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**FIDIO Presentation
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**Tax Treatment of Native Title Benefits
Section 59-50 *Income Tax Assessment Act 1997 (Cth)***

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1. About the legislation
2. Operative Provisions
3. Native title benefits
4. Recipients of native title benefits
5. Future developments
6. Challenges, concepts, consequences and other issues



- The *Tax Laws Amendment (2012 Measures No. 6) Act 2013 (Cth)* (“Act”) was passed on 26 June 2013
- Explanatory memorandum
- The Act received royal assent on 28 June 2013
- Operates retrospectively from 1 July 2008
- Taxpayers can amend past tax returns



- The *Tax Laws Amendment (2013 Measures No. 2) Act 2013 (Cth)* was passed on 28 June 2013
- The Act received royal assent on 29 June 2013
- Operates from 28 June 2013
- Amends the definition of “Indigenous holding entity” to include
 - Before December 2013 - entities endorsed as income tax exempt under subdivision 50B of the ITAA97
 - After December 2013 - “registered charities” (more on this later)

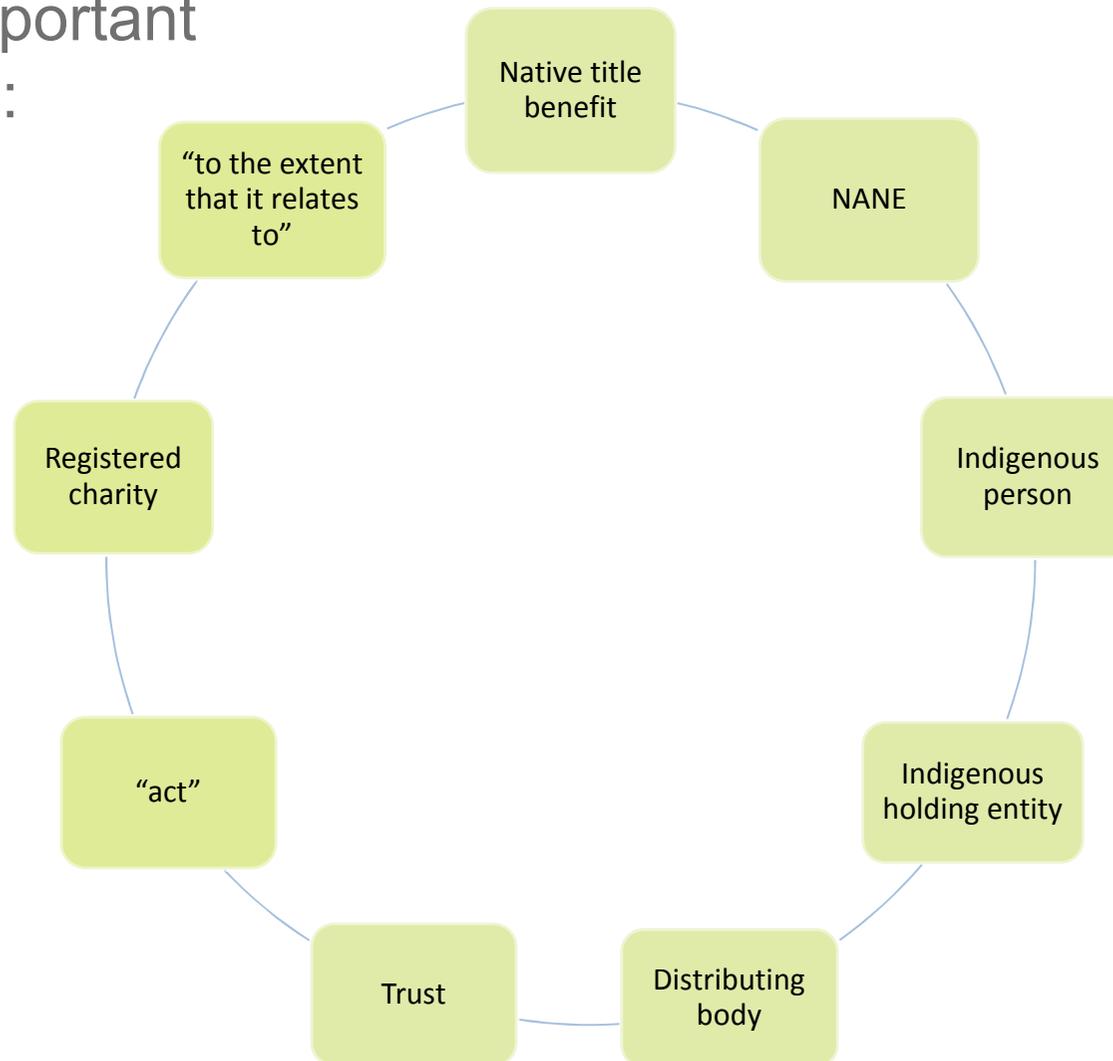


- The *Charities Act 2013* (Cth) was passed on 27 June 2013
- The Act received royal assent on 29 June 2013
- Operates from 1 January 2014
- Introduces a statutory definition of charity



DEFINED TERMS

Some important concepts:





Section 59-50(1) of the Act says:

- to the extent that
- a ***native title benefit**
- would otherwise be included in your assessable income

it is not assessable income and is not ***exempt income** (“NANE”) if you are:

- an ***Indigenous person**; or
- an ***Indigenous holding entity**



Section 59-50(2) of the Act says:

- to the extent that
- **an amount, or other benefit,**
- **arising directly or indirectly**
- from a *native title benefit

would otherwise be included in your assessable income, it is not assessable income and is not *exempt income (“NANE”) if you are:

- an *Indigenous person; or
- an *Indigenous holding entity

E.g. Benefit B (payments made to a trust) arising from Benefit A (right to nominate a trust)



The following are **NOT** native title benefits:

- **Administration costs**
 - e.g. payments to run aboriginal corporations or to implement agreements

- **Remuneration or consideration for goods or services**
 - e.g. Heritage payments, lease payments etc

- **Proceeds from investment of a native title benefit**
 - e.g. bank interest, profits from sale of land etc



- Capital gains and losses derived from the following will also be exempt:
 - the transfer of native title, or the right to be provided with a native title benefit, **between** Indigenous persons and Indigenous holding entities;
 - **the creation of a trust** that is an Indigenous holding entity over native title, or the right to be provided with a native title benefit; or
 - **the cancellation or surrender** of native title or the right to be provided with a native title benefit



An amount or non-cash benefit is only a native title benefit:

- **To the extent that the amount or non-cash benefit relates to an “act” that would**
 - extinguish native title or;
 - that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title

So the native title benefit must relate to the “act”



NATIVE TITLE ACT CONCEPTS

What does “act” mean? No definition provided but look to the *Native Title Act*

- defined in section 226 of the Native Title Act which includes a non-exhaustive list
- divides acts into “past acts”, “intermediate period acts”, “previous exclusive possession acts”, “previous non-exclusive possession acts” or “future acts”
- the “act” is the grant of tenure or creation of a legal right to do something on land and waters, the rights attached to that grant and the exercise of those rights
- an act is only a “future act” if it validly affects native title, which means it “*extinguishes the native title rights and interests or is otherwise wholly or partly inconsistent with their exercise*” in accordance with section 227 of the Native Title Act



When does a benefit “relate to” an “act”?

- No legislative definition
- Wide judicial interpretation with consideration of context in which the words appear
 - *Tooheys Ltd v Commissioner of Stamp Duties (NSW) (1961) 105 CLR*
- Provided there is some sort of direct or indirect connection between the payment of the benefit and the extinguishing or affecting act, the payment should “relate to” the act

How to determine “the extent that” a native title benefit relates to an “act”? Apportion? Watch this space....



An amount or benefit must also arise under an **agreement** which is made

- Under an **Act** of the Commonwealth, a State or a Territory
- Or under an **instrument** made under such an Act or under an **ancillary agreement** to such an agreement; or
- Be determined under the *Native Title Act 1993* (Cth) (“**Native Title Act**”) to be payable as compensation for the effects of certain acts on native title



Some types of agreements:

- Indigenous land use agreements (“ILUA”)
- Section 31 Deeds



RECIPIENTS OF NATIVE TITLE BENEFITS

Native title benefits are treated as NANE in the hands of:

- Indigenous persons
- Indigenous holding entities

Ignore NANE amounts in your tax returns



An Indigenous holding entity is:

- a **distributing body** (see section 128U of the *Income Tax Assessment Act 1936* (Cth) which relates to mining withholding tax on Indigenous land)
 - Includes CATSI Act corporations and Land Councils
- a **trust**, if the beneficiaries of the trust **can only be** Indigenous persons or Indigenous holding entities
- a registered charity (see slide 4)



- Beneficiaries “can only be”...
- Check the class of beneficiaries and the power of amendment in the trust deed
- The *Tax Laws Amendment (2013 Measures No. 2) Act* (Cth) amended the provisions so that income tax exempt entities endorsed before December 2012 and registered charities post December 2012 will be Indigenous holding entities
- For trustees, it is critical to retain character of native title benefits in the books



- Introduction of statutory definition of charity
 - Not-for-profit entity
 - Charitable purposes
 - Public benefit - “section of the public test”

- Certain purposes presumed to be for the public benefit unless there is contrary evidence:
 - Preventing and relieving sickness, disease or human suffering
 - Advancing education
 - Relieving poverty, distress or disadvantage
 - Caring for and supporting the aged and people with disabilities
 - Advancing religion



Charities and Indigenous holding entities

- If a purpose is **directed to the benefit of Indigenous individuals only** and
- The purpose would not otherwise be for the public benefit **only** because the **individuals are related**

Then the purpose is treated as being for the public benefit if the entity

- Receives, holds or manages an amount, or non-cash benefit (as defined in the ITAA97) that relates to
- Native title or traditional indigenous rights of ownership, occupation, use or enjoyment of the land



A snapshot of provisions:

Benefit

Cash or non-cash

To the extent that

The benefits relate to an act

Act

Affects use or enjoyment of native title rights and interests

Agreement

Made under legislation related to native title (ILUA)

Recipients

Limited to Indigenous persons or Indigenous holding entities



WHERE ARE THE CHALLENGES?

- Retrospectively
 - 1 July 2008 to 30 June 2013
 - Was tax paid?
 - If so, is a refund available?
 - Apply the NANE test
 - What about existing and current Private Binding Rulings?



WHERE ARE THE CHALLENGES?

- Prospectively
 - Existing agreements and existing recipients
 - Review
 - Assess
 - Amend agreements, trust deeds and rulebooks if appropriate
 - New agreements, new recipients
 - Private Binding Rulings
 - Drafting of agreements
 - Clarity of purpose - what do the native title holders want to do with the benefits?



CONSEQUENCES AND CONCEPTS

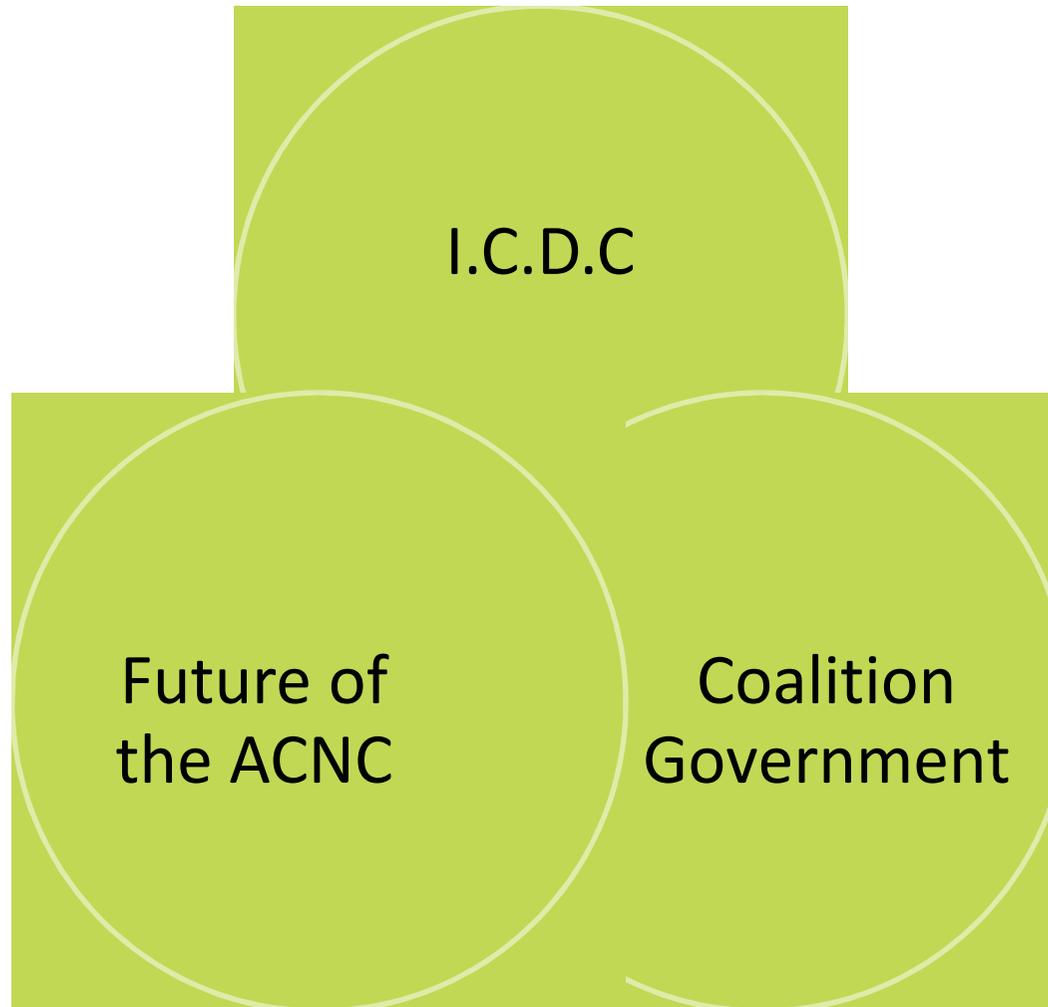
- Closed class of beneficiaries
- Community vs individual
- Tax free capital - new opportunities
- Charitable vs non-charitable
- Possible change in focus of negotiations?
- Possible change in outcomes?



- ABN registration
- GST treatment
- ILUAs and dealing with amendments
- Social security
- Trust reporting and record keeping



FUTURE DEVELOPMENTS





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Thankyou

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