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1 Introduction

> [T]he agreement between Argyle, Traditional Owners for the mine area and the Kimberley Land Council ... carries all the rules to make sure that we treat each other properly. It has taken many years and a lot of hard work to make this agreement. We are very proud to sign it. With this agreement as a start, we can make the future better for Traditional Owners and Argyle.[1]

The recognition of native title in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*) and the enactment of the *Native Title Act 1993* (Cth) ('NTA') has led to significant changes in the status of indigenous traditional owners in negotiating with governments and private stakeholders in Australia about access to, development and use of traditional lands. In the last decade, native title agreements that deliver real payments and benefits to traditional owners have become increasingly widespread across Australia. The benefits provided under native title agreements have also become increasingly valuable, in particular where agreements have been reached with resource companies in respect of very large mineral or oil and gas projects, including the northwest of Western Australia. It is not surprising, then, that the tax consequences of native title agreements and payments has become an issue for both the recipients – traditional owners – and for the private sector payers, largely but by no means exclusively resource companies.

This paper discusses the current state of play regarding income tax and GST issues in relation to native title agreements, including recent reforms and ongoing areas of uncertainty.[2] In May 2010, the federal Treasury released a Consultation Paper on *Native Title, Indigenous Economic Development and Tax* (the 'Consultation Paper').[3] The Consultation Paper focused on the income tax treatment of native title payments for recipient traditional owner groups. As a result, there is before the Parliament, and expected to pass in the current session, Tax Laws Amendment (2012 Measures No. 6) Bill 2012, Schedule 1, which would accord non-assessable non-exempt (NANE) status to some native title payments.

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[1] *Argyle Diamond Mine Participation Agreement — Indigenous Land Use Agreement* (8 April 2005), 'Plain English' text preamble, ATNS Project Database, <www.atns.net.au/objects/Agreements/Argyle%20ILUA.pdf> .

[2] This paper draws in part on the more academic analysis in M Stewart, 'The Income Tax Treatment of Native Title Agreements' (2011) 30(3) *Federal Law Review* 362-398. A number of studies of tax issues related to native title have been carried out in the last few years: see Lisa Strelein, 'Taxation of Native Title Agreements' (2008) 1 *Native Title Research Monograph*; Commonwealth of Australia, Department of Families, Housing, Community Services and Indigenous Affairs, *Optimising Benefits from Native Title Agreements*, Discussion Paper (2008) <http://www.fahcsia.gov.au/sa/indigenous /progserv/land/Documents/native_title_discussion_paper/default.htm>; ATNS Project, 'Optimising Benefits from Native Title Agreements' (Submission to Department of Families, Housing, Community Services and Indigenous Affairs Discussion Paper, 6 December 2008); A Levin, *Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts* (Discussion paper presented at the Indigenous Community and Economic Development and Tax Policy Workshop, ATNS Project, 28 August 2007); Minerals Council of Australia ('MCA') with Jackson McDonald Lawyers and AIATSIS, 'Improving the Tax Treatment of Benefits and Payments to Indigenous Communities from Resource Agreements, Introducing an Alternative: Indigenous Community Development Corporations' (August 2009).

[3] Commonwealth of Australia, Treasury, *Native Title, Indigenous Economic Development and Tax,* Consultation Paper (2010), <http://www.treasury.gov.au/documents/1890/PDF/20101020_Native_Title_Tax _Consultation_Paper.pdf> (the *Consultation Paper*).

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The Consultation Paper also raised other tax issues, including the tax deductibility of native title payments for resource companies and other payers and the possibility of deductible gift recipient status for indigenous organisations. Further issues not addressed in the Consultation Paper include the treatment of native title payments in the Goods and Services Tax ('GST'), the Minerals Resource Rent Tax, and various State taxes. There have also been proposals for tax reform which generally involve establishment of a new tax deduction or credit regime specifically focused on indigenous investment, or establishment of a new form of Indigenous Community Development Corporation (ICDC) which would be tax-exempt.[4] It is unlikely that the current government would countenance introduction of a new deduction or tax credit subsidy regime for investment or Indigenous business activity. However, the proposal for an ICDC has significant merit and deserves consideration because it has been put forward jointly by the Minerals Council of Australia (MCA) and the National Native Title Council (NNTC), the peak representative body for representatives of traditional owners in native title claims).

2 Native title agreements

2.1 What is native title?

Mabo established native title as a *sui generis* right at common law.[5] The NTA recognised the common law of native title as determined in *Mabo* and incorporated it into a statutory framework. Prior to the recognition of native title in *Mabo* and the NTA, claims by Australian Indigenous peoples to recognition of legal rights and interests in their traditional lands failed.[6] State and Territory land rights schemes created various frameworks for returning land to collective Indigenous ownership but did not recognise traditional land rights and interests.[7] The common law concept of native title was translated into statutory form in section 223 of the NTA which defines 'native title' or 'native title rights and interests' as:

> 'the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

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[4] Gunya Australia, 'Indigenous Economic Development Scheme: a solution to create employment opportunities within Indigenous communities' (Gunya Discussion Paper, August 2007); Cape York Institute for Policy and Leadership, 'Can Cape York communities be economically viable?' (November 2005) *Viewpoint*; Miranda Stewart, 'Tax Law and Policy for Indigenous Economic Development' in Langton M and Longbottom J (ed), *Community Futures: Legal Architecture* (Routledge, 2012).

[5] The concept has been widely analysed. See, eg, Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004); Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 114-115; Kent McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil (ed), *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (University of Saskatchewan, Native Law Centre, 2001) 416, 420–3, 435.

[6] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Coe v Cth* (1979) 53 ALJR 403.

[7] See, eg, Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and Aboriginal Land Trusts Act 1966 (SA).

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(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.'

Mabo suggests that native title is communal in nature and inalienable, although in *Cth v Yarmirr* (2001) 208 CLR 1, the majority of the HCA said (at para [9]) that the rights and interests dealt with under the NTA 'may be communal, group or individual rights and interests'. It was also unclear after *Mabo* whether native title was proprietary or personal in nature.[8] In *Wik v Qld* (1996) 187 CLR 1, Gummow J described the 'nature and incidents' of native title as depending on the facts, ranging from personal or communal rights to rights approximating a legal or equitable estate in land. The High Court held in *WA v Ward* (2002) 191 ALR 1 that native title consists of a bundle of rights that could be extinguished one by one.[9] In *Members of the Yorta Yorta Aboriginal Community v Vic* (2002) 214 CLR 422*,* the High Court seemed to take the view that native title is defined by reference to s 223 of the NTA and not by reference to the common law.[10]

The NTA sets out a process for traditional owners to claim native title in respect of particular lands. Where native title is determined, it is required by law to be held for the traditional owners by a Prescribed Body Corporate (PBC), which is a corporation that operates either as a trustee or as an agent of the native title for the native title holders and which must be registered with the National Native Title Tribunal (NNTT).[11] Most PBCs are established under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (they are *CATSI corporations*). There are substantial reporting and governance requirements for CATSI corporations, which are regulated by the federal Office for Regulation of Indigenous Corporations (ORIC, www.oric.gov.au).

Section 51 of the NTA provides a legal right to compensation 'on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'. Government actions, such as the grant of freehold or leasehold estates, which are inconsistent with the continued existence of native title rights and interests, operate to extinguish or override common law recognition of native title. In 1998, substantial amendments to the NTA extended the rules of extinguishment. However, the NTA also contains various provisions that ensure non-extinguishment of native title in respect of certain past or future activity or incursion on native title land. While the concept of compensation is central to the NTA, there have been few successful litigated compensation claims. As at 30 June 2012, there were only 8 compensation claims in the NNTT, compared to 441 native title claims.[12]

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[8] Contrast the approach of Deane and Gaudron JJ in *Mabo* (1992) 175 CLR 1, 109-110 to the majority judgment by Brennan J at 77. The different approaches were considered in the judgments in *WA v Ward* (2000) 170 ALR 159, 178-179 (Beaumont and von Doussa JJ).

[9] *WA v Ward* (2002) 191 ALR 1, 35–6, 40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See Katy Barnett, '*Western Australia v Ward;* One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 *Melbourne University Law Review* 462.

[10] (2002) 214 CLR 422, 440; see James Cockayne, 'Members of the Yorta Yorta Aboriginal Community v Victoria: Indigenous and Colonial Traditions in Native Title' (2001) 25 *Melbourne University Law Review* 786, 805.

[11] Native Title Act 1993 (Cth) Pt III, Div 6.

[12] National Native Title Tribunal (NNTT), *National Report: Native Title* (30 June 2012) <www.nntt.gov.au>, Table 2, 35.

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The NTA also, importantly, establishes a statutory ‘right to negotiate’ of native title claimants about future acts done by the Commonwealth, a State or a Territory, in particular conferrals of mining rights and compulsory acquisitions, in relation to lands subject to a native title claim, before native title is determined.[13] Through its establishment of a negotiation process, the NTA grants an economic dimension to native title rights and interests. The economic character of the 'right to negotiate' is explained by McHugh J in *North Ganalanja Aboriginal Corporation and Waanyi People v Queensland* (1996) 185 CLR 595. McHugh J observed that the Waanyi people ‘had a real chance’ of reaching an agreement with a mining consortium ‘by exercising the negotiation and mediation rights conferred by the Act’ and continued:[14]

> 'Parliament has laid down the law. It has attached valuable rights to an accepted claim, rights that are exercisable by a claimant before the validity of the claim is judicially determined. The Act has given claims of native title an economic as well as a spiritual and physical dimension.'

2.2 Native title agreements

The process of agreement-making under the NTA has generated benefits for native title holders from governments and private stakeholders. Native title agreements may be narrow, focused on discharge of one-off rights, or cover entire projects, regions and a suite of rights. Large native title agreements such as those with some resource companies frequently comprise an overall package of payments and other benefits in exchange for long-term mining and other exploitation access.[15] However, the vast majority of native title agreements are much less valuable and address a single incursion or act affecting native title.[16]

2.2.1 Indigenous Land Use Agreements (ILUAs)

The Indigenous Land Use Agreement (ILUA) is the main native title agreement established under the NTA Division 3, since 1998. ILUAs now cover 18 percent of Australia’s land mass and a substantial area of sea (below the high water mark); at 30 June 2012, there were 646 registered ILUAs, in all states, but with a significant majority in Queensland.[17]

ILUAs may be based on a determination of title or where a claim exists; they must be registered with the NNTT; and a range of steps are required by law that assist in ensuring due process in negotiation

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[13] NTA Part III, Division 3, Subdivision P.

[14] (1996) 185 CLR 595, 644 (McHugh J).

[15] *Argyle Diamond Agreement*, above n 1; *Comalco-Western Cape Communities Co-existence Agreement* available from www.atns.net.au . See MCA et al, above n 2; Strelein, above n 2; Krysti Guest, 'The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements' (Research Discussion Paper No 27, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009) <http://www.aiatsis.gov.au/research/docs/dp/DP27.pdf> ; Ciaran O'Faircheallaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004).

[16] Eg, Owen Springs Gas Pipeline ILUA (Central Australia), http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/ILUA%20Register/2008/DI2008.003/ILUARegisterExport.pdf .

[17] NNTT, above n 12, 37. Some registered ILUAs have expired and been removed from the register.

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and registration of the ILUA.[18] Registered ILUAs will stand even if native title is not, ultimately, made out. When registered, ILUAs bind all parties, including later native title claimants even if they were not party to the ILUA. A majority of ILUAs are so-called area agreements, which may be made where there are no native title PBCs in the entire area to be covered. Increasingly, ILUAs may be made with an existing PBC in respect of activity on established native title land (known as a body corporate agreement).

2.2.2 'Future act' agreements

A 'future act' agreement deals with any act that ‘affects’ native title in the future (for example, the grant of an exploration or mining tenement) (this concept is discussed further below). The NNTT may mediate or provide assistance under s 31 NTA (where the ‘right to negotiate’ applies) or under s 150 of the NTA. A ‘future act’ agreement may be registered as an ILUA (but this is not compulsory), may apply to lands where title is determined, or may be negotiated 'as if' there is native title, applying the 'right to negotiate'. Where property interests are at stake (such as the issue of a licence by the State), the future act provisions are triggered by the State government notifying all relevant native title holders or potential holders in the relevant region. Thousands of future act applications are made each year, but only a small number are fully mediated and hence recorded by the NNTT.[19] Between 2008 and 2010 there were more than 9000 future act applications, many in Western Australia and Queensland.[20] Most applications are withdrawn, presumably being resolved by private agreement, although it is difficult to track these outcomes.

2.2.3 State settlement frameworks

State settlement frameworks are becoming increasingly important in establishing certain, fair and general compensation settlements for traditional owners and other indigenous peoples within each State and Territory. Existing State and Territory land rights regimes provide for a range of compensation payments, shares of mining royalties, land transfers and other benefits in relation to Aboriginal land. Some are directly recognised in the NTA, for example a right to compensation arising from NSW government extinguishment in respect of land rights is provided for in s 22L of the NTA.

Native title settlement frameworks have been developed by the States of South Australia and Victoria. The agreements made under State settlement frameworks aim to provide compensation for loss of native title and the establishment of a comprehensive land management process across the state. The South Australian Settlement process allows for agreements to be made through use of the ILUA process or through consent determinations.[21] Under the new Victorian Government Settlement

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[18] Reforms are proposed to the negotiation process under the NTA, and various other provisions: Native Title Amendment (Reform) Bill (No. 1) 2012, introduced 3 September 2012; see http://www.ag.gov.au/Consultations/Pages/Currentnativetitlereforms.aspx .

[19] The NNTT records 44 future act agreements fully concluded in 2011-12 and 67 partly concluded, above n 12, 55.

[20] NNTT, *Annual Report 2010-11,* available from www.nntt.gov.au , 13.

[21] Government of South Australia, *South Australian Native Title Resolution* (20 July 2009) <http://www.iluasa.com/>; AIATSIS, *South Australian Settlement Framework* <http://www.aiatsis.gov.au/ntru/docs/researchthemes/agreement/broadsettlements/SouthAustralianSettlementFramework.pdf>.

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Framework in the *Traditional Owner Settlement Act 2010* (Vic), the Victorian Native Title Unit conducts agreement-making and responds to applications for determinations of native title in the court system.[22] The Settlement Framework seeks to pre-empt court decisions by conducting direct negotiations with traditional owner groups. Agreements under the Victorian Framework generally include a declaration that the group will cease native title applications in relation to the agreed land and promises not to commence any such action in the future.

2.2.4 'Ancillary' agreements

An ILUA or future act agreement, or an agreement under a State settlement regime, may be signed together with one or more so-called 'ancillary' agreements such as a use or management agreement.[23] It is frequently the 'ancillary' agreement that contains the real economic deal and that may generate payments and other benefits that are significant to the economic development of traditional owners. These 'ancillary' agreements are particularly common in some states, especially Western Australia, and they need to be recognised as part of the native title agreement process in considering tax consequences of native title agreements.

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[22] Department of Justice (Vic), *Native Title* (24 December 2010) <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/>. For information on the WA State Government approach to native title agreements see http://www.dpc.wa.gov.au/lantu/Pages/WholeofGovernment.aspx .

[23] The NNTT recognises these 'ancillary' agreements in relation to future acts: NNTT, *ILUA or the right to negotiate process? A comparison for mineral tenement applications*, (December 2008) <www.nntt.gov.au>.

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3 Case study

This paper will utilise one major case study and a number of more specific examples, to illustrate the various tax issues that may arise in respect of native title.[24] The Case Study is based loosely on existing native title agreements where payments and benefits are public; we have Rio Tinto and the Kimberley Land Council to thank, in particular, for their open and transparent approach to publishing native title agreements (unfortunately, most native title agreements remain secret).[25] It must be noted that this kind of highly valuable, long term and comprehensive agreement remains highly unusual; most ILUAs are much smaller, simpler and less valuable.

Basic facts

An Indigenous claim group, comprising three clans led by individual elders, who are together represented by a Native Title Service Provider, enter into negotiations with a major resource company, and the State government, in relation to a proposed mining project. The mine life is expected to be 30 years. The group has lodged several native title claims with the NNTT and exercises its 'right to negotiate' in respect of issue of mining rights by the State government. The native title claims have not progressed beyond lodgement when negotiations commence.

During the course of negotiations, individuals who were part of the native title claim groups participated in heritage surveys including identification of sacred sites and analysis of potential mine impact. Their costs and expenses were paid by the resource company and individuals sometimes received directly a per diem or fee, while this was sometimes paid to the Native Title Service Provider as agent for the native title claim groups.

After some years of negotiations, agreement is reached between the resource company, the State government and the Indigenous claim group. The main agreement is registered as an ILUA and states that it settles all 'compensation' issues with the resource company and the State government for past and future incursions on native title in respect of this mining project. A series of 'ancillary' agreements provide payments and benefits from the resource company in association with the ILUA.

Two years later, some of the native title claims are upheld, however not all of the native title claims are established for the mining project area. The native title that is established is held on trust by a PBC established as a CATSI corporation, for the Indigenous claim group. The PBC does not receive any payments under the ancillary agreements.

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[24] Summaries of agreements, including location, date, parties and basic content, sometimes with primary documents, are searchable at <www.atns.net.au>.

[25] Rio Tinto has adopted an open process of obtaining a 'social license to operate', see Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a context of Globalisation' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004), 239.

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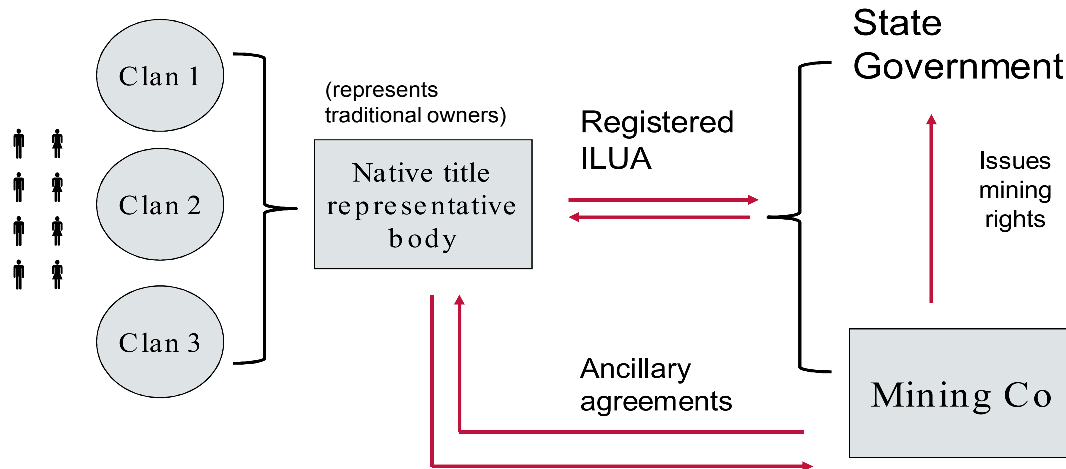
Figure 1

Case study - Agreements

- *Negotiations under the NTA*



Payments and benefits under the agreements

The ancillary agreements provide for the following benefits for the Indigenous claim group:

1. A lump sum of $500,000 paid on signing the ILUA, to establish goodwill and capitalise the various legal entities established by the Indigenous claim group;
2. Annual cash payment, determined by value of output of the mine;
3. Annual profits-based cash payments, calculated as a fraction of profits of one mine. If the mine does not record a profit in a year, these payments are not made;
4. Provision of land owned by the resource company in the local township as freehold title (not subject to the native title claim);
5. $500 000 Employment and Training Budget for employment, training and youth education programs managed by the resource company.
6. $150 000 Cultural Awareness Fund, to be operated by the resource company, cultural heritage survey, site protection plans and ranger programs and a Cultural Awareness Course run by the traditional owners which all resource company staff must complete. For the heritage and ranger programs, this fund pays all costs of the individual Indigenous traditional owners who carry out the heritage survey for new work including a daily fee;
7. Support for Indigenous community development including construction of a recreation centre in the community by the resource company (on government land);
8. Preferential contracting for Indigenous business enterprises carried out by an Indigenous Development company ID Pty Ltd (see below) supplying to the mine and other operations.

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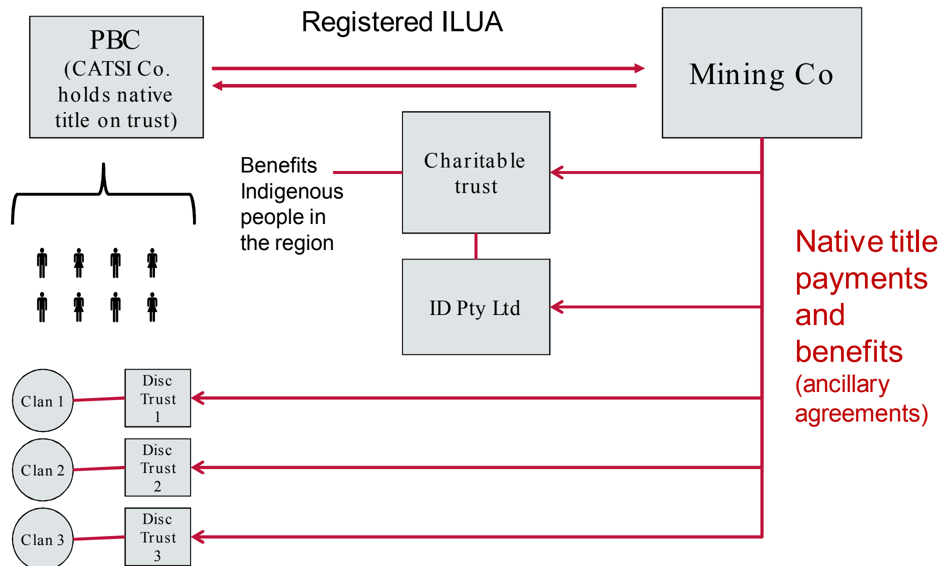
Figure 2

Case study – Entities and payments

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



Entities established pursuant to the agreements

The freehold land, and the cash payments received under the ILUA are distributed in agreed proportions to these entities established by the Indigenous claim group:

Discretionary trusts: Directly to a separate discretionary trust in favour of each traditional owner clan, identified by named elders. The discretionary trusts pay out sums directly to individual clan members as determined by the clan.

Charitable trust: A charitable trust for the purpose of poverty relief and advancement of Indigenous people in the region, comprising both the Indigenous claim group and other Indigenous people who live in the community. The charitable trust has a fund that provides education scholarships for members of the claim group and are utilised to receive payments. It has another fund called the Sustainability Fund, in which the cash payments are invested for the life of mine.

Development company: A proprietary company called Indigenous Development Pty Ltd, which is taxable and in which all shares are owned by the charitable trust. ID Pty Ltd will operate businesses for the Indigenous claim group.

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4 Income taxation of native title payments

The current income tax treatment of native title payments to recipient traditional owners is uncertain. The Treasury *Consultation Paper* suggested that 'payments provided under a native title agreement may or may not be assessable income' for a claimant group.[26]

A native title payment may be taxable as ordinary income or be specifically included by a statutory provision, including a net capital gain under the capital gains tax ('CGT') regime, under the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997') or the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936'). There are no court decisions on the income tax treatment of native title payments so general income tax principles will apply. On this basis, income tax treatment of native title payments depends on their character in the hands of the recipient.[27] While the purpose of the agreement and the compensation framework of the NTA are relevant, tax treatment will also depend on the legal form, mode of payment and character of the underlying rights.[28]

The Commissioner of Taxation has not issued any public binding guidance as to the income taxation of native title payments. However, the Commissioner has applied a 'compensation' analysis to find that native title payments will not be taxable, in a handful of private binding rulings ('PBRs') provided to native title claim groups.[29] This has provided a solution for some native title claimants. However, such a pragmatic approach is of little use to participants in native title negotiations if it is not stated clearly in a public, binding ruling applicable to all such negotiations.

4.1 Are native title payments ordinary income?

The Commissioner's position in available private rulings to date seems to be that the native title payments under consideration have a 'capital' character and not the character of ordinary services, business or property income. A payment that compensates for the loss, damage or extinguishment of a capital asset, diminution of value of an asset, or loss or impairment of earning capacity, would be

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[26] Treasury, above n 3, 4.

[27] *Federal Coke v FCT* (1977) 7 ATR 519.

[28] For a detailed analysis see Stewart, above n 2; Fiona Martin, 'Native Title Payments and their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach?' (2010) 33 *University of New South Wales Law Journal* 685; Julie Cassidy, 'Black Fella Land — White Fella Tax: changing the CGT implications of aboriginal/native title' (2010) 25 *Australian Tax Forum* 397; Julie Cassidy, 'Black Fella Land: White Fella Tax: Changing the CGT Implications of Aboriginal/Native Title' in Georg Kofler et al (eds), *Taxation and Human Rights in Europe and the World* (IBFD Publications, 2011) 327; Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments' (1999) 2 *Journal of Australian Taxation* 344; Warren Black, 'Transferring Native Title to a Body Corporate under the Native Title Act 1993 (Cth) — Can CGT Arise?' (2000) 3 *Journal of Australian Taxation* 155.

[29] ATO, PBR 53360; PBR 77829; PBR 83511; PBR 1011313296606; PBR 1011311599424; PBR 1012055735265, available from the Register of Private Binding Rulings <http://www.ato.gov.au/rba/>. PBR 77829 is an extension of PBR 53360 in respect of the same facts. The Register contains anonymised texts of private rulings provided to specific entities or individuals who requested the ruling. Private rulings are binding on the ATO only in respect of the particular applicant, years and arrangement ruled upon so strictly speaking have no precedential value. However, in the absence of other issued guidance, the rulings in the database provide an indication of how the ATO may approach similar fact situations.

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capital in nature, depending on 'the nature of the claim or cause of action in respect of which the payment was made'.[30]

Private ruling PBR 53360 considered a native title agreement in a context in which native title had not actually been determined. The agreement provided, amongst other things, for 'the payment of compensation to a discretionary trust for the benefit of the native title claimant group in connection with the effect [of the activities] on Native Title rights and interests of the Claim Group.' The ruling states:

> It has been suggested that the payments made under the agreement are compensation payments made for the effect that the project has and will have on the 'claimed' Native Title rights and interests of the Claim Group. We note that Native Title has not yet been granted, however, it is apparent that the payments are being made on the assumption that there is a genuine Native Title right to the area involved and thus an 'asset' has been established.[31]

The NTA compensation regime has some similarities to older State mining compensation regimes. The Commissioner in PBR 53360 relies on cases concerning compensation payments for landowners in respect of mining: *Barrett v C of T* (1968) 118 CLR 666 ('*Barrett*') and *Nullaga Pastoral Company Pty Ltd v FCT* (1978) 78 ATC 4329 ('*Nullaga*'). In *Barrett*, payments to the owner of a farming property from a mining company who mined soapstone on the property were held to be capital in nature. The mining was conducted under a licence granted by a State corporation, which owned the minerals. The mining company paid the farmer in each year in instalments, an amount of 5s for every ton of soapstone removed from the land during the year. Owen J accepted that the payments were 'to make good the estimated diminution in the value of the land and the amount of damage to it which it was anticipated might result from the carrying on of mining operations'.[32] In *Nullaga*, the Supreme Court of Western Australia held that two annual payments of $10 000 received by a pastoral company in exchange for granting a right to explore for and mine bauxite for 5 years on its farmlands, were capital (and hence not taxable). Wickham J held that the payments, agreed under the *Mining Act 1978* (WA), were made as 'compensation to the taxpayer for interference with and damage to the land and diminution in its value resulting from operations carried on or proposed to be carried on'.[33]

Barrett was applied in *Case B79* (1970) 70 ATC 366 in which a farmer who grazed sheep on Queensland Crown leasehold land received payments of $200 annually, for wells drilled by an oil company which held an authority to prospect under the *Petroleum Acts 1923-1967* (Qld). The payments were held to be 'convenient instalments of a total sum of compensation which may not yet be known with certainty.'[34] The Commissioner’s adoption of these authorities indicates that where a ‘compensation’ analysis can be made, even recurrent native title payments that are periodical in character, or analogous to royalties (even though not actually royalties) may be argued to be capital in nature.

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[30] *C of T v Sydney Refractive Surgery Centre Pty Ltd* [2008] FCAFC 190, [10]; *C of T v Smith* (1981) 147 CLR 578, 586 (Gibbs CJ, Stephen, Mason and Wilson JJ); *Commissioner of Taxes (Victoria) v Phillips* (1936) 55 CLR 144, 153 (Starke J), 156-157 (Dixon and Evatt JJ); *Glenboig Union Fireclay Co Ltd v IRC* (1922) 12 TC 427, 463-464 (Lord Buckmaster).

[31] ATO, PBR 53360, above n 29.

[32] *Barrett v C of T* (1968) 118 CLR 666, 672 (Owen J).

[33] (1978) 78 ATC 4329, 4331.

[34] Ibid 367.

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However, the private rulings issued to date fail to acknowledge that native title agreements are increasingly being negotiated on commercial terms. The exploitation of native title in a business-like way, with a profit-making intention, could lead to the characterisation of receipts as income.[35] The situation of native title claimants is also not fully analogous with that of landowners under the mining compensation regimes. The mining compensation cases are concerned mainly with physical damage and loss of economic earning capacity of land. The private rulings cite the mining cases without commenting on the difference between physical damage and other kinds of impacts on 'looking after country', the inability to exercise traditional legal rights of governance in respect of the land, or spiritual welfare. Finally, the private rulings sidestep the issue of the tax outcome should be if native title is not ultimately established, or if the native title claim is not pursued following the agreement, but rather is given up or withdrawn.

4.2 Does CGT apply?

The analogy between native title payments and mining compensation is appealing in a number of respects. Yet it is, generally *irrelevant* today whether a payment is compensation that is capital in nature under the tax law because CGT would now apply to any net capital gain generated by compensation payments such as were received in *Barrett* and *Nullaga*. The Commissioner of Taxation avoids the application of CGT in the issued private rulings, by an assumption that native title is a 'pre-CGT' asset:

> ‘Native Title is a traditional entitlement said to have been held since time immemorial. The capital receipt would not be subject to capital gains tax as the Native Title Rights and interests have been owned by the X people since prior to the introduction of capital gains tax and the Native Title rights and interests would therefore be pre CGT assets.’[36]

This analysis is based on the approach of the Commissioner to settlement agreements in Tax Ruling TR 95/35, para [70], which states that one must 'look through' a compensation agreement to identify the relevant underlying asset, which in this case is presumably the native title itself.

However, the treatment of native title as an exempt pre-CGT asset relies on a number of weak assumptions. Uncertainties in the CGT analysis have been exhaustively explored by others.[37] Issues include whether native title, or associated rights such as the ‘right to negotiate’, are an 'asset' as defined in the CGT rules before and after the 1992 amendments to that definition; the time of acquisition of this asset (that is, whether it is really a pre-1985 asset as defined); who is the taxpayer affected; what is the particular CGT 'event' applicable on entering into a native title agreement or on receipt of payments; the time of that CGT event; and how to ascertain the cost base of the relevant asset. The law does not, in sum, comfortably support the assumption in the Treasury Paper that '[c]ompensation payments for the extinguishment or voluntary surrender of native title rights would

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[35] *C of T v The Myer Emporium Limited* (1987) 163 CLR 199, 209-210 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ); *C of T v Whitfords Beach Proprietary Limited* (1982) 150 CLR 355, 360-361 (Gibbs CJ); *C of T v Montgomery* (1999) 198 CLR 639, 656-657 (Gaudron, Gummow, Kirby and Hayne JJ).

[36] ATO, PBR 53360, above n 29.

[37] See Cassidy, Martin, Black, above n 28.

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generally be regarded as compensation for the loss of a pre-CGT capital asset and therefore any capital gains or losses would be disregarded'.[38]

4.3 Heritage fees and fees for services

The question of how to treat heritage fees, payments for ranger or environmental services or reimbursement of costs to Indigenous individuals in respect of native title lands, or under heritage agreements, has been a vexed issue for some time. The payment of per diems, expenses and fees raises issues under income tax and GST. It has been observed that 'the most common 'individual' payments, are … salary or fees for cultural heritage surveys and clearances', either under native title agreements or under separate State cultural heritage legislation.[39]

The income tax issue for individuals who receive such payments is whether it is assessable income. This is a matter of applying the general income tax law rule as to whether there is ordinary income under s 6-5 of ITAA 1997 or statutory income under s 15-2, for example from services or from a business. Depending on the frequency, type of work and relationship between the individual, organization and state authority or resource company, it is possible that these activities could rise to the level of provision of services or a business, rather than being ad hoc payments in relation to activities of a private or cultural nature.

For the payer, or the Native Title Services Provider which acts as agent for the claim groups or individuals, an issue arises as to whether it should withhold tax on the payment.[40] It seems unlikely that an individual is an 'employee' of a resource company, or of the Native Title Services Provider, where the individual carries out heritage surveys and receives payment.[41] The ordinary meaning of employee requires an analysis of the facts in all the circumstances and relationship of the parties, with key emphasis on control of work, risk, whether there is payment for a result or integration with the payer's organization or business, none of which would be applicable in this case.

However, there is a possibility that the individual is a contractor or is supplying services in the course of an enterprise where provider does not give an ABN. Again, it seems unlikely that there is a delivery of a 'result' or similar as expected of a contractor, and nor would it seem that the traditional owner who carries out the heritage survey is conducting an enterprise. It seem most likely that the services provided are of a private or domestic nature, except that the extent of 'survey' activities and remuneration for them may accumulate to a substantial sum over time. Experience shows that it is likely that a payer will exercise caution, as the onus is to withhold if the payer has reasonable grounds to believe that activities are not 'private'.

Withholding tax issues can be avoided where an ABN is provided by the individual or his or her agent. It is possible for an individual, or an unincorporated group or the agent to obtain an ABN and this in itself will not lead to any further tax consequences.

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[38] The Treasury, above n 3, 4.

[39] Strelein, above n 2, 22.

[40] Under Div 12 of Pt 2-5 of Sch 1 to *Tax Administration Act 1986.*

[41] TR 2005/16.

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No withholding is required where a payment is non-assessable non-exempt income to the recipient. Thus, if the payment can be characterized as for an act affecting native title made pursuant to the native title agreement, rather than being for services, then there would be no withholding obligation.

4.4 Aboriginal Mining Withholding Tax (MWT)

A Mining Withholding Tax (MWT) is imposed at a rate of 4 per cent on certain payments from mining companies to eligible distributing bodies for the benefit of Aboriginal people, under Division 11C of ITAA 1936 (s 128U) and the Income Tax (Mining Withholding Tax) Act 1979 (Cth). Where the MWT applies, then the payment to an Indigenous person or entity is treated as NANE (s 59-15 of ITAA 1997). The MWT is collected under the PAYG regime.[42] The Treasury considered whether to extend the MWT to native title payments in its Consultation Paper (option (3)) (the Howard government had proposed to do this in 1998 but did proceed); the current government has rejected this approach, instead opting to exclude native title benefits from the tax regime altogether. [43]

The MWT was established in 1979 and has had relatively limited operation, primarily in the Northern Territory and in Queensland. It does not specifically apply to native title payments under the NTA, and the definition of Aboriginal land and other aspects does not fit well with the language of the native title regime. However, nor does the MWT specifically exclude them. The Commissioner has issued some private rulings in respect of the possible application of MWT to native title land and has found that in some cases, MWT can apply.

The concept of ‘Aboriginal land’ is defined in s 128U of ITAA 1936 as ‘any estate or interest in land that, under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals, is held for the use or benefit of Aboriginals’. In PBR 1011355966185 and PBR 1011356170176, the Commissioner concluded that where lands were subject to a native title claim that was not yet determined, in respect of land that did not otherwise qualify as Aboriginal land, then there was no ‘estate or interest in land’ under provisions of ‘a law of the Commonwealth or of a State or Territory’, because native title is established at common law and the right to seek a determination was said to be ‘personal’ in nature. Consequently, payments made before native title is made out were held not to be subject to MWT. However, once native title is made out in respect of some lands, then the Commissioner concluded that this would be an ‘estate or interest’ under the NTA. This seems to be consistent with native title law as briefly explained in Part 2 above.

As a determination of native title may attract MWT, it is necessary to consider how the rules apply to the PBC which ‘holds’ the native title, and which may receive payments. In PBR 1011355966185, the Commissioner concluded that ‘production payments’ calculated as a percentage of ex mine gate value of product qualified as ‘mining payments’ that were paid as compensation and hence were subject to the MWT. The mine gate value was based on the sales value of product shipped from the mine. In accordance with the known contract price of product shipped from the mine, a sales value

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[42] Section 12-320 of Sch 1 to the Taxation Administration Act 1953 (Cth).

[43] A detailed analysis of the MWT is in Fiona Martin, ‘Native Title Payments and their Tax Consequences: Is the Federal Government’s Recommendation of a Withholding Tax the Best Approach?’ (2010) 33(3) *UNSW L J* 685. The author agrees with the recommendation of Martin not to extend the MWT to native title and furthermore, that there are strong arguments to repeal the MWT altogether.

was calculated from which deductions are then made for costs associated with shipping and sale of the product, paid periodically in arrears by the company. However, so-called 'establishment payments' for costs incurred by the association of the Aboriginal people in forming the agreement, 'administration payments' contributing to the ongoing costs of administering the agreement and 'Community payments' to each of the local Aboriginal communities and a payment to the Aboriginal community association were not subject to MWT.

4.5 Application to Case Study: current law

To the extent that cash or assets are paid or transferred into discretionary trusts, for benefit of native title clans and individual members, or to ID Pty Ltd, income tax consequences must be considered. This requires consideration of the character of the assets or cash in the hands of the recipient. To the extent that cash or assets are paid or transferred into the charitable trust, they will not be taxable.

The ILUA states that the whole agreement and the ancillary agreements are for purposes of compensation. This may or may not give specific payments this character. None of the discretionary trusts or the proprietary company hold the native title for which the Indigenous claim group is being compensated. When native title is finally established, it is 'transferred' from the native title holders to be held on trust by the PBC for them collectively. However, this is unlikely to affect the tax character of the payments.

Item (1) (the initial $500,000 payment) and Item (4) (one-off transfer of freehold title to land) appear to be compensation of a capital nature. These also appear to be received as capital amounts on ordinary principles (they are not recurrent, substituting for an income stream, or generated by services, business or investment activity).

The argument is more difficult with respect to the royalty-type recurrent payments in Item (2) and the profit-based cash payments in Item (3), which look more like a business profit-sharing arrangement in respect of the mine. However, following the approach in *Barrett, Nullaga* and *Case B79* which are relied on in the ATO private rulings, it appears that the recipients could still argue that even these recurrent payments are compensation for loss of use of land, or damage to it (ie, for acts affecting native title) and so are capital. Moreover, in *Cape Flattery Silica Mines v FCT* (1997) 97 ATC 4552 (a deduction case, discussed below), it was accepted that a profit-based recurrent payment made to an Indigenous community was compensation for loss of use of land or damage to the land. If this analysis can be accepted, then these payments would also not be ordinary income.

The ATO considers that amounts of capital compensation in respect of native title should be treated as not giving rise to a taxable capital gain because the underlying native title is a pre-CGT asset. A question arises as to whether the 'transfer' of this pre-CGT asset to the PBC to be held on trust for traditional owners gives rise either to CGT or to the loss of pre-CGT status, by application of CGT event E1 (s 104-55) or E2 (s 104-60). As native title is a communally held asset and there will be multiple 'beneficiaries', the exception for a sole beneficiary absolutely entitled will not apply, although the trusteeship of native title by the PBC is akin to a bare trust.

How should these amounts be treated if native title is never established, as on our Case Study facts, in respect to part of the relevant land? According to PBR 53360, amounts would be compensation even if native title is not made out; again, this appears to be a pragmatic solution.

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Items (5), (6), (7) and (8) are not received by the various entities as income. However, individuals who receive salary, heritage fees or reimbursement of costs may be assessable under s 6-5 if these qualify as ordinary income. The right to preferential contracting in Item (9) for ID Pty Ltd is not likely to be income in its hands, but may be a CGT asset. Contract fees would, however, be ordinary business income to it.

Finally, the ATO's approach to 'production' payments in respect of mining on land where native title has been determined, suggests that MWT should apply and be withheld by the payer under current law.

5 Tax reform for native title payments

5.1 Tax reforms will legislate NANE treatment

The Treasury in its 2010 Paper proposed as Option (1) a legislated exclusion from taxation for 'payments made under native title agreements' to address the uncertainty about tax treatment of native title payments.[44] In 2012, it was announced that the government would proceed with Option (1) and Exposure Draft legislation was released.[45] Twenty submissions were received. The reform was introduced, following some revisions, into the House of Representatives in *Tax Laws Amendment (2012 Measures No. 6) Bill 2012, Schedule 1*. The Bill was referred to committee, which reported on 13 February 2013.[46] The committee discussed various submissions carefully, but ultimately recommended enactment of the Bill as drafted. In debate on the Second Reading in the House of Representatives, Shadow Treasurer Joe Hockey stated that the Opposition would seek to excise Schedule 1 from the Bill, as requiring further analysis.[47] At the time of writing, the reform has not yet passed. When enacted, the changes are expected to apply retrospectively to native title benefits received on or after 1 July 2008.

The main purpose of the amendments according to the Explanatory Memorandum is to 'clarify that amounts or benefits that may otherwise be assessable income for an Indigenous person or an

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[44] Treasury, above n *, 2, 8–10, and Section 3.1.

[45] The Hon Nicola Roxon MP, Attorney-General, Media Release (6 June 2012); The Hon David Bradbury MP, Assistant Treasurer, 'Release of Exposure Draft Materials to Provide Clarity on the Tax Treatment of Native Title Benefits', Joint Media Release with Attorney-General Nicola Roxon MP, MR No. 079 (27 July 2012) releasing *Exposure Draft Tax Laws Amendment Bill 2012: insert Tax Treatment of Native Title Benefits* and accompanying *Exposure Draft Explanatory Material*, available from http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Tax-treatment-of-native-title-benefits .

[46] House of Representatives Committee on Economics, *Advisory Report on Tax Laws Amendment (2012 Measures No. 6) Bill 2012* (13 February 2013) (the 'Committee Report'), available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=economics/taxlawsno6/report.htm

[47] Parliament of Australia, Hansard, House of Representatives, 14 February 2013, available from http://www.aph.gov.au/Parliamentary_Business/Hansard .

Indigenous holding entity are NANE income if the amount or benefit is a native title benefit'.[48] This is accomplished by inserting new s 59-50 into the ITAA 1997. Division 59 contains miscellaneous NANE rules; in particular, s 59-15 already provides NANE treatment for mining payments which are subject to the Aboriginal Mining Withholding Tax (Div 11C of ITAA 1936). However, in contrast to mining payments, native title benefits that are NANE under this provision are also explicitly excluded from the application of the MWT and so generate no tax consequences at all (new paras (d) and (e) in s 128U(1) of ITAA 1936).

The operative provision provides NANE treatment as follows:

> '**Section 59-50 Native title benefits**
>
> (1) 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 if you are an *Indigenous person or an *Indigenous holding entity.
>
> (2) 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 if you are an *Indigenous person or an *Indigenous holding entity. ...'

The provision is intended to allow NANE treatment for native title benefits that are passed on to further eligible entities, or individuals, by the original recipient.[49]

The Bill also inserts new s 118-77 which disregards a capital gain or capital loss that may arise if native title, or the right to be provided with a native title benefit, is subjected to or transferred to a trust.

5.1.1 Native title benefit

Section 59-50(5) defines a 'native title benefit' as:

> '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.

A non-cash benefit is defined in s 995-1 of ITAA 1997 as 'property or services in any form except money', including a constructive receipt rule. Note 1 to para (a) explains that 'an agreement' can

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[48] Explanatory Memorandum to Tax Laws Amendment (2012 Measures No. 6) Bill 2012 ('the *EM*'), [1.17].

[49] Ibid., paras [1.19]-[1.20].

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include an ILUA, a 'future act' agreement, or an agreement under a State settlement regime such as that established in the *Traditional Owner Settlement Act 2010 (Vic)*.

Paragraph (b) dealing with 'compensation' may apply in a few cases for example, a State act of extinguishment of native title generates compensation determined under the NTA (perhaps under a court order). However, the majority of cases will be under paragraph (a) relating to agreements.

'To the extent'

Under s 59-50(5)(a), NANE treatment is limited by an apportionment rule '*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 ...'.

An issue may arise as to the application of this apportioning rule. It seems to require an analysis of whether **each** payment or benefit 'relates' to an act that would extinguish native title or is otherwise inconsistent with the existence, enjoyment or exercise or native title rights and interests. For some simple agreements, there may not be any issue. However, as one mining company has pointed out, 'although the financial benefits payable in accordance with these kinds of agreements may include 'compensation' for the impairment or extinguishment of native title, the payments are made in consideration for a range of agreements and commitments, not only in relation to native title'.[50] For such a comprehensive agreement (as in our Case Study), the wording of (5)(a) seems to call for the ATO (and the parties) to examine and determine the purpose of **each** payment or benefit in the agreement.

The Explanatory Memorandum to the Bill does not give an example of a set of facts which would require apportionment. The only example seems to imply that a holistic analysis is intended:[51]

> '**Example 1.8: Indigenous Land Use Agreement and native title benefits**
>
> 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.' [emphasis added]

It seems from this example that the fact that payments or non-cash benefits are structured as 'profit-sharing' or 'milestone lump-sum' payments under an ILUA does not prevent them all 'relating' to an act affecting native title. However, the matter is not free from doubt. The author previously submitted in response to the Exposure Draft that such an apportioning exercise would be difficult, if not impossible to carry out in practice.[52] The overall agreement (the ILUA and ancillary agreements) may

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[50] BHP Billiton Ltd, Submission to Commonwealth of Australia, Treasury (Cth), *Submission on the Consultation Paper – 'Native Title, Indigenous Economic Development and Tax',* 30 November 2010, 3, <http://www.treasury.gov.au/documents/1916/PDF/BHP_Billiton%20.pdf>.

[51] EM, above n 48, para [1.27].

[52] ATNS Submission to the Exposure Draft Legislation, available from www.atns.net.au .

satisfy the condition of relating to an act affecting native title, but it may be difficult to demonstrate the relationship with respect to each amount or benefit. The onus is on the native title claim group or individual who receives the payment or benefit to demonstrate that they fit within this provision and hence are eligible for NANE treatment. The problem was also raised by others regarding the Exposure Draft, and in submissions on the Bill to the House Committee, with one respected advisor terming such an investigation 'a Kafka-esque inquiry'.[53]

The Committee considered the matter in some detail and put it to Treasury and ATO representatives. The response from government was that broadening the provision would raise 'integrity' concerns, and this was accepted by the Committee. Ultimately, the Committee concluded that:

> 'The proposals to broaden the definition of native title benefit are too broad and would serious affect the integrity of the measure. If the tax exemption applied to any commercial arrangement, the integrity problems would be readily apparent and the provisions would be soon amended. The committee would prefer that the Schedule proceed as proposed. The ATO has stated that the Schedule will give the required clarification in cases where Indigenous communities have paid tax. Future agreements can be structured to take into account the new law. '[54]

It is expected, therefore, by the legislature that parties will 'structure' agreements in order to ensure NANE treatment as agreed by the parties, in respect of land subject to native title claims. Tax advisors and lawyers, take note!

What is an act affecting native title?

The matter is made more difficult as there is not clear authority as to what is 'an act affecting native title'. The definition of 'native title benefit' in the Exposure Draft referred only to 'an act affecting native title'. The revised wording in the Bill simply picks up the definition of 'an act affecting native title' in s 227 of the NTA, as follows:

> 'Section 227 [NTA] Act affecting native title
>
> An act affects native title if it **extinguishes** the native title rights and interests or if it is **otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise**.' [emphasis added]

The issue of whether there is an 'act affecting native title' has not been the subject of much legal interpretation even in the arena of native title law, let alone in respect of its tax implications. However, limited authority suggests that this is not to be broadly interpreted to mean every kind of activity in respect of traditional lands. Rather, it refers to a **legal** impact on the native title rights and interests.

There are two kinds of 'acts affecting native title' under s 4(3) of the NTA: past acts (defined in s 228 of the NTA) and future acts (defined in s 233 of the NTA). It has been observed that 'the statutory definition of future act does not make immediately clear the characteristics of such an act'.[55] French J (as he then was, in the Federal Court of Australia) explained in *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Qld* (2001) 185 ALR 513 at para [47] that 'A future act by definition is an act

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[53] Arnold Bloch Leibler & Yamatji Marlpa Aboriginal Corporation, Submission 4 to the Committee Inquiry, 2-5; Mr Peter Seidel, ABL, Committee Hansard, Canberra, 30 January 2013, 20; Fiona Martin, Submission 1, 3-4.

[54] Committee Report, above n 46, para [2.40].

[55] *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 271 ALR 624

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which, the NTA apart, validly affects native title in relation to the land … to any extent or is invalid because of the effect it would have on native title were it to be valid … ‘. It is not sufficient to establish that an act ‘might’ affect native title.[56] In *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 it was held that a proposed mineral exploration licence extension was a ‘future act’ affecting native title. On the basis of this limited authority, it seems that legal ‘acts’ such as making or extending mining or exploration rights would satisfy the definition.

One possible circumstance in which apportionment would be required under this test could be where there is an ‘ancillary’ agreement that refers to activity both on the native title claim area and on another area of land which is not native title (and which is perhaps owned as freehold by the Indigenous claim group). In this case, it would seem that amounts or benefits that clearly relate to the non-native title land could be separately identified and would be excluded from NANE treatment.

What if native title is not established?

A related issue concerns the outcome if native title is ultimately found not to exist on all or part of the land subject to an agreement. This could be quite a common situation, and is illustrated in our Case Study. An ILUA will stand between the parties even if native title is not made out. If NANE treatment were not to continue, this would generate very significant uncertainty for all parties in negotiations.

The Committee heard submissions and records the response from Treasury on this issue, as follows:

> ‘Our clear intention was, as the explanatory memorandum said, to give effect to the government's decision that it should apply in such cases. That would be consistent with the way we understand Indigenous land use agreements are treated under the Native Title Act. We gave those instructions to Parliamentary Counsel. These are the words they came up with. Their advice is that it does give effect to that intention. I accept that it is possible to interpret it in a different way, but where you are confronted with two interpretations that are potentially at odds, the Acts Interpretation Act would require you to prefer the interpretation that gives effect to the legislative intent. I would expect the Taxation Office to take that view. The legislative intent is clearly stated in the explanatory memorandum.’[57]

It is the author’s view that the provision as drafted most likely produces the right outcome. It refers to ‘an act that **would** extinguish… or that **would** otherwise affect …’ native title rights and interests. Actual extinguishment of established native title is not required and the link to an agreement means that where the agreement stands, NANE treatment should also stand.

It must be noted that the conclusion of the Committee on these issues, suggesting that an appropriate interpretation of the statute will be applied by the ATO as expressed in the EM, needs to be treated with caution. The Committee appears to be applying a sensible balance between an unduly tightly drafted rule and a rule that it considers to be too broad. Yet recent experience of judicial approaches to interpreting tax legislation suggests that judges may be less likely to take account of policy intent as stated in the EM, than the Committee or Treasury expects. There has been no litigation to date on native title payments and taxation, and we have yet to see how the provision will be applied in practice by the ATO and hence, how a court may interpret it in future.

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[56] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Qld* (2001) 185 ALR 513 at [61], [70], [114].

[57] Mr Gregory Pinder, Treasury, Committee Hansard, Canberra, 30 January 2013, 32, quoted in Committee Report, above n 48, para [2.36].

5.1.2 Payments to Indigenous individuals

The NANE treatment will apply where a native title benefit is provided either directly to an Indigenous person or to an 'Indigenous holding entity'. The new definition of Indigenous person included in s 995-1 of ITAA 1997 encompasses both Aboriginal and Torres Strait Islander peoples. It is uncontroversial and references well-established concepts used elsewhere in Australian law as follows:

> 'an individual who is:
>
> (a) a member of the Aboriginal race of Australia; or
>
> (b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.'

From a policy perspective there has been a debate about whether it is appropriate to provide NANE treatment for payments to individuals. As discussed below, some payments to individuals, for example as remuneration for services, will be excluded in any event. However, payments that relate to extinguishment or an act affecting native title may be eligible for NANE treatment.

The MCA and some resource companies, including BHP Billiton and Rio Tinto, have expressed concern that payments to individuals may not benefit the community as a whole, or for the long term. The Committee observed in its Report that mining groups:

> 'were especially concerned that the Bill could encourage substantial up front payments to individuals at the expense of longer term, inter-generational goals.'[58]

The concern was expressed in the final Report, quoting views at Committee hearings, as follows:

> 'The mining sector was strongly of the view that the Schedule should not proceed because it would have the unintended consequence of encouraging large payments to individuals, which would be contrary to long term development goals:
>
>> 'I think that the question comes back to the behaviour that you are trying to drive by these tax amendments … If you enacted the legislation or the bill as it is currently, there is no incentive … to have today and tomorrow money. There is a positive incentive to distribute everything immediately. Rio Tinto publicly stated in 2011 that the value of these native title benefits paid out under our agreements in the Pilbara alone was $100 million. That is distributed among five, six or seven agreements, but that is a lot of money to be distributed every year as a straight distribution.'[59]

We have yet to see the impact of these reforms. The Committee ultimately accepted evidence from both Aboriginal and mining representatives that current agreement structures generally allow only for small payments to individuals, with the majority provided for long-term collective benefit in either charitable or discretionary trusts. In this author's view, this practice of making only small payments to individuals is most likely to continue, and may be encouraged in other ways including assistance with governance of PBCs and transparency and advice about best practice agreements. Larger payments to individuals will have other implications including an impact on eligibility for social security age

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[58] Committee Report, above n 48, para [2.5].

[59] Ibid, para [2.15], quoting Miss Catherine Crompton, Rio Tinto, Committee Hansard, Canberra, 30 January 2013, 21; and see Mr Mark Donovan, BHP Billiton, Committee Hansard, Canberra, 30 January 2013, 22, referenced by the Committee at [2.16].

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pension or unemployment benefits. It is ultimately up to traditional owners, who claim and hold native title collectively as a communal asset, to determine the proper allocation of agreement benefits to individuals, and for the collective long-term benefit, based on their own decision-making processes. However, there is a case for establishment of an new entity form that will allow long-term accumulation and investment of native title benefits outside of a charitable structure as discussed in part * below.

5.1.3 Payments to Indigenous holding entities

The NANE treatment also applies to native title benefits received by, or that can be traced through an 'Indigenous holding entity', as long as the benefit is ultimately received by an Indigenous person or an Indigenous holding entity. Tracing may take place through multiple eligible Indigenous holding entities.An 'Indigenous holding entity' is defined in proposed new s 59-50(6) as follows:

(a) a *distributing body; or

(b) a trust, if the beneficiaries of the trust can only be *Indigenous persons or distributing bodies.

Distributing bodies

The concept of 'distributing body' is derived from the term used in respect of the MWT (referred to in s 59-15). Unfortunately, the definition has not been rewritten into the ITAA 1997, but remains in the ITAA 1936 (s 128U), amended slightly and cross-referenced in s 995-1. A distributing body is defined to mean (only):

(a) an Aboriginal Land Council established by or under the Aboriginal Land Rights (Northern Territory) Act 2006; or

(b) a corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or

(c) any other incorporated body that

(i) is established by or under provisions of a law of the Commonwealth or of a State or Territory that relate to Indigenous persons; and

(ii) 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.'

This definition **excludes** a regular proprietary company (even if owned by Indigenous persons or entities), a company limited by guarantee, or an incorporated or unincorporated association that is established under general State laws regarding associations. A company acting as trustee will, however, be eligible as a 'trust' to be an Indigenous Holding Entity.

Concerns were raised in respect of the Exposure Draft and the Bill as introduced, that this definition of distributing entity is too narrow. In particular, several submissions asked why the definition did not cover companies or associations established under general law, that is, not under a law relating to Indigenous persons, but which may have as members only Indigenous persons, or entities associated with them. Such a condition could be included in the memorandum and articles, or rules, of a

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company or association if needed. Again, the concern seems to have been one of integrity here, yet it would be possible to draft the rule so that NANE treatment was lost if a non-qualifying entity or person obtained an ownership interest in the entity.

Trusts

The definition of 'Indigenous holding entity' includes under s 59-50(6)(b):

> 'a trust, if the beneficiaries of the trust can only be *Indigenous persons or distributing bodies.'

Under this rule, payments that satisfy the definition of native title benefit may be made to a discretionary trust, or a fixed or unit trust, which has a class of beneficiaries that can only include Indigenous persons as defined or eligible distributing bodies. Presumably, 'beneficiaries' in this provision includes the 'objects' of a discretionary trust. As indicated in the ATO private rulings and our Case Study, in many cases a discretionary trust may be established to receive payments or benefits. The ATO has indicated that where payments can be characterized as compensation for native title, it would take the view that these are non-taxable in any event. The proposed reform will legislate this result.

Currently, many native title claim groups establish charitable trusts to receive some native title payments for public benefit (such as, for the relief of poverty, education, or other purpose of public benefit). It is not clear, on the current wording of s 59-50(6), whether a charitable trust will be eligible for NANE treatment, even if it is only for the purpose of benefiting Indigenous people. A charitable trust is, at law, a trust 'for purposes' and not for the benefit of individual or other persons.[60] If the ordinary interpretation of 'beneficiaries of the trust' were to be applied, that would imply that this provision cannot include a charitable trust as it does not have 'beneficiaries'.

In most cases, it will not matter whether a charitable trust is eligible for NANE treatment under s 59-50 because, applying the rules in Div 50 of ITAA 1997, a charitable trust will be tax-exempt in any event. However, there is a possibility that a charitable trust that benefits Indigenous persons may, for some reason fail to qualify for tax-exempt status even though it is charitable. One possibility could be that it conducts its operations internationally, and so fails the 'in Australia' condition for tax exemption. A question arises as to whether such a charitable trust, which is solely for the purpose of benefiting Indigenous persons, should nonetheless eligible for NANE treatment. This would seem to be consistent with the treatment for Indigenous persons or other entities.

I understand informally from some government representatives that it is intended that charitable trusts are to be included as eligible entities for s 59-50(6), and I have asked for clarification on this point, but have not had a response at the time of writing.

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[60] *AG (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209 (Dixon and Evatt JJ), 222; *Re Godfree (decd)* [1952] VLR 353, (Herring CJ),t 356, approved in *Sydney Homoeopathic Hospital v Turner* (1959) 102 CLR 188 (Dixon CJ), 203; *Re Inman (decd)* [1965] VR 238 (Gowans J), 241.See Laws of Australia, TLA [15.13.106] (updated by Dal Pont).

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Flow through of NANE treatment

The Explanatory Memorandum provides an illustration of a native title benefit received indirectly in Example 1.2, in which a company acting as trustee receives a $2 million native title benefit from an agreement with a mining company (Indigenous Holding Entity A). It then passes the benefit in full to Indigenous Holding Entity B, which pays a portion of that amount to an Indigenous person. In all hands, the amount qualifies for NANE treatment. The EM explains that a flowed through amount or benefit 'must have retained its connection to the native title benefit along the chain of transfers' (para [1.21]). Presumably, records must be kept that trace this native title benefit status. Once native title benefit status is lost, it cannot be regained.

Note that this provision does not allow tracing of a native title benefit through one trust to another trust. This is because a trust is only eligible if its beneficiaries are Indigenous persons or other distributing bodies, but not other trusts (even if those trusts would only have Indigenous beneficiaries). This means that structures common in the SME area (such as a unit trust, in which unit holders are trustees of discretionary trusts), are not possible in respect of native title payments for which NANE treatment is sought.

More generally, it is very common as a matter of drafting of trust deeds, for a discretionary trust to include in its objects a charitable trust. If a charitable trust is an 'object' of such a discretionary trust, this would disqualify that discretionary trust entirely from NANE treatment, because the charitable trust is not an Indigenous person or a distributing entity, and in any even does not have 'beneficiaries' as explained above. There would seem to be considerable merit in allowing NANE treatment for native title payments to a discretionary trust to benefit Indigenous persons, where a possible object of that trust is a charitable trust that is also solely for the purpose of benefiting Indigenous persons.

5.1.4 Exclusions from NANE treatment

There are some explicit exclusions from NANE treatment, even where an amount or benefit would otherwise qualify. Proposed section 59-50(3) excludes any amount or benefit to the extent that it:

> '(a) is for the purpose of meeting the provider's administrative costs; or
>
> (b) is remuneration or consideration for the provision of goods or services.'

The administration costs exclusion mirrors an exclusion in s 59-15 regarding mining payments. It is broadly expressed, but includes the situation where an Indigenous Holding Entity (such as a CATSI corporation) provides administrative services to another Indigenous Holding Entity (such as an Aboriginal Land Council), and receives a fee for that service. The amount received by the service provider would not be NANE as it is for the administrative costs of the paying entity (this is Example 1.5 in the EM). On these facts, it appears that this amount would also be excluded from NANE treatment in the hands of the recipient because it would be consideration for a service, as is illustrated by Example 1.7 of the EM, which excludes from NANE treatment a fee for accounting services paid to an Indigenous person by an Indigenous holding entity.

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The remuneration or fee for service exclusion will have implications for native title benefits that are used to fund heritage surveys or other kinds of service to be provided by the Indigenous claim group or particular Indigenous individuals. This is illustrated by Example 1.6 in the EM (para [1.23]):

> '**Example 1.6**: Native title agreement and services provided
>
> As part of an ILUA a native title group enters into with a mining company, the mining company agrees to employ some members of the native title group to undertake heritage surveys. The ILUA states that the amount that will be provided to the native title group for agreeing to perform this activity is $300,000. This $300,000, despite being an amount arising under an ILUA, is not NANE income for the native title holders as it is remuneration for a service.'

An Indigenous person or holding entity that would otherwise be taxable is also not able to deduct any expenses related to deriving native title benefits that would be accorded NANE treatment (as s 8-1(2)(c) of ITAA 1997 would prevent this).

Investment income

The investment of native title benefits will generate assessable income (in the ordinary course), unless the entity that receives the income is itself tax-exempt. Example 1.4 in the EM explains that interest derived on investment of a native title benefit will be taxable. The taxation of income generated from investing native title benefits was criticised by some submissions to Treasury, as encouraging immediate payouts of tax-free amounts to individuals, rather than long-term investment generating further tax-exempt sums for the benefit of future generations.[61] The issue was also considered by the Committee and addressed in its report.

The problem is illustrated by a comparison of Example 1.1 in the EM ($100,000 native title benefit paid directly to an Indigenous person by a mining company under an agreement is NANE) with the situation in Example 1.4, when an Indigenous Holding Entity invests a native title benefit for the longer term. The criticism is understandable. However, within the narrow parameters of this reform (which is based on a view of native title payments as being compensatory, and which is estimated not to cost the government any revenue), it is clear that any further exemption was considered untenable. Certainly, it would be a tax concession beyond the normal tax system to exclude investment returns from tax. It will be important for the native title claim group as a whole to make careful decisions about how to receive, distribute and invest native title payments for the benefit of the group as a whole.

5.2 CGT and native title payments

Two questions arise as to the potential application of Capital Gains Tax to native title payments. First, if CGT were to apply, can s 59-50 treat the amount instead as NANE? Second, are there other potential CGT consequences in relation to native title and does the Bill address these?

[61] See NTSV, Submission to the Bill.

NANE treatment

Regarding the first question, the Bill does not directly address the CGT treatment of native title payments received by Indigenous individuals or eligible entities. However, s 118-20(4) will reduce a capital gain ‘by the extent that a provision of this Act ... treats (a) an amount of your ordinary income or statutory income from the event as being non-assessable non-exempt income’. This should prevent any CGT issues arising for recipients, if NANE treatment would otherwise apply.

If a native title benefit is excluded from NANE treatment and is taxable (for example, as remuneration for services), then s 118-20(1) should reduce any overlapping capital gain that may arise.

CGT events and native title

The Bill also inserts proposed new s 118-77 which disregards a capital gain or capital loss that may arise if native title, or the right to be provided with a native title benefit, is subjected to or transferred to a trust. This new provision addresses a concern that when a PBC is established as a trust to hold native title, or native title agreement rights are established in an entity, that this could generate CGT consequences. Proposed s 118-77(1)(b)(iii) also confirms that no CGT consequences will arise on extinguishment of native title or termination of a right to receive a native title benefit under an agreement (event C2).

This new provision does not maintain the pre-CGT status of native title. Rather, it applies to disregard a capital gain or loss of an Indigenous holding entity (which would include a trust), in respect of a transfer or termination of native title rights or interests. The EM briefly confirms that there will be no CGT implications and provides the example of a Federal Court determination that a PBC holds native title rights on trust for a group (Example 1.12).

5.3 Application to Case Study: proposed new law

The discussion of the Case Study above indicates that, under current law, an argument may be made that most benefits received by the native title claim group and associated entities will be non-assessable. However, the argument is not free from doubt. New s 59-50 eliminates that doubt for many, but not all, of the payments.

First, all of the payments and benefits are eligible under s 59-50(5) even though they are made under agreements that are cross-referenced to, but separate from, the ILUA, because these would qualify as ‘ancillary’ agreements. Recall that they are eligible only ‘to the extent that the amount or benefit relates to an act that would extinguish native title or that would be otherwise wholly or partly inconsistent with the continuation of native title’. This seems to require us to analyse the nature and purpose of each separate payment or benefit, a difficult task, as explained above. If a holistic analysis can be done, as indicated by Example 1.8 in the EM, all of the payments bear that relationship to an act affecting native title under the NTA.

Second, the fact that native title is not yet determined at the time of signing the ILUA, and in fact subsequently it is found that native title is *not* made out legally in respect of some parts of the mining

project area, will not prevent eligibility for NANE treatment. This is clearly illustrated in Example 1.9 of the EM.

Third, NANE treatment is extended both to amounts (of cash) and to non-cash benefits. These would include the title to freehold land and possibly services and benefits provided by the resource company to the native title claimants under the various training, education or site protection or heritage programs established under the agreements and funded, and/or operated by the resource company.

Fourth, NANE treatment is extended to the benefits provided to the discretionary trusts, as these will qualify as Indigenous holding entities. However, it appears that NANE treatment would **not** apply to amounts received by the charitable trust and would **not** be extended to any payments or benefits provided to ID Pty Ltd, even though it is owned by a charitable trust for benefit of the Indigenous claim group. The company ID Pty Ltd is excluded from the definition of Indigenous holding entity.

The returns on investing the native title income, or derived from assets received under this agreement are taxable in the normal course, unless derived by a tax-exempt entity such as the charitable trust. For example, the Sustainability Fund can only maximise its long-term returns where it operates as a fund of the charitable trust (which is tax-exempt). If this was a regular trust for long-term benefit of the Indigenous community, the investment returns would be taxable.

A question arises as to payments for heritage surveys. Where these are carried out and amounts paid during the course of negotiations and prior to signing the agreement, it appears that NANE treatment cannot apply. The ordinary income tax rules must be applied. Where these payments are made under the agreement, they may be excluded from NANE treatment as remuneration for services. This exclusion raises the same characterisation questions as apply under current ordinary income tax law.

Once native title is established, it is possible that some of the payments made to the native title claim group trusts or other entities in respect of the native title lands may be subject to MWT, according to the current approach of the ATO. In this regard, the proposed reform is important, as it carves out of the MWT amounts that would otherwise by ‘mining payments in compensation for mining on native title lands, for example including the profit and royalty-type payments in Items (2) and (3).

6 Deductibility of native title payments

No special income tax rules apply regarding the tax treatment of native title payments (or other Indigenous payments) for the payer, or are proposed to be included in the income tax law.

6.1 Application of ordinary income tax principles

Payments or (in some cases) non-cash benefits provided by private businesses to or for the benefit of Indigenous individuals or groups may be deductible under s 8-1 of ITAA 1997, as losses or outgoings incurred in gaining or producing assessable income, or necessarily incurred in carrying on a business to produce assessable income. This will depend on the application of the general principles of deductibility, including establishing a sufficient nexus between the business or producing assessable income and establishing that expenditure is not capital in nature.

There is authority that at least some payments to native title holders will be treated as deductible, in *Cape Flattery Silica Mines v FCT* (1997) 97 ATC 4552. The taxpayer held mining leases for mineral sands that had been originally granted in the 1970s and 1980s for terms of up to 20 years and were renewed at various times. The Hope Vale Aboriginal Council (HVAC) obtained a royalty calculated on gross proceeds following mining compensation proceedings and a special condition that 3 per cent of the taxpayer's annual net pre-tax profit in each year be paid to the Department of Aboriginal & Islander Affairs for the benefit of the Aboriginal inhabitants of the Hope Vale Aboriginal Reserve, in proceedings before the Mining Warden’s Court of Queensland. The final Deed stated that the compensation was ‘full and complete compensation to Hope Vale in respect of the mining operations’.

The Commissioner issued private rulings in respect of the years 1992 to 1994 stating that the payments were of a capital nature and so not deductible under (then) s 51(1) of ITAA 1936. A subsidiary argument of the Commissioner that the payments were made ‘too soon’ to be regarded as an expense in gaining assessable income was ‘summarily rejected’ by the Court because the payments were made quarterly in arrears during the course of the taxpayer’s business.

Although argued by the taxpayer to be royalties, the payments in *Cape Flattery* were held not to be royalties at law, primarily because the native title holders are not the ‘owners’ of the minerals at law. The Commissioner argued that an amount paid by way of compensation rather than royalty for use or taking is prima facie if not always on capital account, and the receipt in the hands of the landowner is a capital receipt. This was rejected by his Honour Justice Spender, who finally concluded that the payments were all deductible. An extract from his reasoning is below:[62]

> ‘This is not a case, such as *Broken Hill Theatres Pty Ltd v Federal Commissioner of Taxation* [1952] HCA 75; (1951-52) 85 CLR 423, where an amount is paid in order to protect or preserve the profit yielding structure. Of course there would be no lease (and hence no mining and therefore no profit) granted to the taxpayer without it satisfying the requirements of s 7.38 of the Mining Resources Act. However, that factor does not necessarily make the payments on capital account. Unless rent for a factory is agreed to be paid to the landlord, there can be no occupation of the factory (and hence no production, and therefore no profit), yet it is clear that payments pursuant to the agreement to pay rent are not on capital account.
>
> In each case it is necessary to determine the character of the payment. To determine what it is that the moneys were paid for in this case requires one to focus on what the deed says, but as Jacobs J pointed out in *Cliffs* ... the problem is to be solved by reference to the ‘many aspects of the whole set of circumstances, some of which may point in one direction, some in the other’, adopting the phrase of Pearce LJ in *BP v Federal Commissioner of Taxation* (1965) 112 CLR 386 at 397. The payments in question, as cl 5.2 of Deed A indicates, are ‘compensation,... as provided in this Deed and the Collateral Deed, in lieu of determination of the amount of compensation by the Mining Warden’ under s 7.38(3) of the Mineral Resources Act. The quantum of the payments (under both deeds) is 3% of gross sales. These payments are recurrent payments (calculated as a percentage of gross sales) in lieu of compensation for deprivation of possession, diminution in value, diminution of the use which may be made of the land, severance of any part of the land, compensation for any surface rights of access, and for loss and expense that arises as a consequence of the renewal of the mining lease. Looking at the matter realistically, in my view, the payments when made, were made essentially as compensation for the deprivation of possession of the land the subject of the mining leases. ...

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[62] *Cape Flattery Silica Mines v FCT* (1997) 97 ATC 4552.

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> The essential character of the payments in issue in the present case is that of a series of recurrent payments in the nature of rental, for the right of occupation by the taxpayer, a right which otherwise would be enjoyed by the aboriginal community. The quantum of the recurrent payments is calculated by reference to the value of silica sand that is won from the mining lease. In my opinion the payments made under the compensation deeds are on revenue account.'

Cape Flattery follows other authority, most importantly *Cliffs International Inc v FCT* (1979) 142 CLR 140, from which Spender J found the case indistinguishable (and indeed 'a much stronger case for the taxpayer than *Cliffs*'). There is some ambiguity in the case as to whether the payments were on a net profit or gross basis, but it appears that this did not make any difference to his Honour.

Justice Spender in *Cape Flattery* also upheld deductibility of an annual bursary paid by the taxpayer company to an individual member of the Hope Vale Aboriginal Community for training in an area that would be of relevance to the mining operations. The recipient of the bursary was not obliged to work for the mine. Spender J said:

> In circumstances where the members of the Hopevale community make up a substantial section of the workforce at the operations of the taxpayer ... and where it is clear that good relations between the taxpayer and the community is important to the success of the taxpayer's business activities and operations, it seems to me that the payment of the annual bursary is properly to be regarded as a business expense and on revenue account.[63]

This is a useful comment about deductibility of expenses of a resource company or other stakeholder which provide a benefit to the Indigenous community and are important in establishing 'good relations' – what Rio Tinto has called a 'social licence to operate' in the community.

A question arises as to whether, if payments made under a native title agreement are capital in nature, they may be written off by the payer under a capital allowance or other provision of the income tax law. It may be possible to deduct native title payments under one of the capital allowance rules in relation to mining or projects; it may be included in the cost base of a CGT asset including a project mining or exploration right; or it may possibly be deductible under s 40-880 of ITAA 1997 as a last resort.

6.2 Application to Case Study

On the basis of *Cape Flattery* and other authorities, it seems clear that Items (2) and (3), being annual recurrent cash payments calculated on either a price or profit basis, may be argued to be tax deductible, as 'a series of recurrent payments in the nature of rental for the right of occupation of the taxpayer'.

The costs in Items (5) and (6) involving payment of amounts for Indigenous employment, training, cultural heritage survey fees and other costs, ranger programs, a cultural awareness course and the payments in Item (8) on contracts for supplies or services from Indigenous businesses would all be deductible under s 8-1 as losses or outgoings that are necessarily incurred in carrying on the business.

[63] Ibid.

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However, the matter is more problematic with respect to Item (1) being the initial lump sum of $500,000; the transfer of freehold title to certain lands in Item (4); and cost of construction of a recreation centre for the community in Item (7). These all lack the 'recurrent' character which was important in establishing deductibility in *Cape Flattery* , *Cliffs International* and similar cases. The fact that they are intended as compensation would seem to tend against treating them as deductible. The provision of freehold land is also not a 'loss or outgoing incurred' by the mining company.

7 Goods and Services Tax

A range of issues arise in respect of the GST and native title. Some of these have been clarified by ATO ruling, however others are left as matters of general interpretation of the GST law. In general terms, for GST to apply to a native title payment or benefit, the following criteria must be established under s 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) for a taxable supply:

(a) you make the supply for consideration;

(b) the supply is made in the course or furtherance of an enterprise that you carry on;

(c) the supply is connected with Australia; and

(d) you are registered or required to be registered.

Leaving aside the question of registration of an enterprise, a taxable supply essentially requires a nexus between a 'supply' defined broadly as 'any supply whatsoever' (s 9-10) and the 'consideration'.

7.1 Compensation in native title agreements

The question of how to treat amounts that are essentially compensation for native title or arise in a settlement agreement is an issue in the context of the GST, as for the income tax.

With respect to payments from government agencies, the Commissioner in GST Ruling 2006/9 that accepts that in the case of a 'government authority compulsorily acquiring land and interests relating to that land, including the native title rights under a particular statute where the effect of compulsory acquisition is that every registered and unregistered interest in the land is extinguished, and each person who formerly held such an interest has that holding converted into a claim for compensation', then 'the compensation relates to the loss suffered by the claimants on the extinguishment of their interest in the land' and so is not subject to GST.[64] The approach in this ruling was applied in GST Private Ruling 45857, which confirmed that the extinguishment of native title rights is not a 'supply'. However, this GST ruling does not directly address payments by private parties, or payments where there is no compulsory acquisition or extinguishment of native title.

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[64] GST Ruling 2006/9, para [89].

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More generally, GST Ruling 2001/4 addresses settlement agreements and states that a payment wholly in compensation for a damages claim is not a 'supply' for consideration (para [110]-[111]). It does not address native title agreements and seems not to have been applied to them in some specific private rulings on the application of GST to native title agreements.

In GST Private Ruling 43869, it was held that native title holders and applicants were not making a taxable supply when they fulfilled their obligations under an agreement made under the NTA, under which they received compensation and other negotiated payments from private enterprises. The native title agreement established sums of money payable on a regular basis to an entity for benefit of the native title applicants. Under the agreement, the native title applicants:

- agreed to the doing of the project,
- undertook to do all things reasonably necessary that the enterprise requests them to do to ensure that the enterprise is granted rights; and refrain from doing any act which would impede or prevent the enterprise from a grant or enjoyment of the rights, and
- agreed to support any request made by the enterprise to the State Government regarding the grant of the acts or the project rights; and to not do anything which prevents or hinders the grant or enjoyment of the act or the project rights.

The ATO determined that the various obligations of the native title applicants under the agreement did constitute a 'supply' as defined in s 9-10 of the GST Act, as it includes:

> (2)…(g) an entry into, or release from, an obligation:
>
> (i) to do anything; or
>
> (ii) to refrain from an act; or
>
> (iii) to tolerate an act or situation;…

Further, the ATO considered that there was a 'supply for consideration', even though it acknowledged the payments were in 'compensation', without any reference to the possible application of GST Ruling 2001/4.

However, the ATO concluded that no GST was payable because the supply was not 'made in the course or furtherance of an enterprise' carried on by the native title applicants. This was, at least, the case while the native title claim was not yet finally determined. The private ruling states:

> '[T]here is no indication that the Native Title Applicants are conducting activities in the form of a business, or in the form of an adventure or concern in the nature of trade. While the words 'in the form of' broaden the set of activities that would be considered a business or adventure or concern in the nature of trade, it is considered that some of the main factors that indicate the carrying on of a business or trade are missing, viz. significant commercial activity, profit making intention, purpose of the activity and businesslike organisation. Paragraph 9-20(1)(c) of the GST Act provides that an enterprise includes an activity that is done on a regular or continuous basis, in the form of a lease, licence, or other grant of an interest in property. This paragraph refers to the activity of participating as a lessor or grantor of an interest in property. You have advised that the Native Title Applicants have lodged a native title claim to land incorporating the lease, however the claim has not yet been determined and may not be for some considerable time. The agreement shows that the State Government is granting the act and the project rights to the enterprise, with compensation payable to the Native Title Applicants via Entity A. It is therefore considered that the Native Title

> Applicants are not an entity granting a lease, licence or interest in property for the purposes of paragraph 9-20(1)(c) of the GST Act.'

It is not clear whether the ATO would have had a different view if the native title claim had actually been determined. It seems that the native title holders would not, in this case, have been lessors or grantors of interests in property, as that is done by the State government. However, query whether there might be significant profit making intention or commercial activity, as discussed in relation to the income tax context?

In GST Private Ruling 9144, the Commissioner considered whether carrying out certain non-monetary obligations to carry out road maintenance, owed by an exploration company to a council acting on behalf of both native title holders and leaseholders of certain land, would attract a GST liability. The road maintenance carried out by the company was in consideration for obtaining its exploration rights, which were issued by the Crown. The council, on behalf of native title claimants, surrendered a right to compensation on negotiating the agreement. This surrender of a right was held to be a 'supply' under s 9-10 of the GST Act. However, this surrender was not in exchange or consideration for the maintenance obligations, which were merely an obligation *of* the exploration company as well as consideration paid *by* the exploration company under the agreement. In contrast, payments by the exploration company to the council in consideration for it administering the agreement and doing its own road maintenance would attract GST.

Similarly, in GST Private Ruling 1011736542456, the ATO held that the surrender of rights by a native title claim group was held not to be in the course of an enterprise, even though done voluntarily and not compelled, and generating payments under a primary and 'ancillary' agreements. This private ruling contains substantial discussion of what constitutes an 'enterprise' or a business for both income tax and GST purposes, with reference to MT 2006/1.

7.2 Should native title claim groups register as an enterprise?

The mere fact that a native title claim group, or individuals, have entered into a claim or negotiated native title agreements, has been found not to be enough to require registration as an entity conducting an enterprise for GST.

An entity may be required to be registered for GST. The term 'entity' is defined broadly in s 184-1(a) of the GST Act, including incorporated and unincorporated associations of persons, trusts and individuals. On the basis of this definition, it might be thought that a native title claim group, or the agent representing them (such as the PBC or Native Title Service Provider), may be required to register for GST if an enterprise were established.

However, the Commissioner has stated in GST Private Ruling 1012045801296 that this is not the case. The Commissioner accepted the submission that a 'native title claim group', does not amount to an association or body of persons as required by the definition, because:

> § The Peoples, for the purposes of the Native Title Claim, is not a group in the nature of a club, society or unincorporated association. It is a group of individual persons associated on the basis of their heritage and ancestry, being a group with the same cultural heritage.

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§ The Peoples have no formal or informal rules or contractual relationship between its members. It has no constitution or governing document.

§ Members of the Peoples are associated by virtue of their cultural heritage, not in order to achieve a common goal or purpose.

§ Practically, the Peoples have always existed and the sole reason that there is a formalised identity of the group was for the purpose of making the Native Title Claim.

The ATO also concluded that the representative body was merely an agent for the Peoples and hence not itself an 'entity', and further that while the individuals comprising the native title claim group would be 'entities', they are not as individuals carrying on an 'enterprise' and so do not need to register for GST.

However, indigenous individuals, or companies or trusts owned by indigenous persons that conduct an 'enterprise' under the general definition may be required to register for GST on that basis. For example, an individual or in our Case Study, the development company ID Pty Ltd, which carries on business, would clearly be required to register for GST. A difficult boundary arises, as in the income tax, with respect to heritage surveys and similar 'services' carried out pursuant to a native title agreement or under State heritage legislation.

A logical consequence of there being found to be no 'taxable supply' in these cases, by the native title claim groups, is that there can be no input credits claimed by resource companies or other parties to agreements, in respect of the rights obtained.

7.3 Application to case study

On the basis of the ATO private rulings issued to date, and on the limited guidance in a public ruling, it would appear that the ATO would accept that GST is not applicable to native title payments or benefits under the ILUA or 'ancillary' agreements, on the basis that there is no 'taxable supply'. This may be because:

1. To the extent that payments are compensation for extinguishment or acts affecting native title, there is no 'supply' or the rights arising for the native title claim group under the agreements are not 'consideration' for a supply;
2. The native title claim group as a whole, is not an 'entity' that needs to be registered for GST and in any event is not carrying on an 'enterprise';
3. The indigenous individuals who benefit under the agreements are 'entities' but are not carrying on an 'enterprise'.

It must be noted that these conclusions generally assume that the native title claim group, or entities owned by it, are not carrying on commercial activities or acting in a business-like manner in negotiating these and agreements. While this may be the case in terms of the fundamental claim of native title and custodianship of traditional lands, it seems to ignore the increasingly enterprising ways in which traditional owners are seeking to turn native title rights and interests to economic account.

8 Charitable trusts

To avoid uncertainties as to whether native title payments were taxable and to enable tax-exempt investment of assets and accumulation of payments for distribution for poverty relief, education and other purposes of public benefit to the Indigenous community, many Indigenous claim groups have established and sought charitable status, or qualification as a public benevolent institution, enabling the entity receiving payments to be tax-exempt.

Eligible charitable purposes date back to the Statute of Elizabeth of 1601 (*Charitable Uses Act*), as interpreted in *Commissioners for Special Purposes of Income Tax v Pemsel*,[65] and are essentially: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community (which has come to be known as purposes of 'public benefit').[66] It is clear that PBCs that hold native title may be eligible for charitable status, and that indigenous communities may establish charitable trusts for the purpose of poverty relief and other community benefits.[67] A trust for purposes of public benefit including the advancement of Indigenous people and furthering of cultural heritage and protection seems appropriate for many native title claim groups.

8.1 Problems with charitable trusts

As discussed by a number of commentators, and raised by various industry and indigenous representative bodies including the MCA and NNTC, charitable trusts are 'not a neat fit' for all goals of traditional owners or other stakeholders in agreement-making.[68] Problems in the use of charitable trusts arise from inherent limitations in the common law and statutory definitions of charity and the administrative approach, or perceived approach, of the Commissioner of Taxation to endorsement of entities as tax-exempt.

First, there is concern that eligible charitable purposes are too narrow and prevent traditional owners from carrying out substantial community and economic development goals. In particular, there has been uncertainty about whether business or commercial activity is allowed to be conducted in a charitable entity, where it is not merely incidental to a main, charitable purpose. The High Court decision in *C of T v Word Investments Ltd*[69] indicates that a charity may conduct a business for profit, as long as the profits are used for the eligible charitable purposes of the entity. However, a charity

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[65] [1891] AC 531.

[66] Tax Ruling TR 2011/4 addresses these issues in light of recent case law; see *Royal National Agricultural & Industrial Association v Chester* (1974) 48 ALJR 304. See also Ann O'Connell, 'The Tax Position of Charities in Australia: Why Does It Have to Be so Complicated?' (2008) 37 *Australian Tax Review* 17; Gino Dal Pont, *The Law of Charities* (Lexis Asia Pacific, 2010).

[67] There is no direct authority, but a positive indication is in *Northern Land Council v Commissioner of Taxes* (2002) 12 NTLR 86; see Fiona Martin, 'Prescribed Bodies Corporate under the *Native Title Act 1993*: Can they be exempt from income tax as charitable trusts?' (2007) 30 *University of New South Wales Law Journal* 713; Fiona Martin, 'The legal concept of charity in the context of Australian taxation law: The public benefit and commercial activity, important issues for indigenous charities' (2010) 25 *Australian Tax Forum* 275.

[68] MCA et al, above n 2; Strelein, above n 2, 25; Lisa Strelein and Tran Tran, 'Taxation, trusts and the distribution of benefits under native title agreements' (Native Title Research Report No 1/2007, 2007) 9–10.

[69] (2008) 236 CLR 204.

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could probably not adopt a purpose of commercial or business development as one of its core purposes, even where this is to enable the native title community to benefit from economic development so as to become sustainable in the longer term. A government proposal to tax unrelated business income of charities is currently under consultation.[70]

Second, there is concern about the scope of the definition of 'public' or 'public benefit' required to be a charitable trust. There are two aspects to this. There may be a problem with benefiting native title holders related by blood (by virtue of defining the group by their ancestors) or small groups of native title claimants. For example, the Argyle Diamond Agreement provides for a portion of benefits to be paid to seven specific family groups; this is done in a discretionary trust structure, not a charitable trust. The issue is whether a PBC, holding title for native title claimants, benefits a sufficiently broad class to qualify as a section of the 'public'.[71] In New Zealand, an amendment has been made to the tax exemption relating to charities, which essentially ensure that funds for the benefit of Maori clans are not excluded from eligibility because they benefit people related by blood.[72] There is also concern about a conflict between broader community purposes or 'public benefit' and the specific obligations of native title holders in law and culture.

In the Case Study, the charitable trust is stated to be for the benefit both of the native title claim group (comprising 3 clans, elders and descendents) and for indigenous peoples generally in the area. This broader scope is likely to satisfy the requirement of ‘public benefit’ for charitable purposes.

Third, there is concern about whether charitable trusts are able to accumulate funds for the long term. This concern arises because of the general law requirement that funds of a charity must be used for its defined charitable purposes. There has been some anxiety about the ability to accumulate funds beyond 10 years; however, there is no such fixed rule in the law. The question is always whether funds are being directed to the eligible purposes. Where there is a clear purpose in the fund to accumulate for the long term sustained benefit of a community, as in the Argyle Diamond trust, this may be acceptable. Nonetheless, anxiety continues about a requirement to distribute at least some funds for purposive expenditures in each year.[73]

Finally, there are concerns about the substantial governance requirements for charitable trusts. Trusts with significant funds have less of a problem in this regard than smaller PBCs: although governance needs are concomitantly greater, expertise can be bought in.

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[70] The Treasury, above n 3. See Chia, J and Stewart, M ‘Should we tax the business profits of not-for-profits?’ (2012) 33 *Adelaide Law Review*.

[71] *Flynn v Mamarika* (1996) 130 FLR 218 held that a charitable trust for the benefit of 12 Aboriginal clans was allowed as this was a sufficient section of the public. However, whether this would apply for smaller numbers of clans in a native title PBC, or one clan only, is not clear.

[72] Fiona Martin and Audrey Sharp, 'The Family Connection when a Charity is for the Advancement of Indigenous Peoples: Australia and New Zealand compared' (AIATSIS Issues Paper No 4(4), November 2009) 8.

[73] Strelein, above n 2, 26, suggests that native title PBCs have sometimes been wound up due to failure to 'get the money out on the ground'.

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8.2 Charities reform and native title bodies

The government has begun a substantial process of reform of regulation and taxation of not-for-profit entities in Australia. After a long process, a new federal regulator, the Australian Charities and Not-for-profits Commission (ACNC) was established and commenced operations at the end of 2012. At present, the ACNC registers (and regulates) only charities and not, as yet, other not-for-profit organisations. The relationship between the ACNC and ORIC, which regulates CATSI corporations, has yet to be finally determined. At present, indigenous charities that are CATSI corporations are required to report to both organisations.

Other reforms on the agenda include the taxation of unrelated business income of charities, tighter rules about activities being 'in Australia' and a standardised definition of 'not for profit'. These are in Bills before the Parliament. Down the track, a statutory definition of 'charity' and reform to not for profit tax concessions is intended by the government. The government has established a Not-for-profit Sector Tax Concession Working Group (the author is a member) which has as its terms of reference to 'consider whether there are better ways of delivering the current envelope of support provided through tax concessions to the NFP sector by the Australian Government', including examining the current range of tax concessions.[74] The Working Group issued a Discussion Paper in November 2012, with submissions due by 17 December 2012. There are approximately 200 submissions. The Working Group will report to Treasury in March 2013. However, as 2013 is an election year, it is not clear how far these will progress.

8.3 Deductible Gift Recipient status

In its Consultation Paper, the Treasury identified concerns about qualification for Deductible Gift Recipient (DGR) status by Indigenous organisations.[75] The most common category would be organisations that qualify as Public Benevolent Institutions (PBIs) that provide direct assistance to those in need. There are a number of native title representative bodies and native title PBCs that have succeeded in qualifying for this status.

However, the Treasury noted that it had received submissions that Indigenous organisations that carry out multiple activities which would separately qualify for DGR status, but which do not in total fall within a single DGR category, may have difficulty qualifying. The Treasury concluded that there may be a case for creating a new general DGR category to include Indigenous organisations in this situation. No further progress has been made on this recommendation as yet, however the issue was noted in the Discussion Paper issued by the Not-for-Profit Tax Concession Working Group.

8.4 Indigenous Community Development Corporation

A proposal for a tax-exempt Indigenous Community Development Corporation (ICDC) has been put to government jointly by the MCA and NNTC, among others. The purpose is to provide clarity and

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[74] See http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Tax-concessions-for-the-not-for-profit-sector .

[75] Treasury, *Consultation Paper*, above n 3, 20.

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economic support for the long term governance of income and assets from native title agreement-making, for the sustained economic development of the indigenous community.

In its review of Tax Laws Amendment (Tax Measures No. 6) Bill 2012, Schedule 1, the House of Representatives Standing Committee on Economics recognised the ICDC proposal. It observed that:

> ‘At the hearing, there was considerable support for the view that the Schedule should also provide preferential tax treatment for Indigenous community development corporations. This is outside the scope of the Bill and the committee does not believe that a recommendation along these lines would be appropriate.
>
> However, the committee would like to stress that native title is only 20 years old. Indigenous people have spent much of that time proving native title and are still learning how to release the economic potential of that title for the benefit of present and future traditional owners. The evidence given indicates that there is work to be done in finding consensus on what is an appropriate legal framework that recognises native title once transferred through a compensation payment to a monetary form. Finding that consensus will become more important as Indigenous communities explore new mechanisms to unlock the economic potential of native title for the benefit of their community now and in the future. … The committee expects that further legislative innovations will be introduced in the coming years.[76]

The ICDC would have the effect of ensuring tax-exempt status for investment or other earnings on native title payments, subject to defined conditions and limits. That is, the ICDC proposal is intended to overcome the limits of NANE treatment which applies only to the native title benefits themselves.

There are many design issues associated with establishment of an ICDC. An ICDC may have key objectives of addressing economic and social disadvantage through direct provision of community services and payments to individuals, contributing to 'closing the gap'; allowing for provision of assistance for long term well-being of individuals, for example including tax exempt contributions towards individual superannuation; investing in business or commercial development; and accumulation for future generations.

With these purposes, an ICDC can be understood to have features similar in various respects to a number of other kinds of entity: (1) a 'future fund' for the collective benefit of the particular community; (2) a community or municipal corporation that provides services, invests in and supports social, business and governmental activities of the local community; and (3) a charity with the purpose of advancing poverty alleviation, education, religion or other purposes of public benefit. However, if it would simply replicate the requirements to establish a charity, there is little point in establishing a new form of tax-exempt entity.

If accumulation for the long term were allowed in an ICDC (thereby overcoming one of the apparent limitations of a charitable trust in holding native title benefits), accumulation limits may need to be set. These might include maximums and minimums, and the accumulation requirement might not apply where the annual revenue stream is below a certain amount. The MCA has suggested accumulation of 50 percent of benefits for life of mine, or else a dollar amount, such as $500 000 per annum.[77]

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[76] Committee Report, above n 46, iii-iv.

[77] MCA et al, above n 3.

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Many other issues, including governance structures, would also need to be determined. However, an ICDC would seem to fit the goal of establishing a new approach to the long term investment and management of native title benefits for Indigenous economic development in Australia.

9 MRRT, PRRT and native title

9.1 Minerals resource rent tax

The Minerals Resource Rent Tax (MRRT), effective from 1 July 2012 is imposed on a miner's mining profit in respect of a project, less its MRRT allowances, at a rate of 22.5 per cent (that is, at a nominal rate of 30 per cent, less a one-quarter extraction allowance to recognise the miner's employment of specialist skills). The MRRT aims to tax profits attributable to the value of the resource mined in a particular taxable project. The assessment rules are in the *Minerals Resource Rent Tax Act 2012* (MRRT Act).

9.1.1 Native title payments as mining expenditure

During consultation for the MRRT, an issue arose as to the treatment of native title payments as upstream costs of a project in ascertaining the taxable profit. Essentially, the MRRT requires definition of a taxing point for the project and recognition of the costs of producing the resource to that point.[78] A project's mining profit is its mining revenue less its mining expenditure, which is explained in the EM as 'the cost a miner incurs in bringing the taxable resources to the valuation point'. The EM claims that 'the majority of upstream costs incurred by the miner in extracting the non-renewable resource' are immediately deductible under the MRRT (whether of a capital or revenue nature).[79] The issue was whether native title payments qualify as mining expenditure.

The general test for 'mining expenditure' is set out in s 35-10 of the MRRT Act. It adopts some of the same language as the income tax test for deductibility in s 8-1 of ITAA 1997, except that it does not matter whether the expenditure is of a revenue or capital nature: the cost is deductible 'to the extent that it is necessarily incurred by the miner in carrying on upstream mining operations in respect of that mining project interest'.[80] These words were selected deliberately because of the guidance provided by judicial analysis of the income tax provision (see paras [5.14]-[5.17]), however the nexus must be established to the particular mining project and not the business more generally.

The definition of 'mining operations' in s 35-20(1)(a) includes operations or activities, to the extent that they are 'preliminary or integral to, or consequential upon (i) extracting or producing taxable resources from the project area for the mining project interest; or (ii) producing something using those taxable

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[78] See http://minister.ret.gov.au/MediaCentre/MediaReleases/Pages/PolicyTransitionGroupReleasesIssuesPaper.aspx ; Policy Transition Group, Issues Paper, Part A, [25], available from http://www.futuretax.gov.au/content/Content.aspx?doc=publications.htm .

[79] MRRT EM, para [2.18]. A detailed explanation of mining expenditure is set out in Chapter 5 of the EM.

[80] s 35-10 MRRT Act; MRRT EM para [5.8].

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resources'. The concept of 'expenditure' is explained in the EM as referring to 'disbursement of an amount of money (except where the non-cash benefit rules apply)'.[81]

Based on the general language of this rule, and following income tax authorities such as *Cape Flattery*, native title payments would be expenditure in respect of 'upstream mining operations'. However, for clarity and following submissions, the MRRT Act now explicitly recognises native title negotiations as part of 'upstream mining operations' under s 35-15, which includes as an example of such an operation, in respect of the production right:

> '(a) Obtaining the agreement of native title holders as part of the process of obtaining a production right over the project area;'

The *Issues Paper* considered that where native title payments were in the form of, or essentially analogous to private mining royalties, they should actually be *excluded expenditure* which would hence not be deductible even if the general test for mining expenditure was satisfied. This view was based on an assumption of symmetry of treatment between the paying miner and the recipient native title group. The *Issues Paper* stated that on one view, native title payments (para 203):

> 'could be viewed as an expense of mining. That position would be defensible if the payments were properly characterised as a cost of the mining activity (for example, if the payment compensates for access and/or disturbance to land that would otherwise be denied). In that case, it could be argued that the expense should be deductible for MRRT purposes but not assessable to the recipient native title owners.'

However, the *Issues Paper* argued that alternatively (para 204):

> 'the payments could be viewed as part of the rents from exploiting the resource (that position would be more arguable if the payments are a share of the mining revenues). In that case, as for private royalties generally, the payments should be either deductible to the mining entity and assessable to the recipients, or non-deductible to the entity and non-assessable to the recipients, to ensure that all the rents from exploiting the resource are subject to the MRRT.'

This was the position proposed by the Working Group. However, after submissions were made, the Government agreed not to exclude native title-related expenditure even if it is in the nature of a royalty. Section 35-40(1) includes as 'excluded expenditure' a private mining royalty, but an exception from this exclusion is created for native title payments. Section 35-40(4) states as follows:

> '(4) Despite subsection (1), a *private mining royalty is not excluded expenditure, to the extent that it is by way of consideration for the carrying on of *mining operations in the *project area for a mining project interest, if it is paid:
>
> (a) to a native title holder (within the meaning of the Native Title A ct 1993) whose approved determination of native title (within the meaning of that Act) relates to the project area for the mining project interest; or
>
> (b) to a registered native title claimant (within the meaning of the Native Title Act 1993) whose claimant application (within the meaning of that Act) relates to the project area for the mining project interest; or
>
> (c) to a person who holds a right that:
>
> (i) arises under another *Australian law dealing with the rights of *Aboriginal persons or *Torres Strait Islanders in relation to land or waters; and

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[81] MRRT EM, para [5.10].

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(ii) relates to the project area for the mining project interest.'

As noted in *Cape Flattery,* it may be the case for most native title payments that they are not royalties, strictly speaking, as the native title claim group is not the owner of the resource. However, the definition of private mining royalty for MRRT purposes is broader and would cover profit sharing arrangements involving payments in the nature to a royalty and calculated by the quantum or value of the resource (s 35-45(2)). This clarification is reassuring for both traditional owners and mining companies. The MRRT EM confirms the concession in an Example:[82]

'Example 5.21: Private mining royalties and native title holders

Wildfire Coal negotiates an Indigenous Land Use Agreement (the Agreement) with a native title group under the Native Title Act 1993. The Agreement is registered. In accordance with the Agreement, the native title group agrees to the granting of mining tenure over a part of their land, and to allow Wildfire Coal to access and mine that land. Wildfire Coal agrees to provide a benefits package that includes a lump sum payment, a share of mining revenues, scholarship and apprenticeship programs, payments relating to heritage protection and environmental management, and the provision of community infrastructure.

These payments by Wildfire Coal in accordance with the Agreement are necessarily incurred in carrying on upstream mining operations and so are mining expenditure. Although the payments of a share of mining revenues are private mining royalties, they are not excluded expenditure because they are paid to a native title holder in consideration for carrying on mining operations on its land.'

9.2 Petroleum resource rent tax

The treatment of native title expenditure has not arisen in relation to the Petroleum Resource Rent Tax (PRRT), because the PRRT has been levied exclusively, until recent times, in relation to projects in offshore Commonwealth waters that are not subject to native title. However, going forward, the treatment of native title payments may become relevant to onshore oil and gas projects. A similar issue of nexus of native title payment expenditure to an oil or gas project will arise, in terms of ascertaining deductibility, as under the MRRT.

The concept of deductible expenditure in the PRRT Assessment Act 1987 (Cth) is complex, comprising a range of different categories, but the main relevant categories would be exploration expenditure or general project expenditure. The challenge will be establishing the nexus of expenditure to the project. For exploration expenditure, the main rule requires that the expenditure (whether capital or revenue) be incurred 'in carrying on or providing operations and facilities involved in or in connection with' exploration. For project expenditure, the expenditure can be 'in carrying on or providing operations and facilities preparatory to' project activities, 'including in carrying out any feasibility or environmental study' and various other categories.

Private override royalties are also excluded expenditure under the PRRT Assessment Act as they are considered to be in the nature of profit sharing arrangements (although they are not defined in the Act itself). A provision excluding native title payments from treatment as private override royalties was

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[82] MRRT EM, Example 5.21, 88.

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inserted in s 44(2) of the PRRT Assessment Act by Petroleum Resource Rent Tax Assessment Amendment Act 2012 (Act No. 18 of 2012). It states:

> (2) For the purposes of paragraph (1)(e), a private override royalty payment does not include a payment to the extent:
>
> (a) it is by way of compensation for carrying on or providing, in an area the operations, facilities or other things comprising a petroleum project; and
>
> (b) it is paid:
>
> (i) to a native title holder (within the meaning of the Native Title Act 1993) whose approved determination of native title (within the meaning of that Act) relates to that area; or
>
> (ii) to a registered native title claimant (within the meaning of the Native Title Act 1993) whose claimant application (within the meaning of that Act) relates to that area; or
>
> (iii) to a person who holds a right that relates to that area and arises under another Australian law dealing with the rights of Aboriginal persons or Torres Strait Islanders in relation to land or waters.

The EM to this provision states that 'to ensure that this exclusion does not prevent a deduction for eligible native title payments, a carve-out has been included in the existing definition of excluded expenditure'.[83] Two examples are provided.

> 'Example 4.9: Deductibility of native title payments
>
> Triangle LNG negotiates an Indigenous Land Use Agreement with a native title group under the Native Title Act 1993. The Indigenous Land Use Agreement is registered. In accordance with this Agreement, the native title group agrees to the granting of tenure over a part of their land, and to allow Triangle LNG to access and disturb that land to extract coal seam gas. Triangle LNG pays a compensation payment to the native title holders. This compensation payment is deductible against the petroleum project's assessable receipts.
>
> Example 4.10: Payment not amounting to a compensation payment
>
> To celebrate the agreement reached in Example 4.9, Triangle LNG organises for a famous indigenous band to play at the local school. Since the agreement has already been reached, the cost incurred in providing the concert is not a compensation payment for carrying on the petroleum project.'

It may be noticed that the wording of s 44(2) which excludes native title payments from being private override royalties is more limited than the wording in the MRRT Act. As this amendment was done more or less at the same time as the MRRT Act provision, it is not clear why different wording has been used. This wording in the PRRT Act excludes a payment that would otherwise be a 'private override royalty' only 'to the extent' that it is 'by way of compensation' for the petroleum project. It also requires payment to the 'native title holder' or 'claimant', which means the PBC or the specified named individuals (usually tribal elders).

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[83] Explanatory Memorandum to Petroleum Resource Rent Tax Assessment Amendment Bill 2011, para [4.35].

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