows that the Trust has always been "for the education, benefit welfare, comfort and general advancement of certain Aboriginal people resident upon Groote Eylandt and Bickerton Island." Given the potential size of the fund and the small number of beneficiaries, it is not surprising that the trust was not limited to relief from poverty.

[265] Counsel also point out that clause 2 of the Trust Deed is drafted in very general terms. It authorises the use of the funds "for such charitable purposes (in the strict legal sense) as may be served by the provision of money, property or other advantages for the benefit, welfare and advancement of the Beneficiaries." There is nothing in this clause which would limit the use of the funds to the relief of poverty.

[266] Clause 6.3 of the Trust Deed permits the Charitable Purpose Fund to be used to promote religious and funeral activities, to assist in the

maintenance of ceremonial activity, to assist in the maintenance of cultural activities, to provide educational, sporting and social facilities and to relieve against poverty by the provision of essential goods and services. Whilst the trust property is stated to be held for charitable purposes, those purposes are not, on their face, limited to the relief of poverty. They expressly extend to other charitable purposes.

[267] This conclusion is supported by the observations of Martin CJ in *Flynn v Mamarika* where his Honour considered proposed expenditure in relation to the 1996 Trust Deed. In that trust deed the trustee was similarly authorised to make distributions to advance a range of charitable purposes. His Honour considered proposed expenditures and ascertained whether or not they would be valid. In doing so, his Honour identified the charitable purposes under which the payment might be validly made. In particular, he concluded that many of the proposed grants were for valid charitable purposes which did not involve the relief of poverty, namely, medical grants, funeral grants, church grants, old age pensions and handicap pensions, homeland grants, education grants, and festival grants.[157] Others were supported on the basis that they were for the relief of poverty.

[268] It is clear that his Honour was of the view that the purpose of the trust was to advance a variety of charitable purposes and not merely the

[157] *Flynn v Mamarika* at 226-228.

relief of poverty, and he made the directions on that basis. I am of the same view.

[269] I also accept in part, but do not place much weight on, the other points made by the third defendant and summarised in [262](b), (c) and (d) above. First, I do not consider it necessary to speculate about the intentions of those who were involved in establishing the Trust and amending the various trust deeds from time to time. For the reasons just stated, I do not consider that the trust deeds in any of their emanations can be construed as limiting the purpose as for the relief of poverty.

[270] Secondly, to the extent that context and circumstances are relevant, I would have thought that it is the circumstances in 1965 when the trust was established that are important, not circumstances some 40 years later. Much of the factual material which the third defendant has referred to relates to significant changes that occurred much later, such as the opportunities, assistance and benefits provided to some local indigenous inhabitants by the Anindilyakwa Land Council and other bodies such as Groote Eylandt and Bickerton Island Enterprises Pty Ltd.

[271] Thirdly, even if circumstances as at 2008 were relevant, with the result that some of the potential objects of benefaction would not now be regarded as “poor”, this would not mean that the trust is no longer one

for the relief of poverty. Indeed the third defendant properly acknowledges that there are members of the various clans who are living in poor conditions and who may be relieved from the impacts of poverty by the operation of the trust.

[272] Fourthly, the fact that the Trust does now have significant assets, presumably as a consequence of the continued and successful mining operations being carried out on Groote Eylandt, is irrelevant to this question of construction of the Trust. That fact really shows that the Trust has operated successfully, possibly even more so than the original settlor might have expected. Even if the mining operations had shut down at an early time and or minimal royalties been paid into and retained in the Fund, the legal character of the Trust would be no different.

[273] I am not persuaded by the contention summarised in [262](e) above that I can look at the way in which the trustee has actually used the Trust monies as a means to construing the trust purposes. Whether any particular payment was made a particular reason cannot assist me in determining the meaning and legal effect of the trust deeds. That question may well be relevant in the main proceeding if it is alleged that some payments were not authorised at all, but not for present purposes.

[274] I conclude, primarily for the reasons at [264] - [268] above, that the Trust was and is not a trust solely for the relief of poverty. The *Dingle* exception does not apply.

Charitable purposes

[275] The next question to consider is whether all of the trust purposes are charitable purposes (or purposes ancillary thereto), that is purposes that fall within one or other of the *Pemsel* categories.

[276] Most if not all of the purposes set out in clause 6.3.2 of the Trust Deed and its predecessors were considered and held to be charitable purposes by Martin CJ in *Flynn v Mamarika* in the course of providing directions to the interim trustee.

[277] Those which his Honour held to be charitable purposes included "medical grants" (to provide patients and their escorts with transport to and from appropriate medical establishments including amounts for sundry expenses and accommodation of both the escort and the patient), "funeral grants" (to enable the coffin, elders, and relatives to be flown to Groote Eylandt including for related ceremonies), "church grants" (to assist church elders in organising church activities), "old aged / pensioner and handicapped grants" (provided they were used for the relief of the disabilities of age and handicap), "homeland grants" (to assist people on outstations), "education grants" (including to assist children travelling to and from school on the mainland), "sport and

recreation grants" (in particular for "physical education or the enhancement of physical proficiency and efficiency" and the "enhancement of physical well-being"), "Power and Water Authority grants" (to pay for charges for electricity to households occupied by members of the community), "festival grants" (to support activities necessary to meet Aboriginal traditional obligations) and "ceremony grants" (to enable elders to perform ceremonies which are culturally necessary).[158]

[278] His Honour explained how each of these fell within one or other of the *Pemsel* categories. During that explanation his Honour warned that such grants could only be made if made for a charitable purpose. For example:

(a) In relation to church grants, after saying that "such a grant would be unconditional, to be used at the discretion of the elders of the church" his Honour said: "These may be charitable if falling within the considerations relating to the advancement of religion. A grant to church elders to dispose of as they see fit would not."[159]

(b) In relation to education grants his Honour said that "these grants would not be made where the courses are supported by government or the educational institution."[160]

[158] *Flynn v Mamarika* at 226-9.
[159] Ibid at 227 [2].
[160] Ibid 227 [7].

(c) In relation to the Power and Water Authority grants his Honour said they "may be charitable if for the relief of poverty".[161]

[279] This warning reflected what his Honour had earlier emphasised, including in the passage quoted in [66] above that the references to purposes of the Trust in paragraph 4 of the 1989 Trust Deed were "subject to the requirement that the trust funds be applied for charitable purposes" and that "those particular enumerated purposes do not extend or override the primary and only purposes of the Trust, that is, charitable purposes."

[280] This point was further emphasised by the addition of the words, in capitals, "Subject to the requirement of charitable purpose", at the beginning of clause 4.2 of the 1996 Trust Deed and the 1998 Trust Deed.

[281] With the exception of the provision of "sport and social facilities" no party has seriously contended that the other purposes set out in clause 6.3 are not charitable purposes.

Sport and social facilities

[282] The third defendant contends that the trust is not a valid charitable trust at law because the trust deed "permitted the charitable grant fund to be applied toward *inter alia* sport and social facilities, which

[161] Ibid 228 [3].

purposes are not charitable purposes."[162] This is part of the purpose stated in clause 6.3.2(xv) of the Trust Deed, namely "to provide education and sporting and social facilities."

[283] Counsel for the third defendant points out that the power of the trustee under the trust is not to provide the specified benefits to the public generally or even to the Aboriginal Community. It is to provide the benefits to a limited class of persons who are defined by their membership of a clan. Included in the powers are the power to provide education and sporting and social facilities. I interrupt at this point to note that it does not matter if persons other than those entitled also benefit as a result of the exercise of the power.[163]

[284] Counsel for the third defendant contend that trusts for the promotion of sport have never been accepted as trusts for charitable purposes because they do not fall within the kind of purposes contemplated by the Preamble to the *Statute of Charitable Uses*.

[285] Numerous trusts for the purposes of the promotion of sport have been held not to be charitable.[164] That is so even though it is accepted that

[162] Defence [13(a)].
[163] See for example Blanchard J's reference to *Pemsel* in [31] of *Latimer*, quoted in [190] above.
[164] *Re Clifford* [1912] 1 CH 29 a trust for improving angling in certain rivers was not charitable; in *Re Pattern* [1929] 2 Ch 276 a trust for the promotion of cricket was not charitable; in *Inland Revenue Commission v City of Glasgow Police and Athletics Association* [1953] AC 380, a trust for the promotion of sports and general pastimes for officers and ex-officers of the police was not charitable.

the encouragement of sporting activity is beneficial generally. In *Said v Barrington*[165] Windeyer J said:

> There is, in these cases, some temptation to extend the public benefit requirement to any good cause and I think this has to be resisted. There would be little doubt, I think, that right thinking members of the community would regard encouragement of sailing for children to be generally beneficial, but not so as to bring it within the requirements to make it a charitable purpose to obtain the protection given to what would otherwise be a perpetual trust.[166]

[286] In *Royal National Agricultural and Industrial Association v Chester*[167] the High Court appears to have accepted the trial judge's conclusion that a trust for the promotion of sport (in that case the breeding and racing of pigeons) is not, of itself, a trust for a charitable purpose and that, even if such gifts have side effects which advance charitable purposes they are not charitable where the promotion of such purposes is not the direct and necessary object of the bequest. In relation to the trial judge's references to authorities concerning those propositions the Court said:[168]

> His Honour referred to the cases to emphasize that, although the side effects of the gift may indirectly serve such purposes, the promotion of such purposes is not the direct and necessary object of the bequest. The cases were properly regarded as instances of the application of the rule that, <u>if a gift permits applications for uses which are not charitable, it is not charitable in the legal sense</u>. Although we have put our decision upon a somewhat broader basis, we do agree with the

[165] *Said v Barrington* [2001] NSWSC 576.
[166] Ibid at [9].
[167] *Royal National Agricultural and Industrial Association v Chester* (1974) 3 ALR 486 (***Chester***).
[168] Ibid at 489.

> learned trial judge that the provision of racing facilities and trophies would certainly be within the discretion of the trustee and that such an application of the income of the estate would not be for charitable purposes. (underlining added by me)

[287] The third defendant contends that there is nothing in the trust deed which limits the power of the trustee in relation to the provision of facilities for sport to associate that with some other relevant charitable purpose such as for a school or church.

[288] Similarly, the courts have rejected the suggestion that trusts for the provision of social activities fall within the spirit and intent of the Preamble. A trust for the promotion of moral, social, spiritual and educational welfare of Welsh people in London by the provision of a social centre was held not to be valid in *Williams' Trustees v Inland Revenue Commissioners*[169] as was a trust for the promotion of the religious, social and physical well-being of Methodists in certain counties in England in *Inland Revenue Commissioners v Baddeley.*[170] The Courts have noted that no matter how beneficial the encouragement of social activity may be seen to be it is not within the scope of the Preamble because it does not satisfy the necessary requirement of general public utility.

[289] The principles in these cases have been followed in Australia where trusts have been held to be not charitable and invalid where they were

[169] *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447.
[170] *Inland Revenue Commissioners v Baddeley* [1955] AC 572.

for a girls' friendly society,[171] and where they were for a "Catholic Boys Club.[172] In the latter case it was expressly stated that the expenditure of funds for social intercourse or sporting activities cannot be regarded as being within the Preamble.[173]

[290] In their written submissions counsel for the plaintiff responded to paragraph 13(a) of the Defence in the following way.

[291] In the first place, by reason of the express terms of the Trust Deed, the Trustee was empowered to provide benefits from the Expenditure Fund to provide education sporting and social facilities "[s]ubject to the requirement of charitable purpose". Even if, which is not conceded, the use of the fund to provide such benefits was not inherently charitable, the express requirement of charitable purpose is cumulative. That is, the Trust Deed contemplates expenditure upon education sporting and social facilities insofar as that involves a charitable purpose.[174]

[292] In the second place, if the object of a trust is to relieve poverty, the method to achieve that result is immaterial: Jacobs at [10-19]. The opening words of clause 4.2 of the 1996 Trust Deed ("Subject to the requirement of charitable purpose") make it abundantly clear that

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[171] *In Wilson's Grant* [1960] VR 514.
[172] *Attorney-General v Cahill* [1969] 1 NSWR 85. This was followed in *Anglican Trusts Corp of Diocese of Gippsland v Attorney-General (Vic)* [2008] VSC 352 where money had been left to establish a girls' camp for girls of the Church of England.
[173] *Attorney-General v Cahill* [1969] 1 NSWR 85, 93 [10] – [30].
[174] Citing *Re Best* [1904] 2 Ch 354.

clause 4.2 and the objects specified in it are subject to clause 2 and the purposes it legitimately attracts. Hence, it is intrinsically open under the Trust Deed to apply the trust fund to provide those specific benefits in the interests of relief of poverty without there being any suggestion of any invalidity. Accordingly, if relief of poverty were found to be the only valid charitable purpose embodied in clause 2, nonetheless clause 4.2 and the more specific objects in it, being subordinate to clause 2, such as the provision of sporting and social facilities (clause 4.2.4), could be used to relieve poverty.

[293] I interrupt here to reject this point in so far as it assumes that the Trust is solely for the relief of poverty, a proposition which I have rejected. However I think the point is valid where the provision of sporting and social facilities are ancillary to that or another charitable purpose set out in the Deed.

[294] Thirdly, and in any event, it is recognised in authority that expenditure of trust funds on the promotion of sporting and recreational activities is itself a legitimate charitable purpose essentially on two grounds.

[295] First, the provision of the means of public recreation such as playing fields, parks and gymnasiums, is an accepted charitable object within the fourth *Pemsel* category.[175] This is so, even though the purpose of the trust is to provide such facilities for the benefit of inhabitants of a

[175] Citing *Re Haddin* [1932] 1 Ch 133 and *Re Morgan* [1955] 2 All ER 632.

defined area.[176] Further, in *Flynn v Mamarika*, Martin CJ in his directions held that the promotion of sport and recreation for the benefit of the community may be a charitable purpose.

[296] Secondly, and in any event, if provision for sporting or social facilities is associated with the advancement of educational work (even if not of a particular educational institution) it may be a valid charitable purpose under the second *Pemsel* category.[177]

[297] In *McMullen*, the House of Lords held that, while the mere playing of games or enjoyment or amusement or competition was not charitable by itself, nor necessarily educational, the totality of the process of education consisted in a balance between spiritual, moral, mental and physical elements and was not limited to formal instruction and did not exclude pleasure and the exercise of skill.[178] In that matter the gift was specifically for the provision of facilities for the benefit of pupils at schools and universities in any part of the United Kingdom. While the stipulation of schools and universities was a consideration in the reasoning in the relevant speeches that gave the gift a character of advancing education, Lord Hailsham (with whom Lords Diplock and Salmond agreed and Lord Keith relevantly agreed) did not discount

[176] *Oldham Borough Council v Attorney-General* [1993] Ch 210.
[177] *Inland Revenue Commissioners v McMullen* [1981] AC 1 (***McMullen***); *In re Mariette* [1915] 2 Ch 284 (where a gift to build additional squash courts was held to constitute a gift for the advancement of education).
[178] Ibid 17-18 (Lord Hailsham).

adult education as an aspect of the advancement of education more generally.

[298] Further, in *Flynn v Mamarika*, Martin CJ accepted both that the promotion of adult education was within the charitable purpose of the advancement of education, and that the promotion of sport and recreation may be regarded as for the advancement of education, particularly physical education or the enhancement of physical proficiency and efficiency.

[299] In the present case, although the specific object of the expenditure on sporting and social facilities was not limited to facilities within an educational institution, in the obvious context of the communities on Groote Eylandt and Bickerton Island, the provision of such facilities will entail the advancement of education in the broader sense. If that were not self-evidently the case, then it would result from the opening words of clause 4.2 (and as well the reference to "education" in clause 4.2.4).

[300] Whilst, for reasons already expressed, I do not accept that all of the purposes are for relief of poverty, I do accept that the provision of sport and social facilities may be a charitable purpose, as contemplated by the authorities referred to including *Re Haddin, Re Morgan*, *McMullen* and, in particular, *Flynn v Mamarika*. Accordingly the purpose in clause 6.3.2(xv) of the Trust Deed is a valid charitable

purpose, notwithstanding that the Charitable Grant Fund can only be used for sporting and social facilities that fall within the scope of one or other of the *Pemsel* categories.

[301] Unlike the situation in *Chester* the trustee is not permitted to apply funds to a purpose that is not charitable. This is clear from the Trust Deed, in particular the clear wording in clause 2. Also, as counsel for the Attorney-General points out, the Trustee's broad powers are "subject always to any express provisions to the contrary herein contained". These include, as stressed by Martin CJ in *Flynn v Mamarika*, the fundamental requirement that the funds only be applied for charitable purposes.

Charitable purpose market garden

[302] In its written submissions, as part of its submissions regarding relief against poverty, the third defendant raised a new point, namely that

> Clause 24 of the deed makes specific provision for the distribution of funds for a community market garden. It is difficult to fit that use of funds into the spirit and intent of the *Statute of Charitable Uses*.[179]

[303] The third defendant submitted that even if a trust is "dressed up" as a charitable trust it may well not be such if it permits the funds to be

[179] The provision of a market garden for the benefit of a few is not analogous to the promotion of agriculture generally: *Grain Growers Ltd v Chief Commissioner of State Revenue* [2015] NSWSC 925.

used for non-charitable purposes.[180] This may arise unintentionally where the draftsperson had subjectively thought that they were creating a valid charitable trust but had failed to do so by the inclusion of non-charitable purposes or by failing to cast the scope of objects widely enough.

[304] In fact clause 24.1 permits the Trustee to "make a payment up to but not exceeding $200,000 from the Charitable Grant Fund for the leasing of land and the establishment of a charitable purpose market garden" and clause 24.2 permits the Trustee to pay an annual amount "for two financial years following the payment in clause 24.1 to be used to develop and maintain the charitable purpose market garden."

[305] The clear intent of that clause, having regard to the words that I have underlined, is that such money only be paid for a market garden that will serve a charitable purpose. Even if such a garden might be described as a "community market garden" as the third defendant describes it, there is no basis for the assumption implicit in the footnote to the third defendant's contention, that it will only be "for the benefit of a few". To the contrary, one can readily conclude that such a charitable purpose market can be established and maintained for a charitable purpose, for example to educate members of the community in the growing of vegetables, flowers and other produce or to assist people in poverty by providing them with such produce.

[180] *Attorney-General v Ross* [1986] 1 WLR 252 at 263.

Conclusion

[306] I conclude that none of the grants or payments contemplated or permitted under the Trust Deed, in particular clause 6.3.2, may be made for a purpose that is not a charitable purpose. Accordingly the trust satisfies *Pemsel* requirements.

Conclusion and disposition

[307] The answer to Question 1 is “No”. Question 2 no longer needs to be answered.

[308] I will conduct a directions hearing in order to discuss costs and the further advancement of this matter.
