



**atns**

**ATNS SUBMISSION**

**NATIVE TITLE, INDIGENOUS ECONOMIC DEVELOPMENT AND TAX  
CONSULTATION PAPER (MAY 2010)**

**CONTENTS**

<b>EXECUTIVE SUMMARY .....</b>	<b>2</b>
<b>SUBMISSION .....</b>	<b>4</b>
<b>1. POLICY CONTEXT AND CONSULTATION PROCESS.....</b>	<b>4</b>
<b>2. AGREEMENT MAKING WITH INDIGENOUS COMMUNITIES AND A TAX EXEMPTION FOR     NATIVE TITLE AGREEMENTS .....</b>	<b>5</b>
<b>2.1 Types of “native title” agreement.....</b>	<b>5</b>
<b>2.2 Problems with Current Income Tax Treatment of Agreements .....</b>	<b>7</b>
<b>2.3 Income Tax Exemption for Native Title Agreements.....</b>	<b>9</b>
<b>2.4 Conditions or Limits on Exempt Native Title Payments .....</b>	<b>11</b>
<b>3. INDIGENOUS COMMUNITY FUND (Section 3.2, p. 10) .....</b>	<b>12</b>
<b>3.1 Problems with Charitable Trusts .....</b>	<b>12</b>
<b>3.2 A Tax-exempt Indigenous Community Fund.....</b>	<b>13</b>
<b>3.3 Payments received by the Fund .....</b>	<b>14</b>
<b>3.4 Uses of the Fund .....</b>	<b>15</b>
<b>3.5 Legal entity form and governance for the Fund .....</b>	<b>16</b>
<b>3.6 Law reform approach for Indigenous Community Fund .....</b>	<b>18</b>
<b>3.7 Transitional arrangements .....</b>	<b>19</b>
<b>4. NATIVE TITLE WITHHOLDING TAX (Section 3.3, p. 14) .....</b>	<b>20</b>
<b>5. OTHER TAX AND RELATED ISSUES .....</b>	<b>20</b>
<b>5.1 Deductibility of payments under the income tax law .....</b>	<b>20</b>
<b>5.2 Deductible Gift Status (Section 5.1, p. 19) .....</b>	<b>21</b>
<b>5.3 Treatment of payments under the social security (transfer) system .....</b>	<b>21</b>
<b>5.4 Goods and Services Tax (GST).....</b>	<b>21</b>
<b>5.5 Resources Super Profits Tax (RSPT).....</b>	<b>21</b>
<b>6. CONCLUSION.....</b>	<b>22</b>
<b>Appendix 1: Alternative State Government Native Title Settlement Frameworks .....</b>	<b>23</b>
<b>Appendix 2: Income Tax Law and Native Title Payments .....</b>	<b>26</b>
<b>Appendix 3: Summary of Rights, Payments and Key Provisions under the <i>Native Title Act 1993</i> (CTH) .....</b>	<b>32</b>
<b>Appendix 4: Consultation Questions.....</b>	<b>44</b>

## EXECUTIVE SUMMARY

This submission is made by Associate Professor Miranda Stewart in collaboration with Associate Professor Maureen Tehan and Professor Marcia Langton, on behalf of the Chief Investigators for the ATNS Project.

Thank you for the opportunity to respond to the Treasury Consultation Paper *Native Title, Indigenous Economic Development and Tax* (May 2010) (the “Treasury Paper”). We commend the Treasury (with FaHCSIA) for initiating this consultation process. We also commend the Treasury Paper as raising in broad terms the right issues for consideration.

The Treasury Paper discusses three main possible reform options for treatment of native title payments to recipients (p. 8ff):

- (1) Income tax exemption for native title payments
- (2) Tax-exempt Indigenous Community Fund
- (3) Native title withholding tax

As noted in the Treasury Paper, these approaches could operate in isolation or in combination.

We support the proposals for an income tax exemption for native title payments, and a tax-exempt Indigenous Community Fund. We submit that these two proposals are complementary and should both be advanced. Although there may be some advantages of a withholding tax model it is submitted that this model will not translate well to the native title arena and it is not supported.

The adoption of the complementary options described above, being the exemption of compensation payments and payments under NTA agreements, and the enactment of a new tax-exempt Indigenous Community Fund, will improve agreement making and enhance native title outcomes in a number of respects:

- It will remove the uncertainty and difficulty in negotiations currently generated by confusion about tax treatment and uses of benefits;
- It will buttress the spirit and purpose of the NTA framework of compensation and harnessing of resources for current and future generations;
- It will provide clear guidelines about governance, ownership and benefit sharing in communities out of native title agreements;
- It will ensure that settlements and compensation made outside the NTA framework will be treated equally;
- It will leverage the benefits of native title agreements and the relationships built to date with resource companies for the economic development of future generations.

## ABOUT THE ATNS

The Agreements, Treaties and Negotiated Settlements (ATNS) project is a University of Melbourne based research project consisting of a series of ARC Linkage grants and a team of inter-disciplinary researchers from Melbourne, Griffith and the Australian National Universities. The project began in 2002 with an ARC Linkage grant examining treaty and agreement-making with indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. In 2005 the research team secured a second grant to build on the project. The second phase examined the process of implementation and the wider factors that promote long term sustainability of agreement outcomes. The third iteration of the project began in 2010. The new project 'Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities aims to study the institutional, legal and policy reforms required to reduce indigenous people's poverty and to promote economic development for sustainable indigenous communities. The interdisciplinary research will draw on anthropology, geography, demography, law and public policy and continue to focus on comparative case studies. The project will analyse the impacts of large-scale resources projects, and government policy and services, on local communities. The object is to identify solutions for realising sustainable social and economic development for indigenous people based on social, policy, fiscal, procedural and legal models.

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- Rio Tinto Ltd
- Woodside Energy Ltd
- Santos Ltd
- Marnda Mia Central Negotiating Committee Pty Ltd

**This submission is made by the Chief Investigators on the ATNS Project and does not necessarily represent the views of the industry research partners on the project.**

## SUBMISSION

### 1. POLICY CONTEXT AND CONSULTATION PROCESS

The tax treatment of payments under native title agreements and other benefits has been a matter of concern to traditional owners and other stakeholders including the resources industry for some time. The last few years have seen a number of workshops and detailed studies of these issues, including submissions to the Henry Tax Review and to the FaHCSIA working group on optimising benefits from native title agreements.<sup>1</sup> There have also been proposals for tax reforms to enhance indigenous economic development more broadly.<sup>2</sup>

The taxation issues addressed in the Treasury Paper arise in a broader government policy context including a number of other policy proposals by government concerning indigenous economic development and native title. Other relevant papers or proposals include in particular:

- FaHCSIA, Housing paper (submissions due by 17 September).
- FaHCSIA/DEWAR, Economic Development Strategy (submissions due by 1 November).
- FaHCSIA/AG, Discussion Paper on Leading Practice Agreements: Maximising Outcomes from Native Title Benefits (July 2010).
- Proposed Resources Super Profits Tax and its potential effect on native title agreements and regional funding for indigenous economic development.

There are a number of links between the issues raised in the Treasury Paper and in the other policy areas covered by the papers listed above. The tax issues considered in the Treasury Paper, on which we make the submissions below, must be considered holistically with the policy issues raised in the other government proposals.

**We submit that this is just the beginning of a more substantive consultation.** In particular, it will be crucial, to ensure the best design and full acceptance of proposed reforms, that there is

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<sup>1</sup> Minerals Council of Australia with Jackson McDonald Lawyers and AIATSIS, *Improving the Tax Treatment of Benefits and Payments to Indigenous Communities from Resource Agreements, Introducing an Alternative: Indigenous Community Development Corporations* (August 2009); FaHCSIA, *Discussion Paper - Optimising Benefits from Native Title Agreements* (2008); Agreements, Treaties and Negotiated Settlements Research Project, *Discussion Paper Optimising Benefits from Native Title Agreements* (Discussion paper prepared for FaHCSIA, 6 December 2008); Levin, A, *Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts* (Discussion paper prepared for ATNS workshop on 28 August 2007); Strelein, L, 'Taxation of Native Title Agreements', *Native Title Research Monograph* (No1/2008) AIATSIS; Minerals Council of Australia, *Native Title Consultative Discussion Paper* (2008).

<sup>2</sup> Gunya Australia, 'Indigenous Economic Development Scheme: A solution to create employment opportunities within Indigenous communities', Gunya Discussion Paper, (2007); Cape York Institute 'Can Cape York communities be economically viable?' *Viewpoint* (November 2005), Cape York Institute for Policy and Leadership.

significant further consultation with traditional owner groups, Native Title Representative Bodies (NTRBs) and other stakeholders.

Consultation with tax technical experts will also be valuable in refining these proposals, including consultation on draft tax legislation. As in other tax reform processes, the potential for interaction with other tax rules and unintended consequences is significant and this risk will be reduced with a full consultation process.

The focus of the Treasury Paper is on the income tax and its application to payments in the hands of recipients, and their tax treatment in the hands of payers (such as resource companies). It specifically states that State taxes and other Commonwealth taxes are outside the scope of the Paper. Nonetheless, it is important to remember that a number of other tax issues arise in respect of payments to indigenous communities or individuals. These other issues are briefly summarised at the end of this Submission.

## 2. AGREEMENT MAKING WITH INDIGENOUS COMMUNITIES AND A TAX EXEMPTION FOR NATIVE TITLE AGREEMENTS

### Consultation Questions

**(a) In the context of your experience, when do the potential income tax implications of an agreement arise in an agreement making process?**

**(f) How would an upfront tax exemption for payments made in respect of a native title agreement impact on the negotiation of agreements?**

**(g) How should the concept of a native title agreement be defined? Should this concept be defined with respect to the NTA?**

### 2.1 Types of “native title” agreement

Native title is a *sui generis* property right recognised at common law.<sup>3</sup> Under section 51 of the *Native Title Act 1993* (Cth) (NTA), native title holders have an entitlement to compensation “on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests”.

The right to compensation for native title arises as a result of the operation of the *Racial Discrimination Act 1975* (Cth), which ensures that any right to compensation for the loss of property under the Constitution or any compulsory acquisition legislation extends to native title holders. The NTA recognises this right and introduces mechanisms for determining compensation.

The Treasury Paper discusses the income tax treatment of “payments made under native title agreements” (p. 2). It does not define a “native title agreement”.

It is important to observe that there is a range of agreements, and associated payments, that are made to indigenous communities, which may not directly refer to native title. Agreements may be

<sup>3</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Western Australia v Ward* (2002) 191 ALR 1 .

narrow, focused on discharge of one-off rights, or may cover entire projects, regions and a suite of rights. Most agreements are, however, the result, directly or indirectly, of native title negotiations that take place under the auspices of the NTA.

- **Indigenous Land Use Agreements (ILUAs):** ILUAs are the central large scale agreements under the NTA.
  - ILUAs have the advantage that they must be registered under the NTA and that a range of steps must be taken that assist in ensuring due process in negotiation and registration of the ILUA.
  - An ILUA may be negotiated “as if” there is native title, or on the assumption that native title may be established in due course (and may stand even if native title is not, ultimately, made out).
  - A range of payments and benefits may be agreed under an ILUA. Some payments may have a form which for income tax analysis might be considered “capital” in nature, for example, a payment is made as a lump sum, once and for all, and is expressed to be for compensation or for access to or acquisition of an asset. Other payments may be periodical, or tied to use of an asset and so may be treated as “income” for tax purposes. Some benefits, such as heritage protocols or employment targets, are more difficult to categorise.
- **“Future Act” Agreements:** A “future act” agreement (that is not an ILUA) deals with any act that affects native title in the future (excluding some specific matters). This refers to any act that extinguishes or is inconsistent with native title.
  - The main purpose of a future act agreement is to compensate for future impairment of title, even though the agreement itself may not extinguish or suspend title.
  - A future act negotiation, like an ILUA, may apply to lands where title is determined, or may be negotiated “as if” there is native title, or on the assumption that it may be established in due course.
  - Where property interests are at stake (such as the issue of a licence by the State), the future act provisions are triggered by the State government notifying all relevant native title holders or potential holders in the relevant region.
  - Payments under future act agreements, like those under ILUAs, may be in a range of different forms.
- **Non-extinguishment principle:** In some situations, as noted in the Treasury Paper (fn 2), acts which may generate compensation specifically do not extinguish native title under the non-extinguishment principle. These are still the result of native title negotiations under the NTA.<sup>4</sup>

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<sup>4</sup> The Treasury Paper refers to s47A of the NTA, which disregards historical extinguishment for the purposes of determining if native title exists.

- **“Ancillary” agreements to ILUAs or future act agreements:** In some situations, eg in Western Australia, an ILUA or future act agreement may be signed together with one or more so-called “ancillary” agreements such as a long-term management agreement. It is frequently the “ancillary” agreement that contains the real economic deal and that may generate payments and other benefits that are significant to the economic development of traditional owners. These “ancillary” agreements need to be recognised as arising under the NTA and treated as “native title” agreements.
- **Payments under the “right to negotiate”:** Payments are made under agreements that may initiate in a native title process, “as if” there is native title but where, in the result, no native title determination is ever made, including payments made under the “right to negotiate” under the NTA. The background to most such agreements is the ILUA and non-extinguishment process. The State delegates its responsibility to negotiate compensation. It is submitted that these are still “native title” agreements as they are generally made under a “future act” or ILUA process or under other processes initiated or concluded under the NTA, for example in relation to a registered or lodged claim.
- **State Settlement or Compensation Frameworks:** Payments may also be made under alternative State settlement frameworks or other compensation processes. For example, under frameworks developed by the States of South Australia and Victoria and the NSW Land Rights Act or other entitlements for compensation (recognised in s22L NTA).
  - Although sometimes referred to as “non-native title” payments, payments and other benefits provided in these processes are specifically aimed at compensation for loss of native title and are generally linked to a process under the NTA.
  - These processes are not referred to in the Treasury Paper but it is important that they are included in any provision to exempt income under “native title” agreements.

More information about State settlement processes is in Appendix 1 to this Submission.

Finally, we note that native title is unique and raises specific problems, but it is not available for all indigenous people. For example, some agreements with indigenous communities in Victoria are made on freehold land and are not based on native title.

The definition or class of native title agreements to be treated as tax-exempt should be broad enough to cover the range of innovative approaches to agreement making that have been promoted by State and Federal governments.

However, the fact that native title is not available for all Australian indigenous people is one strong argument for the provision of a tax-exempt Indigenous Community Fund. The combination of both the exemption for native title agreements and provision of the Indigenous Community Fund recognises the technical need to address the treatment of native title, while acknowledging that the principle should apply more generally.

## 2.2 Problems with Current Income Tax Treatment of Agreements

As the tax law currently stands, it is uncertain whether native title payments, even if explicitly described as compensation, would be exempt from income tax. As explained by the Minerals

Council of Australia (MCA), resource agreements with indigenous communities typically comprise a bundled and undifferentiated package of benefits and as a result, the tax treatment can be very complicated.<sup>5</sup>

The Treasury Paper correctly states that “applying the current rules of the income tax system, payments provided under a native title agreement may or may not be assessable income” for a native title claimant group (p. 4).

This statement is correct because, depending on the legal form, mode of payment and underlying basis for a payment, it may be taxable as either ordinary income or a form of statutory income such as a royalty, or it may generate a taxable capital gain under the Capital Gains Tax (CGT) regime (under relevant provisions in the *Income Tax Assessment Act 1997* (ITAA 1997) or the *Income Tax Assessment Act 1936* (ITAA 1936)). Appendix 2 discusses some of the key tax provisions that could apply to different forms of payment under the current law. One aspect of CGT treatment is briefly discussed here to highlight the difficulties in application of the tax law.

The Treasury Paper states that “compensation payments for the extinguishment or voluntary surrender of native title rights would generally be regarded as compensation for the loss of a pre-CGT capital asset and therefore any capital gains or losses would be disregarded” (p. 4).

This statement assumes, first, that the compensation payment is capital and would not be assessable as a form of income or by assessment under a specific rule, eg as a royalty. Even if a form of payment is treated as capital in nature, however, there is a risk that CGT could potentially apply.

The main basis for the Treasury Paper statement that compensation payments under the NTA are not subject to CGT is the interpretation provided by the Commissioner in Tax Ruling TR 95/35. A “pre-CGT capital asset” is an asset that was acquired prior to 20 September 1985 (when CGT was introduced). Ruling TR 95/35 enables us to “look through” a settlement agreement to the “underlying asset” for which compensation is being received.<sup>6</sup> Applied in this context, it is assumed by Treasury that the underlying asset would be the common law native title or right to compensation (whether recognised in a determination under the NTA or otherwise) and that this would be pre-CGT. However, a number of issues arise as to whether this approach or outcome is correct, depending on the particular negotiation process under the NTA. Problems would potentially be generated in respect of compensation payments where native title is not ultimately investigated or determined. Other potential issues include the characterization of native title as a communal asset; the impact of holding native title in an entity or trust (a Prescribed Body Corporate) and the different types of “CGT events” that may happen to the native title or other CGT asset. An overview of potentially applicable provisions is provided in Appendix 3.

It should be emphasized that TR 95/35 deals generally with compensation payments and does not refer to native title at all. It is only binding on the Commissioner if an individual or entity’s circumstances fall squarely within the terms of the ruling. While the ruling may provide some comfort, it is by no means clear that all payments that provide compensation within the overall NTA framework will be exempt as a result of this analysis.

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<sup>5</sup> MCA (August 2009), above n 1; see Strelein, above n 1 p. 26.

<sup>6</sup> para 70 TR 95/35



### 2.3 Income Tax Exemption for Native Title Agreements

We support the proposal for a legislated income tax exemption for payments under native title agreements.

It is possible that some aspects of tax uncertainty about compensation payments for native title could be addressed by the issue of a binding tax ruling specifically addressing native title settlements by the Commissioner of Taxation. However, it is submitted that this would only resolve some of the tax issues in relation to native title agreements. The diversity of native title agreements and the various payments arising from them is such that legislative reform is required to ensure certain, consistent and equitable outcomes.

The legal and moral basis for a legislative exemption for all such payments made under “native title” agreements in the various forms set out above is that they are, in essence, compensation payments.

In addition, for native title claimants, these agreements provide a basis for future economic development and independence and contribute significantly to sharing the benefits of resource development and “closing the gap” as well as compensating for future replacement value of the non-renewable resources to the future generations of traditional owners.

Crucially, it is the *agreement-making process* that should be supported as it enhances economic opportunity and engagement of indigenous communities. Research has demonstrated that agreements constitute a major form of engagement and collaboration between indigenous people, governments and industry, enabling relationship building and improved future economic participation and governance.<sup>7</sup>

We make the following general submissions in relation to the design of an exemption:

1. In carrying out legislative reform, rather than dissecting the types of payments in native title agreements, a holistic approach is required. Overall, these agreements are made under the framework of the NTA so that the package of payments incorporates all of these aspects of land access, social licence and compensation for use of land.<sup>8</sup>
2. The goal of an income tax exemption is to generate certainty and equity in respect of the native title agreement-making process and not simply for any particular form of agreement, outcome or payment. As a general principle, the same tax treatment should apply to payments arising in all agreements that are a result of a negotiating process under the NTA or are specifically compensation for native title.
3. A specific legislative exemption for payments under native title agreements could be provided in a manner similar to s 118-37 of the ITAA 1997 which disregards any capital

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<sup>7</sup> See the detailed comparative research on agreement making in Langton, Tehan, Palmer and Shain (eds) *Honour among Nations? Treaties and Agreements with Indigenous People* (2004), Melbourne University Press, Carlton.

<sup>8</sup> Langton, M, *The Mabo Lecture: Native Title, Poverty and Economic Development* (3 June, 2010), p. 17 observes that payments under native title agreements “are private transactions, but as substitution for crown compensation, they should not be taxable in their primary form”. See also Agreements, Treaties and Negotiated Settlements Research Project, *Discussion Paper Optimising Benefits from Native Title Agreements* (2008), above n 1.

gain (or loss) relating to compensation or damages for any wrong, injury or illness suffered in an occupation or personally, as well as various kinds of industry exit grants (eg sugar or tobacco industry exit grants) and some other payments. An exemption would need to be drafted also to encompass other income tax law provisions. Other examples include the exemption from tax of profits of venture capital limited partnerships in s 51-55, or of structured settlement annuities in Div 54 of the ITAA 1997.

4. In this context, a “native title agreement” could be defined in the income tax legislation with reference to the negotiating process under which it is carried out (in the NTA) and not simply the type of agreement or payment.
  - a. For example, this could be done by reference to negotiations under the various relevant legislative provisions of the NTA (including ILUAs; s 31 “future acts”; State settlements recognised under s 87 and other relevant provisions). As proposed by Treasury, it is possible that reference to “any agreement recognised or authorised under the NTA” (p. 8) would be wide enough, however further detailed analysis and consultation is required on this to ensure that it would cover all native title negotiating processes.
  - b. Alternatively, the general principle relating to negotiations for compensation under the NTA could be stated in the income tax law and reference made to regulations or a schedule under which the relevant provisions and types of negotiation or agreement could be listed.
5. The Treasury Paper suggests that one option could be “to allow an independent decision maker (such as the Commissioner of Taxation or the National Native Title Tribunal) to declare that an agreement is a native title agreement to which the income tax exemption extends” (p. 9).
  - a. A difficulty with this proposal is that there would not be certainty as to the tax treatment of the agreement until after it was made. It would not be an “upfront” exemption as proposed by the Treasury. It is necessary for clarity to be provided to participants at the beginning of a native title negotiating process that payments arising out of the process will be exempt. Consequently, this option is not supported.
  - b. If some form of decision-making were required (in any event, some form of auditing or policing of the exemption will be needed even after the fact), it is submitted that the Commissioner of Taxation is the appropriate decision maker in regard to an income tax exemption. However, clear guidance by reference to appropriate NTA provisions or processes will be required.
6. A legislative exemption should ensure that payments are exempt from both ordinary income and statutory income rules, including CGT.
7. The exemption should apply to money, property or services received. As noted in the Treasury Paper, if certain conditions are satisfied, benefits might be provided in the form of property such as land or assets, or in services. A similar approach should be taken to the market value of property or services received, as to monetary payments.

## 2.4 Conditions or Limits on Exempt Native Title Payments

### Consultation Question

**(h) Should the purposes for which an exempt payment may be used be prescribed? For example, should there be a restriction on an exempt payment being used for purely private consumption?**

In general, we do not support imposing such restrictions or conditions apart from the basic eligibility requirements of agreement making under an NTA process, outlined in the proposal above.

FaHCSIA/AG's *Discussion Paper on Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* (July 2010) poses a question as to whether "any new tax treatment should be conditional on adopting the governance measures and leading practice principles discussed above?" (p. 7). We support proposals to enhance governance and transparency in native title agreement-making (we are making a separate *Submission* to the FaHCSIA/AG's Paper in this regard).

However, we do not support a requirement that would make a tax exemption conditional on agreement outcomes, registration or surveillance at the *end* of agreement-making. As noted in Section 2.3 above, this kind of restriction at the end of the process would work against providing certainty and fairness upfront in native title negotiations. It would also potentially undermine indigenous autonomy and decision-making about agreements and benefits.

In terms of use of payments, as a matter of principle, there should be no limit on the use of a tax-exempt payment of compensation for native title. It should be a matter for the native title community who is in negotiation with the government or private party (such as a resource company) to determine the best short and long term use of native title payments.

For example, it should not be expected that such payments be utilized for infrastructure funding or services in a remote community where such facilities and services should be provided by government. Importantly, the economic potential of such payments should not be fettered. The communal nature of the underlying asset and the requirements of the NTA in relation to consultation on native title decisions and authorisation of ILUAs, as well as other protections under corporations and trust laws provide sufficient safeguards for members and beneficiaries.

So, a payment under an exempt native title agreement or other form of compensation received by an individual should not be taxable. However, where the individual is in receipt of government benefits such as a pension, such a payment may have an impact on eligibility and amount of that pension through the application of income or assets tests under the *Social Security Act 1991* (Cth). The social security treatment of native title payments is a separate issue that also requires attention.

Of course, if a tax-exempt payment (money or property) is received, it may be invested or dealt with to generate further income or gains. For example, if land subject to freehold title is received in a settlement, this land could be sold, or a capital sum received could be invested in shares or a business to generate dividends or profits (see Mt John Valley ILUA<sup>9</sup> and Broome ILUA<sup>10</sup> as

<sup>9</sup> NNTT Number: DI2009/002, registered 6 May 2009.

examples). Income or capital gains generated as a result of such investment or dealings in native title payments or assets would be taxable in the usual way, unless the asset is owned or payment received by a tax-exempt entity such as an Indigenous Community Fund (discussed in the next section).

### 3. INDIGENOUS COMMUNITY FUND (Section 3.2, p. 10)

#### Consultation Questions

**(d) What has been your experience in the use of charitable trusts as a means of managing payments received under native title agreements?**

**(j) Within the context of your experience, what difference would a new tax exempt vehicle make to native title groups and indigenous communities?**

The Treasury Paper proposes establishment or designation of a new entity that would be eligible for an income tax exemption, referred to for discussion purposes as an Indigenous Community Fund. We first respond here to Consultation Question (d) about charitable trusts and then make submissions in support of enacting a specific Indigenous Community Fund tax exemption.

#### 3.1 Problems with Charitable Trusts

Currently, charitable trusts or corporations seeking endorsement as exempt entities are commonly used for holding benefits and managing some payments from native title agreements, largely to avoid the uncertainty of tax treatment of native title payments (and partly for governance reasons).

Native title agreements have been negotiated in general on the basis that they are compensatory in nature and should be tax-exempt. Stakeholders such as the mining industry suggest that the quantum of native payments in agreements is premised on the understanding that they will be non-taxable. In many cases, a tax-exempt entity such as a charitable trust has been adopted by the native title group or instigated by negotiators, so as to ensure tax-exempt status.

However, as noted previously by the Minerals Council of Australia and native title representative bodies, charitable trusts are “not a neat fit”.<sup>11</sup> The problems of charitable trusts have been discussed by a number of researchers and analysts.<sup>12</sup> These problems arise from the limitations of common law and statutory definitions and the approach of the Australian Taxation Office (ATO) to endorsement by interpretation and application of these concepts (as it does across the board for charitable entities).

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<sup>10</sup> Yawuru Prescribed Body Corporate ILUA, NNTT Number:WI2020/003, registered 24 May 2010 & Yawuru Area Agreement ILUA, NNTT Number WI2010/004, registered 6 August 2010.

<sup>11</sup> MCA (August 2009), above n 1; and see Strelein, L & Tran, T, ‘Taxation, trusts and the distribution of benefits under native title agreements’, Native Title Research Report No 1/2007, AIATSIS, Canberra, p. 9-10.

<sup>12</sup> Strelein, above n 1, p. 25; Levin, above n 1, p. 6; Strelein and Tan, above n 11.

The main limitations of charitable trusts for indigenous purposes are:

- Restricted charitable purposes and problems with establishing a fund to achieve multiple purposes; and confusion about the definition and extent of these various activities and purposes.
- Scope of the definition of ‘public’ or ‘public benefit’ and problems with benefiting native title holders ‘related by blood’ (by virtue of defining the group by their ancestors) or small groups of native title claimants.
- Difficulties with accumulation of funds within charitable trusts for the long term, because of the requirement that funds must be used for the defined charitable purposes but without clear guidelines or explanations.
- Conflicts between broader community purposes and the specific rule and obligations of native title holders in law and culture.
- A view of the ATO that business or commercial development activity is not allowed in a charitable trust (but see the recent High Court decision in *Word Investments*<sup>13</sup>); and an inability to have a significant purpose of commercial or business development as an element of charitable purpose even where this is to enable the native title community to benefit from economic development and diversification so as to become sustainable in the longer term.<sup>14</sup>

### 3.2 A Tax-exempt Indigenous Community Fund

We support a reform that would legislate a specific Indigenous Community Fund tax exemption. This would provide much needed clarity for native title agreement making and long term governance of income and assets.<sup>15</sup>

This proposal would complement the basic exemption of payments made under native title agreements from tax and would facilitate the best use of compensation for depletion of resources and loss or impairment of native title.

We submit that this proposal, even more than the proposal for an income tax exemption for native title agreements, requires substantial community consultation to achieve the most suitable outcome.

The fundamental goal of a tax-exempt Indigenous Community Fund is to facilitate communities in converting a communal benefit made under a collective agreement into economic and capabilities development and relief of economic disadvantage of indigenous individuals and families in current and future generations. It should be designed to achieve these ends, enabling accumulation and good management of funds beyond the current generation and enabling the use of some benefits by the current generation that will support the building of individual and family wealth. The rules

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<sup>13</sup> *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 (HCA).

<sup>14</sup> Strelein, above n 1, p. 26; native title prescribed bodies corporate have sometimes been wound up due to failure to consider the ability to ‘get the money out on the ground’.

<sup>15</sup> See also Agreements, Treaties and Negotiated Settlements Research Project, *Discussion Paper Optimising Benefits from Native Title Agreements* (6 December 2008), above n 1.

of the Fund need to permit an Indigenous Community Fund to formulate its powers and governance arrangements to achieve these ends.

An Indigenous Community Fund may be conceived of as having features similar in various respects to:

- A “future fund” for the collective benefit of the particular community.
- A superannuation fund for long term benefit of individual members of a native title group.
- A community organisation or municipal corporation that provides services, invests in and supports social, business and governmental activities of the local community.
- A charity that satisfies existing elements of the current definition of charitable organisation, such as educational or poverty relief objectives or multiple purposes including health, environment and culture.

The Fund would have key objectives of:

- Addressing economic and social disadvantage through direct provision of community services and payments to individuals, contributing to closing the gap;
- Allowing for provision of assistance for long term well being, for example including tax exempt contributions towards individual superannuation;
- Accumulation for future generations – for example 50% of agreement benefits to accumulated for the life of mine;
- Supporting ongoing administration costs for PBCs.

The Indigenous Community Fund should be an optional alternative to other entity structures including a charitable trust. It would not replace charitable trusts as a potential vehicle for investment of native title payments for particular purposes, for example educational scholarships. A place remains for the use of charitable trusts for particular purposes for indigenous communities and individuals, as for any other Australian citizen or group.

The specific questions raised in the Treasury Paper are briefly addressed in the following sections.

### **3.3 Payments received by the Fund**

**Consultation Question (i):**

**(i) What payments should such a fund be able to receive? Should the fund only be allowed to receive payments made under a native title agreement or should it be allowed to receive other payments?**

The tax-exempt Fund could receive tax-exempt payments such as native title compensation or payments under an ILUA.

However, the Fund should not be restricted in the kinds of payments it should receive as long as these payments are used for the purposes of the Fund. The Fund could also receive payments that would otherwise be assessable income, such as investment earnings in the example given by the Treasury Paper. These payments would be tax-exempt in the hands of the Fund as long as they are used for eligible purposes.

The Fund should be eligible to invest in businesses and to receive profits from such businesses (whether held directly or by investment in a taxable company) which would, if used for eligible purposes of the Fund, be tax-exempt and would not prevent the Fund itself being eligible for exemption. See a discussion of business or economic development activity further below.

### 3.4 Uses of the Fund

**Consultation Question (i):**

**(ii) Do you agree with the proposed permitted uses of the fund? What other uses could be considered?**

The purposes and uses of the Fund should be defined in consultation with indigenous communities, acknowledging that they may need to develop or change overtime as the sector changes.

The Treasury Paper lists a number of proposed worthy activities or uses of the Fund. However, it is submitted that those uses, purposes or activities do not cover the full range of eligible purposes that may be sought by indigenous communities. We highlight some key potential uses or purposes of the Fund here.

#### *Business and Financial Security; Economic Development*

The development of business and entrepreneurship in indigenous communities and establishment of indigenous financial security and independence is acknowledged as central in the Government's indigenous Economic Development Framework. It is of great importance to indigenous communities. However, these purposes and uses of the Fund are not referred to in the Treasury Paper.

From the perspective of indigenous economic development, a crucial element is the ability to invest in economically beneficial activities and businesses including indigenous businesses and business activity in indigenous communities.

The Fund should be enabled to facilitate these goals, based on decision-making by the community seeking to take responsibility for its own well-being in the short and long-term.

#### *Payments to individuals or provision of property or services for individual benefit*

In general, tax-exempt treatment requires that an entity be "not for profit" in the sense that it cannot make distributions to individual members, sometimes called the non-distribution requirement.

There is a case for allowing a Fund to make limited cash payments to individuals, for example elders in a community, without putting at risk the Fund's tax exemption.

That is, there could be the possibility of investing a portion of its capital (and earnings) for the long term purpose of funding either a particular community as a kind of “future fund” or superannuation for retirement of existing members of a native title group.

Individual payments can provide recognition of individual native title claimants’ interests and contribute to ownership of the process because they enable individuals to benefit immediately, in a small and visible way, from the native title agreement. Up to a designated limit, such payments could be legislated to be exempt in the recipient hands and not income for the purposes of social security payments. Payments in excess of that limit may be not allowed, and/or may be taxed in particular ways.

Another possibility is that the ability to make such payments could extend to distribution of payments where they are compensation for individual loss of particular native title rights. For example, in the Torres Strait where individual interests in land are well defined, compensation is often paid to the individual land owner. This could be done directly, or could potentially be managed through the Indigenous Community Fund.

The conditions and form on which such payments may be made to individuals should be a matter for further consultation.

### 3.5 Legal entity form and governance for the Fund

**Consultation Question (i):**

**(iii) What legal form should the fund be required to take?**

**(iv) What kinds of governance requirements should the fund be subject to?**

The legal and governance issues for the Fund should be the subject of further detailed consultation in their formulation. The MCA has usefully set out a number of detailed proposals about governance in a previous submission.<sup>16</sup> There is not scope in this Submission to address all aspects of governance (we also propose to address some governance aspects in our Submission to the FaHCSIA/AGs Discussion Paper).

Key points are noted here. Overall, governance rules for the fund should be designed with regard to the following issues:

- Strong prudential regulation.
- Investment expertise and activities (for example in directors or advisors).
- Provision for distributions.
- Intergenerational benefits and wealth creation (ie accumulation).

#### *Legal form and regulatory regime*

It is not recommended that a particular legal form, such as incorporation as a *CATSI* corporation, should be required for the Fund. Other legal structures, such as a trust (like a self managed superannuation fund) or a company limited by guarantee, may be more suitable depending on the circumstances.

<sup>16</sup> MCA (August 2009), above n 1, p. 14ff and see the Figures on pp. 23-24 of that paper.



As a key purpose of the Fund is accumulation and saving for retirement and long term benefit, an appropriate regulatory authority might be the Australian Prudential Regulatory Authority (APRA) which regulates superannuation funds or ASIC which regulates companies. It would be important that the complexity of superannuation regulation not be replicated but this approach may assist in designing rules about governance and management of investments for long term financial benefits.

The Fund would be “not for profit” in the sense of being required to use its funds for designated purposes and not for distribution, except in specific, designated and limited circumstances (as discussed above).

#### *Decision-making processes*

The decision-making processes should incorporate appropriate structures that reflect indigenous law and custom, contributing to effective participation, engagement and legitimacy of the organisation.

Integrity and investment measures could include the requirements below. Issues about administrative and compliance burden must be balanced with the goal of good governance, especially for smaller Funds.

- At least one and no more than half of the directors be experienced in corporate and financial management;
- A minimum number of directors be representative of the community being appointed or elected in some manner as agreed;
- For Funds of a certain size (or regional Funds), independent responsible persons sit on the board;
- No noncommercial (non-arm’s length) transactions with associates or otherwise;
- Annual audits in accordance with the relevant regulatory regime; and
- Annual returns submitted to the ATO;
- Preparation of annual investment and distribution plans to be included in audit requirements;
- Internal (community) transparency and accountability procedures including regular reporting, meetings and adequate and legitimate representation;
- Public reporting be done as required by relevant regulatory regime.

#### *Scale of Fund purposes and beneficiaries*

The governance arrangements should be sufficiently flexible to permit Indigenous Community Funds of various scales to be used. The range of scale might be from a small local group to a regional Fund covering a number of groups. There might even be State based Indigenous Community Funds in some States. This would be a matter for the native title group to determine in negotiation and consultation with other groups, State governments and private actors.

A Fund established for the purposes of a limited group of beneficiaries would likely delineate that group on the basis of Aboriginal law and custom.<sup>17</sup>

A larger scale Indigenous Community Fund such as a regional or State based one might be one way of accommodating some pooling of resources to achieve economies of scale and better returns.

It may be that a group might have a local Indigenous Community Fund as well as be a participant in a larger scale Indigenous Community Fund to achieve some of these purposes.

#### *Other aspects of Fund governance and structure*

- Funds may derive from a range of sources including but not limited to payments under agreements, as discussed above.
- Funds may be used for the range of purposes set out in its objects and not limited to charitable purposes, as discussed above.
- A proportion of capital in the Fund may be permitted to be used to support, assist or invest in commercial activity. We agree with the suggestion in the MCA paper that this be permitted but limited because of the risk factors involved in commercial enterprises. For example, the Fund could decide to invest in a separate proprietary limited company which would carry on a business, or to use a portion of funds for business loans or subsidies. The Fund could prioritise indigenous business ventures in conjunction with other mechanisms such as Indigenous Business Australia and the Indigenous Land Corporation. However, a significant proportion of the Fund's assets would be subject to strict prudential restrictions to support its role in long-term accumulation and wealth creation for the benefit of future generations.
- The Fund could be permitted to make limited cash payments in certain circumstances or to apply funds for the provision of goods and services for individuals, under conditions, as discussed above. For example, the Fund could be permitted to provide individual payments if tied to a personal financial plan relating to superannuation, business development, home purchase or other income generating activity such as education.
- Obligation to accumulate in a future fund; accumulation limits be set: these might include maximums and minimums. The MCA paper gives an example of '50% of benefits for life of mine. The accumulation requirement might not apply where the annual revenue stream is below a certain amount. The MCA has previously suggested \$500,000 per annum - some guidance may be needed on this amount.<sup>18</sup>

### **3.6 Law reform approach for Indigenous Community Fund**

The particular legislative form of a tax exemption for an Indigenous Community Fund should be the subject of further consultation.

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<sup>17</sup> This kind of determination would capture the information based on evidence led to establish the native title claim in the first place – see *Adnyamathanha No. 1 Native Title Claim Group v The State of South Australia (No.2)* [2009] FCA 359 - Determination made 30/03/2009, among others.

<sup>18</sup> MCA (August 2009), above n 1.

It is submitted that the most appropriate means under the current income tax law would be to insert a new, separate category of exempt entity (Division 50 of ITAA 1997) whose ordinary income and statutory income (including capital gains) is exempt from tax.

Potential models for the exemption include the current Div 50 rules under which a municipal corporation is specifically exempt under s 50-20 of ITAA 1997 and a society or association for the purposes of promoting the development of agricultural or industrial resources in Australia is exempt under s 50-40 of ITAA 1997. An alternative model requiring separate registration is that utilised for environmental heritage organizations; however, it must be noted that not-for-profit organizations in that sector find it difficult to navigate the various processes to obtain registration and endorsement.

Endorsement may be required by the Commissioner of Taxation. This could assist in oversight of the Funds. Alternatively, as is currently the case for municipal corporations, adequate conditions would be included in the statute or regulations and endorsement is not required in this case. The entity would also be subject to other regulatory rules (such as APRA or ASIC) as appropriate.

Integrity rules would need to be included either in the tax provision or by reference to another regulatory regime. A model in this regard is the notion of a “complying” superannuation fund for purposes of Australia’s concessional tax treatment of superannuation funds. To the extent that the Fund operates like a superannuation fund, it may be required to “comply” with APRA conditions in order to maintain its tax-exempt status.

Special conditions may be attached to the exemption in the statute, for example including that it is not-for-profit (with specific conditions or exceptions) or that it carries out its activities primarily in Australia. Alternatively, a regulation making power could be included for the establishment of conditions.

### 3.7 Transitional arrangements

#### Consultation Question (i)

**(v) How would the establishment of a new tax exempt vehicle impact on existing agreements?**

**(vi) What kinds of transitional arrangements would be required?**

Many existing agreements rely on charitable trusts or other entities which have achieved tax-exempt status, for example as public benevolent institutions.

Transitional rules may be required to enable “migration” of some or all of the existing assets in these other entities to the Indigenous Community Fund without attracting tax consequences. Communities may wish to leave some funds in a charitable trust with, for example, a purpose of educational scholarships, but to invest some assets in the Fund for purposes of long term wealth creation and economic development.

It would be desirable for existing PBCs holding native title to be able to register or qualify for this exempt status without needing to establish a separate entity; however, this may depend on the long-term accumulation and other regulatory rules for the fund.

It may also be desirable to merge a number of separate, small charitable trusts, possibly held for the benefit of a single community, or for the benefit of different communities in a region and

arising out of different agreements made over time, into a single Fund for benefit of all of the communities in the region. This would assist in eliminating some of the governance, fees and compliance cost issues associated with a multitude of small funds. This should also be allowed with no tax consequences.

It may also be desirable for existing charitable trusts to negotiate to contribute the assets of the trust into a Fund established later for broader purposes.

Legislation will be required to enable these various transitions in a simple manner and tax-free. A “rollover” model as is used in a number of other parts of the income tax law could be suitable. More consultation is needed in defining such a rollover.

#### **4. NATIVE TITLE WITHHOLDING TAX (Section 3.3, p. 14)**

**Consultation Question (k): Within the context of your experience, how would a NTWT affect:**

**(i) the negotiation of native title agreements?**

**(ii) the form of benefits provided under native title agreements, if a NTWT only applied to monetary payments?**

**(iii) the management of benefits received under a native title agreement?**

The Treasury Paper notes that a native title withholding tax was proposed by the previous government in 1998 but was not enacted at that time. The proposal was modeled on the current Mining Withholding Tax (MWT) which is levied at 4 % on ‘mining payments’ made to Aboriginal people or a distributing body such as a Land Council, in respect to the use of Aboriginal land. For example, the MWT currently applies to payments under the Northern Territory *Aboriginal Land Rights Act 1976*.

A withholding tax has the merit, as noted in the Treasury Paper, of simplicity and generates no further tax consequences for the recipients. The current MWT operates in a simple and well understood manner in the Northern Territory. However, it is submitted that this would not translate well to the diversity of payments and agreements in the native title context.

Moreover, as noted by others, a fundamental disadvantage of this model is that it is premised on the basis that tax is owed on the payment.<sup>19</sup> As will be clear from the previous discussion above, we submit that as a matter of principle, payments related to native title should be tax-exempt. There is no place for a MWT in relation to exempt payments. Similarly, there would be no place for a MWT in relation to payments to a tax-exempt entity such as an Indigenous Community Fund.

#### **5. OTHER TAX AND RELATED ISSUES**

##### **5.1 Deductibility of payments under the income tax law**

At present, general income tax law provisions apply to determine whether payments made under an ILUA or other form of native title agreement by a taxable entity (such as a mining company) are deductible.

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<sup>19</sup> Strelein, above n 1, p. 46.

Native title agreements are negotiated on a “total cost” basis which assumes that payments will be deductible to private payers.<sup>20</sup> Such payments may be deductible under a range of provisions, as noted in the Treasury Paper. These include sec 8-1 of the ITAA 1997 and various provisions in Div 40 ITAA97 related to projects. It is submitted that further consultation be conducted on deductibility of payments under native title agreements. It is further submitted that deductibility for payers should not be affected by the exempt status of such payments where they qualify under the income tax exemption proposed above, or in the hands of a tax-exempt Indigenous Community Fund.

## **5.2 Deductible Gift Status (Section 5.1, p. 19)**

The Treasury Paper raises the possibility that deductible gift recipient status could be extended to indigenous organisations (possibly, although this is not specifically stated, to the proposed Indigenous Community Fund discussed above). This may be an appropriate measure for the Treasury to consider. Further consultation is advised.

As a priority, however, rather than highlighting the charitable role of indigenous organisations and Funds, it is submitted that the Treasury focus on tax reform to enable an Indigenous Community Fund to carry out active steps enabling economic development and wealth accumulation while maintaining tax-exempt status, as explained above.

## **5.3 Treatment of payments under the social security (transfer) system**

There are a number of issues concerning the treatment of native title payments under the federal transfer (welfare) system, including the *Social Security Act 1991* (Cth) and other relevant legislation. Issues arise for individuals in receipt of pensions or other benefits or allowances under the welfare system, in respect of income or assets paid or provided in relation to native title (p. 3).

The definition of income, and relevant application of income and assets tests for transfer payments, differs from the tax definitions in a number of respects. The solutions for any problems (whether they be legislative or administrative) may differ also.

We submit that FaHCSIA and the Treasury should carry out a separate analysis of issues arising under the welfare system.

## **5.4 Goods and Services Tax (GST)**

The Treasury Paper does not address the potential for GST to apply to native title payments. As discussed by others, while there may be fewer issues in the GST, there remain some areas of uncertainty.<sup>21</sup> The Treasury should examine the potential application of GST to native title agreements in the future.

## **5.5 Resources Super Profits Tax (RSPT)**

Assuming that the government proceeds down the path of enactment of an RSPT, as previously proposed, it is crucial that native title payments be treated as part of the capital base of a resource

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<sup>20</sup> Levin, above n 1, p. 11, discusses the additional advantages of a comprehensive tax deductibility framework for attracting investment.

<sup>21</sup> Strelein, above n 1, p. 32-34.

company in the definition of taxable profit. A number of other issues may also arise in relation to indigenous communities and native title, with respect to the legislative design of an RSPT and the use of its funds for Australian regional development. It is submitted that the Treasury should consult in detail on these matters as the RSPT development proceeds.

## 6. CONCLUSION

### Consultation Questions:

**(l) Would adopting one or more of the options outlined above change the way in which you approach agreement making?**

**(m) Would adopting one or more of the options outlined above affect the nature of payments you provide?**

The adoption of the complementary options described above, being the exemption of compensation payments and payments under NTA agreements, and the enactment of a new tax-exempt Indigenous Community Fund, will improve agreement making and enhance native title outcomes in a number of respects:

- It will remove the uncertainty and difficulty in negotiations currently generated by confusion about tax treatment and uses of benefits;
- It will buttress the spirit and purpose of the NTA framework of compensation and harnessing of resources for current and future generations;
- It will provide clear guidelines about governance, ownership and benefit sharing in communities out of native title agreements;
- It will ensure that settlements and compensation made outside the NTA framework will be treated equally;
- It will leverage the benefits of native title agreements and the relationships built to date with resource companies for the economic development of future generations.

## APPENDIX 1: Alternative State Government Native Title Settlement Frameworks

### I. South Australian Government Settlement process

See: <http://www.aiatsis.gov.au/ntru/docs/researchthemes/agreement/broadsettlements/SouthAustralianSettlementFramework.pdf>

See: <http://www.iluasa.com/>

#### a. Outline

The South Australian Settlement process focuses on two alternative paths to litigation under the Native Title Act (NTA) for resolving native title disputes – use of Indigenous Land Use Agreements (ILUA) or through consent determinations.

#### b. Rights received

Under both approaches, a continued right to practice traditional laws and customs on the native title land is recognised. When an agreement is registered as an ILUA, there is by default a consideration of the right to negotiate land use with people wanting to exploit the resources in the native title land. Consent orders may have details like this stripped away, but other rights will usually be evidenced as part of the native title claim. There will also be a continuing right to compensation from the Crown against acquisition of land or water rights.

#### c. Approaches to agreement-making

ILUAs are registered with the National Native Title Tribunal (NNTT) and so have some level of consistency and oversight. There is a South Australian Native Title Resolution (SANTR) process operating in parallel to the ILUA process, bringing together the Congress of Native Title Management Committees, the South Australian Native Title Services (SANTS), the SA Farmers Federation (SAFF), the SA Chambers of Mines and Energy (SACOME), Wildcatch Fisheries SA, the Local Government Association (LGA) and the South Australian Government. The SANTR process can result in a court determination, a consent determination, or an agreement not to pursue.

Consent determinations, following negotiations and compulsory mediation, take legal effect when confirmed by a Federal Court. Claimants have to provide evidence as to a continued connection to the land under the requirements of the NTA for consent determinations, but this is significantly cheaper and simpler than preparation for a full trial. Prior to confirmation of the determination, applicants may seek to fulfill the Registration Test, effectively lodging a caveat against further land use while the application is pending.

#### d. Compensation

Compensation is determined either under a consent determination or an ILUA in South Australia. A consent determination can leave a claimant exposed to exploitation or not aware of their rights, and so may undervalue the native title claim. The ILUA negotiating framework and consultation process makes a full consideration of the economic, social and cultural needs of the native title claimants and so may provide for more holistic compensation. The Resolution process does not specify particular heads of compensation. Compensation beyond recognition and acknowledgement of a continued right may simply be unnecessary in many cases.

## II. Victorian Government Settlement Process<sup>22</sup>

See: <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/>

### a. Outline

The Native Title Unit conducts agreement-making under the Victorian Native Title Settlement Framework, and responds to relevant applications for determinations of native title to the Federal Court. Both of these pathways are open to applicants, and failure in one avenue does not necessitate failure in the other (for example, the Yorta Yorta people came to an arrangement under the Settlement Framework with the Victoria Government, despite failing in their appeal to the High Court).

### b. Rights received

The key components to a Framework Agreement are

#### *Access to land*

- Transfers of land to Traditional Owner groups (with or without conditions).
- Handback of Crown land in perpetuity through joint management.
- Joint management where the State retains control of the land.

#### *The Land Use Activity Regime*

- Much like agreements in relation to future acts in the NTA, coordinating native title holders, Crown use and third-party use, but simplified to four areas from ten: routine, advisory, negotiation or agreement activities.

#### *Access to and use of natural resources*

- Rights in relation to management, rights in relation to non-commercial Traditional Owner use, and participation rights in relation to commercial use.

#### *Measures for recognition and strengthening culture*

- Including suggestions such as protocols for public events, a recognition statement, cultural centres and keeping places, indigenous place naming, signage on roads, development of interpretive and educational information and cultural awareness projects.

#### *Alignment with cultural heritage processes*

#### *Claims resolution*

- Compensation
- Funding
- Certainty and finality

### c. Approaches to agreement-making

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<sup>22</sup> This framework has now been legislated: [Traditional Owner Settlement Act 2010](#)



Native title applications to the Federal Court can result in declarations of native title, but the Settlement Framework seeks to pre-empt Court decisions by conducting direct negotiations with Traditional Owner groups. Agreements under this framework are called 'non native title agreements'. They generally include a declaration that the group will cease native title applications in relation to the agreed land and promises not to commence any such action in the future. The intention is to minimise costs for applicants and increase the number of groups exercising native title-like rights in Victoria without increasing the burden on the Court system.

#### **d. Compensation**

The 'claims resolution' aspect of the Settlement Framework accounts for the majority of compensation. Other rights such as participation in use of natural resources could have a profound economic development effect, however.

The entirety of the Framework Agreement is designed to be equivalent to a native title settlement under the NTA. The Land Use Activity Regime accounts for future acts such as mining and large-impact land-use, providing for community benefits in that case. The 'benefits' will be targeted to assist economic, social and cultural development goals. Sustainable and on-going funding may be provided to Traditional Owner corporations as part of the Agreement so as to allow them to continue to deliver their obligations under the Agreement.

## APPENDIX 2: Income Tax Law and Native Title Payments \*

This appendix summarises the key income tax law provisions that could apply to assess a native title payment to tax under either the *Income Tax Assessment Act 1997* (ITAA97) or the *Income Tax Assessment Act 1936* (ITAA36), depending on the form of the payment and transaction, characterization of the rights involved, and the legal basis for the payment.

### Ordinary income

Amounts received under native title agreements may be “income according to ordinary concepts” assessable under s 6-5 of the ITAA97 in a particular income year if they can be characterised, in the hands of the recipient, as a receipt from:

- Services or employment;
- Business;
- The use or exploitation of property;
- Compensation for one of the above kinds of receipts; or
- A receipt that is periodical and for maintenance, of an income character; and it is
- Not capital in nature; and
- Comes in beneficially to the recipient.

### Statutory income

Amounts received under native title agreements may be income under a specific statutory provision of the income tax law. Income is statutory because it is listed as such in the statute. This includes a CGT provision; the application of CGT is discussed below. Other provisions could include:

- Ordinary royalties (whether or not of a capital nature): section 15-20 of ITAA97
- Bounties or subsidies: section 15-10 of ITAA97
- Insurance or reimbursements: section 15-30 of ITAA97
- Recoupment of deductible amounts: division 20 of ITAA97

### Income vs capital

Whether a payment can be characterised as a capital or income payment in the hands of the recipient is a crucial step.

In *Scottish Australian Mining v FCT* (1950) 81 CLR 188 it was held that the mere realization of a capital asset is not to be regarded as an income-generating activity (and hence is not to be assessed under s 6-5) if the realization is not in the regular course of business of the entity – that is, a one-off disposal or extinguishment is unlikely to be treated as an income stream as opposed to capital revenue. However in *FCT v Myer Emporium Ltd* (1987) 163 CLR 199, following *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, it was held that a lump sum in a profit-making scheme or received in trade for a right to an income stream could well be characterised as an income amount rather than a capital amount. Relevant factors also include whether the payments

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\* With thanks to Fiona Martin, UNSW Law School, on whose note on these issues we rely in some cases: F Martin, “Summary: Existing Tax Treatment of Native Title Payments”.

were in the regular course of business, or expected business profits. Where native title holders seek to carry out business or commercial operations, these provisions may be relevant.

### Compensation payments

A compensation payment is received by a taxpayer in recognition or dissolution of a right to seek compensation or court action. It is again necessary to look to the characterization of the receipt as a whole to determine whether a capital asset is being realised through compensation, or whether the compensation substitutes for income. A quantum unrelated to income will generally be characterised as capital, while an on-going payment that is calculated in accordance with an expected income stream can be assumed to be at least in part related to income. Again, the difficulty exists in characterization and that largely depends on the nature and form of the payments made.

Compensation for loss or extinguishment of title would usually be regarded as capital in nature. The view has been confirmed by the ATO in the context of the GST (GSTR 2006/9). The ATO states that in the case of a *'government authority compulsorily acquiring land and interests relating to that land, including the native title rights under a particular statute where the effect of compulsory acquisition is that every registered and unregistered interest in the land is extinguished, and each person who formerly held such an interest has that holding converted into a claim for compensation then: 'The compensation relates to the loss suffered by the claimants on the extinguishment of their interest in the land'*.

Whether or not payments for temporary suspension of native title are ordinary income may depend on the agreement and particular circumstances. If the agreement results in the Native Title Claimant Group (NTCG) surrendering rights that are significant to the native title and the surrender period is for a substantial length of time then the payment is arguably for the surrender of a capital asset and will therefore be capital. Otherwise the payment will be income. Payments that are linked to the future commercial use of the native title and are not permanently surrendering the native title e.g. a lease or licence to allow mining, are likely to be considered as income.

Payments under native title agreements are frequently generated as an entire "package" and so should be regarded as an un-dissected lump sum compensation receipt which is capital in nature. However, the matter is not free from doubt.

### Capital Gains Tax (CGT)

A taxable capital gain may arise where the capital proceeds received (or deemed to be received) by an entity in respect of a CGT event that happens in relation to a CGT asset exceed the cost base of that asset (Part 3-1 of the ITAA97). The capital proceeds are money or property provided to the recipient (Div 116 ITAA97). The cost base of the CGT asset is its cost of acquisition plus some incidental costs of acquisition and disposal, such as legal costs (Div 110 and 112 ITAA97).

To illustrate the complexity, four CGT events that may potentially apply to a native title agreement are CGT event A1 (a "disposal" of a CGT asset); CGT event C2 (the "termination" or "cancellation" of a right or interest which is a CGT asset); CGT event D1 or CGT event H2 (an event that takes place in relation to a CGT asset). Other CGT events may also be applicable.

## CGT event A1

### S 104-10 Disposal of a CGT asset: CGT event A1

- (1) **CGT event A1** happens if you dispose of a CGT asset.
- (2) You **dispose of** a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner.

Note: A change in the trustee of a trust does not constitute a change in the entity that is the trustee of the trust (see subsection 960-100(2)). This means that CGT event A1 will not happen merely because of a change in the trustee.

- (3) The time of the event is:
  - (a) when you enter into the contract for the disposal; or
  - (b) if there is no contract—when the change of ownership occurs.

Note 1: If the contract falls through before completion, this event does not happen because no change in ownership occurs.

Note 2: If the asset was compulsorily acquired from you: see subsection (6).

- (4) You make a **capital gain** if the capital proceeds from the disposal are *more* than the asset's cost base. You make a **capital loss** if those capital proceeds are *less* than the asset's reduced cost base.

#### *Exceptions*

- (5) A capital gain or capital loss you make is disregarded if:
  - (a) you acquired the asset before 20 September 1985; or
  - (b) for a lease that you granted:
    - (i) it was granted before that day; or
    - (ii) if it has been renewed or extended—the start of the last renewal or extension occurred before that day.

#### *Compulsory acquisition*

- (6) If the asset was acquired from you by an entity under a power of compulsory acquisition conferred by an Australian law or a foreign law, the time of the event is the earliest of:
  - (a) when you received compensation from the entity; or
  - (b) when the entity became the asset's owner; or
  - (c) when the entity entered it under that power; or
  - (d) when the entity took possession under that power.

Note: You may be able to choose a roll-over if an asset is compulsorily acquired: see Subdivision 124-B.

## CGT event C2

### S 104-25 Cancellation, surrender and similar endings: CGT event C2

- (1) **CGT event C2** happens if your ownership of an intangible CGT asset ends by the asset:
  - (a) being redeemed or cancelled; or
  - (b) being released, discharged or satisfied; or

- (c) expiring; or
  - (d) being abandoned, surrendered or forfeited; or
  - (e) if the asset is an option—being exercised; or
  - (f) if the asset is a convertible interest—being converted.
- (2) The time of the event is:
- (a) when you enter into the contract that results in the asset ending; or
  - (b) if there is no contract—when the asset ends.
- (3) You make a **capital gain** if the capital proceeds from the ending are *more* than the asset's cost base. You make a **capital loss** if those capital proceeds are *less* than the asset's reduced cost base.
- (4) A lease is taken to have expired even if it is extended or renewed.

*Exceptions*

- (5) A capital gain or capital loss you make is disregarded if:
- (a) you acquired the asset before 20 September 1985; or
  - (b) for a lease that you granted:
    - (i) it was granted before that day; or
    - (ii) if it has been renewed or extended—the start of the last renewal or extension occurred before that day.

## CGT event H2

### S 104-155 Receipt for event relating to a CGT asset: CGT event H2

- (1) **CGT event H2** happens if:
- (a) an act, transaction or event occurs in relation to a CGT asset that you own; and
  - (b) the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.
- (2) The time of the event is when the act, transaction or event occurs.
- (3) You make a **capital gain** if the capital proceeds because of the CGT event are *more* than the incidental costs you incurred that relate to the event. You make a **capital loss** if those capital proceeds are *less*.
- (4) The costs can include giving property: see section 103-5. However, they do not include an amount you have received as recoupment of them and that is not included in your assessable income.

*Exceptions*

- (5) **CGT event H2** does not happen if:
- (a) the act, transaction or event is the borrowing of money or the obtaining of credit from another entity; or
  - (b) the act, transaction or event requires you to do something that is another CGT event that happens to you; or
  - (c) a company issues or allots equity interests or non-equity shares in the company; or
  - (d) the trustee of a unit trust issues units in the trust; or

- (e) a company grants an option to acquire equity interests, non-equity shares or debentures in the company; or
- (ea) a company grants an option to dispose of shares in the company to the company; or
- (f) the trustee of a unit trust grants an option to acquire units or debentures in the trust; or
- (g) a company or a trust that is a member of a demerger group issues new ownership interests under a demerger.

### CGT event D1

Under s 104-35, a CGT D1 event occurs where the taxpayer creates 'a contractual right or other legal or equitable right in another entity'. This event will not however apply if another CGT event applies: subs 104-35(5)(b)).

It is unclear whether the right to compensation under a statute is covered by CGT event D1 as it is not a right 'created' in another person.<sup>23</sup> It is however possible that a native title claim group, either as individuals or as a Prescribed Body Corporate who enter into ILUAs, for example, to allow access for mining, or enter into an agreement to negotiate quickly regarding a future act, trigger a D1 event. It is not relevant for the operation of D1 that the native title is pre-CGT as D1 applies to create the right at the time that the taxpayer enters into the contract or otherwise creates the right.<sup>24</sup> Another example of a D1 event is where there is an agreement for the supply of mining information in the possession of the taxpayer. Although the information is not an asset as it is neither property nor a right, the right to supply the information or knowledge is a CGT asset. Where this right is created, CGT event D1 may happen.<sup>25</sup>

### CGT Asset

A CGT asset is defined to include all forms of property and legal or equitable rights that are not property (s 108-5 ITAA97). Whether a right under consideration is native title that is recognised at common law, or whether it is a right arising from the NTA or other statute, it is likely to be a CGT asset for tax purposes.

For most of the above CGT events, if the CGT asset is "pre-CGT" (ie. was acquired prior to 20 September 1985), any capital gain or loss will be disregarded. Whether a right or interest related to native title is treated as a pre-CGT asset is a complex question. The ATO in *TR 95/35* takes the view that a 'look-through' approach to identify the relevant underlying asset is a valid method of analysis. Native title claimants would need to relate all the payments to that underlying native title asset. This would only be of assistance if it was clarified that indeed native title is a pre-CGT asset.

### Specific Exemption for Compensation

S 118-37 exempts a capital gain arising from certain compensation payments. It states relevantly:

#### **S 118-37 Compensation, damages etc.**

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<sup>23</sup> As noted by Martin, and see Warren Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth)-Can CGT Arise? (2000) *Journal of Australian Taxation* 155, [3.2.2.2.b].

<sup>24</sup> ITAA97 s 104-35(2).

<sup>25</sup> Australian Master Tax Guide (2009) 570-571.

- (1) A capital gain or capital loss you make from a CGT event relating directly to any of these is disregarded:
  - (a) compensation or damages you receive for any wrong or injury you suffer in your occupation;
  - (b) compensation or damages you receive for any wrong, injury or illness you or your relative suffers personally;
  - (c) gambling, a game or a competition with prizes;
  - (d) a re-establishment grant under section 52A of the *Farm Household Support Act 1992*;
  - (f) a sugar industry exit grant that you receive under the program known as the Sugar Industry Reform Program;
  - (g) a tobacco industry exit grant that you receive under the program known as the Tobacco Growers Adjustment Assistance Programme 2006 if, as a condition of receiving the grant, you entered into an undertaking not to become the owner or operator of any agricultural enterprise within 5 years after receiving the grant;
  - (h) a right or entitlement to a tax offset, a deduction, or a similar benefit under an Australian law, a foreign law or a law of part of a foreign country;
  - (i) a variation, transfer or revocation of an allocation (within the meaning of the *National Rental Affordability Scheme Act 2008* );
  - (j) anything of economic value provided to you by:
    - (i) a Department of a State or Territory; or
    - (ii) a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory;

in relation to your participation in the National Rental Affordability Scheme.
- (2) A capital gain or capital loss is disregarded if you make it as a result of receiving a payment or property as reimbursement or payment of your expenses, or receiving or using a voucher or certificate, under:
  - (a) a scheme established by an Australian government agency, a local governing body or a foreign government agency under an enactment or an instrument of a legislative character; or
  - (b) the General Practice Rural Incentives Program or the Rural and Remote General Practice Program; or
  - (c) the Sydney Aircraft Noise Insulation Project; or
  - (d) the M4/M5 Cashback Scheme; or
  - (e) the Unlawful Termination Assistance Scheme or the Alternative Dispute Resolution Assistance Scheme.
- (3) A capital gain you make from compensation you receive under the firearms surrender arrangements is disregarded.

...

### **APPENDIX 3: Summary of Rights, Payments and Key Provisions under the *Native Title Act 1993* (CTH)**

This Appendix briefly summarises some aspects of the *Native Title Act 1993* (Cth) (NTA) in relation to past and future acts that affect native title rights and interests. It also extracts some key relevant provisions of the NTA (of course it is no substitute for a full reference to provisions of the NTA itself as needed).

Native title is recognised in Division 1 of the NTA. Division 2 validates certain past acts by State and Federal governments in relation to native title. Division 3 deals with future acts and Indigenous Land Use Agreements (ILUA), while Division 5 relates to the determination of compensation for acts that offend or have offended native title.

#### **Native Title**

Native title is defined in s 223 of the NTA as follows:

##### **Section 223 Native title**

###### *Common law rights and interests*

- (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
  - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
  - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
  - (c) the rights and interests are recognised by the common law of Australia.

###### *Hunting, gathering and fishing covered*

- (2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

###### *Statutory rights and interests*

- (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression ***native title*** or ***native title rights and interests***.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

...

Native title rights then persist where they have not been abrogated in the meantime. To claim a native title right, a continuing observance of a practice or tradition in relation to that right must be demonstrated. Future act agreements, ILUAs and compensation will hence all relate to these rights.



## **Right to compensation**

The right to compensation for native title is a result of the operation of the *Racial Discrimination Act 1975*. The NTA recognises this right and introduces mechanisms for determining compensation.

### **51 Criteria for determining compensation**

#### *Just compensation*

- (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

#### *Acquisition under compulsory acquisition law*

- (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

#### *Compensation where similar compensable interest test satisfied*

- (3) If:
  - (a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
  - (b) the similar compensable interest test is satisfied in relation to the act;

the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines similar compensable interest test).

#### *Compensation not covered by subsection (2) or (3)*

- (4) If:
  - (a) neither subsection (2) nor (3) applies; and
  - (b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable;

the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

#### *Monetary compensation*

- (5) Subject to subsection (6), the compensation may only consist of the payment of money.

*Requests for non-monetary compensation*

- (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
- (a) must consider the request; and
  - (b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

*Where recommendation not complied with*

- (7) If the person does not transfer the property or provide the goods or services in accordance with the recommendation, the person claiming to be entitled to the compensation may request the court, person or body to determine instead that the whole or the part of the compensation concerned is to consist of the payment of money.

*Where recommendation complied with*

- (8) If the person does transfer the property or provide the goods or services in accordance with the recommendation, the transfer of the property or provision of the goods or services constitutes full compensation for the act, and the entitlement to it is taken to have been determined in accordance with this Division.

There are also some specific provisions about compensation. Section 17 provides that for **past acts** of extinguishment, the Commonwealth will be liable for compensation. Such compensation payments would be tax-exempt in the hands of the recipient.

Division 3, subdivision G provides that the Commonwealth (or State as applicable) is liable for compensation in relation to **future acts** under non-exclusive agricultural leases granted on or before the application of native title (23 December 1996). Mining activities are specifically excluded from the scope of this subdivision, which only relates to 'primary production activities' (s 24GA). On-going activities and activities that could have been done under any legislation in force before 31 March 1998 are excluded from the compensation framework (s 24GC). The emphasis of the compensation is on **future acts**.

### **Indigenous Land Use Agreements (ILUAs)**

ILUAs are the central large scale agreement making process under the NTA. ILUAs have the advantage that they must be registered under the NTA and that a range of steps must be taken that assist in ensuring due process in negotiation of the ILUA. An ILUA may be negotiated "as if" there is native title, or on the assumption that native title may be established in due course (and may stand even if native title is not, ultimately, made out).

A range of payments and benefits may be agreed under an ILUA. Some payments may have a form which for income tax analysis might be considered "capital" in nature, for example, a payment is made as a lump sum, once and for all, and is expressed to be for compensation or for access to or acquisition of an asset. Other payments may be periodical, or tied to use of an asset and so may be treated as "income" for tax purposes and hence assessable under the general tax rules. Some benefits, such as heritage protocols or employment targets, are more difficult to categorize.

NTA Division 3, Subdivisions B, C and D provide for ILUAs made with bodies corporate; those made in relation to an area where there is not a body corporate; as well as those made under 'alternative procedures'. These subdivisions provide for the technicalities of registering an agreement. Each subdivision provides a list of requirements for an agreement to satisfy the definition of an ILUA. The specification and division of these requirements may point to divisibility in assessment being possible in relation to a final payment under any such ILUA.

Some of the requirements of an ILUA with a body corporate include consideration of compensation for past acts and future acts, payment for future acts, extinguishment of native title rights, frameworks for interaction between native title rights and other parallel rights, and the manner of exercise of those various rights (s 24BB).

### **Subdivision B—Indigenous land use agreements (body corporate agreements)**

#### **24BA Indigenous land use agreements (body corporate agreements)**

An agreement meeting the requirements of sections 24BB to 24BE is an *indigenous land use agreement*.

Note: Subdivisions C and D provide for other kinds of indigenous land use agreements.

#### **24BB Coverage of body corporate agreements**

The agreement must be about one or more of the following matters in relation to an area:

- (a) the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts, or future acts included in classes;
    - (aa) particular future acts (other than intermediate period acts), or future acts (other than intermediate period acts) included in classes, that have already been done;
- Note: Intermediate period acts are or can be validated only under Division 2A.
- (ab) changing the effects, that are provided for by section 22B or by a law of a State or Territory that contains provisions to the same effect, of an intermediate period act or of intermediate period acts included in classes;
  - (b) withdrawing, amending, varying or doing any other thing in relation to an application under Division 1 of Part 3 in relation to land or waters in the area;
  - (c) the relationship between native title rights and interests and other rights and interests in relation to the area;
  - (d) the manner of exercise of any native title rights and interests or other rights and interests in relation to the area;
  - (e) extinguishing native title rights and interests in relation to land or waters in the area by the surrender of those rights and interests to the Commonwealth, a State or a Territory;
  - (eaa) providing a framework for the making of other agreements about matters relating to native title rights and interests;

(ea) compensation for any past act, intermediate period act or future act;

(f) any other matter concerning native title rights and interests in relation to the area.

#### **24BC Body corporate agreements only where bodies corporate for whole area**

The agreement must not be made unless there are registered native title bodies corporate in relation to all of the area.

#### **24BD Parties to body corporate agreements**

##### *Registered native title bodies corporate*

- (1) All of the registered native title bodies corporate in relation to the area must be parties to the agreement.

##### *Governments*

- (2) If the agreement makes provision for the extinguishment of native title rights and interests by surrendering them to the Commonwealth, a State or a Territory as mentioned in paragraph 24BB(e), the Commonwealth, State or Territory must be a party to the agreement. If the agreement does not make such provision, the Commonwealth, a State or a Territory may still be a party.

##### *Others*

- (3) Any other person or persons may be parties.

##### *Procedure where no representative body party*

- (4) If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, the registered native title body corporate, before entering into the agreement:
  - (a) must inform at least one of the representative Aboriginal/Torres Strait Islander bodies of its intention to enter into the agreement; and
  - (b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement.

### **Future Acts**

A “future act” agreement, like an ILUA, may apply to lands where title is determined, or may be negotiated “as if” there is native title, or on the assumption that native title may be established in due course. Payments under future act agreements, like those under ILUAs, may be in a range of different forms. One purpose of a future act agreement is to compensate, in a loose sense, for future impairment of title, even though the agreement itself may not extinguish or suspend title. It is possible that native title may not ultimately be made out, or impaired. However, the payment may have already been made, sometimes some years previously.

A future act in relation to native title is defined at s 233 NTA. Acts that simply affect native title are dealt with at s 227. Section 24AA(2) provides that a future act is valid if covered by the provisions of the NTA, while s 24AA(3) provides that a future act is valid if dealt with by a registered ILUA.

#### **227 Act affecting native title**

An act **affects** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

### 233 Future act

#### *Definition*

- (1) Subject to this section, an act is a **future act** in relation to land or waters if:
- (a) either:
    - (i) it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or
    - (ii) it is any other act that takes place on or after 1 January 1994; and
  - (b) it is not a past act; and (c) apart from this Act, either:
    - (i) it validly affects native title in relation to the land or waters to any extent; or
    - (ii) the following apply:
      - (A) it is to any extent invalid; and
      - (B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and
      - (C) if it were valid to that extent, it would affect the native title.

#### *Validation and extinguishment legislation excluded*

- (2) If:
- (a) the act consists of the making, amendment or repeal of legislation; and
  - (b) the act purports to:
    - (i) validate any past act or intermediate period act; or
    - (ii) extinguish native title, or extinguish native title rights and interests to an extent; and
  - (c) the act is done or permitted to be done by Division 2, 2A or 2B of Part 2; subsection (1) does not apply to the extent that the act purports to validate the act, or to extinguish the native title or the native title rights and interests.

#### *Acts creating or affecting Aboriginal/Torres Strait Islander land or waters excluded*

- (3) Subsection (1) does not apply to any of the following acts:
- (a) an act that causes land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under a law mentioned in the definition of **Aboriginal/Torres Strait Islander land or waters** in section 253;
  - (b) any act affecting Aboriginal/Torres Strait Islander land or waters.

### **Other relevant provisions: Structured agreements “outside” the NTA**

Section 22L and sections 86-87A of the NTA may authorise structured agreements or other settlements. These provisions may provide authority for some State based settlements.

### **22L Entitlement to compensation**

#### *Compensation where validation*

- (1) If a law of New South Wales validates the acts, the native title holders concerned are entitled to compensation.

*Recovery of compensation*

- (2) The native title holders may recover the compensation from New South Wales.

*Compensation to take into account rights etc. conferred by transferee*

- (3) The compensation is to take into account all rights, interests and other benefits conferred, in relation to the lands, on the native title holders by, or by virtue of membership of, the Aboriginal Land Council (within the meaning of the *Aboriginal Land Rights Act 1983* of New South Wales) to which the lands are transferred or by which the lands are held.

*NSW may create compensation entitlement*

- (4) This section does not prevent a law of New South Wales from creating an entitlement to compensation for the acts or for their validation.

Note: Paragraph 49(b) deals with the situation where there are multiple rights to compensation under Commonwealth and State legislation.

**86 Evidence and findings in other proceedings**

- (1) Subject to subsection 82(1), the Federal Court may:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
    - (i) the Court; or
    - (ii) another court; or
    - (iii) the NNTT; or
    - (iv) a recognised State/Territory body; or
    - (v) any other person or body;
  - and draw any conclusions of fact from that transcript that it thinks proper; and
  - (b) receive into evidence the transcript of evidence in any proceedings before the assessor and draw any conclusions of fact from that transcript that it thinks proper; and
  - (c) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (v).
- (2) Subject to subsection 82(1), the Federal Court:
- (a) must consider whether to receive into evidence the transcript of evidence from a native title application inquiry; and
  - (b) may draw any conclusions of fact from that transcript that it thinks proper; and
  - (c) may adopt any recommendation, finding, decision or determination of the NNTT in relation to the inquiry.

## Division 1B—Reference for mediation

### 86A Purpose of mediation [...]

### 86B Referral of matters for mediation [...]

### 86BA Mediator may appear before the Court [...]

### 86C Cessation of mediation [...]

### 86D Federal Court's powers

*Court may determine fact or law [...]*

*Court may adopt agreement on facts [...]*

*Directions to attend or produce documents for the purposes of mediation [...]*

### 86E Federal Court may request reports from a mediator [...]

## Division 1C—Agreements and unopposed applications

### 86F Agreement to settle application etc.

*Parties may negotiate for agreement*

- (1) Some or all of the parties to a proceeding in relation to an application may negotiate with a view to agreeing to action that will result in any one or more of the following:
  - (a) the application being withdrawn or amended;
  - (b) the parties to the proceeding being varied;
  - (c) any other thing being done in relation to the application.

The agreement may involve matters other than native title.

*Assistance by NNTT*

- (2) The parties may request assistance from the NNTT in negotiating the agreement.

*Information obtained in providing assistance not to be used or disclosed in other context [...]*

(2A) [...]

*Court may order adjournment to help negotiations*

(3) [...]

*Court may end adjournment*

(4) [...]

*Court's powers not limited*

- (5) [...]

### **86G Unopposed applications**

*Federal Court may make order*

- (1) If, at any stage of a proceeding in relation to an application under section 61, but after the end of the period specified in the notice given under section 66:
- (a) the application is unopposed; and
  - (b) the Federal Court is satisfied that an order in, or consistent with, the terms sought by the applicant is within the power of the Court;

the Court may, if it appears appropriate to do so, make such an order without holding a hearing or, if a hearing has started, without completing the hearing.

Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

*Meaning of unopposed*

- (2) For the purpose of this section, an application is **unopposed** if the only party is the applicant or if each other party notifies the Federal Court in writing that he or she does not oppose an order in, or consistent with, the terms sought by the applicant.

### **87 Power of Federal Court if parties reach agreement**

*Application*

- (1) This section applies if, at any stage of proceedings after the end of the period specified in the notice given under section 66:
- (a) agreement is reached between the parties on the terms of an order of the Federal Court in relation to:
    - (i) the proceedings; or (ii) a part of the proceedings; or
    - (iii) a matter arising out of the proceedings; and
  - (b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and
  - (c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court.

*Power of Court*

- (1A) The Court may, if it appears to the Court to be appropriate to do so, act in accordance with:
- (a) whichever of subsection (2) or (3) is relevant in the particular case; and
  - (b) if subsection (5) applies in the particular case—that subsection.

*Agreement as to order*

- (2) If the agreement is on the terms of an order of the Court in relation to the proceedings, the Court may make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.



Note: If the application involves making a determination of native title, the Court's order would need to comply with section 94A (which deals with the requirements of native title determination orders).

*Agreement as to part of proceedings*

- (3) If the agreement relates to a part of the proceedings or a matter arising out of the proceedings, the Court may in its order give effect to the terms of the agreement without, if it has not already done so, dealing at the hearing with the part of the proceedings or the matter arising out of the proceedings, as the case may be, to which the agreement relates.

*Orders about matters other than native title*

- (4) Without limiting subsection (2) or (3), if the order under that subsection does not involve the Court making a determination of native title, the order may give effect to terms of the agreement that involve matters other than native title.
- (5) Without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title.
- (6) The jurisdiction conferred on the Court by this Act extends to:
  - (a) making an order under subsection (2) or (3) that gives effect to terms of the agreement that involve matters other than native title; and
  - (b) making an order under subsection (5).
- (7) The regulations may specify the kinds of matters other than native title that an order under subsection (2), (3) or (5) may give effect to.

*Agreed statement of facts*

- (8) If some or all of the parties to the proceeding have reached agreement on a statement of facts, one of those parties may file a copy of the statement with the Court.
- (9) Within 7 days after a statement of facts agreed to by some of the parties to the proceeding is filed, the Registrar of the Court must give notice to the other parties to the proceeding that the statement has been filed with the Court.
- (10) In considering whether to make an order under subsection (2), (3) or (5), the Court may accept a statement of facts that has been agreed to by some or all of the parties to the proceedings but only if those parties include:
  - (a) the applicant; and
  - (b) the party that the Court considers was the principal government respondent in relation to the proceedings at the time the agreement was reached.
- (11) In considering whether to accept under subsection (10) a statement of facts agreed to by some of the parties to the proceedings, the Court must take into account any objections that are made by the other parties to the proceedings within 21 days after the notice is given under subsection (9).

## 87A Power of Federal Court to make determination for part of an area

### *Application*

- (1) This section applies if:
  - (a) there is a proceeding in relation to an application for a determination of native title; and
  - (b) at any stage of the proceeding after the end of the period specified in the notice given under section 66, agreement is reached on a proposed determination of native title in relation to an area (the **determination area**) included in the area covered by the application; and
  - (c) all of the following persons are parties to the agreement:
    - (i) the applicant;
    - (ii) each registered native title claimant in relation to any part of the determination area who is a party to the proceeding at the time the agreement is made;
    - (iv) [sic] each representative Aboriginal/Torres Strait Islander body for any part of the determination area who is a party to the proceeding at the time the agreement is made;
    - (v) each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is a party to the proceeding at the time the agreement is made;
    - (vi) each person who claims to hold native title in relation to land or waters in the determination area and who is a party to the proceeding at the time the agreement is made;
    - (vii) the Commonwealth Minister, if the Commonwealth Minister is a party to the proceeding at the time the agreement is made or has intervened in the proceeding at any time before the agreement is made;
    - (viii) if any part of the determination area is within the jurisdictional limits of a State or Territory, the State or Territory Minister for the State or Territory if the State or Territory Minister is a party to the proceeding at the time the agreement is made;
    - (ix) any local government body for any part of the determination area who is a party to the proceeding at the time the agreement is made; and
  - (d) the terms of the proposed determination are in writing and signed by or on behalf of each of those parties.

### *Proposed determination may be filed with the Court*

- (2) A party to the agreement may file a copy of the terms of the proposed determination of native title with the Federal Court.

### *Certain parties to the proceeding to be given notice*

- (3) The Registrar of the Federal Court must give notice to the other parties to the proceeding that the proposed determination of native title has been filed with the Court.

### *Orders may be made*

- (4) The Court may make an order in, or consistent with, the terms of the proposed determination of native title without holding a hearing, or if a hearing has started, without completing the hearing, if the Court considers that:
  - (a) an order in, or consistent with, the terms of the proposed determination would be within its power; and

(b) it would be appropriate to do so.

Note: As the Court's order involves making a determination of native title, the order needs to comply with section 94A (which deals with the requirements of native title determination orders).

(5) Without limiting subsection (4), if the Court makes an order under that subsection, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title if the Court considers that:

(a) the order would be within its power; and (b) it would be appropriate to do so.

#### *Objections*

(8) In considering whether to make an order under subsection (4) or (5), the Court must take into account any objections made by the other parties to the proceedings.

#### *Agreed statement of facts*

(9) If some or all of the parties to the proceeding have reached agreement on a statement of facts, one of those parties may file a copy of the statement with the Court.

(10) Within 7 days after a statement of facts agreed to by some of the parties to the proceeding is filed, the Registrar of the Court must give notice to the other parties to the proceeding that the statement has been filed with the Court.

(11) In considering whether to make an order under subsection (4) or (5), the Court may accept a statement of facts that has been agreed to by some or all of the parties to the proceedings but only if those parties include:

(a) the applicant; and

(b) the party that the Court considers was the principal government respondent in relation to the proceedings at the time the agreement was reached.

(12) In considering whether to accept under subsection (11) a statement of facts agreed to by some of the parties to the proceedings, the Court must take into account any objections that are made by the other parties to the proceedings within 21 days after the notice is given under subsection (10).

#### APPENDIX 4: Consultation Questions

- (a) In the context of your experience, when do the potential income tax implications of an agreement arise in an agreement making process?
- (b) What has been your experience in seeking advice or guidance, either privately or from government agencies, on the interaction between the income tax system and native title?
- (c) How could government agencies assist to provide greater clarity regarding the tax treatment of payments made under a native title agreement?
- (d) What has been your experience in the use of charitable trusts as a means of managing payments received under native title agreements?
- (e) Within the context of your experience, what structures or arrangements are used to manage the use of payments received under native title agreements?
- (f) How would an upfront tax exemption for payments made in respect of a native title agreement impact on the negotiation of agreements?
- (g) How should the concept of a native title agreement be defined? Should this concept be defined with respect to the NTA?
- (h) Should the purposes for which an exempt payment may be used be prescribed? For example, should there be a restriction on an exempt payment being used for purely private consumption?
- (i) If development of a new tax exempt vehicle is progressed further:
- (i) What payments should such a fund be able to receive? Should the fund only be allowed to receive payments made under a native title agreement or should it be allowed to receive other payments?
- (ii) Do you agree with the proposed permitted uses of the fund? What other uses could be considered?
- (iii) What legal form should the fund be required to take?
- (iv) What kinds of governance requirements should the fund be subject to?
- (v) How would the establishment of a new tax exempt vehicle impact on existing agreements?
- (vi) What kinds of transitional arrangements would be required?
- (j) Within the context of your experience, what difference would a new tax exempt vehicle make to native title groups and Indigenous communities?
- (k) Within the context of your experience, how would a NTWT affect:
- (i) the negotiation of native title agreements?
- (ii) the form of benefits provided under native title agreements, if a NTWT only applied to monetary payments?
- (iii) the management of benefits received under a native title agreement?
- (l) Would adopting one or more of the options outlined above change the way in which you approach agreement making?
- (m) Would adopting one or more of the options outlined above affect the nature of payments you provide?
- (n) How would a new DGR general category for Indigenous organizations that carry out activities across multiple DGR categories impact on the ability of such organizations to obtain DGR status?