Taxation of Native Title Agreements

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Table of Contents

Introduction

Native title was recognised by Australia's High Court in 1992. The decision, *Mabo v Queensland*[1], belatedly redressed over 200 years of denial of any rights that may have been held by the previous sovereign inhabitants of the Australian continent. The decision recognised that at least the communal proprietary interests of Indigenous peoples survived the assertion of sovereignty by the British. Although the decision was handed down in 1992, the court held that native title has always existed, and came to Australia with the rest of the common law. Native title is a unique legal concept that seeks to bridge the rights held by Indigenous peoples under their own law, and an accommodation and protection of those rights within Australian law. Its recognition required an immediate rethinking of Australia property law and the way in which governments, in particular, dealt with land.

An agreement-making framework was developed to facilitate access to land where native title has been found to exist or is under native title claim. However, the common law and legislative framework have constrained native title as an economically valuable right. The common law has limited rights over resources and has only rarely included overt reference to economic rights in the description of the extent of native title.[2] In addition, the courts have tended to extinguish the most valuable rights to control access and decision-making over the use of lands and prioritise the rights of non-indigenous interests.[3] The *Native Title Act 1993* (Cth) (NTA) further limits the economic power of native title holders by limiting their rights to negotiate access and use.[4]

These legal constraints are strangely at odds with presumptions that native title will be an economic boon for Indigenous peoples. This is teamed with the rhetoric of respondents and interest groups, particularly in the years surrounding the *Wik Peoples v State of Queensland; The Thayorre People v State of Queensland & Ors* (1996) decision and subsequent amendments to the NTA, that native title is a significant cost to industries and the economy more broadly.

Despite the restrictive framework of native title law, Indigenous groups are active in negotiating agreements over land and water matters, both inside and outside the NTA's framework. Governments and industry — particularly the mining and extraction industries — have responded to the recognition of Indigenous peoples' claim to authority over their traditional lands.

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[1] *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

[2] See for example the Kaurareg determinations, which include the right to carry on economic activities, rights to harvest, husbandry, and manufacture: *Kaurareg People v Queensland* [2001] FCA 657 (23 May 2001); see also reference to economic use in, for example, *Masig People v Queensland* [2000] FCA 1067 (7 July 2000).

[3] *Western Australia v Ward* (2002) 213 CLR 1. See generally Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo*, Aboriginal Studies Press, Canberra, 2006, pp. 70-3; 137-40.

[4] Native title holders have no right to say no to development on their lands and have more limited rights of notification or consultation rather than negotiation over certain classes of acts or land and water, for example, s.24HA water and airspace, s.24JA reserves.

It is in seeking to understand the nature of native title and the practical benefits that Indigenous people gain from its recognition, that I came to be interested in how native title is taxed. Some of the agreements being reached involve payments and benefit packages that are complex and in almost all circumstances raise significant conceptual and practical questions as to their treatment for taxation purposes. Little analysis has been done to determine how native title fits with the tax system and resolution of this issue has eluded a generation of policy makers.[5]

In this paper, I examine the agreement-making environment that surrounds native title whether triggered and governed by the operation of the NTA or more broadly arising in a native title context. This includes the legal framework for acts directly affecting native title, the types of agreements being reached and how those agreements are structured. I will then turn to the taxation treatments that might apply to native title and explore the complexity and ambiguity that arises in the intersection of two of Australia's most intricate legal regimes.

[5] It is interesting to contrast other jurisdictions where Aboriginal rights have a much longer history of recognition. For example, the leading text book on Aboriginal legal issues in Canada contains a whole chapter on taxation: see John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, materials and commentary*, (second edition) Butterworths, 2003, pp. 745-828.

I. Native title and agreement-making

Native title and extinguishment

Native title, or native title rights and interests under Australian law are said to be unique to each particular native title group.[6] They are considered to vary in accordance with the proof of laws and customs of the group and the impact of settlement and legislative intervention since the British Crown's assertion of sovereignty. However, where there is no extinguishment by the acts of the Crown, native title most often translates into a right of exclusive possession, including the right to control access and determine the use of the land and waters and its resources.[7] Native title does not conform to English property law concepts and is considered unique, or '*sui generis*'.

Where extinguishment has occurred, native title rights and interests can be taken away in a piecemeal fashion because of the way in which the law prioritises non-indigenous interests. Thus, where a pastoral lease has been granted, it is considered that the right to control access, or determine the use of the land generally, has been taken away from the native title holders.[8] However, rights to use the resources of the land may continue to co-exist and must be compensated for if affected.

Under the common law, native title is susceptible to extinguishment by an inconsistent act subject only to the protection provided by the *Racial Discrimination Act 1975* (Cth) (RDA). Extinguishment is deemed under the NTA to be permanent.[9] Under the RDA, any act that occurred after the introduction of the RDA would be invalid if it extinguished native title without just terms compensation or failed to deal with native title interests as it would have treated any non-indigenous property interest.

The NTA specifically provides that native title cannot be extinguished contrary to the NTA.[10] But, the NTA also provides for the validation of past acts and intermediate period acts that would be invalid by operation of the RDA, providing for compensation to be payable.[11] The NTA also establishes a detailed regime for future acts that may affect native title. The NTA provides that an act may be valid if the parties enter into an agreement called an Indigenous Land Use Agreement (ILUA).[12] An ILUA may include a

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[6] The term 'native title group' is used in this paper to include both native title claimant groups and holders of native title, who have had a successful determination of native title.

[7] For a summary table of the rights and interests recognised in each determination see <http://ntru.aiatsis.gov.au/research/nativetitle_rightsinterests.html>.

[8] See *Western Australia v Ward* (2002) HCA. The courts to date have excluded rights to minerals and petroleum on the basis that these were not 'used' by the group at the time of colonisation. Where use, and laws and customs relating to use, can be established, for example to ochre, rights over the resource are recognised. This is inconsistent with the law in other jurisdictions, such as Canada and the United States and in relation to other resources, where sovereign ownership has been distinguished from management: see *Yanner v Eaton* (1999) 201 CLR 351.

[9] NTA s. 237A.

[10] NTA s. 11.

[11] In order to do this, the NTA 'suspends' the operation of the RDA: NTA s. 7.

[12] NTA, s. 24AA(3).

wide variety of matters in relation to an act or the exercise of native title rights and interests, as well as the relationships between parties. An act will also be valid if it meets the procedural requirements for notification, consultation or negotiation.[13]

The NTA provides for circumstances in which acts can be done on, or in relation to, native title land without extinguishing native title. The 'non-extinguishment principle', for example, applies to suspend rather than extinguish native title rights in relation to a Category C past act consisting of the granting of an exclusive possession mining lease.[14] It also applies generally to future acts.[15]

Under the common law, native title is inalienable except to the Crown. However, as a result of the non-extinguishment principle, it is no longer necessary to surrender native title to the Crown in order to negotiate with proponents for development. In these instances, compensatory liability of the Crown is, in effect, transferred to the proponent. It should be noted that the statutory 'rights' to notification, comment, consultation and negotiation are inferior to compulsory acquisition rights of non-indigenous property rights and comparable fiduciary obligations that apply to the Crown in other jurisdictions.[16] While native title holders may not be able to develop the land themselves, if they have a partner with whom to negotiate an agreement, many of the restrictions of the common law inalienability can be effectively overcome.

Compensation

Through the Mabo decision the High Court established a fundamentally discriminatory common law position, which held that while extinguishment without compensation may be racist, it was not unlawful under the laws of the Commonwealth, until the introduction of the RDA.[17] One of the most powerful aspects of the High Court's recognition of native title was that the extinguishment of native title, because of the protection of the RDA, was like taking away any other property right, and should therefore be subject to compensation payment. Division 5 of the NTA regulates determination of compensation for acts affecting native title. Compensation, under s. 51(1), is an entitlement on just terms for the loss, diminution, impairment or other affect of an act on native title rights and interests, but the NTA purports to limit compensation to any applicable law in relation to compulsory acquisition or, more generally, a 'similar compensable interest

[13] NTA, ss. 24AA(4)(a)-(k). In Canada, the right to be consulted and accommodated is not based on statutory rights but on the common law, bolstered by the established fiduciary relationship between the Crown and Aboriginal peoples: *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700

[14] NTA, s. 238(8).

[15] NTA, s. 24AA(6).

[16] Contrast *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, responsibilities of the Crown to negotiate and accommodate the needs of Aboriginal title holders cannot be delegated.

[17] *Mabo v Queensland [No.2] (*1992) 175 CLR 1, 15 (per Mason CJ and McHugh J on behalf of the court). This required a determination that the parliament and executive and the courts were free to ignore the principles of the common law and the Just terms provisions of the Australian (and various State) Constitution, or various compulsory acquisition legislation and provisions.

test' that equates native title to any ordinary title, as required by the RDA.

There are a number of provisions relating to compensation for past or future acts where agreement over compensation was not reached. As mentioned, the NTA validated grants that may have been invalid by operation to the RDA. The NTA also converts any right to compensation under the RDA to a s. 51 compensation claim. In 1998 when further acts were validated, the legislation also 'confirmed' extinguishment in a number of circumstances.[18] Acknowledging that such confirmation provisions may go beyond the common law, compensation is again provided for through s. 51.

Indigenous Land Use Agreements (ILUAs)

An act will be valid under, or can be validated by, an Indigenous Land Use Agreement (ILUA). The parties may include provision in an ILUA for compensation for the doing of a past, intermediate or future act. Unless specific provision is made for surrender of native title rights and interests, the non-extinguishment principle applies. There are no restrictions on the way compensation or other payments in an ILUA must be structured or indeed that there should be any form of payment or benefit passed to the native title group. However, registration of an ILUA restricts compensation such that any native title holder/body bound by the ILUA or entitled to benefit from the agreement is not entitled to any compensation for the act other than compensation provided for under the agreement.[19] The purpose of the ILUA provisions was to provide certainty for non-indigenous parties by ensuring that agreements are binding on all potential claimants and future generations, including those who were not signatories to the agreement.

The right to negotiate, notification and consultation procedures

Certain acts are subject to a right to negotiate, including particular rights to mine and particular acts by government. This is mandatory negotiation which must be conducted in good faith, that is, with a view to reaching agreement.[20] It should be reiterated that Indigenous parties have no discretion to say 'no' to the doing of an act. The NTA specifically states that such negotiations may include a share of profits, income or product.[21] If after six months, no agreement is reached, the matter will be referred to arbitration.[22] A party may apply for the matter to be expedited.
Future act negotiations are generally mediated and arbitrated by the National Native Title Tribunal (NNTT). In the absence of an agreement, the arbitrating body determines whether the act should or should not be done and on what terms. There are no examples of the NNTT determining that an act should not be done and any terms are generally minor procedural terms, despite vast numbers of objections from native title holders or

[18] For example, in relation to acts affecting any native title rights and interests in relation to waterways and airspace, s. 24HA(5), s. 212.

[19] NTA s. 24EB.

[20] NTA s. 31(2).

[21] NTA s. 33.

[22] NTA s. 35.

claimants.[23]

An arbitrating body other than the NNTT can determine that compensation is appropriate and that an amount be paid into trust until it is dealt with under s. 52, that is, until a determination of native title is made. If the NNTT is the arbitrating body, the native title applicants must apply to the courts under Division 5 for a determination of compensation.

Other less rigorous procedural rights, for example, to be notified or consulted about acts affecting airspace or water, expressly include a right to compensation, in lieu of an effective right to negotiate. Similarly, since 1998, lesser procedural rights apply to mine infrastructure — which would have attracted a right to negotiate and can have significant impact on native title land — can now only be dealt with as a compensation claim. Again, native title holders can make an application for a determination of compensation under Division 5.

Whether payments are determined through the specified negotiation process, the negotiation of an ILUA, or by the tribunal or the courts, s. 51 of the NTA allows native title holders/claimants to request that the compensation payments be made through either a wholly cash payment, wholly non-cash payment or a combination of both. This request must be considered, but does not have to be agreed to, by the courts, or person or body making the payment. Where no request is made, compensation is to be in cash only. In the absence of an ILUA, compensation is limited to the freehold or similar compensable interest test.[24]

Types of agreements

Native title groups are engaged not only in their application for a determination that native title exists, collating evidence, resolving disputes and mediating with respondents to their claim, but they are also engaged in myriad negotiations and partnerships with parties wanting access to their traditional lands and resources. There are a number of different kinds of agreements being reached by native title groups, each of which involves different legal processes and outcomes. Some of these agreements can take the parties outside the compensation provisions of the NTA, as negotiated settlements range over a broader scope.

ILUAs

By 31 December 2007 there were 310 ILUAs registered with the NNTT. Only eight of these involve extinguishment (that is the non-extinguishment principle applies in almost all ILUAs if rights and interested are affected) and the large majority are non-mining

[23] See Ciaran O'Faircheallaigh, ''Unreasonable and Extraordinary Restraint': native title, markets and Australia's resources boom', *Australian Indigenous Law Reporter*, 11, 3, 28-42, a version of which was presented at 'Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries', Broome, 9-10 July; see also, A. Corbett, and C. O'Faircheallaigh, (2006) Unmasking Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions', *University of Western Australia Law Review*, Vol 33, No 1, 153-177.

[24] NTA s. 51(3); s. 240 (defined).

agreements including infrastructure, development and access.[25] The confidentiality of agreements makes more detailed analysis difficult.[26] ILUAs can be cumbersome and take time to make their way through the notification and registration process with the NNTT. However, their statutory basis and security can be attractive to both Indigenous and non-Indigenous parties.

Future act agreements and determinations

Again, as at 31 December 2007, there were 2,351 future act determinations, which may or may not attract compensation. There are 158 future act determinations that involve a determination by consent of all the parties that the future act can be done. It is still unclear how many of these involve agreement as the NNTT keeps no record of such agreements and they are rarely mentioned in the determination. It is likely that consent was reached through an agreement involving payments of some kind in at least some of these agreements. Many regions now have template agreements for activities such as mining, exploration, though many of these do not include payments other than heritage clearance fees. However to determine the true extent of future act agreements would require significant research and investigation. In addition, the majority of the agreements concern non-mining interests, including development and infrastructure.

Determination of compensation

Jango v Northern Territory (2006) FCA is the only application for a determination of compensation yet to be heard by the courts or that has dealt specifically with the issue of compensation. However, in that case the applicants did not successfully prove that they were the native title holders for the area subject to claim. The comments of Sackville J in that case, while of interest, are not binding. The judge did not deal with any taxation issues or distribution of benefits although he made some comments about the time at which the right to compensation arises and the status of 'improvements' in determining quantum of compensation. As at December 2007 there are 11 active applications for a determination of compensation.

Supported consent determinations and alternative settlements

Reference should also be made to supported consent determinations and alternative settlements, which, although still relatively unusual, are likely to be an emerging method of resolving native title claims. The Victorian Government has entered into two such settlements in relation to the Wimmera claims and the Gunditjmara claim.**[27]** The

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[25] The AIATSIS ILUA summary table illustrates the kind of subject matter covered by ILUAs and, as far as information is available, the content of those agreements: <http://ntru.aiatsis.gov.au/research/ilua_summary.pdf>.

[26] The AIATSIS ILUA summary table contains links to the Agreements Treaties and Negotiated Settlements database. This database is the most comprehensive collection of materials relating to agreements with Indigenous peoples ever undertaken. The project has been running for three years. The limited number of agreements that are published on this database reflects the difficulty of accessing details about the content of agreements for the purposes of analysis and determining policy. <www.atns.edu.au>.

[27] >http://www.vgso.vic.gov.au/news/gunditjmaranativetitleconsentdetermination.aspx>.

Wimmera agreement involved three consent determinations and seven ILUAs covering matters such as transfer of culturally significant parcels of land, funding for a cultural/community centre, involvement in decision-making over natural resource management in the area, joint management and employment in Parks Victoria and ongoing funding for the Prescribed Body Corporate (PBC).

Case example: The Gunditjmara consent determination and ILUAs

The Gunditjmara settlement includes:

- Determination by consent that the Gunditjmara People hold the following native title rights and interests over certain Crown land and waters:
  - non-exclusive right to have access to or enter and remain on the land and waters;
  - right to camp on the land and waters landward of the high water mark;
  - right to use and enjoy the land and waters;
  - right to take resources of the land and waters; and
  - right to protect places and areas of importance on the land and waters.
- Determination by consent that native title does not exist over the balance of the application area.
- Indigenous Land Use Agreement (Body Corporate Agreement).
- Co-operative Management Agreement, which sets out arrangements for involving the Gunditjmara in the management of Mount Eccles National Park.
- Agreement to transfer certain land.
- Funding Agreement, pursuant to which the state will provide financial assistance to the Gunditj Mirring Traditional Owners Aboriginal Corporation which has been set up to hold the native title rights on trust for the Gunditjmara People (the PBC).
- Memorandum of Understanding, which underscores the on-going collaboration between the State and the Gunditjmara on various projects.

Source: Victorian Government Solicitor's Office <www.vgso.gov.au>.

Other supported consent determinations have been negotiated in Queensland with the Eastern Yalanji claims, and in New South Wales with the Githabul. The agreements settle all compensation issues.[28]

The Eastern Yalanji settlement is the largest of these with 15 supporting ILUAs, a cooperative management and a conservation agreement. The settlement covers approximately 230,000 hectares of land in Cape York, including world heritage areas. The agreements recognise the Eastern Kuku Yalanji People's native title rights and stipulate how those rights will be exercised in national parks and other areas. Other ILUAs affect a transfer of ownership or management of freehold and reserve areas, create

[28] Western Australia released a consultation paper outlining their proposed policy in 2005, in which native title groups can agree to a determination that native title does not exist in exchange for certain rights and interests. The policy has never been finalised.

new conservation and national park areas, as well as prescribe consultative processes and arrangements concerning certain site specific concerns.[29]

Fee for service agreements

Due to the limited resources available to Native Title Representative Bodies and service providers (NTRBs) and native title groups, there are also agreements for proponents to pay the costs of negotiation for the Indigenous party, including meetings and advice.[30] Companies may agree to pay for other forms of support such as research or legal advice in relation to a claim or governance training and there are individual payments for heritage-related payments such as site clearance, monitoring, training and advice. In the Pilbara, for example, Rio Tinto have engaged in a number of activities to support the claims process, cultural heritage surveys and other initiatives to facilitate access and agreement-making in the resource-rich region.

Surrender agreements

Some large scale agreements have been reached with state/territory governments, such as the Ord Stage 2 development and the Burrup development agreement, effected through a state deed. These have applied to large scale surrender/extinguishment agreements that effectively cleanse an area of native title claims in order to clear the way for proponent investment and free investors from having to individually comply with the future act process. These two agreements have involved large compensation payments in the form of cash paid into trusts, community development programs, land transfers, funding of administrative organisations and other benefits. Smaller surrender agreements have been reached, particularly in relation to land releases for expansion of towns in Alice Springs, Broome, Tennant Creek, and the first such agreement at Crescent Head, NSW.

Case example: The Ord Stage 2 global negotiations

Outcomes for the state

- Full and final compensation for all matters relating to Ord 1, Ord 2, and the Miriuwung Gajerrong claim #1 (MG#1), (Around 70,000 ha) including:
    - Settlement of compensable native title extinguished for all Ord 2: 40,000+ ha.
    - Settlement of compensable native title extinguished in MG#1 Consent Determination area: 15,000 ha.
    - Settlement of compensation for unclaimed land in Kununurra town.
    - Settlement of all issues from Ord 1 and Lake Argyle Aboriginal and Social Impact Assessment.

[29] see <http://www.nrw.qld.gov.au/nativetitle/dealings/yalanji.html>.

[30] Recent changes to the NTA provide for PBCs to be able to charge third parties for cost recovery for negotiations under the NTA from 1 July 2008: s.60AB(1).

Outcomes for the Miriuwung Gajerrong

Yawooroong Miriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation

- $100,000 to set up MG Corporation and $1 million pa over 10 years to operate.
- Composition of Executive same as composition of the MG#1 PBC.
- PBC to delegate admin tasks to MG Corporation.

Miriuwung Gajerrong Community Foundation Trust

- $5 million up front, $1 million pa over nine years.
- 50 per cent of profit to be put back into trust; 50 per cent able to be used on community ventures.
- Charitable trust.

MG Development Trust

- Discretionary trust for use with investments.
- No assets included as yet.

M21 Land

- Five per cent (800 ha) irrigated farm land.
- Five per cent “buy-in” option.
- Aboriginal Development Package (5 per cent buy-in at cost).

Mantinea Farm Land

- Five per cent (200 ha) irrigated farm land.
- Five per cent rural residential or commercial land.
- Five per cent “buy-in” option.
- Aboriginal Development Package – five per cent buy-in at cost.

Ord East and West Bank

- Five per cent (up to 138 ha) irrigated farm land.
- Five per cent “buy-in” option.
- Aboriginal Development Package – five per cent buy-in at cost.

Packsaddle Lands

- 736 ha.
- $700,000 access road.
- $60,000 establishment.

East Kununurra Lands

- 400+ ha additional land to the highway.
- $60,000 establishment.

M2 Buffer Lands

- Freehold with lease to an Environmental Management Entity (EME) for 1,000 years, no rent.
- Miriuwung Gajerrong representation on the EME.
- MG retain native title & access for traditional purposes.

Reserve 31165

- Reserve with joint management (127,000 ha).
- Subject to W and RC, MG access for traditional purposes.

Yardungarrl

- Freehold to 50,000 ha (includes eight community living areas)

Community Living Areas

- Freehold title to 11 Aboriginal Community Living Areas (CLA) (agreed by the state since late 1990s).
- Native title extinguished.

Aquaculture

- First option for aquaculture lease on Lake Argyle for six months.
- For execution, 18 months to finalise.

Conservation Parks

- “Freehold” to 150,000 ha Conservation Parks.
- 200 year lease back to the state Department of Environment and Conservation (DEC), for no rent, subject to a ten year review.
- Existing mining tenements excluded from freehold, retains “right to negotiate”.
- Joint Management with DEC.
- $1 million to set up joint management and plan of management.
- $1 million for infrastructure.
- $4 million over four years to run parks.
- Non-extinguishment principle applies, except:
    - Settlement of all issues from Ord 1 and Lake Argyle Aboriginal and Social Impact Assessment.
    - No native title “right to negotiate” for mining but get freeholders’ rights.
    - Compensation for acquisition: for freehold or native rights whichever is higher.
    - Right of veto regarding leases and licences for commercial interests.
    - More than 50 per cent of parks jobs for MG peoples.
    - Right of access for “MG culture”.

Aboriginal development package

- MG Corporation must set up register of potential contractors or employees, with developer to employ person to help MG Corporation.
- Jobs and contracts to target only "registered" MG people.
- Short-term (2-5 years).
- Additional five per cent "buy-in" for land or shares or joint venture.

Participation agreements involving native title holders and Traditional Owners

There are an important group of agreements that operate within the native title sector but outside the processes of the NTA. The recognition of native title in Australian law highlighted the role of Traditional Owners in speaking for country. Traditional Owners may or may not assert, or successfully claim, native title. e Nevertheless, they areasserting a right to and being sought out by proponents to be involved in decisions and ventures affecting their traditional country. For example, the Murray and Lower Darling Rivers Indigenous Nations, a confederacy of Aboriginal Traditional Owners groups, signed an agreement with state and Commonwealth agencies over management of the Murray-Darling basin.[31]

It has also long been the practice of mining companies to provide community infrastructure, from a social hall or sports equipment though to motor vehicles, or jobs and training as part of their 'corporate social responsibility' to the communities in which they base their operations.[32] Similarly industry groups have been interested in entering into joint ventures, service contracts or other agreements that involve native title holders or Traditional Owners.

Case example: Dugine Mine Services, Queensland

Dugine Mine Services (DMS) is a company that is 50 per cent owned by BBKY Services Limited and 50 per cent owned by Coalroc Contractors Pty Limited. DMS is an Indigenous-focused Company Limited by Guarantee undertaking surface works within the Bowen Basin's coal industry and [also working with] agricultural and local government organisations.

BBKY Services Limited is the peak corporate entity for the Barada, Barna, Kabalbara and Yetimarala people who are the traditional custodians of these affected areas of Central Queensland. BBKY Services Ltd is endorsed with the Australian Taxation Office (ATO) as a charitable institution.

Coalroc Contractors Pty Limited has been involved in the mining community of the Bowen Basin for the past 15 years as mining contractors.

[31] <http://www.mldrin.org.au/whatwedo/achievements.htm>.

[32] See papers presented to a Symposium 'Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries', Broome, 9-10 July.

DMS was created out of the need for labour, skilled and otherwise, in the mining community of Mackay and the Bowen Basin. Coalroc chose not to look to source a workforce from interstate and overseas as other local companies had. Instead, they took the experience learnt from their involvement with another Indigenous people — the Upper Hunter Wonnarrua Council (U.H.W.C) in NSW — and met with Mackay-based BBKY to form DMS.

Source: DMS website: <http://www.dugine.com.au/>.

There have also been discussions about the involvement of proponents in the development and delivery of benefits under government Shared Responsibility Agreements and Regional Partnership Agreements (SRAs and RPAs). However, it should be noted that SRAs and RPAs need not been entered into with Traditional Owners, and have generally been entered into with Indigenous 'communities' based on residence. For example, the Ngaanyatjarra RPA covers a broad range of strategies and issues for Ngaanyatjarra communities. Agreement has been reached on the need to improve services, reduce bureaucratic red tape, develop a 20 to 30 year vision, develop an investment plan for the area and establish meaningful representative arrangements.

The RPA includes:

- funding to establish a committee of Ngaanyatjarra people to liaise with government
- the establishment of a central government contact point for Ngaanyatjarra people, instead of individual agencies, and
- improved access to municipal services, including housing and power.

To supplement the RPA, three Shared Responsibility Agreements (SRAs) were also signed.[33] Similarly, an SRA was entered into with the Minerals Council of Australia to support education and employment in the Pilbara/Port Hedland and aim to improve the access to and enjoyment of economic success from the mining boom in the region.[34]

The recipients of native title payments and distribution policies

Native title holders

Compensation for the impairment or suspension of native title payments, where agreed, must be paid to the native title holders. Where native title has been established a determination must include a finding as to who are the native title holders. Similarly, an application for a determination of native title must contain a description of the claim

[33] For a description of the agreement see: <http://atns.net.au/agreement.asp?EntityID=3051>. For a copy of the agreement see: <http://indigenous.gov.au/rpa/wa/ngaanyatjarra.pdf>.

[34]< http://www.indigenous.gov.au/rpa/wa/porthedland.pdf>.

group. The claim group description need not identify every native title holder; indeed in many groups this is impossible. Rather, the description must be clear enough so that any person may be able to identify whether they are or are not part of the group. This is generally done with reference to particular ancestors and/or the laws and customs that bind the group and determine membership.[35] In this instance, the NTRB/NTS plays an important role in certifying that all reasonable efforts have been made to ensure that those who may hold native title have been identified.[36] This carries through to the agreement process. The main purpose of an ILUA is to bind native title holders inter-generationally and while there is a notice period and objection process, once registered the ILUA will bind all potential native title holders.

Prior to a determination, any agreement or future act process must include all registered native title claimant groups and possible common law native title holders. The latter is achieved through notification of the NTRB for the area. If there is no claim, a request from a proponent may prompt lodgement of a claim in response to such a notice.[37]

Of the 310 registered ILUAs as at 31 December 2007, only 27 (8.7 per cent) are Body Corporate Agreements. The remainder are Area Agreements. This suggests that the majority of ILUAs have been reached with native title groups who have yet to achieve a determination of native title.[38] Area Agreement ILUAs can be entered into by an NTRB and will bind all potential common law holders of native title. Native title claim groups are not required to be incorporated but may do so in the context of negotiations or in anticipation of receiving benefits under the future act process. Formally, however, responsibility for decisions about the native title application prior to a determination rests with the applicants, and they must sign off on any s. 31 future act agreements.[39]

When a determination of native title is made, the native title holders are required by the NTA to establish a body corporate to hold the title – known as Registered Native Title Bodies Corporate or Prescribed Bodies Corporate (PBCs).[40] It is then the responsibility of the PBC to negotiate agreements and deal with native title matters. Where native title groups incorporate prior to a native title determination, there is no prescribed legal form. Some groups may wish to anticipate a successful determination and design a corporate

[35] The application must be brought by an applicant/s who are authorised by the group to make the application in the form proposed. See generally Lisa Strelein, 'Authorisation and the replacement of applicants: *Bolton v WA* [2004]' *Issues Paper* no. 3(1); 'Native Title Holding Groups and native title societies: *Sampi v WA* [2005]' *Issues Paper* no. 3(4).

[36] NTA ss. 24CG/203BE. Until the recent amendments, native title service delivery agencies such as the NSW, Victorian and Queensland South Native Title Services are unable to certify.

[37] NTA s.29.

[38] Body Corporate Agreements are reached only with all PBCs in the area. Area Agreements cannot be made if there are PBCs for all of the area. This is not an absolute conclusion, as any agreement that covers an area that includes a PBC and an area where there is no PBC would have to be an Area Agreement.

[39] NTA s. 62. Section 31 agreements refer to the 'normal' negotiation process, where the full right to negotiate applies (see section 26 for the scope of the applications of the right to negotiate provisions).

[40] PBCs nominated by the claim group and determined by the court become RNTBCs when they are registered by the NNTT on the Register of Native Title Bodies Corporate. 'PBCs' will be used in the paper to refer to both PBC and RNTBC phases.

entity in a form that can become the PBC. Others may establish a trust or business entity to receive and manage benefits from agreements that will remain separate from any future PBC.

Prescribed Bodies Corporate

As at 31 December 2007 there were 55 PBCs (for 75 determinations that native title exists).[41] PBCs may be established as either a trust or an agent for the native title holders. While trusts appear to be favoured, the agency relationship is the default under the NTA. That is, the native title holders must specifically elect to create a trust. In the absence of such an election, the judge will determine that the title is to be held as an agent.[42]

The PBC is required to consult with the native title holders in relation to decisions that affect native title rights and interests.[43] The recent review of PBCs by the Australian Government resulted in a commitment to amend the PBC regulations to require consultation only on decisions that require surrender of native title rights. However, the PBC can place its own restrictions through its rules (no change has yet been made).

Consultation may be based on traditional decision-making practices under law and custom or a decision-making process adopted for the purposes of the PBC. Ensuring informed and inclusive decision-making processes can be resource-intensive and time-consuming but have been shown to be an indicator for the long-term success of the negotiation and implementation of agreements.[44] While an agreement may contain details as to how benefits will be distributed, some groups have developed distribution policies, which may also reflect traditional decision-making process.

PBCs are required to be established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act), which contains specific provisions for PBCs. This Act replaced the *Aboriginal Councils and Associations Act 1976* (Cth) (ACAA Act) and in the two years leading to June 2009, all registered organisations will have to transition their rules to comply with the new Act.[45] Many PBCs are currently non-compliant with the legislation in relation to regular reporting and meeting requirements.[46]

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[41] see AIATSIS RNTBC Summary table at <http://ntru.aiatsis.gov.au/research/rntbc_summary.pdf>.

[42] NTA s. 57.

[43] See *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg.8.

[44] Toni Bauman, Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation. Indigenous Facilitation and Mediation Project. Report No. 6. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006.

[45] *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006* (Cth). For further information see the ORATSIC website: <http://www.orac.gov.au/about_orac/legislation/FAQ_CATSI-Act-2006.aspx#4>.

[46] For a discussion of compliance rates among Aboriginal and Torres Strait Islander corporations, see the ORAC extract from the 2005-06 departmental (FaCSIA) annual report: <http://www.orac.gov.au/publications/annual_reports/2005-06_FaCSIAextract.aspx>.

The new Act seeks to alleviate some of the reporting burden imposed on small entities and align reporting and legal requirements with the *Corporations Act 2001* (Cth) for larger corporations.[47]

There has been a recognised problem within the system due to the fact that most PBCs were unfunded. A change in government policy in 2007 has seen the relaxation of this constraint, and PBCs can now receive Commonwealth funding for day-to-day operations.[48] However, without new resources introduced into the system, most PBCs still depend on the occasional support of NTRBs, for example in assisting with meetings or negotiating agreements.[49]

Many PBCs are dependent on reaching an agreement for the impairment or extinguishment of native title that contains provision for the administration of the PBC or a related organisation that can provide effective support to the PBC. For example, it was more than six years after the recognition of native title of the Tjurabalan people that they secured a funded position within the PBC as a result of an ILUA with the Tanami Gold venture. The Patta Aboriginal Corporation, the PBC for the Wurrunmungu native title group, negotiated $200,000 funding for their corporation as part of the $500,000 compensation package for the surrender of parcels of land within the Tennant Creek township.[50] The use of compensation funds for administration of the PBC is the source of some concern for native title groups.[51]

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47 <http://www.orac.gov.au/about_orac/legislation/FAQ_CATSI-Act-2006.aspx#5A>.

48 <http://ntru.aiatsis.gov.au/major_projects/pbc_guidelines.PDF>.

49 see AIATSIS PBC workshop reports: Lisa Strelein and Tran Tran, *Native Title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment*, Native Title Research Report No.2/2007; and Toni Bauman and Tran Tran, *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes Canberra 11-13 April 2007*, Native Title Research Report No.3/2007.

50 <http://www.nntt.gov.au/media/1188781367_3480.html>.

51 See AIATSIS Native Title Research Report No. 3 /2007.

Case example: Tjurablan-Tanami Agreement

The Tjurabalan determination in the East Kimberley was one of the first determinations of native title on the mainland, handed down on 20 August 2001. It was a determination by consent and recognised exclusive possession over most of the claim area.

The nature and extent of the native title rights and interests held by the common law holders in relation to the Determination Area are the right to possess, occupy, use and enjoy the land and waters of the Determination Area to the exclusion of all others, including:

(a) the right to live on the Determination Area

(b) the right to make decisions about the use and enjoyment of the Determination Area

(c) the right to hunt and gather, and to take water and other traditionally accessed resources (including ochre) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual and communal needs

(d) the right to control access to, and activities conducted by others on, the land and waters of the Determination Area

(e) the right to maintain and protect sites which are of significance to the common law holders under their traditional laws and customs, and

(f) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the Determination Area.

The native title rights and interests are exercisable in accordance with the traditional laws and customs of the common law holders.

A PBC was established to hold the title, the Tjurabalan Native Title Aboriginal Land Corporation. The Tjurabalan PBC signed an agreement with mining company Tanami Gold, which was launched by the Governor-General on 26 May 2006. The agreement covers mining and exploration over the 26,000 square kilometres of land located south-east of Halls Creek in Western Australia's Kimberley. Central to the agreement is a commitment to employment, training and business development opportunities for the Tjurabalan people and community development initiatives. The agreement provided for a resource officer to be appointed by the PBC.

Six years after the determination of native title, it was not until this agreement with Tanami Gold over the Coyote Mine that a funded position has existed within the PBC. This position was able to progress the community’s use and enjoyment of their native title rights and interests, by identifying other resources and programs that support the aspirations of the community, including obtaining an Indigenous Protected Area — Paruku.

Individual payments and distribution policies

In the best circumstances, the distribution of benefits under native title agreements would be determined by the native title group through considered discussion with their advisors. Indeed, best practice would see the development of distribution policies and appropriate financial structures for the management of funds prior to entering into any agreement. However, this has rarely been the case, particularly in areas with high volumes of future act activity.

A review by one NTRB of the compliance and management of native title funds in their region revealed ad hoc practice that failed to maximise the opportunity provided by payments received by native title groups. The NTRB undertook to renegotiate an appropriate distribution policy with each claim group to meet their needs and aspirations. The NTRB proposed the following generic distribution for discussion by each group:

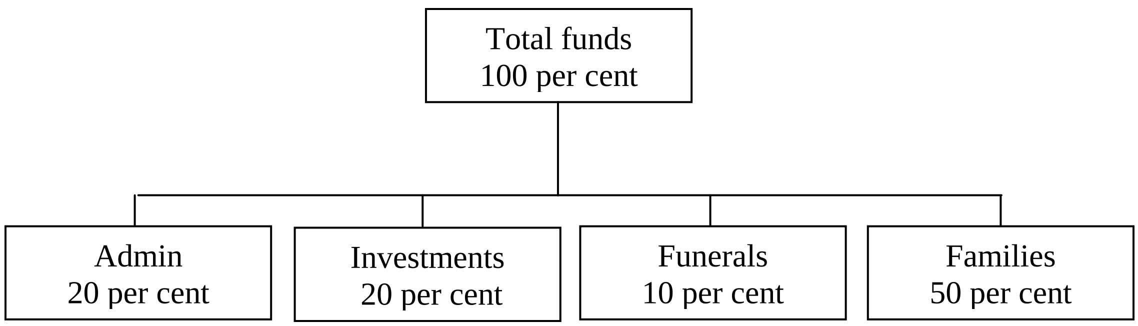

Figure 1. Distribution policy used by the Goldfields Land and Sea Council

A similar review is now being undertaken in the Pilbara region, to assess the existing structures for managing benefits and their effectiveness. While still in process, that review suggests that priorities for the distribution of funds often fall into four broad categories:

- Social capital/infrastructure.
- Accumulation for future generations.
- Distribution to current native title holders.
- Business and economic opportunities.

There have been calls for regional trust structures to provide economies of scale and administrative efficiencies as well as an opportunity to pool funds for investment in economic ventures.[52] This must be weighed against the new-found independence of native tile groups who wish to have control over their resources and recognition as distinct entities.

[52] AIATSIS Native Title Research Report no.1/2007.

At the other end of the scale, making direct payments to individuals can be fraught in the native title context. As discussed, the claim group description can be relatively open and membership may not be exhaustively defined. In perhaps the most extreme example, the Noongar claim involves between 25,000 and 40,000 individuals. In contrast, it may be more common to be able to identify 'family groups' or other subgroups, such as estate groups, which often underpin the governance structure within native title claim groups.

It is relatively common practice to release some money initially to the elders or heads of families, particularly from the first agreement, in recognition of their long struggle for the return of land and the significant burden of the native title claim and agreement processes. As well, such payments recognise the limited benefit the older people will receive from native title over the remainder of their lifetimes, not to mention the lost amenity during their lifetime, prior to the recognition of native title.

In practice: regional approach advocated by a land council

One land council has confirmed that it does not make agreements that deal with individual payments. Consideration is provided in the form of payments into charitable trusts established for the purpose of the agreement. Otherwise, payment is made to a charitable trust already in existence in the community, such as the community council, which then takes responsibility for the distribution and use of the funds. The trusts are income tax exempt. In one instance where individual payments were required because no trust existed, and could not be formed, tax was withheld on behalf of individuals.

The most common 'individual' payments, are however, salary or fees for cultural heritage surveys and clearances. Many native title agreements contain cultural heritage provisions. However, most states also have separate cultural heritage legislation. Who conducts cultural heritage clearances in a particular area may or may not align with the native title group in the area. In Queensland and Victoria for example, native title bodies (pre or post-determination) can apply to be the registered heritage body in their area. Proponents may be charged by a corporate body, or the NTRB and in most instances, individuals who conduct the surveys are remunerated or charge fees in their personal capacity.

Agreements are still being reached that provide direct financial payments to some members of the group, such as the applicants. Although the practice has been discredited, some companies continue to make direct cash payments, especially to applicants, in order to secure agreement. More common are distribution policies that allocate funds for particular purposes, such as investment or administration. A percentage of these funds is then allocated for each family, or for a purpose such as funerals and anyone from the groups can apply for such funding. There is a risk that in distributing money in small amounts administration of the funds and transaction costs become expensive and erode the capital base, particularly when held in bare or discretionary trusts.[53]

However, native title is, as discussed earlier, an intergenerational asset and there are strong arguments for balancing distribution in favour of long-term accumulation for the development of the group rather than the immediate gratification of those current native title holders. Native title once lost cannot be revived (except for the operation of the non-extinguishment principle), thus compensation for native title should include compensation of future generations for the loss of such important cultural inheritance and property rights. This question brings with it an economic and philosophical dimension as to the best way to advantage future generations. It could be argued, for example, that the investment in the wealth of the current generation of native title holders is be the best way to provide greater opportunities for the next generation, particularly in circumstances of extreme poverty. Some may argue that investment in the capabilities of individuals is the best use of resources, in particular through education and health care, also legitimising the expenditure of benefits in this generation.[54] It is important to remember, in this context, that the native title system limits the choices available to native title holders to expend or accumulate resources through the dual legal constraints of inalienability and involuntary future act processes.

How benefit packages are structured

The structure of benefit packages under native title agreements varies considerably according to numerous factors. These include: the nature of the negotiations; the respondents involved; the priorities of the native title groups for use of benefits; and the corporate structures available for the management of the funds. The largest agreements can involve significant cash benefits, most commonly paid into trusts for community/economic development. A limited number involve land transfers or percentage of property developments (the latter particularly applicable to native title determinations in townships). Comparatively few agreements involve equity or royalty arrangements.[55]

Ciaran O'Faircheallaigh has written the most comprehensive analyses of the content of agreements, particularly in the resources sector.[56] O'Faircheallaigh pays particular attention to the content and implementation of agreements, including the nature of the financial payments being negotiated. In 2003 O'Faircheallaigh identified six models of

[53] AIATSIS Native Title Research Report No. 1/2007, pp. 16-17.

[54] Amartya Sen, *Development as Freedom* , University Press Oxford, 1999

[55] See Martu agreement.

[56] See for example, O'Faircheallaigh, C (2006) Mining Agreements and Aboriginal Economic Development in Australia and Canada, *Journal of Aboriginal Economic Development*, Vol 5, No 1, 74-91; O'Faircheallaigh, C. (2007) 'Managing Financial benefits from Mining Projects in Australia', Presentation to a Forum 'Power, revenues and benefits: Ensuring fairness now and across generations', Fort Good Hope, Northwest Territories, 4-6 June. For a list of O'Faircheallaigh's papers see: <http://www.griffith.edu.au/school/gbs/ppp/staff/ciaran_ofaircheallaigh.html>.

financial payments to Indigenous communities:[57]

1. Single upfront payments with no further opportunity for payment or negotiation (for example, the Eastern Pipeline agreement, NSW/Vic).
2. Fixed annual payments, whether untied or tied to particular programs or purposes (for example, Century Zinc, Carpentaria).
3. Royalties based on volume of output or unit royalties.
4. Royalties based on value of output (for example, Ranger Uranium Mine, NT).
5. Profit-based royalties before or after tax (for example, Cape Flattery, CY).
6. Equity participation (for example, Skardon, CY).

There are advantages and disadvantages to each of the models and parties must balance the certainty and immediacy of upfront payments against the greater affordability but delayed benefit of profit-based payments. O'Fairceallaigh notes the variability in the success of agreement within any particular model. Interestingly, he notes, there is no clear progression of improvement in design, implementation or outcomes for Indigenous communities from agreements. This is largely as a consequence of the strict confidentiality of agreements. Rather, substantial progression in the sophistication of agreements and the outcomes achieved, can emerge where Indigenous representative bodies are able to develop greater expertise in negotiation and administration of agreements within a particularly active period for the resource sector in their region.[58]

With greater sophistication comes greater complexity. As O'Fairceallaigh notes, one agreement between Alcan and the people of the Western Cape York over the Comalco mine resulted, not atypically, in an agreement that incorporates three different financial models, to achieve different objectives of the parties over the life of the project. These included: a one-off payment on signing (model 1); set annual payments for part of the life of the project (model 2); and unit royalties (model 3).[59]

Comalco Indigenous Land Use Agreement (ILUA) (Western Cape Communities Co-existence Agreement)

The Western Cape Communities Co-existence Agreement (WCCCA), also known as the Comalco ILUA, is a comprehensive regional agreement, inclusive of Traditional Owners and other Indigenous people with historical connections. It links present and future bauxite mine development at Weipa with regional development, employment opportunities, training, community assistance, and financial advice.

[57] For a commentary on financial models used in mining agreements with Indigenous peoples see O'Faircheallaigh, C. (2003) Financial Models for Agreements between Indigenous Peoples and Mining Companies (PDF 295k), Aboriginal Politics and Public Sector Management Research Paper No 12, Griffith University, Brisbane.

[58] O'Fairceallaigh, 2003, p. 20.

[59] O'Fairceallaigh, 2003, p. 21.

Further items covered by the ILUA include:

- Consent to 'construction, operation, use, maintenance or repair' of public facilities in Weipa. This includes roads, bridges, schools, hospitals, pipelines and communications facilities.
- Consent to 'rights to enable the supply of gas to the Weipa Operations and to any related gas pipelines or provide any storage installations and other facilities' subject to conditions including compensation payment.
- Consent to transfer land to Traditional Owners.

The agreement encourages:

- mutual respect and recognition
- support for future Comalco mining operations
- -economic development of Indigenous communities
- increased Indigenous representation in consultations about operations, and
- increased levels of cultural awareness among Comalco employees.

A charitable trust (controlled by a majority of Traditional Owners) has been set up to manage the funds and annual contributions made by Comalco and the Queensland Government. Sixty per cent of the annual funding will be placed in long-term secure investments.

As well as the annual contributions:

- $500,000 will be managed by Comalco to run employment and training programs endorsed by the Coordinating Committee
- $150,000 will be allocated to a Cultural Awareness fund
- the Comalco-owned Studley Station, a 1,325 sq km pastoral property, will be transferred to the Traditional Owners, and
- parts of the Comalco lease that are no longer needed for mining will be relinquished to the state government for its return to Aboriginal ownership.

The Coordinating Committee has broad representation from all signatories to the agreement and will oversee the day-to-day implementation of the agreement. The committee will also consult on:

- cultural heritage and site management
- Comalco operations and plans
- employment and training initiatives
- environmental and rehabilitation aspects, and
- land access (mine and recreation).

Source: ATNS database.

O'Faircheallaigh makes the point that financial payments are among the most beneficial aspects of agreements not only because they can be significant amounts of money, but because they are more certain to accrue than other inclusions such as employment targets that often remain unrealised.[60] Many agreements are limited to such less tangible benefits including education and training commitments, cultural awareness training, heritage protocols and the nomination of specific positions within proponent

[60] O'Faircheallaigh, 2003, p. 6

organisations, such as heritage officers.[61] Others are limited to intangible benefits such as 'recognition' as native title holders or Traditional Owners. While the financial components of an agreement may be clearly quantifiable, other provisions may be less clearly articulated and easily valued.

The 'value' of the package

Where agreements are reached through negotiation it is not clear whether compensation payments are only part of the makeup of the consideration for entering into the agreement or are rightly considered entire compensation in a market environment. There is therefore considerable 'greyness' in the application of compensation principles in the negotiation of agreements. This is primarily due to the fact that elements of the consideration are not differentiated. This complicates the tax treatment of native title payments, as will be demonstrated later in this paper.

There is no requirement under the NTA to identify components of agreements as native title payments, compensation or other. Although there is a cap on compensation under s. 51, the ILUA provisions allow compensation to be defined within the terms of an ILUA. Section 24EB(4)-(6) provides that the ILUA determines all compensation (regardless of whether, or how much, compensation was actually paid). In practice it is almost impossible to ascertain the component of consideration attributable to temporary impairment or suspension of native title rights by future acts.

This problem is exacerbated by the number of inclusions in agreements that could be considered to be government programs or services (such as joint management, inclusion in natural resource management decision-making and community/economic development programs) or corporate responsibilities (such as cultural awareness training or employment programs or broader corporate social responsibilities). Such arrangements are regularly entered into with communities under other government or corporate programs without any impairment of native title rights. For example, the Ord Stage 2 agreement contained transfers of Aboriginal Community Leases that has been under negotiation outside the native title context for over a decade.

There is the same tendency in commercial agreements where there is agreements can be padded and exaggerated in terms of their monetary value. This can disguise the benefits directly flowing to the community and in particular overstate the 'compensation' being paid for the extinguishment and impairment of native title.

A particular conflation occurs over the idea of corporate social responsibility or 'social licence to operate', which has long been a part of the mining industry's investment in their social reputation.

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[61] See the AIATSIS ILUA summary table: <http://ntru.aiatsis.gov.au/research/ilua_summary.pdf>.

A definition of CSR

The World Business Council for Sustainable Development defines corporate social responsibility (CSR) as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".

WBCSD, Corporate Social Responsibility: Making good business sense, 2000, p.8.

There is however some confusion between CSR and legal obligations to negotiate with native title groups for the impairment of legal rights. There are essentially three bases upon which native title groups and mining industries engage:

1. Indigenous peoples as holders of valuable legal rights – negotiating access and compensating impairment and loss of amenity.
2. Indigenous people as the local community – the socio-economic impact of infrastructure and extraction, developing the good neighbour/ongoing relationship.
3. Broader CSR – Indigenous peoples as a severely disadvantaged group within Australia whose rights are not fully recognised in the law of the state.[62]

In the current resources boom, industries have particular interest in Indigenous communities as local providers of labour and services.

This becomes problematic when companies seek to 'tie' compensation payments. Documented experiences in Queensland, and shared increasingly across the country, suggest that proponents themselves will now insist on cash and equity components being paid into charitable trusts, with others insisting on the additional security of a custodial trustees. It has been suggested that key among the motivations in this case is the reputation of the company – that is the need to see the money 'spent properly'.[63]
Charitable and community trusts in which the industry partner continues to have a stake demonstrates a conflation between the three areas of engagement of Indigenous people and the resource industry. How so ever Indigenous groups choose to manage the payments, respondent parties should remember that when a deal is done for access to native title land it is not charity. It is important that industry and government parties do not confuse commercial deals, community engagement and corporate responsibility, but address all three aspects of the relationship.

Despite the limited value of the large majority of agreements, there are some agreements that set new benchmarks in terms of the process of negotiation and the benefits flowing to

[62] See Lisa Strelein 'Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries', Seminar Paper, Broome, 9-10 July 2007.

[63] Strelein, L & Tran, T. 2007. *Senior Professional Officers Workshop: Taxation, Trusts and the Distribution of Benefits*, Native Title Research Report No. 1/2007, Native Title Research Unit, AIATSIS, Canberra, pp. 13-14.

the native title holders. Agreements such as the Tanami Gold Agreement and the Argyle Agreement in the East Kimberley, and the Aztec Agreement over Koolan Island around Derby provide significant outcomes in complex packages designed to provide long-term economic benefit to communities suffering severe economic and social disadvantage.

Case example: Dambima-Ngardi and Aztec Agreement: Koolan Island

Main features of the agreement:

- Money and shares to the Traditional Owners' Charitable Trust.
- Funds for Traditional Owner administration staff and employment and training officers.
- Employment for Traditional Owners with the company (including two positions for Cultural and Heritage Officers and Trainees).
- Protection of significant sites on the island.
- Involvement of Traditional Owners in environmental decisions.

Access and reporting:

- Aztec will build a training centre, jetty, and mooring buoys on the island that Traditional Owners can use.
- Aztec will report to the Derby community and Traditional Owners on Koolan Island operations and progress.

Aboriginal heritage and culture:

- Aztec operations are within a set area, and the agreement includes strict rules about looking after significant sites, with Dambima-Ngardis having the final word on these matters.
- Aztec will pay Dambima-Ngardi people to run cultural awareness courses for mine workers.
- Aztec will employ two Traditional Owner cultural heritage rangers to make sure Koolan Island is looked after.

Environmental:

- Aztec will follow strict rules to look after the environment, and will include Traditional Owners in decisions affecting the environment, and in the mine closure plan.
- Aztec will provide funds to Traditional Owners each year to engage an environmental consultant.

Jobs and economic development:

- The agreement provides clear goals for Indigenous employment – up to 30 per cent of the work force.
- Aztec will provide a 'life skills' course for eight to ten people for the life of the mine, and make sure the workplace is culturally appropriate for Traditional Owners.

The community's aspirations:
The opportunities from the agreement will help Dambima-Ngardi people to reclaim their lives, after having been removed from their traditional lands and resettled in Derby and nearby Mowanjum community.

'It's been 50 years since we moved from our home lands to live in the Derby area,' said Janet Oobagooma. 'We've kept our links to country strong, and now we can go back home.

'We want to return to our country. We want to go back and stand in a place that we know in our hearts is our ancestral home. Then we can feel the true meaning of belonging.

'Now we have the chance to return to our country. We moved away as a group, now we will move back as a group. This agreement gives us a secure economic base for the future, and the freedom and independence we need to go back and live on our own country. We can start to rebuild our Dambima-Ngardi community.'

(Source: Kimberley Land Council)

Whatever the concerns a proponent may have for its social licence to operate, it is native title that brings proponents to the table. The proponent needs to negotiate access to land and often have an interest in resolving negotiations within a short timeframe, which can result in a better outcome for Indigenous groups. But many projects remain price sensitive and it is difficult to separate the value of the package into different components, for native title or goodwill/CSR. All of the package could be considered consideration in the context of the deal, whether compensation for impairing access or speedy resolution of the negotiation, or, indeed, purchasing a good local or international reputation.

In addition, determining the 'commercial' value of the agreement must take into account that the cost to Indigenous people of the loss of land may outweigh the willingness of the proponent to compensate in financial payments alone. There are also issues brought to the table in native title negotiations that may go beyond the native title sphere. Without any recognition under Australian law of a general fiduciary duty or liability for past dispossession (prior to 1975), the native title concept of 'compensation' is not able to adequately describe the dynamics at play in the negotiation and settlement of native title agreements. In contrast to the size of comparable settlements for in other countries, Australia's concept of compensation is rather meagre.[64]

Native title provides a limited opportunity for Indigenous communities to highlight historic grievances and current economic and social disadvantage. Indigenous people may seek to have these matters included in any resolution of the native title matter, particularly where government parties are involved. The return of land, especially to

[64] See the Nunuvut example below. While it would be impossible to describe and analyse the difference in the compensation and settlement packages in Canada and New Zealand, they are worth learning more about. The Australian state has a long way to travel before we approach best practice in reaching meaningful settlements of past grievances and future partnerships with Indigenous peoples.

community living areas or land trusts lands, should be considered as a recognition of past dispossession (not unlike the rationale for the establishment of the Indigenous Land Corporation program). For example, during the Ord Stage 2 negotiations, the Miriuwung Gajerrong negotiators insisted that past dispossession caused by the Ord Stage 1 should be addressed by the state government. As a result, the Aboriginal Social and Economic Impact Assessment formed a significant part of the negotiations and settlement of Ord Stage 2.[65]

Thus, negotiated compensation for loss or impairment may be greater than what we currently predict to be the case through court-assessed compensation under s. 51 of the NTA. However, we must be wary of making judgements about the value of native title before any real modelling has been done to value what is being given up, for example in relinquishing an intergenerational right.

A comparative example – the Nunavut land clvaim settlement in Canada

The Nunuvut land claim settlement is the largest settlement in Canada. In exchange for surrendering their aboriginal rights, the Inuit receive several economic and land title benefits, as well as some self-government powers.

Economic benefits:

- A cash settlement totalling $1.148 billion over 14 years.
- A $13 million Training Trust Fund to aid in the training of the Inuit for approximately 600 new government jobs in Nunavut.
- A share of federal government royalties from oil, gas, and mineral development on government lands.
- Procurement preference policies that ensure the increased participation of Inuit firms in federal and territorial government contracts awarded for Nunavut-destined projects.

Land title benefits:

- Legal title to 350,000 sq kms of land in Nunavut, of which 35,200 square include mineral rights.
- The right to harvest wildlife on government lands and waters in Nunavut.
- The creation of three new national parks in Nunavut.

Self-government powers :

- The establishment of the Nunavut Territory.
- Proportionate representation in the public service of Nunavut.
- Equal representation on several territorial management boards, including the Nunavut

[65] Under the Ord Stage 2 agreement the largest areas of freehold transfer were required to be immediately leased back for 100-1,000 years (at a rent of $1 per 100 years) for environmental zoning, while the Miriuwung Gajerrong people were liable for stamp duty and transfer costs. The Miriuwung Gajerrong people were also offered unconditional freehold over community living areas but would receive no roads infrastructure or surveying otherwise they would receive conditional freehold. Compare this with the deal secured by non-indigenous pastoral interests involved in the project.

- Wildlife Management Board, Nunavut Planning Commission, Nunavut Impact Review Board, the Nunavut Water Board, the Nunavut Surface Rights Tribunal.
- The right of first refusal on sport and commercial development of renewable resources in Nunavut.
- Advanced negotiation of Inuit Impact and Benefits Agreements (IIBAs) on major development projects that could have a detrimental impact or provide benefits to Inuit.

<http://www.mapleleafweb.com/old/features/nunavut/claims.html>

The impact of tax on decision-making

The structure of an agreement is affected by the nature of negotiations and the recipients of benefits. The expected tax treatment of the benefits also impacts on decisions about how the benefits are to packaged and managed. Most native title claimants and PBCs rely on advice from the NTRBs in the structuring of agreements. The subsequent management of distributions however is more likely to reside at the community level.

Many Indigenous groups opt to establish a charitable trust to manage benefits under agreements from a tax perspective in order to maximise the funds available from native title agreements. There are two key reasons for seeking charitable status. First, a 'charitable' entity is exempt from income tax under Division 50 of the *Income Tax Assessment Act 1997* (ITAA 1997). Second, an entity may be eligible for endorsement under Division 30, which allows for tax deductions for gifts made to certain entities endorsed by the Commissioner of Taxation as 'deductible gift recipients' (DGR), for example if it is a Public Benevolent Institution (PBI).[66]

The current practice of diverting native title payments into charitable trusts/funds reflects a number of policy concerns:

- The nature of native title as a communal title (difficult to identify all individuals in the group).
- The need for long-term benefits from the limited opportunities that may arise from native title (particularly considering the inter-generational nature of the title).
- Significant community development needs of many native title groups that can prioritise social over economic outcomes. For example, money from two agreements in the East Kimberley have been used to buy kidney dialysis machines and in one case, a nurse's salary.
- The impact of individual cash payments on government payments.[67]
- Negative social impact of the sudden injection of sums of money on communities

[66] Charitable trusts and deductible gift recipients each have certain (but different) tax concessions under the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTAA). It is important to note here the difference between a charitable fund, which holds funds for charitable purposes) and a charitable institution, which can do charitable acts, for example, giving direct relief form poverty. A fund cannot receive endorsement under Division 30.

[67] That is, establishment of a charitable trust to provide community services and infrastructure rather than immediate distribution of all funds. However it should be noted that any distributions to individuals will be considered income for the payee and accordingly may affect means- tested welfare related payments

suffering severe poverty. Individual payments are often limited to a small number of elders, which may or may not be expected to be redistributed.

Importantly, as we shall see in Part II of this paper, the exempt status of the charitable trust makes it unnecessary to determine the character of the payment itself, This simplifies what otherwise becomes a complicated inquiry, because there are three interrelated taxation events in relation to the payments discussed here:

1. the characterisation of the payment itself
2. the characterisation of tax status of the entity receiving the payments, and
3. characterisation of the receipt of the payment (or benefit arising from the payment) in the hands of individuals.

Case example: Argyle Diamond Mine Agreement

Signed Sept 2004, ILUA June 05

Main features of the agreement:

- Cultural heritage, ‘no means no’.
- Fixed payments to affected communities, variable payment to Traditional Owner groups, related to profits.
- Individual payments to small number of senior Traditional Owners.
- Remaining Traditional Owner payments to Charitable Trust (70 per cent) and Special Purposes Trust (30 per cent).

Charitable trust:

- Until 2009, 86 per cent to Sustainability Fund, for long-term investment. Income reinvested until end of mining. 100 per cent to Sustainability Fund after 2009.
- Until 2009, 14 per cent to ‘Partnership Fund’, for joint community development projects with government or private partners.
- After 2009, up to 25 per cent of capital and income can be invested in local businesses.

Special purposes trust

- All income flowing to the trust allocated for the benefit of seven estate groups in agreed proportions.
- Estate groups submit annual plans, money released if they conform to rules set out in agreement.
- Payments from the trust are to create benefits in areas such as employment, business, health, education, culture.

Agreed determination of native title, grazing lease in trust for Traditional Owners until end of mine, Argyle to then support grant of freehold.

Environmental management:
- Traditional Owners right to be consulted, submit proposals.
- Employment, training:
- Targets, training and then employment preference for Traditional Owners.
- Business development:
- Taskforce, Business Development Coordinator funded for three years.
- Argyle allocates funds for Management Plans, Argyle/Traditional Owners allocate funds to set up/run Trusts.

Important gains for Traditional Owners:
- Cultural heritage, 'no means no'.
- Recognition for Traditional Owners, central role in the agreement.
- Payments specifically for benefit of Traditional Owners, contractual basis for all payments.
- Agreement a requirement for Rio's decision to go underground =-substantial leverage.
- 'Rules for Money' built into agreement.

(source: Cairan O'Fairchealleigh, Griffith University)

While charitable trusts have significant tax benefits, they are an imperfect vehicle for native title holders.[68] The use of funds for social and community purposes may have a sound basis, with so many Indigenous communities in need of positive social infrastructure and personal support for members of the native title group. However, there are also problems with this approach as a universal solution. The conversion of economic opportunities into social outcomes (or economic money into social money) needs careful thought.

The ATO has consistently argued that a charitable trust cannot be established for the native title group alone, as the native title groups are not 'an appreciable section of the community'. Instead, the office suggests that a native title group is defined by reference to a family group (extrapolated from the common use of 'apical' ancestors to determine the scope of the group). This ignores the fundamental element of the native title group as based on a society. Some groups have been able to receive endorsement as a PBI by structuring their objects to reflect a dual role, of holding the benefits on behalf of the native title group and providing direct relief from poverty for Indigenous persons within a geographical area that encompasses the lands subject of the native title determination. However, the purposes to which funds can be put are limited and may constrain the corporation from meeting its responsibilities to the native title group.
In addition, the ATO has determined that there are limits on the accumulation of funds by

[68] See Strelein, L & Tran, T. 2007. *Senior Professional Officers Workshop: Taxation, Trusts and the Distribution of Benefits*, Native Title Research Report No. 1/2007, Native Title Research Unit, AIATSIS, Canberra, Table 1, p. 10.

charitable institutions. Current practice seem to suggest that 10 to 11 years is the accepted limit for accumulation. The rationale for this rule lies in the idea of a trust for purposes – that is the idea of a charity receiving funds free from tax is to redistribute or utilise those funds for charitable purposes. But this is inconsistent with the idea of native title payments as intergenerational assets or compensation.

The restrictions on the use of funds within charitable funds or entities has led to considerable dissatisfaction with trusts that are unable to support the kind of progress and development aspirations of the group. A recent review of a number of trusts in the Pilbara resulted in substantial amendments. In some cases additional trusts were established because the beneficiaries have been too narrowly defined (to include only the claim group) to secure tax exemption and, the benefits that were expected to be enjoyed under the agreement have been substantially reduced.[69]

A further concern in relation to current practice is where proponents are designing the structure for the particular agreement, including funding or providing technical advice. It is not surprising that in most cases the result is an arrangement particular to that agreement. The Miriuwung Gajerrong peoples' experience, however, shows how the number of trusts and corporations can grow quickly – there are two PBCs, the Miriuwung Gajerrong Corporation, the two Argyle trusts that some Gajerrong estates are involved with, and no doubt more to come. This takes a lot of effort to retain the alignment of the organisations and provide the resources for each of them to operate. The administration and transactions costs of multiple corporate entities could be debilitating in the long term.

The Ord Stage 2 Agreement may be unique in its size and complexity due to the multiple purposes that the corporate structure had to meet. But, Adam Levin has noted that his review of trust arrangements in the Pilbara has almost always resulted in the creation over time of at least two subsidiary entities, each with a specified purpose. This is in part due to the fact that there is not, at present, one single corporate vehicle that can meet the various purposes identified by native title groups in a tax effective way.[70]

This kind of design and modelling needs to take into account the long-term sustainability of the governance structure surrounding the native title group. I am mindful of Marcia Langton's keynote speech at last years Native Title Conference about the risk of pursuit of corporate goals and decision-making structures that may in the end undermine the traditional decision-making structures that native title seeks to recognise and protect.[71] One of the reactions to this concern is to 'quarantine' the PBC from an economic development arm. However this has the potential to create and institutionalise conflict between the cultural/non-economic body and the wealthy/economic/unconstrained body. There needs to be an alignment of corporate and cultural values, enhancing rather than contesting native title rights and authority of traditional law and custom.

[69] Pers. comm. Adam Levin, 25 February 2008.

[70] Pers. comm.

[71] Langton, M, 2006, Legal personality and native title corporations', Native Title Conference: Tradition and Change, Culture and Commerce, 24-26 May 2006

Here Adam Levin has reflected on the inadequacy of the funding for administration in the MG structure. He argues that while being cognisant of the need to balance traditional decision-making and commercial legal and compliance responsibilities, the challenge is to provide funding for appropriate governance and risk mitigation strategies. This approach ensures small, talented boards can operate yet remain responsible to and acknowledge the specific traditional decision-making processes of native title groups.[72]

At the other extreme are the large number of trusts that are managed by a single individual trustee who has to consult and may take advice from an advisory board, but is otherwise completely independent. Trustees are becoming more educated about what is involved in running native title-related trusts and increasing their fees as a result of the administrative burden. This in turn, increases the costs to the native title holders in administering the benefits received. Custodial trustees have the added challenge of leaving native title holders feeling 'supervised' in the use of their money, particularly under the additional constraints of charitable status.[73]

There is now a serious concern that where trusts were poorly conceived in the first place, or have proved inadequate or inappropriate, the underlying agreement itself will require revisiting in order to modify the way in which benefits are to be received under the agreement. This includes related consent determinations.

[72] Pers. comm.

[73] See Strelein, L & Tran, T. 2007. *Senior Professional Officers Workshop: Taxation, Trusts and the Distribution of Benefits*, Native Title Research Report No. 1/2007, Native Title Research Unit, AIATSIS, Canberra,, Table 2, p. 11-2.

II. Taxation arrangements for use of native title lands

Despite the influence of tax minimisation on decisions about how native title agreements should be structured, on the whole, the taxation of native title is poorly understood by native title groups, government parties, proponents and policy makers. It is rarely discussed or documented and attempts at developing clear policy on taxation of native title have faltered because of the practical and conceptual hurdles that must be confronted. There are primarily two regimes that apply to the taxation liability of any person or entity in Australia: the Income Tax regime, which determines a taxpayer's taxable income; and the Goods and Services Tax (GST), which targets the point at which a transaction occurs. Normally GST and income tax regimes are considered separately, but I have included discussion of both to illustrate the difficulty in identifying and isolating a native title payment as well as defining the nature of such payments. There are two special treatments applicable to Indigenous peoples, which I will also consider in the native title context. They are the Mining Withholding Tax and the Social Security Means Test (exempt trusts) Declaration. Both of these models are useful in pointing to alternative treatments that may resolve some of the practical and conceptual issues that occur in the application of the general taxation arrangements to native title. Other policy alternatives will also be canvassed looking at both the taxing of transactions and entities.

Goods and Services Tax

Valuation of even the most complex native title agreements may be necessary for the purpose of calculating the GST. The GST, introduced in 2000, is a broad-based value add taxation scheme.[74] GST of 10 per cent of the value (or 1/11th of the total price) is payable on any supply of goods and services, and almost anything falls under the concept of supply. There are very few exemptions from GST (or zero rated supplies), such as basic food, education and health, and domestic rent.[75] The GST is intended to be borne by the end user or private consumer of the good or service. GST paid on acquisitions further up the supply chain may be claimed as an input tax credit, effectively neutralising GST until the ultimate consumer is reached. The valuation of native title agreements proves a difficult task because they are rarely a simple payment for a service. In addition, the overall taxation arrangements are imperative to the issues of corporate design and the structuring of settlements currently confronting native title groups.

The application of the GST depends on two central elements: first, whether there has been a supply; and second, whether the supply is taxable. When native title groups receive payments that are subject to GST, further consideration may need to be whether those groups should be registered for GST. The key provision to determine the application of the GST is Section 9-5 of the GST Act:

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[74] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act).

[75] GST free supplies under Division 38, GST Act; GST input taxed under Division 40, GST Act.

You make a taxable supply if:

- you make the supply for consideration, and
- the supply is made in the course or furtherance of an enterprise that you carry on, and
- the supply is connected with Australia, and
- you are registered, or required to be registered, however,.
- the supply is not a taxable supply to the extent that it is GST-free or input taxed.

The nexus between a supply and consideration is important in the native title context and raises some threshold conceptual questions about the nature of native title negotiations, in particular how much of any native title deal is 'compensation', raising similar issues to those that determine the application of the Capital Gains Tax provisions.

There are three specific tax rulings that are relevant to determining the application of GST to native title payments, dealing with the concept of a supply broadly (GSTR 2006/9); court orders and out of court settlements (GSTR 2001/4); and non-monetary consideration (GSTR 2001/6).

What is a supply?

A supply not only includes goods and services, but also includes the provision of information and advice, any grant, creation, transfer, assignment or surrender of property, and/or any agreement to do an act or refrain from, or tolerate an act.[76] It essentially encompasses any act that results in the passing of something from one party to another.[77]

While the grant of an interest, or the transfer of a right would be defined as a supply, the realisation of a right, such as the recognition of native title, is not a taxable supply, just as the realisation of copyright, upon the creation of a work is not a supply.[78] The critical issue here is the absence of a supplier. The common law recognises that native title is not a grant from the Crown like other real property interests in Australia and depends on a determination of native title or recognition from the Crown for its existence.[79]

The ATO has noted that in other jurisdictions the surrender of a right or entering into an obligation, does not, without more, constitute a supply, despite the definition explicitly including them. In two European Community cases, an agreement by a farmer to reduce production was held not to constitute a supply, because there was no link with the chain of consumption, that is, there was no identifiable acquirer of the supply.[80] However, the Australian law is likely to be interpreted more broadly, in particular, because GST liability is not determined by the supply alone, but by the conditions for a taxable supply

[76] s. 9-10(2).

[77] GSTR 2001/4, [22].

[78] see GSTR 2006/9 [60].

[79] *Mabo v Queensland [No.2]* (1992) 175 CLR 1, at 59 (per Brennan J)

[80] *Landboden-Agrardienste GmbH & Co. KG v Finanzamt Calau* [1998] BVC 70 and *Mohr v Finanzamt Bad Segeberg* [1996] BVC 293.

set out in s. 9-5, reproduced earlier.[81]

What is a taxable supply?

In order to be taxable supply, the supply must be made for consideration.[82] The definition of consideration is broad, and extends beyond cash payments to include, for example, 'a forbearance', that is, an agreement not to object to something, or to put up with something being done. There must be a nexus or direct link between the supply and the consideration. The GST Act explains the nexus between a supply and consideration as being based on 'connection with', 'an inducement to', or 'in response to', a supply.[83] The fact of a payment then, doesn't automatically assume a supply. For example, in *Catham Islands Enterprises v Commissioner of Inland Revenue*[84] the New Zealand Court of Appeal determined that the mere settlement of a sum of money upon a trust by the government was not consideration for any particular supply.

To determine a nexus between a payment and a supply then, it is necessary to concentrate on the nature of the transaction. The different kinds of native title payments may give rise to different GST treatment. Importantly what a contract or agreement might say about the tax treatment is not conclusive. As with any issue in contract law, 'the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not the label they put on it'.[85] If the agreement is vague or fails to faithfully represent the transactions taking place then an objective assessment of the total fact situation may be required.[86]

Compulsory acquisition and determinations of compensation

It seems reasonably certain that where a state or the Commonwealth Government vests land with the effect of extinguishing native title there is no supply. The ATO, in their 2006 ruling, gave a specific illustration in relation to compulsory acquisition of native title, which states that:

> Although the claimants have agreed to accept the compulsory acquisition and the amount of the compensation, the agreement does not cause claimants' rights to be extinguished. These rights over the land are extinguished when all the limitations, reservations and restrictions over the land are revoked by the operation of the statute. The claimants are not making a supply of surrendering their rights.[87]

Mere acceptance of a compensation amount does not constitute a supply. A

[81] GSTR 2001/4 [36].

[82] s. 9-15(a).

[83] s. 195-1; s9-15.

[84] (1999) 19 NZTC 15075.

[85] *Radaich v Smith* (1959) 101 CLR 209, 214, per McTiernan J.

[86] GSTR 2006/9, [226].

[87] GSTR 2006/9, [88].

determination of compensation would likely not involve a taxable supply, because the meaning attributed to 'supply' requires the supplier to take some action to give rise to the payment. This would presumably apply to any of the provisions that prescribe the payment of compensation for impairment of native title rights, including validation and confirmation provisions.

The ATO's analysis of compulsory acquisition

A government authority is compulsorily acquiring land and interests relating to that land, including the native title rights under a particular statute. 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.

As required by the statute, the authority has made a public announcement that it is acquiring the land, and as a result, a number of groups of claimants have registered their respective native title over the land.

The authority has negotiated with each of the claimant groups as required by the statute, as to just compensation for the extinguishment of their rights over the land, and has entered into a deed with them. The deed sets out, among other things, that:

the claimants accept the compulsory acquisition and extinguishment of any and all native title rights and interests in the land and agree to withdraw a related objection made under the statute to compulsory acquisition; and the authority undertakes to provide compensation to the native title claimants in the form of funding, land and certain services.

Although the claimants have agreed to accept the compulsory acquisition and the amount of the compensation, the agreement does not cause claimants' rights to be extinguished. These rights over the land are extinguished when all the limitations, reservations and restrictions over the land are revoked by the operation of the statute. The claimants are not making a supply by surrendering their rights.

It may be argued that the native title claimants are making a supply of entering into an obligation to withdraw any objections made under the relevant native title statute. However, no part of the compensation is consideration for a supply of withdrawing objections to the compulsory acquisition. The compensation relates to the loss suffered by the claimants on the extinguishment of their interest in the land.

Source: GSTR 2006/9 [85-89].

Future acts and ILUAs

In *Shaw v Director of Housing and State of Tasmania (No.2)*[88], Underwood J determined that the payment of a judgment debt was not a taxable supply because the supply was not voluntary, it occurred by force of law and required no action by the supplier. Underwood J was of the view that compulsion by statute to take some action may still be a taxable supply if an entity must still take some action or do some positive act to cause the thing to be done.[89] However, perhaps unsurprisingly, this area of the law has some uncertainty in its application to native title. The ATO's view is that a distinction can be drawn between something brought about solely by operation of law (in which case there is no supply) and something done by an entity as a consequence of a legal requirement (which may constitute a supply).[90]

Future acts do not fit easily within the distinction drawn by the ATO. Simply because the NTA requires native title groups and proponents to negotiate or take some other action when a future act is instigated does not necessarily mean that the negotiated compensation is voluntary. The future act provisions provide a range of procedural rights when an act is proposed in relation to native title land. However, a native title group cannot say no to a future act occurring.[91] A closer look at the ATO's example in relation to compulsory acquisition would seem to apply equally to future act negotiations. Yet in a private ruling, the ATO has suggested that an agreement authorising a future act was a supply under s. 9-10(2)(g), and the periodic payments constitute consideration. However the ATO is of the view that the applicants were not carrying on these activities in the form of a business of enterprise. They have identified necessary components of commercial activity or profit-making intention. As a result, although they consider there is a supply for consideration, it is not furthering of an enterprise and is therefore not taxable supply.[92]

ILUAs, in contrast to future act determinations, could be argued to be negotiated voluntarily and depend upon much more economic and legal agency from the group. While many ILUAs validate future acts, it is not necessary to enter into an ILUA for the future act to proceed. Moreover, as argued here, the issues that are canvassed as part of the native title negotiation extend further and the resulting package may include the provision of services or programs that would not normally be considered a supply.

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[88] [2001] TASSC 2.

[89] [2001] TASSC 2, [19]. See also *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2006] FCAFC 115.

[90] GSTR 2006/9 [78].

[91] This view is supported by recent analysis of the NNTT arbitration determinations in which 100 per cent of future acts are allowed to go forward without any significant conditionality despite having been objected to by the native title group. Ciaran O'Faircheallaigh, ''Unreasonable and Extraordinary Restraint': native title, markets and Australia's resources boom', *Australian Indigenous Law Reporter*, 11, 3, 28-42, a version of which was presented at 'Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries', Broome, 9-10 July.; see also, Ciaran O'Faircheallaigh and Tony Corbett, *UWA Law Review*, op.cit.

[92] Register of Binding Private Rulings, Authorisation no. 43869 (2008). <http://www.ato.gov.au/rba/content.asp?doc=/rba/content/43869.htm>.

Consent determinations and supporting settlement packages

This concern about the nature and extent of the transaction goes beyond the negotiation over future acts and increasingly applies to the determination of native title itself. A consent determination, which is in effect an out–of-court settlement of native title, now often involves not just a determination that native title does or does not exist, but also includes other benefits for either the native title group or the state (and other third party respondents). For example, a state government may agree to: a consent determination that native title exists in one area on the condition that there is an agreement that native title does not exist in another area; or a surrender of parcels of land, or agreeing to given up future act rights; or a full and final settlement clause. Concomitantly, the consent determination may be supported by ILUAs that provide additional benefits to the native title group, for example, guaranteeing funding for the native title body corporate or joint management of a national park. Each of these elements of a settlement package may be considered a separate supply and assessed individually. Where forms of consideration, such as these, are not in the form of cash, the situation becomes more complex. But the GST Act does not appear to shy away from complexity.

Non-monetary consideration, unenforceable provisions and apportionment

Many of the complicating factors in determining the value of the native title settlement are non-monetary concessions by state or proponent parties. The Commissioner for Taxation has explained that the provision of non-monetary consideration is itself a taxable supply and each party must remit GST on their supply and claim input tax credit on their acquisition. That is, the primary barter principle applies, in which only the cash payments are exempted. The multiple supplies and acquisitions must be identified and treated separately for tax purposes. Native title agreements can contain vague and unenforceable commitments. Normally a supply cannot exist around the mere creation of an expectation that is not enforceable.[93] However, consideration can include ‘unenforceable’ elements that form part of the supply or that are ‘connected’ with the supply,[94] so long as there is something else that is a good or service that passes from the supplier to the recipient.[95] This may apply to some common provisions in native title agreements that promise employment targets or cultural awareness training in association with cash payments and equity.

If it is determined that a package of payments and broader consideration has a nexus with more than one supply, and that one supply is GST-free and another is not, the payment must be apportioned and considered separately to determine the appropriate GST treatment.[96]

[93] GSTR 2001/4, [37-9]; *Commissioner of Inland Revenue v New Zealand Refining Co Ltd* (1997) 18 NZTC 13187.

[94] GST Act ss9-15 and 195-1.

[95] GSTR 2001/11

[96] GSTR 2001/4, [118].

Should native title groups register for GST?

The final element of the definition of a taxable supply, under s. 9-15, is whether the supply is made in the course of carrying on an enterprise, and, related to that, whether the entity is, or should be, registered for GST. While the native title group need not be incorporated to register for GST, we are again confronted with some fundamental conceptual issues about whether native title agreements and payments received for acts that affect native title are a business or enterprise. The definition of enterprise is very broad and may even be limited to one transaction.

Section 9-20 of the GST Act provides that an enterprise is an activity, or a series of activities, done:

- in the form of a business or trade (ss. 9–20 (a)-(b))
- regular or continuous lease, licence or other grant of an interest in property (s. 9–20(c))
- certain trusts, charitable institutions or funds (under subdivisions 30, 50 (ss. 9–20 (d)-(f), (h)), or
- Commonwealth, state or territory or body established by law for a public purpose (s. 9–20(g)).[97]

It is not clear whether the activities of native title groups fit under subsection (c), which applies generally to landlords, or whether PBCs and incorporated native title groups would fit under subsection (g), being bodies established for a public purpose under a law of the Commonwealth. The general provision, (a), in the form of an enterprise, business or concern, could include the activities of a native title group, particularly where agreements are designed to generate a profit, either immediately or in the long term.[98] But as the 2008 private ruling reveals, the ATO suggests a single future act agreement does not constitute an enterprise.[99] Of course, where charitable institutions or funds are established to manage proceeds from native title agreements, they certainly fit within the definition and can register for GST.

Not all native title groups are registered for GST and may be missing opportunities for claiming input tax credits on GST paid by them in the course of conducting their 'native title business'. GST, and hence the price/value of an agreement can be a neutral transaction if both parties enter into the agreement as part of their business activities. This is important in not only the task of valuing the agreements but also in the likely scrutiny from the ATO (that is, the Commonwealth revenue 'at risk' of not being correctly remitted). Even if a particular transaction is not subject to GST, the GST incurred on other supplies necessary to give effect to that agreement, from legal advice to stationery, can be claimed as an input tax credit against other GST liability.

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[97] For the full, mores specific list see s. 9-20(a)-(h) GST Act.

[98] See *Ferguson v FCT* (1979) 26 ALR 307; *London Australian Investment co Ltd v FCT* (1977) 138 CLR 106, re: the distinction between income and capital where making a capital return is in the nature of the enterprise.

[99] Register of Binding Private Rulings, Authorisation no. 43869 (2008). <http://www.ato.gov.au/rba/content.asp?doc=/rba/content/43869.htm>.

Entities that have an annual turnover of $75,000 would be required to register under this threshold. The benefits of registering for GST must be weighed against the administrative burden of regular reporting to the ATO on business activity.[100] There may be some benefit in a native title group applying for an Australian Business Number (ABN) regardless of whether they then register for GST. This can simplify some invoicing/ payment processes.

There should be a clear understanding or agreement at the outset of negotiations as to the GST treatment. That is, negotiations must be clearly based on either 'price' (GST inclusive) or 'value' (GST exclusive). The latter may be preferable or even necessary, given the substantial non-cash or tied cash payments involved in many agreements. There is a risk that native title groups may be required to remit GST yet do not have the necessary cash flow or reserves. Indeed the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations advised that failure to remit GST is one of the major causes for the appointment of administrators to corporations registered under their Act.[101]

The practice in some agreements, for the state to simply accept liability for GST does not resolve the issue. Indeed this provision, in itself, is a taxable supply. Where native title groups are registered for GST, states in particular should be willing to negotiate on a GST-exclusive basis. The value can then be grossed up to include GST, which can then be claimed as an input tax credit.

Income tax

The *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) governs the annual assessment of the tax liability of individuals or entities.[102] There are rules and different treatments to apply to the relationship between individuals and the entities they are involved with, to determine where tax liabilities lie. A taxpayer's tax liability is determined by their total assessable income, less any allowable deductions which equals taxable income. Taxable income is then subject to marginal tax values, levies and rebates.

A taxpayer's liability is determined against any amounts of ordinary income or statutory income in a taxpayer's assessable income.[103] 'Ordinary income' carries its ordinary meaning, for example wages for individuals or revenue/profit of corporate entities.[104]

[100] Business activity statements (BAS) can be lodged monthly, quarterly or annually depending on the level of activity.

[101] Registrar of Aboriginal Corporations, Report of the Forum on risk issues for programs funding Indigenous corporations, ORAC, 2005, p. 17

[102] The statutory framework for income tax is complex and involves the interaction of a series of Acts. Income tax is technically 'imposed' by the *Income tax Act 1986* (Cth). The *Income Tax Assessment Act 1936* (Cth) also continued to apply in certain circumstances. The administration of the tax system, for example, offences and enforcement, is governed by the *Taxation Administration Act 1953* (Cth).

[103] ITAA 1997 s.6-15.

[104] *Scott v Commissioner of Taxation (NSW)* 1935 3 ATD 182.

Ordinary income is traditionally distinguished from earnings from capital and treated differently in determining overall assessable income. Part 3–1 of the ITAA 1997 contains provisions relating to capital gains and capital losses, which can affect the income tax liability of an individual or entity.

The capital/income distinction in native title

In the native title sphere, the future acts process provides native title groups with an opportunity to negotiate an agreement with a proponent to do an act. Is this a commercial transaction resulting in a revenue stream for 'allowing access'? Or, is it compensation for the impairment of an underlying capital asset? If the former, this could fall into the definition of ordinary income. If it is the latter, it could be defined as a 'capital event', which may or may not be taxable. A third consideration may be whether the payment is more akin to personal injury and solatium.[105] When determining whether compensation is ordinary income or capital in nature, it is necessary to look not at the nature of the compensation payment, but at what the compensation is being paid for, that is, what does the compensation seek to replace?[106] For example, if compensation is for the loss of capital asset it is irrelevant that the compensation is tied to a revenue stream or paid in instalments.

There is no judicial guidance in relation to native title specifically, so at this stage it is necessary to return to first principles of tax law to see if the nature of a native title payment can be readily identified. To determine whether payments received by native title groups in consideration for 'allowing' activities to occur on native title land should be considered ordinary income is not an uncomplicated inquiry. While exclusive possession native title holders have the right to determine use and access to land, many determinations, as discussed at the outset, do not include rights to commercial use of native title rights and interests. While many native title groups have aspirations for economic and business outcomes from their native title, and many are now managing land and assets resulting from future acts and ILUAs, the extent to which native title holders can carry on a business enterprise on native title land without entering into ILUAs remains untested. There is no doubt that native title groups have developed significant agency in the negotiation of agreements, but the fundamental constraint of the NTA is that there is ultimately no right to walk away.

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[105] 'Solatium' payments are compensation for insult or injured feelings as distinct from financial loss or physical suffering. That is, to alleviate the grief, suffering, and anxiety resulting from injuries or property or personal loss. On the debate around 'compensation' for native title see: Paul Burke, How can judges calculate native title compensation, AIATSIS Discussion Paper, 2002, <http://ntru.aiatsis.gov.au/research/compensation/burke_compensation.pdf>.

[106] *Glenboig Union Fireclay Co. Ltd v IRC* (1922) 12 TC 427.

The position in relation to compulsory acquisition and compensation for extinguishment may seem clear, but there are many agreements that do not extinguish native title. In particular, the distinction between capital and income streams is further complicated by the operation of the non-extinguishment principle. This effectively provides for activities to occur on native title land — which would normally have extinguished native title — to have no extinguishing effect. Does this provision change the nature of the event? What of the illusory non-extinguishing act that, for example, effectively denies access and enjoyment of native title rights and interests for 99 years? If so, this would be an unexpected anomaly, whereby the non-extinguishment principle, intended as a beneficial provision, could have a punitive tax consequence.

In the Federal Court case of *Cape Flattery Silica Mines Pty Ltd v. Federal Commissioner of Taxation* [1997] Spender J considered the character of the payments in relation to an agreement with the Hopevale Aboriginal Community.[107] The land was held by the community under Deed of Grant in Trust (DOGIT). The judge was concerned with the tax treatment of the payments for the purpose of the mining company's books. At issue were of a series of recurrent payments, calculated by reference to the value of silica sand that was extracted under the lease, an education and training bursary and the payment of related legal fees.

The judge considered what the company received in exchange for the payments, that is, what was the purpose of the payments. The important principle to be held in mind is that capital expenditure relates to the set up and expansion of the business and the revenue account concerns the day-to-day operations.[108] His Honour found that the payments made under the compensation deeds were appropriately included on the revenue account rather than the capital account. His Honour thought that the *ad valorem* payments were in the nature of rental for the right of occupation that would otherwise have been enjoyed by the community.

Spender J also observed that, as members of the community made up a substantial section of the workforce of the operations of CF Silica Mines, and good relations between CF Silica Mines and the community was important to the success of Cape Flattery's business activities and operations, that the payment of the annual bursary was to be regarded as a business expense and on revenue account. Interestingly the judgement clearly identified the CSR/goodwill aspect of the agreement.

The judge was influenced by his perception of the degree of power that the community held in negotiations over the granting of the lease. Spender J noted that s. 7.36 of the *Mineral Resources Act 1989* (Qld) made the grant of the lease conditional upon agreement with the community or a determination by the Warden's Court. His Honour observed the community had used this to extract the best price.[109] It is arguable that the

[107] *Cape Flattery Silica Mines Pty Ltd v. Federal Commissioner of Taxation* [1997] FCA 706 (28 July 1997)

[108] *Hallstrom Pty Ltd v Federal Commissioner for Taxation* (1946) 72 CLR 634, 647; *Associated Newspapers Ltd v Federal Commissioner for Taxation* (1938) 61 CLR 337, 359.

[109] 97 ATC 4556.

provisions of the NTA do not have the same level of protection for Indigenous interests as was observed in this example.

In any event, as Spender J himself notes, the consistent statements of principle have been applied with different results based on the particular facts of the case and the views of the judge.[110] Importantly, in *Cliffs International Inc. v. Federal Commissioner of Taxation,*[111] a judgement applied by Spender J and Barwick C J highlighted the fact that the treatment of the payments in the hands of the company does not determine the nature of the payment in the hands of the recipient, and vice versa.[112] Spender J compared his decision with the decision in *Barrett v Federal Commissioner of Taxation*, where the High Court was concerned with assessability (with which we are concerned) rather than deductibility.[113] The majority of the High Court determined that in the hands of the recipient, a per tonnage payment was indeed compensation of the diminution in the value of the land and the estimated damage caused by the mining. As consistently applied, the fact that the payments were over the period of the mine, did not prevent them being appropriately considered capital in nature.

Similarly, in *Nullaga pastoral co. Pty Ltd v Federal Commissioner of Taxation* (1978), Wickham J held that periodic payments received from a mining company as compensation for damage and interference to the use of the land by the pastoral company caused by exploration of bauxite were capital in nature.[114] One private ruling points to an agreement that provides for compensation for the 'effect of the project, project works and project titles [grants] on the claimed native title rights and interests to be paid periodically was none the less considered as capital by the ATO.[115]

It should also be noted here that native title is not just an interest in land. We are not simply concerned with physical damage to the land itself, but the damage to the associated rights and interests, the capacity to carry on cultural activities that sustain connection to country, and the laws and customs of the group.

Capital Gains Tax

In order to understand the consequences of the revenue/capital distinction, we need to examine the operation of the Capital Gains Tax (CGT) regime. The definition of 'capital' for CGT purposes is quite broad and includes land, shares, units in a unit trust,

[110] 97 ATC 4561.

[111] *Cliffs International Inc. v. Federal Commissioner of Taxation* 79 ATC 4064; (1979) 142 CLR 140.

[112] 79 ATC 4064.

[113] *Barrett v Federal Commissioner of Taxation* (1968) 118 CLR 666.

[114] 78 ATC 4329; (1978) 8 ATR 757.

[115] Register of Binding Private Rulings, Authorisation no. 77829 (2004): www.ato.gov.au/rba/print.asp?doc=/rba/content/77829.htm.

contractual rights and options.[116] It also includes intellectual property and goodwill. It is almost certain to cover native title, or native title rights and interests, without the need to characterise native title as real property or an interest in the land itself.[117]

There are two issues to consider in determining the treatment of native title transactions under Capital Gains Tax (CGT). First, identifying a CGT asset, and second, a CGT event. Defining these two things distinguishes capital income streams from revenue streams. A CGT event occurs when a CGT asset is disposed of through sale or gift or otherwise transferred; or if the asset is lost or destroyed, including through compulsory acquisition.[118] Of course, a CGT event does not presume a profit. A CGT event can also occur in other circumstances, for example entering into a conservation covenant (such as an Indigenous Protected Area), which may cause a reduction in the value of the asset and result in a capital loss.[119]

The capital gain (or loss) arising from a CGT event is determined by the difference between the cost base at the time the asset was acquired, and the capital proceeds from the disbursement. Section 116–20 of the ITAA 1997 states that the capital proceeds from a CGT event are the total of the money you have received, or are entitled to receive, in respect of the event happening and the market value of any other property you have received or are entitled to revive in resect of the event happening. Native title groups could acquire a CGT asset as part of a settlement or agreement, such as land, shares/equity, options or monies paid into a trust. Agreements are increasingly including immediate transfers of valuable assets including commercial and residential blocks or commitments to transfer infrastructure for nominal amounts, for example, at the end of mining.

However, the CGT was introduced in 1985 with a grandfather clause that exempts assets acquired before the legislation came into effect on 20 September 1985. Native title, under Australian law, was effectively ‘acquired’ by native title holders at the assertion of sovereignty and, needless to say, prior to the introduction of a CGT.[120] As an exempt asset, proceeds from the disposal of the asset would not be taxable, and nor would any loss be taken into account. As a result, the value of land, buildings and improvements, future payments and transfers are all included in the ‘compensation’ that represents the CGT-free payment. This package forms the ‘cost base’ for those assets and any subsequent sale will give rise to CGT on the difference.

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[116] The ‘right to seek compensation’ is also considered an asset for the purposes of the CGT (see TR 95/35), and the CGT even/disposal would be triggered when the right is surrendered or discharged. That is a ‘right’ that is recognised and protected by law and enforceable by a court of law or equity is considered an asset for the purposes of the CGT: ITAA 1936 s. 160A(a); ITAA 1997 s. 108-5(1).

[117] see judicial discussion by the High Court of native title as property in *Mabo* per Brennan J, 51, Deane and Gaudron JJ, 88-9; and *WA v Ward* (2002) 213 CLR 1, 64-5, more extensively debated in the full Federal Court: *WA v Ward* (2000) 99 FCR 316, for example, 338. See generally, Lisa Strelein, 2001, ‘Conceptualising Native Title’, 23 *University of Sydney Law Review* 95.

[118] Distribution from unit trusts can also be a CGT event if the distribution is sourced from capital proceeds.

[119] ITAA 1997, s. 116.105.

[120] There are private rulings that have accepted this as correct, and confirmed in TR95/35.

While native title should be considered a pre-CGT asset, buildings structures and improvement on the land may be considered a separate asset. And if constructed after 1985, would be covered by the CGT provisions if subsequently transferred.

Even compensation assets may trigger a CGT event if they are disposed of in the future. Native title holders should be able to receive a CGT exemption for a 'replacement asset'. That is, assets received as compensation for the 'loss' of an exempt asset, due to compulsory acquisition or negotiated settlement entered into as a result of a notification of compulsory acquisition. You can also choose this kind of rollover of the CGT exemption to assets acquired with monetary compensation, so long as the asset is used for a similar purpose.[121]

When compensation is received through a determination of a court or tribunal, the compensation is determined for loss, impairment or diminution of native title. This more clearly links the compensation to the effect on the underlying asset, such as the impact of a mine on the right to access, hunt and fish and the reasoning in *Barrett* applies.[122] However, there remains a grey area around whether all benefits negotiated under ILUAs or other agreements should be treated as part of the compensation package. Regardless of the nature of the compensation payment — for example, a percentage of net profit, a lump sum, or other payment structure — the pivotal questions remain whether the payment is compensation and what is the compensation intended to replace?

Compensation for personal injury and some government compensation regimes are tax exempt.[123] Traditionally personal injury settlements are divided into damage and solatium on the one hand and loss of income on the other.[124] If native title compensation were to be characterised as analogous not only to capital losses but also personal losses — that is loss of amenity and enjoyment of life (including traditions, laws and customs) — it should be exempt on the same principle.

Other taxes and charges

Failure to anticipate the taxation implications of a native title agreements can have disastrous effects, particularly with respect to ongoing taxation liabilities. Land tax and rates are the most obvious minefield if not appropriately catered for in the agreement and implementation plan. Some agreements involve transferring land and assets, with

[121] This is consistent with linking compensation with the 'underlying asset' that it seeks to replace. An alternative analysis may link compensation to the right to be compensated (which could be argued arose with the introduction of the NTA in 1993). This appears to have been settled by TR 95/35, [3], [71]. See Black, op.cit., also, *Federal Commissioner of Taxation v Guy* 96 ATC 4520.

[122] See Warren Black, 'Tax Implications to native title holders of compensation payments', *Journal of Australian Taxation* Sep/Oct 1999, 344.

[123] Division 54 ITAA 1997.

[124] In 2002, a scheme was introduced to allow tax payers to enter into structured settlement agreements or orders that allow for settlements to be invested and provide an annuity that is clearly tax exempt under eg Division 54B ITAA 1997.

insufficient cash to cover up-front stamp duty, or revenue stream to fund administration charges such as rates. This could result in the need to sell off settlement assets in order to service the implementation and administration costs. For example, Lhere Artepe, who are the PBC for the central Arrernte determination in and around Alice Springs received two years' start up funds in 2002 from the Northern Territory Government for administration purposes. The organisation must now rely on proceeds from surrender of native title for commercial and residential land releases, which included some blocks for development by Lhere Artepe. In another example, Patta Aboriginal Corporation received a $500,000 compensation package for release of town blocks in Tennant Creek, $200,000 of which is earmarked as 'administration' funds for the PBC.[125]

There is evidence of some land offers being rejected because of the costs associated with holding the assets. Other agreements have included state government agreement to waive stamp duty, land tax and rates for a five year period.[126] Having tax exempt bodies as the holding body for such land transfers can result in exemptions from stamp duty and land tax.

However, there may be tensions where exemptions apply for particular uses of the land, rather than to the entity itself. This can give rise to a separate inquiry. For example, the *Local Government Act 1995* in Western Australia exempts land for local government land tax if the land is used exclusively for charitable purposes'.[127] In the Western Australia Supreme Court decision in *Shire of Derby-West Kimberley v Yungngora Association*[128] the case involved an appeal from a decision of the State Administrative Tribunal to grant Yungngora an exemption from an obligation to pay rates under the Local Government Act. The association holds land including the Noonkanbah pastoral station and has been endorsed as a charitable organisation providing housing, schooling and facilities on the land it owns. The shire had argued that the charitable purpose of the station was incidental to its commercial purpose. The tribunal had initially found that the land was charitable, being used to improve the economic position, social condition and traditional ties to the land of the local Indigenous community. However, on appeal it was found that the tribunal was wrong to focus on the benefits of the pastoral enterprise rather than the use to which the land was actually put. It was noted that the 'land is not used for charitable purposes where the land is used for the purpose of raising funds for charitable purposes'. The court held that the 'benefits to the community and its members are not sufficient for a finding that the Land is used exclusively for charitable purposes'.

This decision is in contrast to the decision of the Full Federal Court in *Word*

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[125] It should be noted here that where PBCs have access to such funds from compensation settlements, they may be ineligible for funding for operational costs from the Commonwealth under current funding guidelines. See Department of Families Housing, Communities and Indigenous Affairs *Guidelines for Support of Prescribed Bodies Corporate* <http://ntru.aiatsis.gov.au/major_projects/pbc_guidelines.PDF>.

[126] See for example, Queensland Department of Natural Resources and Mines, *Guidelines for negotiating an Indigenous Land Use Agreement*,<http://www.nrw.qld.gov.au/nativetitle/pdf/land_use_agreement1.pdf>.

[127] See, for example, s. 6.26(2)(g) *Local Government Act 195* (WA).

[128] *Shire of Derby-West Kimberley v Yungngora Association Inc* [2007] WASCA 233. Contrast *Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully* (1952) 85 CLR 159; [1952] HCA 4.

Investments.[129] There, the court was concerned with the activities of Word Investments — a company limited by guarantee that conducts a funeral business — part of the profits from which are distributed to religious organisations.

Interestingly, Justice Sundberg, at first instance, noted that the corporate structure of many contemporary charities are complex and involve the use of separate legal entities to perform separate functions.[130] On appeal, Justice Jessup reiterated the conclusion of Sundberg J:

> With the decline of the welfare state, charitable organisation are expected to do more with the same resources. Reliance on donations alone will, in many cases, be insufficient. Hence many charitable organisations have established business ventures to generate the income necessary to support their activities. There may appear to be a vast difference between selling lamingtons at a church fete and selling funeral services, but where the object of raising the funds is the same, I can…[sic] see no reason to draw a legal distinction between the two.[131]

The full court affirmed the judgement of Sundberg J, that it is not the manner of raising money that determines whether an activity is charitable, but the purpose for which money is raised.[132] The established legal principle for assessing the 'true character' or nature of the entity is to refer to its 'objects, purposes and activities', not simply the activity alone.[133] Indeed, the purpose affects the character of the activity.[134]

Conclusion

The tax treatment of native title 'events' turns on a few key conceptual issues. Firstly, whether native title groups are engaging in activities that extract consideration, or whether they are receiving compensation. This is the key determinant for the application of GST. From here, the tax treatment depends on the distinction between income and capital and the underlying purpose of the payment or compensation — that is, what is the payment trying to replace. In the native title context, one of the key factors that make these questions intractable is the extent of agency that native title groups are able to exercise in relation their native title rights. The common law inalienability of title except any surrender to the Crown, and the vulnerability of the title to extinguishment without consent, is tempered buy the future act and ILUA provisions and the non-extinguishment principle, which, while still involuntary, provide greater economic agency and bring negotiations into a more commercial environment.

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[129] *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171 (Stone, Allsop and Jessup JJ).

[130] *Commissioner of Taxation v Word Investments Ltd* [2006] FCA 1414 (Sundberg J) [44]

[131] *Commissioner of Taxation v Word Investments Ltd* [2006] FCA 1414 (Sundberg J) [60]; cited in *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171, [81] (per Jessup J).

[132] *Commissioner of Taxation v Word Investments Ltd* [2006] FCA 1414 (Sundberg J)

[133] *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171, [14] (per Allsop J). See *Royal Australasian College of Surgeons v The Federal Commissioner of Taxation* (1943) 68 CLR 436.

[134] *Commissioner of Taxation v Word Investments Ltd* [2007] FCAFC 171, [40] (per Allsop J).

While not wishing the underplay the economic imperatives within native title groups to develop their land and reap benefits for their groups, it is important to remember in this context, that native title is a unique or *sui generis* right and efforts have been made in High Court decisions to counsel against seeking to fit native title rights into traditional common law categories, in particular trying to categorise native title as real or personal property. This compensation and capital/revenue debate presents us with the same challenge. Native title is unique, and to ask Indigenous people to give up their native title rights and interests even for a time, involves complex emotional and cultural questions that sit outside the normal commercial market. Native title compensation should at least be exempted under the income tax assessment regime. This is particularly important in relation to settlements between native title groups and the state, where more complex histories come into play. But it may also impact on commercial agreements, particularly where companies have enjoyed unfettered access to Indigenous peoples' lands in the past. I have pointed to the difficulties in 'valuing' these settlements for tax purposes. Nevertheless, they are in many respects truly compensation, but perhaps within a regime that deals with rights and wrongs that we are yet to legally recognise.

III. Toward tax policy solutions

The need for greater clarity and simplicity in the tax treatment of native title payments is a key policy motivator and the primary purpose of this discussion paper. Attempting to untangle the 'right' tax treatment from the complex environment of native title has proved more than difficult. There is clearly a rationale for a special tax regime for native title that can provide the necessary certainty. However, a discussion of tax policy solutions cannot be undertaken without consideration of the related economic and social policy priorities that impact on native title groups.

From an economic policy perspective, it now well established that Indigenous people are among the most economically marginalised and impoverished citizens of Australia. Dr Ken Henry, Secretary to the Treasury, has begun to examine the complex social and economic policy framework that is required to improve the 'wellbeing' of Indigenous people, in the context of the Treaury's overall mission to 'improve the wellbeing of all Australians'.[135] Henry looks to strategies that do not rely merely on the redistribution of income through welfare, but that promote the attainment of capabilities.[136] In particular, Henry identifies the importance of education as a pathway to employment and economic participation. But, he notes, investment in education requires the support of other policy platforms that together form an 'holistic Indigenous development strategy'. Henry makes the link between the need for simplicity and clarity in policy solutions that break down the 'Himalayan' pile of paperwork. He is critical of the way in which 'the mountains of red tape simply bury the limited administrative resources available at the local level'.[137]

Ken Henry acknowledges the visible economic disadvantage in remote Indigenous communities and the limited economic opportunities that may be available if people want to remain on country. Native title has the potential to be a primary economic driver in remote and regional Indigenous communities, where the vast majority of native title has been determined, through negotiated agreements, business development-related employment and the many social and education spin-offs. But these agreements may come around only once. Tax policy can play a role both in creating incentives for investment as well as maximising the benefit of native title payments, particularly in relation to price sensitive agreements. The following discussion looks at some existing

[135] Ken Henry, Secretary to the Treasury (2007a), 'Addressing Extreme Disadvantage Through Investment in Capability Development', Australian Institute of Health and Welfare Conference: 'Australia's Welfare 2007', 6 December 2007 pp. 15-16: <http://www.treasury.gov.au/documents/1327/RTF/Health_and_Welfare_Conference.rtf>. See also Ken Henry, Secretary to the Treasury (2007b), 'Creating The Right Incentives For Indigenous Development', Cape York Institute Conference 'Strong Foundations – Rebuilding Social Norms In Indigenous Communities', Cairns, 26 June 2007: <http://www.treasury.gov.au/contentitem.asp?NavId=008&ContentID=1275>.

[136] Henry draws heavily on the work of Amartya Sen. See for example: Sen, A. (1999) *Development as Freedom*, Oxford University Press, Oxford.

[137] Henry 2007a, p. 17.

special regimes involving Indigenous people and proposed regimes for native title and broader Indigenous economic development incentives. The concluding section will look to develop a framework for an appropriate tax policy for native title.

Distribution of benefits and flow through taxation effects

In 1999, Warren Black identified some of the difficulties in applying the normal CGT provisions to native title groups, both in the communal nature of the title, and the consequent difficulties in freezing 'membership' at any one moment.[138] This question, of 'who are the taxpayers', is fundamental to the flow-through tax implications of native title payments. While, charitable trusts have been established in many circumstances, as described earlier, distributions may be made to individuals as representatives of families and further distributed among the community. Or funds may be held in bare or discretionary trusts or investment funds.

The allocation or distribution of benefits to individuals in such an uncertain tax environment raises considerable concern about non-compliance and hence criminalisation of behaviour around native title payments. The diversity of experience of Indigenous people makes it difficult to generalise about the capacity of any individual or corporate recipients of native title payments to understand the tax implications of any distribution of benefits. However, there are continuing concerns about the financial literacy of many native title claimants and holders generally and limited understanding of taxation regimes more specifically.[139] There should be even greater concern about the taxation of native title holders as beneficiaries, who may be argued to have vested interest in the trust assets of their PBC.

When determining how benefits from a native title agreement are to be managed, many groups are concerned about the impact on members' social security or other entitlements and potential problems of self assessment and reporting of changes in income and assets.[140]

Social security means-testing exemption

There is already an exemption for distributions from certain trusts that may alleviate some of these concerns. Distributions to members of the native title group (or other individuals) from the PBC or other trust structures established to manage native title assets and proceeds may be subject to the *Social Security Means Test Treatment of Private Trusts – Excluded Trusts Declaration 2005*. The exclusion of payments under

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[138] For example, the 'change in ownership' that occurs though death or marriage (ITAA 1997 s149-30) or the change in majority underlying interest in an asset (ITAA 1997 s128-15), both of which theoretically could bring to an end the pre-1985 status of an asset. Black, op.cit

[139] These issues were canvassed at a meeting between NTRB CEOs and the Commonwealth Treasury, March 2006.

[140] Native Title Research Report No.1/2007, pp. 9-10.

the declaration from Social Security means testing does not exempt the payments from income tax. However, amounts can be considered unearned income in relation to means-tested benefits.

Section 5 of the declaration defines a community trust as ‘a trust that has the sole or dominant purpose of:

- receiving, managing or distributing property transferred directly to it, or through an interposed entity, by a government body for a community purpose, or
- holding, managing or disposing of Indigenous-held land for a community purpose, or
- receiving, managing or distributing income that has been created from Indigenous held land; and is applied for a community purpose.’

Indigenous-held land is defined by s. 4B of the *Aboriginal and Torres Strait Islander Act* as an interest in land held by an Aboriginal or Torres Strait Islander person or corporation. Native title is arguably an interest in land, at least under the common law, or an interest in relation to land, as the Native Title Act refers to it.[141] If it were suggested that native title is excluded from the class of interests in land because of its *sui generis*, or unique nature, then it is likely that the *Racial Discrimination Act*, s. 10(1), would require a reading of this provision that includes native title.[142]

In the past, therefore, this instrument included a potentially large number of trusts. The *Aboriginal and Torres Strait Islander Act* defines Aboriginal and Torres Strait corporations as any corporation registered under the CATSI Act or body corporate where all the members are, or in which a controlling interest is held by, Aboriginal persons and/or Torres Strait Islanders.

Community purpose means a purpose that is intended to benefit primarily members of a particular community or group. This does not imply the same restrictions as a charitable purpose and would therefore include trusts ostensibly for persons and whose activities extend beyond charitable activities to include economic development.

This declaration is not limited to a particular class of trust or legislative framework and is not subject to any register. The exclusion extends to distributions from any statutory trusts, or prescribed trusts, CATSI Act trusts, private law trusts and equitable or constructive trusts, so long as the eligibility and dominant purpose tests is met. The

[141] See s. 223(1) NTA. See also discussion by the Full Federal Court in *Bodney v Bennell* [2008] FCAFC 63 (23 April 2008), [133].

[142] That provision requires that:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin

See for example the explanation in *Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098 (8 August 2002) [110] ff.

declaration provides a model for exemption based on a dominant purpose test of the tax entity and how to deal with flow on effects of distributions.

Mining Withholding Tax

A withholding tax, similarly seeks to address flow on taxation effects, but centres on the nature of the payment. In the main, commercial dealings on Indigenous lands are subject to the normal taxation arrangements in Australia, specifically, income tax (including capital gains tax) and Goods and Services Tax. There is one exception to this — the Mining Withholding Tax (MWT). At one point it was intended to apply a similar withholding tax to native title payments.[143] In many circumstance the MWT operated with the social security means test exemption to further limit the impact of distributions. Division 11C of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) imposes a MWT liability on certain kinds of payments that are received by Aboriginal or Torres Strait Islander persons or communities in respect of the use of 'Aboriginal land' for purposes associated with mining activities. 'Aboriginal land' is defined under section 128U of the ITAA 1936 to mean any estate or interest in land that, under provisions of a law of the Commonwealth or of a state or territory that relate to Aboriginal people or Torres Strait Islanders, is held for the use or benefit of Aboriginal people or Torres Strait Islanders.

It is unlikely that the definition of Aboriginal and Torres Strait Islander land includes land subject of a determination that native title exists or land that can be proved to be held under common law native title, despite the fact that the common law or the NTA are considered laws of the Commonwealth. The definition is too narrow to encompass native title, given the following observations:

Native title is recognised and protected by the common law of Australia but it is not a title held 'of the Crown':

- The NTA recognises and protects native title but does not 'grant' native title.
- Native title is a communal right and not a title held 'for the use or benefit' of Aboriginal people or Torres Strait Islanders.
- On some interpretations native title is not considered a right 'in land' (as discussed above).
- 'Aboriginal/Torres Strait Islander land or waters' is defined separately in the NTA (s. 253) to include land held for the benefit of Aboriginal peoples or Torres Strait Islanders under legislative regimes but does not include land recognised to be subject to native title.

However, native title may co-exist with the kind of tenures encompassed by the definition of Aboriginal and Torres Strait Islander land. Native title is not extinguished by the

[143] 'Taxation Implications Of The Native Title Act And Legal Aid For Native Title Matters', Media release, The Treasurer, The Hon. Peter Costello MP Attorney-General The Hon. Daryl Williams AM QC MP, 13 February 1998.

reservation or dedication of land for the benefit of Aboriginal and Torres Strait Islander people. Indeed, in *Mabo*, such reservations or dedications were considered to be recognition that native title is preserved and numerous cases have confirmed this approach.[144] The NTA goes further to provide that any past extinguishment is to be disregarded in relation to land held by or for the benefit of Aboriginal peoples or Torres Strait Islanders.[145] Thus native title may be recognised over land subject to the MWT.

In such circumstances, the MWT would apply to land that *may* be subject to native title. Native title exists under common law and does not depend upon recognition by legislative or executive act. That is, native title may exist at common law prior to a determination of native title by the Federal Court and acts that may 'affect' native title must comply with the provisions of the NTA regardless of a determination. This is largely managed by the procedural rights that attract to a registered claim of native title which has not yet been determined and the notification requirements for all future acts to which potential native title holders may respond. However, the future act provisions themselves do not apply to a number of areas that would be subject to the MWT including Aboriginal land in the Northern Territory and South Australia.[146]

The kind of payments included under the MWT regime are certain payments made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and:

> any other payment made … under provisions of a law of the Commonwealth or of a state or territory that relate to Aboriginals or under an agreement made in accordance with such provisions, being a payment made:
>
> (i) in consideration of the issuing, granting or renewal of a miner's right or mining interest in respect of Aboriginal land
>
> (ii) in consideration of the granting of permission to a person to enter or remain on Aboriginal land or to do any act on Aboriginal land in relation to prospecting or exploring for, or mining of, minerals, or
>
> (iii) by way of payment of mineral royalties payable in respect of the mining of minerals on Aboriginal land or by way of payment of an amount determined by reference to an amount of mineral royalties received by the Commonwealth, a state or the Northern Territory in respect of the mining of minerals on Aboriginal land.
>
> However, this does not include a payment made by a distributing body.

Where payments are made for the kinds of acts described in the ITAA 1936, and native title exists, the benefits would be subject to the MWT. The benefit of the withholding tax

[144] *Mabo*, per Brennan, p. 69.

[145] NTA s.47A *ff.*

[146] NTA ss. 233, 253

is the simplification of the flow through impact of the distribution of the funds within the affected communities (and the accumulation of funds within the community trusts). Where the MWT operates, no other taxation flows to any receiving body or individual.

A native title withholding tax?

As part of the discussions around the *Native Title Amendment Act 1998* (Cth), the government proposed that the ITAA 1936 be amended to provide for a native title withholding tax (NTWT), modelled closely on the existing MWT provisions, such that amounts, however paid, to native title holders under the provisions of the NTA for the temporary impairment or suspension of native title by future acts would be taxable. The tax would be collected via a final withholding tax arrangement, at a rate of taxation that would not impose an undue tax burden.

When announcing the policy in February 1998, the government said that 'the existing tax law should apply to native title related transactions wherever possible. Departures from this approach would occur only where the administrative and compliance costs involved in applying the existing tax law to some native title related transactions outweigh any potential benefit, or where departures from existing tax law will provide a more equitable treatment for certain transactions'.[147] A withholding tax of course, does not change the tax treatment when payments are made in the form of wages or salaries, for example in relation to cultural heritage surveys, and additional pay as you go (PAYG) withholding tax will be payable.

A native title withholding tax necessarily shifts the tax burden to the person making the payment (for example the Crown or a mining company). This also means there will be a transfer of compliance costs for the payment of taxation from the recipient to the person making the payment.

The introduction of a withholding tax must be underpinned by important assumptions:

- amounts received would normally be taxable, and
- the compliance costs or other policy issues outweigh the revenue at risk.

There may also be assumptions in this model about the low assessable income of the final recipient individuals or entities, the likelihood of redistribution of money within the community, and low compliance levels with the self assessment regime.

These assumptions and trade-offs need to be tested in order to determine the appropriateness of a withholding tax and any appropriate concessional rate against how the general taxation arrangements operate in the native title context both in theory and in practice.

[147] 'Taxation Implications Of The Native Title Act And Legal Aid For Native Title Matters', Media release, The Treasurer, The Hon. Peter Costello MP Attorney-General The Hon. Daryl Williams AM QC MP, 13 February 1998.

There is a real risk with any withholding tax regime that tax will be withheld and paid in respect of some amounts which may otherwise be exempt from taxation, albeit at a concessional rate. This is a particular problem in the native title context, as we have seen, where compensation payments or capital income could be argued to be exempt.

Where payments are received for the surrender of native title under a compulsory acquisition order, or threat of compulsory acquisition through the NTA processes, it is generally accepted that the payments would compensation for lost capital (pre-1985) and therefore tax exempt. Where the non-extinguishment principle applies, the treatment is less certain. There is no right to say no, or veto, once a notice has been issued under the NTA for a development or project. Thus agreements that authorise the doing of an act should properly treated as compensation for diminution in the value or amenity of the asset (contrary to the views expressed in *Cape Flattery*). It is arguably not compensation for lost income, as native title restricts native title holders on most circumstances to non-commercial activities. Similarly, the payment cannot be rent because native title is inalienable under the common law, that is, native title holders cannot grant interests in their land to non-native title holders, or, more correctly, cannot grant interests outside the traditional system of law and custom.

Potentially, there is room for considerable argument around the apportionment of benefits under agreements, but as noted in the discussion above it is virtually impossible to determine that value of compensation separate from, for example, a premium for speedy resolution. The distinction between up front payment and profit based payments must also be discussed in determining whether payments are assessable. In virtually all of the agreements reached in the native title sphere the native title groups have not brought liquid equity to the venture in return for the 'royalty' or equity return. This may change over time for those communities who secure multiple agreements and are able to use investment funds to 'buy-in' to new projects.[148]

In the native title context, then, it may be necessary to apply a concessional rate much lower that that applied to the MWT, even to the extent of a 'zero' rating. Zero rating native title payments acknowledges that the payments are within the tax system but based on the assumptions about the nature of the native title payments and the taxpayers, it is appropriate to assume that little of the payments will be subject to tax under the normal tax regimes. A zero rating also allows for a broad brush approach to the question of what is a native title payment, including government programs, for example, without requiring a forensic analysis of taxable and non-taxable components.

Just as with a determination of whether funds are still capital, so too, a decision needs to be made as to the flow on of the advantages of withholding tax. The ITAA specifically exempts interest earned on an exempt personal injury payment. The CGT provisions applicable to replacement asserts also prescribe some flow-on of the exemption of pre-1985 assets. How income derived from investments of exempt funds is to be treated must be resolved as part of the design of any NTWT. Whether by accident or design, the MWT

[148] O'Faircheallaigh distinguishes equity that is provided 'free',. Or without consideration, in determining what is a financial payment. 2003, p. 17.

operates in partnership with the social security means testing exemption. Similarly, a means testing exemption would still need to apply to any NTWT to minimise the final flow on effects of such payments on social security and other benefits.

Tax exemption?

If a zero rated (or even marginally rated) withholding tax is contemplated, then clearly an exemption from income tax must also be considered an appropriate tool to reduce the complexity. Quite apart from the capacity of individuals and entities to manage the complexity of the taxation of native title payments, it has been suggested that there may be an additional conceptual hurdle — where native title claimants would consider payments received from native title activities as not taxable. That is, because the source of native title rights is in the laws and customs of Indigenous peoples and part of the negotiation of rights between the colonising state and the colonised people, they would reject such a proposition on principle.[149]

Native title emerges from the laws and customs and reflects the rights and interests of Indigenous peoples that existed prior to and survived the colonisation of the Australian continent. In other jurisdictions, such as Canada and the United States, the unique status of native title as emerging from the laws and customs of the Indigenous people is recognised as placing transactions concerning those rights outside the taxation system. The tax exemption is supported by the judicial theory of Aboriginal title (in many respects common to all three jurisdictions) but is yet to be tested in Australia.

Indigenous peoples with Aboriginal title in Canada or on Indian treaty land in both jurisdictions have the discretion to raise their own taxes or rates on their land but are not subject to general state and federal taxes. This has given rise to significant economic opportunities for otherwise marginal communities.[150] The exemption under the *Indian Act* (Can) extends to taxation of personal property of Indians or bands (that is the individual or collective) on Indian land.[151] The law draws a fence around the Indian land that effectively limits the exemption to income derived from the 'traditional economy' or use of the land in order to avoid 'laundering' investment income through reserve based businesses. The exemption applies to income tax and sales/consumption taxes, and thus provides a choice of locus of economic activity that gives a tax advantage to conducting business on Indian land. In the United States it is construed as 'immunity' from taxation

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[149] Meeting with CEOs of Native Title Representative Bodies with treasury officers, Canberra, 16 March 2006.

[150] See Membertou, Mi'kmaw community of Nova Scotia, who have developed partnerships with companies such as Boeing, Lockheed Martin, Clearwater Fine Foods, Sodexho, Earth Tech, SNC-Lavalin, Bennett Environmental and Jacques Whitford. I 1996, Membertou had an annual budget of $4.5 million, was about $1 million in debt and had less than 30 employees. Today they have an operating budget that shows revenues of $75 million

[151] See *Indian Act* ss. 87, 89 and 90; *R v Nowegijick* [1983] 1 SCR 29, *Mitchell v Pegius Indian Band* [1990] 2 SCR 85.

rather than exemption.[152] Perhaps the most well known outcome of the tax advantage is the prominence of gaming complexes on Indigenous land, but there are also examples of large warehouse retail outlets and even aeronautical ventures.[153]

Regardless of whether, from a policy perspective, exemption would be recognised on the basis of prior sovereign immunity, there are good tax policy and social policy reasons for an exemption regime for the native title sector. It would clarify and simplify the tax treatment for native title payments and broader policy goals to encourage economic development on Indigenous land. Exempting native title payments from income tax and GST would eliminate the need to determine the nature of the payments as revenue/capital or compensation/enterprise. Exempting only a class of 'payment' that could be identified as native title payments is, as we have seen, fraught with complex practical and theoretical issues. Requiring apportionment may have the unintended consequence of reducing the return to Indigenous communities from agreements, either in transaction costs, or more problematic, in encouraging a more legalistic approach to negotiations.

Instead of focusing on a class of payments, it may be possible to identify a class of *agreements* as native title agreements – that is, those agreements involving a process under the NTA. This would include, consent determinations, settlement agreements under s. 87, ILUAs, future acts or compensation determinations. This approach, importantly would not require the revenue, capital or compensation questions to be resolved. More importantly, it does not require Indigenous groups to position themselves as either economic agent or victim in negotiations. It may also increase the value of packages in the hands of Indigenous groups in relation to ventures that are price sensitive. However, for class agreements this option would exclude less formal agreements such as MOUs and what was described earlier as 'participation agreements' including joint ventures, service contracts and the like.

Parties could bring many such agreements within the NTA by utilising the ILUA provisions, but to ensure the policy did not discourage settlement of native title claims it would be necessary to ensure that any consent determination or agreement conceding that native title does not exist or surrendering native tile, would be included in the class of exempt agreements. Some consideration may also need to be given to the current strictures of the ILUA process that discourage some parties from formalising agreements through the provisions of NTA.

However, even with these precautions, this strategy would not accommodate agreements reached outside the native title sector, including with those groups who do not claim or have been unsuccessful in their claim or those that have already negotiated settlements that include an agreement that native title does not exist or is surrendered. Here we meet the limits of the native title system, which falls far short of recognising the rights of Indigenous peoples over their traditional lands.

[152] See *Bryan v Itasca County*, 426 US 373 (1976)

[153] See David H. Getches, Charles F. Wilkinson, and Robert A. Williams *Cases and Materials on Federal Indian Law*, 2004.

Nevertheless, if native title compensation/payments or payments under exempt agreements, would be exempt in the hands of the recipient — and where that recipient is a trust — the nature of the payments (whether as distributions or present entitlements) would be the same in the hands of the beneficiaries. But, this strategy does not resolve all of the management and distribution issues. Questions that arise include: when do the proceeds from exempt agreements re-enter that tax system? Does the exemption extend to distributions to individuals or related entities when the receiving entity is not a trust? Does it apply to commercial dealings undertaken or assets acquired with those proceeds or even wages paid, as in North America?

A new tax vehicle?

Indigenous people are now looking for simpler solutions to the growing administrative complexity and burdens, that provide protection for the valuable native title assets and compensation. For example, companies limited by guarantee, may provide an answer to the risks of unit trusts and the restrictions of charitable trusts. But for some, when they map their aspirations, a single corporate structure does not exist to fulfil the diverse needs of the native title holders and the kinds of benefits that are being negotiated. Even with planning and with the knowledge of the burdens faced by groups such as the Miriuwung Gajerrong, corporate structures currently being developed involve complex groups with complicated distribution and governance models.

A possibility would be to attach the exemption to the entity who receives and manages the benefits. For example, the PBC, Aboriginal Community Trusts (as defined in the Social Security Means Test exemption) or 'native title groups', however incorporated or unincorporated could be given tax exempt status under Division 50 of the ITAA 1997.

While I have focussed on, and been drawn to this issue because of the difficulties of identifying the tax treatment on native title payments, a number of proposals have emerged recently that target the related or broader policy objectives of encouraging economic development within Indigenous communities. This itself is part of the broader policy objective of improving the social and economic wellbeing of Indigenous peoples in Australia.

The first proposal is provided by Adam Levin, senior tax partner with Jackson Macdonald Lawyers, building on his experiences with establishing and reviewing trusts for native title groups. Levin has suggested a new corporate model that acknowledges the inherent value for the broader economy in supporting economic and social development on Indigenous lands, and in Indigenous communities.[154] Levin's Aboriginal Community Foundation proposes registered tax exempt and DGR status, long-term accumulation and special rules that would be designed specifically for the benefits received by Indigenous people as a result of native title and similar agreements. The new entity is coupled with a proposal to provide tax incentives for expenditure on capacity

[154] Adam Levin, 'Improvements to the Tax and Legal Environment for Aboriginal community organizations and trusts', Discussion Paper, Jackson McDonald Lawyers, August 2007.

building or infrastructure, regardless of who incurs the cost, and an Indigenous venture capital model to foster the development of Indigenous capital.

The model addresses a number of the issues that plague the distribution and management of benefits including the accumulation of funds ostensibly received from the loss or use of intergenerational assets. Levin points to models such as the prescribed private funds or superannuation funds as more appropriate analogies to the aim of many Indigenous trusts. Importantly, Levin identifies the absence of a single corporate vehicle to meet the diverse objectives of Indigenous communities in the areas of social and economic development; ridding Indigenous people of 'charitable' tag; and rationalising corporate design and administrative burdens. He argues that Indigenous economic development should be independently present in Division 50 and Division 30.

Similarly, Mark Leibler, of Arnold Bloch Leibler Lawyers and co-chair of Reconciliation Australia, has proposed a simpler 'Aboriginal Development Corporation' that would meet a dominant purpose test and be entered on to a register to receive DGR Status. Based firmly within the not-for-profit sector, the model specifically excludes any organisation that distributes to members. The model is based on similar provisions for environmental and cultural organisations. Leibler's proposal is not limited to Indigenous corporations but extends to any not-for-profit undertaking prescribed activities with Indigenous communities.

Finally, the Gunya Foundation, headed by former Macquarie Bank executive Bill Moss, has proposed an Indigenous Economic Development Scheme. The proposal, like the Leibler model, suggests a registered corporation with significant tax incentives for investors, modelled on similar investment schemes for other rural industries. In particular Moss proposes a 150 per cent rebate for start up capital and operating losses in the first five years in recognition of the significant social infrastructure investment and high risk of negative returns in the start up phase.[155] The proposal focuses on the development of cottage industries and contains rigorous requirements for business and managerial development support and skills transfer from the investor to the Indigenous corporation in return for the tax break. The aim of Gunya model is to develop tax-paying profit-making businesses over time. The Gunya models requires an administering infrastructure for assessment and compliance.

None of these proposals are restricted to the native title sector. While the Gunya and Levin proposals clearly provide tax advantages to investors and proponents, all of the proposals identify the singular problem facing Indigenous people who seek to establish an entity that deals with multifaceted challenges of social and economic development in Indigenous communities.

The underlying objective is to maximise the benefits that can be gained from any investment in Indigenous communities, recognising the failure of the market to invest in Indigenous ventures, and that economic development for Indigenous peoples is a legitimate policy objective, worthy of support from the tax system. That is, an additional,

[155] <http://www.gunya.com.au/acrobat/gunya_discussion_paper_august_07.pdf>.

specifically charitable, cultural, religious, educational, environmental or health objective should not be required. Levin makes the point that this is not a call for Indigenous exceptionalism, but Indigenous 'me-too-ism'. The expansion of the classes of tax exempt entities in recent years has demonstrated that this is a feasible policy response.

While all three proposals address the social policy objective of economic development in Indigenous communities, they don't specifically turn their attention to the tax policy problem that native title presents. They may also reveal their own complex definitional issues, in particular the idea of 'aboriginal community'. However, by exempting the entity itself, within the established exemption regime, many of the difficult conceptual questions need not be resolved, at least in the hands of the recipients.[156]

[156] The issues raised in *Cape Flattery* may be revisited in the different context of native title.

Conclusion

There may be no single answer to the tax policy questions raised by native title agreements. A framework may need to be developed that addresses all of the key issues involved through different targeted strategies.

- Some issues are conceptual, emerging from the unique nature of native title within Australian law. They include:
- Native title only partially reflects the rights of Indigenous peoples in relation to their traditional lands and resources under their own law and custom.
- International and comparative jurisprudence supports sovereign immunity or exemption from state taxes on Indigenous land.
- Native title is a communal and intergenerational asset.
- Native title under the common law is inalienable except to the Crown.
- Negotiations under the NTA are compulsory for both native title groups and third parties.
- The Crown's duty to consult and pay compensation is largely delegated to proponents under the NTA.
- Native title groups have no right to say no to an act authorised by the Crown.

The policy priorities for resolution that emerge from the interaction of this unique right with the tax system include:

- resolving the capital/revenue and compensation uncertainty around native title and the non-extinguishment principle
- minimising the flow-through effects on social security of the distribution of benefits to individuals or allocation of interests to beneficiaries
- identifying the extension of any exemption to future use of benefits, and
- maximising and fostering Indigenous economic development and growing Indigenous assets.

All of this should be considered in light of the overall objective of clarity and simplicity in policy design in order to achieve more effective outcomes.

Options for reform

Four options have emerged from the discussion here:

- Sovereign immunity for taxation within the native title determination area.
- A zero rated native title withholding tax could apply to a class of native title agreements, including any agreement that involves a process under the NTA.
- Payments for loss or impairment of native title and the exercise of native title rights and interests could be defined as compensatory and specifically exempted from the Income Tax and GST regimes, including interest and revenue generated from those funds.

- A new tax vehicle or tax exempt class of entities under Division 50 and 30 could be formulated (which would either specifically or by definition include PBCs) that recognises Indigenous economic development, accumulation and distribution needs of native title groups.

All exemption regimes should be accompanied by an expanded social security means testing exemption.

The definitional issues around the capital and compensation arguments regarding native title payments are intractable and have stifled policy development in this area for many years. A specific regime for native title could not only recognise the unique right and its inherent value to Indigenous communities but also maximise the rare opportunities that native title provides for Indigenous economic development.