

Recent developments in tax and native title... and continuing issues



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Miranda Stewart
Melbourne Law School

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Overview

- What is native title?
 - Types of native title agreements
 - Why are there tax issues?
- Income tax
 - Are native title payments assessable income?
 - Bill in Parliament: Non-assessable non-exempt treatment
 - Deductibility for native title payments
- Charitable trusts
 - Continued relevance of charitable trusts
 - The impact of reform proposals
- GST
 - Is there a taxable supply?

Native Title Agreements

- **20 years** since *Mabo* (1992) and the Native Title Act 1993 (Cth) recognised indigenous traditional ownership of land
- Native title claim groups have a '**right to negotiate**' where a private company wishes to obtain legal access eg to mine or develop claimed lands
 - Even where native title is not yet determined
 - This forces parties to the table
- More than **18 per cent** of Australia's land is affected by native title agreements and this continues to grow.
- Agreements are delivering some real economic benefits for traditional owners, and are supported by the federal government as a part of 'closing the gap'

Native Title Agreements

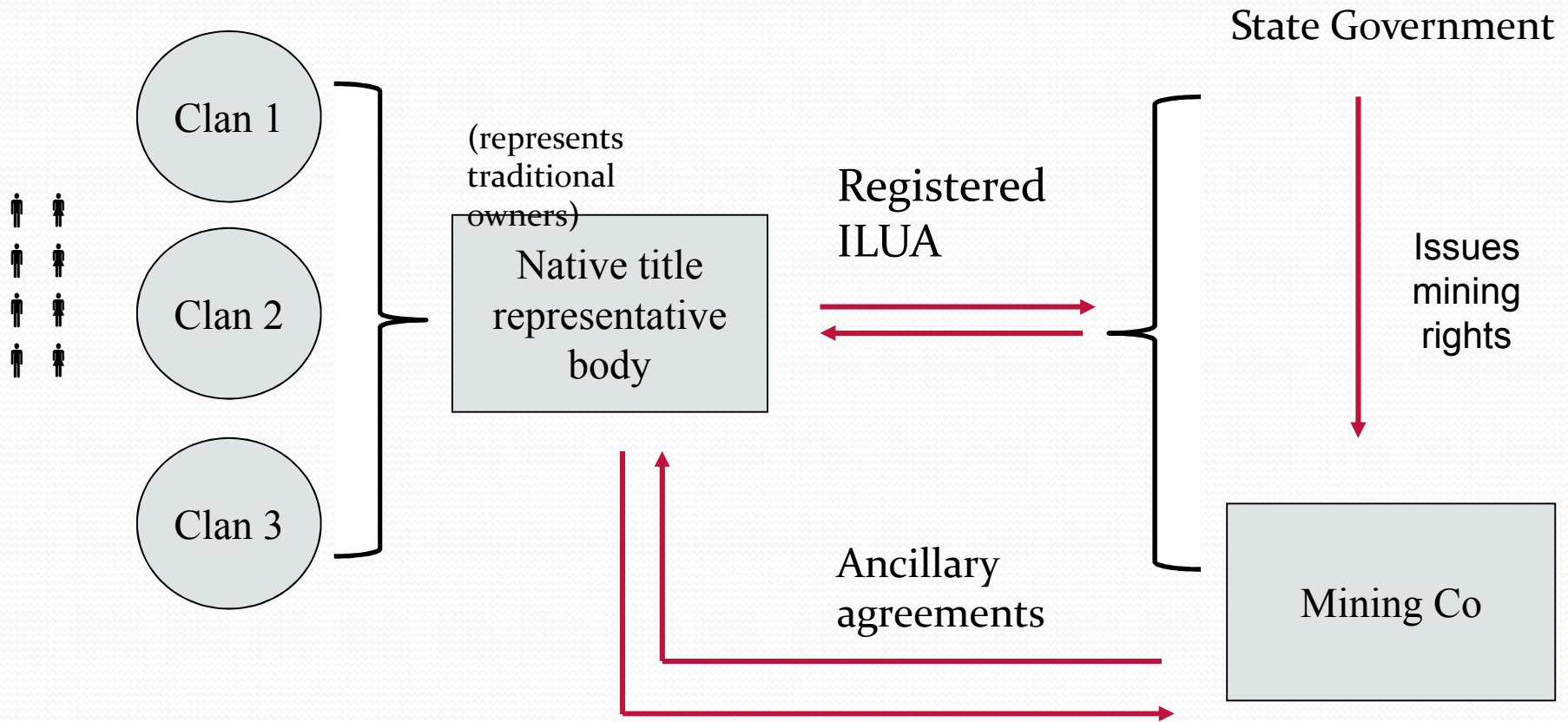
- Indigenous Land Use Agreements (ILUAs)
 - Registered with Native Title Tribunal
 - Binds those not parties to original agreement
 - Stands even if native title is not ultimately made out
- ‘Future act’ agreements
 - In particular for mining/exploration licenses or where other State approvals required
 - ‘Acts affecting native title’ in future
- ‘Ancillary’ agreements
- State settlement frameworks
 - SA, Vic
 - Approach in WA? – regional collective approach to SW area

Case Study

- Native title claim group and resource company
- ILUA and 'ancillary' agreements in a comprehensive settlement provide the following benefits
 1. **Lump sum** of \$500,000 on signing;
 2. Annual **cash payment by value of output** of mine;
 3. Annual **profits-based cash payment**; if the mine does not record a profit, this is not paid;
 4. **Freehold title** to land in the local township;
 5. **\$500 000** Employment and Training fund
 6. **\$150 000** Cultural Awareness fund (& heritage services);
 7. **Construction of a recreation centre** in the community;
 8. **Preferential contracting** for businesses of ID Pty Ltd.

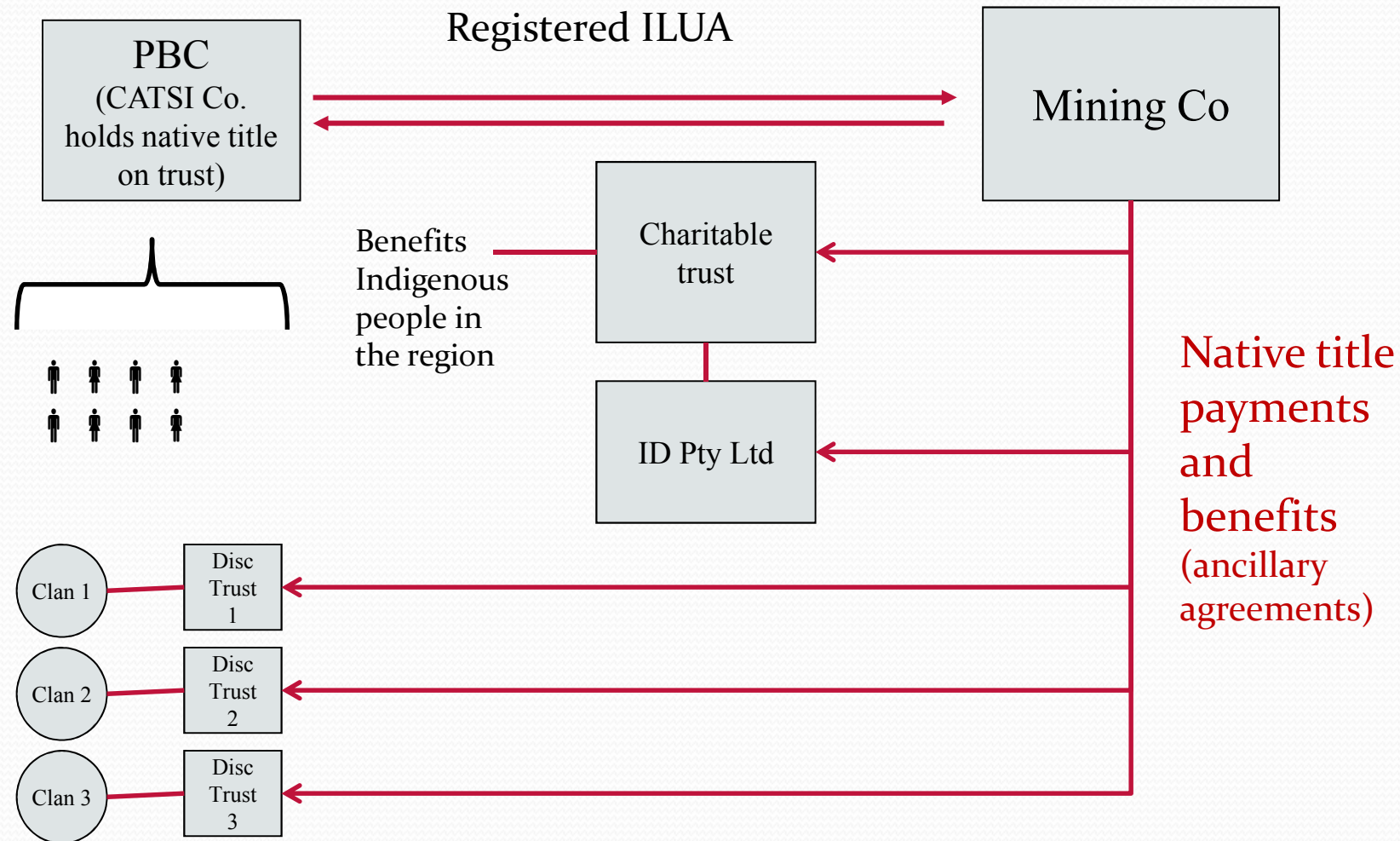
Case study - Agreements

- *Negotiations under the NTA*



Case study – Entities and payments

- *Entity structure post-agreement and native title claim determination*





Income tax – current law

- Are recipients assessable on native title payments and benefits provided under the agreements?
 - Are native title payments ordinary income?
 - Does CGT apply?
 - Heritage fees and fees for services
 - Aboriginal Mining Withholding Tax
- **Application to Case Study**

Income tax - reform

- **Tax reform** to treat native title payments as NANE
 - TLA (2012 Measures No. 6) Bill 2012 Schedule 1
 - House Committee recommends passage without amendment
 - Opposition states they oppose the amendments
- Proposed **NANE treatment** of native title payments
 - Operative provision: new s 59-50 ITAA 1997
 - Native title benefit
 - Indigenous person or Indigenous holding entity
 - Exclusions
 - CGT: new s 118-77
- **Application to Case Study**: proposed new law

Income tax - reform

- **Native title benefit**
 - Definition
 - Cash or non-cash benefit
 - Agreement
 - Compensation
 - Apportionment 'to the extent'
 - Acts affecting native title
 - What if native title is not established?

Native title benefit

‘An amount, or *non-cash benefit, that

(a) arises under:

(i) an agreement made under an Act of the Commonwealth, a State or a Territory, or under an instrument made under such an Act; or

(ii) an ancillary agreement to such an agreement;

to the extent that the amount or 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; or

(b) is compensation determined in accordance with Division 5 of Part 2 of the Native Title Act 1993.

Example in EM

An Indigenous group enters into an ILUA with a mining company. Under the agreement, the group sets up a trust as an Indigenous holding entity to receive cash payments in the form of profit-sharing payments and milestone lump-sum payments. The agreement also provides for non-cash benefits in the form of training for the beneficiaries of the trust.

As the agreement is an ILUA entered into under the NTA and the trust satisfies the definition of an Indigenous holding entity, the benefits received by the trust and its Indigenous beneficiaries are native title benefits and thus NANE income.

Income tax - reform

- Payments to indigenous individuals
 - Who is eligible?
 - Is this the right policy?
- Payments to ‘indigenous holding entities’
 - ‘Distributing bodies’ defined
 - What about regular corporations?
 - Trusts
 - What about charitable trusts?
 - Tracing through multiple entities
 - But not trusts

Income tax - reform

- ‘Indigenous holding entity’ s 59-50(6)
 - (a) a *distributing body; or
 - (b) a trust, if the beneficiaries of the trust can only be *Indigenous persons or distributing bodies.

Income tax - reform

- Aboriginal Land Council (Aboriginal Land Rights (Northern Territory) Act 2006)
- CATSI Corporation
- Other incorporated body
 - established by or under provisions of a law of the Commonwealth or of a State or Territory that relate to Indigenous persons; and
 - is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Indigenous persons or to apply such moneys for the benefit of Indigenous persons, either directly or indirectly

Income tax - reform

- Exclusions
 - Remuneration for services
 - Heritage surveys/fees?
 - Payment for administrative costs
- **Investment income** derived from native title benefits
 - What is the right policy for investment income?

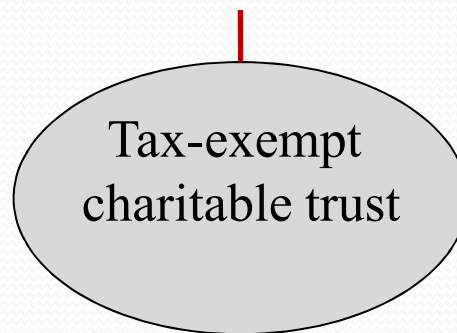
Charitable trusts

- Wide use of charitable trusts in native title agreements
 - Tax-exempt status
 - (though note potential unrelated business income tax)
 - Have advantage of providing for collective public benefit of native title group
- **Problems with charitable trusts**
 - Limits on potential purposes to be charitable
 - ‘public benefit’ – is a native title claim group a sufficient ‘section of the public’?
 - Not-for-profit – limits on ability to distribute payments
 - Accumulation – may be limits on period of time for which charitable trust can accumulate for future generations
- Various reforms in pipeline; Review of tax concessions

Charitable trusts

- **Business activity in ID Pty Ltd**
 - Taxable company
 - Refund of franking credits on distribution to charitable trust

Indigenous community



Tax-exempt
charitable trust

Exempt from tax;
franking credit
(refund)

Franked
dividend

ID Pty Ltd

Company tax paid
at 30% rate

CGT - reform

- Can CGT apply to native title or to provision of benefits under agreements?
- Proposed **new s 118-77**
 - Applies to native title holders or holding entities where native title is 'transferred' to a PBC, or extinguished or otherwise terminated.
 - Disregards capital gain or loss

Income tax deductibility

- Are native title payments deductible to the payer?
 - (even if non-assessable to recipient)?
 - Section 8-1 of ITAA 1997
 - *Cape Flattery; Cliffs International*
 - Capital allowance or other provisions
- **Application to Case Study**

Goods and Services Tax

- Issues for individuals or trustees and trustee companies
 - Anecdotal evidence of widely varying practices
- Registration obligations; is remittance of GST required?
- GST and native title agreements – ‘taxable supply’?
 - Is there a ‘supply’?
 - Is there ‘consideration’ for a supply?
 - Are native title claim groups or individuals ‘entities’ that may need to be registered?
 - Are they carrying on an ‘enterprise’?
- Heritage surveys and ‘enterprise’

GST

- GST is payable on a “taxable supply”: s 9-5
 - “Supply”
 - For “consideration”
 - In course or furtherance of an “enterprise”
 - Taxpayer is / ought to be registered
 - Supply is “connected with Australia”
- (And not input-taxed or GST free)

What is a taxable “supply”: s 9-10

- Any form of supply, including:
 - supply of goods or services,
 - provision of advice or information,
 - grant, assignment or surrender of real property or an interest in real property,
 - creation, grant, transfer, assignment or surrender of any right,
 - supply of a financial service, and
 - entry into, or release from, an obligation “to do anything or to refrain from an act or to tolerate an act or situation”.
- Or any combination of the above
- How are ‘compensation’ or ‘settlement’ payments treated? [a few private rulings only]

ABN and registering for GST

- To be entitled to have an ABN and register for GST, you must be an “entity” that is “carrying on an enterprise”
 - “Entity” and “enterprise” have the same meaning for ABNs and for GST
 - “Entity” includes individuals, companies, unincorporated groups ie. includes Claim Groups
- Advantage of having an ABN:
 - Provide ABN on invoices where these are requested
 - Prevent withholding of tax on services income
- Tax Ruling MT 2006/1

Is the NTRB/NTSP acting as “agent”?

- For claim group or individuals in the group?
 - Legal representative with authority to act on behalf of the claim group or individuals
- If yes: NTRB can issue an invoice to payers on behalf of the claim group or particular individual quoting its own ABN
 - Sec 12-190(2A)(a) in withholding regime
 - But ensure that the invoice makes clear that
 - NTRB is acting as agent
 - The GST amount is zero (assuming the group or individual is not registered for GST)
- NTRB should not report any amounts on its own BAS in relation to these invoices

Carrying on an enterprise

- Includes all business and trading activities, but is broader than this
- Includes all activities that are “in the form of” a business or “concern in the nature of trade”,
 - ie of a commercial nature
 - Can be one-off (but not ad hoc and very informal)
 - including commencement and termination activities
- Providing services on a regular basis in a commercial manner and receiving payment would appear to be “carrying on an enterprise”
- Again, query compensation/settlements

Exclusions from “enterprise”

- A hobby or “a private recreational pursuit”, or
- Activity wholly of a private nature, or
- Activities by an individual without a reasonable expectation of profit or gain, or
- Activities done as an employee
- “Hobby” statements – *see Handout*
 - These are acceptable in place of quoting an ABN if the provider does not have one for a legitimate reason, or provides a service for which one of the above exceptions applies

Other possible tax reforms?

- Deductible gift recipient (**DGR**) status
 - For indigenous organisations with multiple qualifying purposes
- Indigenous Community Development Corporation (**ICDC**)
 - MCA and NNTC
 - A tax-exempt vehicle for indigenous development?
 - Wider set of eligible community and business development purposes for benefit of indigenous peoples
 - Ability to accumulate and invest in superannuation for individuals
 - Limited ability to pay out, eg small pensions to elders
 - Pool investment funds for economies of scale
 - Strong prudential and governance standards