Native Title, Indigenous Economic Development and Tax

The statement that the government is "committed to ensuring a more flexible, less legalistic to native title," must be examined before any proposals can be put towards any scheme. Both current and proposed schemes need to be scrutinised on what they have delivered in the past, what they are delivering now and what are the future directions of native title policy and tax considerations that will deliver "practical outcomes for Indigenous Australians." First however we must determine what we mean when we use the terms **flexible** and less legalistic.

Flexibility and Less Legalistic

A detailed consideration of responses from Government discussion Papers like that of the 2009 paper examining the **Benefits from Native Title agreements** reveals that flexibility is somewhat one sided. Unlike other property transactions that are transparent and are referenced to other like transactions the secrecy surrounding each native title royalty agreement limits their negotiating position. Agreements in isolation compromise the legislative clout that native title parties have to negotiate from a position of strength. It has become increasingly evident that this position has been severely eroded by a complex system which favours the interpreters of the law. In the Australian Government Discussion Paper 2009 it was concluded that;

> "Working Group members estimated that while hundreds of agreements exist between traditional owners and industry, there are only around one dozen agreements that provide substantial benefits to Aboriginal people and Torres Strait Islanders and exhibit principles embodying best practice in agreement making. The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the Native Title Act 1993 (NTA) is, in itself, deserving of inquiry," and that; "While information that is genuinely commercially or culturally sensitive should be protected, much of the structural and technical content of agreements could be made public, assisting future drafters and enabling greater transparency and accountability. It would also reduce costs for model clauses, based on best practice, to be made available. (AGDP p.9)

One can only conclude that flexibility in the system combined with the secret nature of these agreements has led to a system that requires immediate attention by the Australian Government. These agreements should be scrutinised by a Royal Commission and determinations be made. Information coming out from the Native Title Office in Perth is that some PBC's or native title representatives have legal representatives who directly or indirectly represent the interests of resource companies. Flexibility therefore has become the friend of the legal profession but the enemy of the claimant group. Before any tax implications can be considered a new foundation needs to be built which 1) Maintains flexibility but more closely regulates a starting point for negotiation by; 2) Looking at the precedence of payments at the highest end of the scale in each resource sector as a starting point for negotiation; 3) That an agreed set of figures is determined and signed off on

by native title parties and the government (Native Title Office) before an agreement can proceed. At this point the Native Title Office appointed legal representatives will explain the tax implications of their decisions and how it relates to a Government that is committed through its tax system to promote Indigenous economic development into the future.

It must be acknowledged by governments that the current system of native title agreements cannot continue from a privatised legal perspective as the moral and social justice issues are undermining the intent of Native Title. The average Australian taxpayer should also be considered in regard to the tax burden that many indigenous communities put upon Federal and State budgets. By optimising the tax environment for investment it will result in a fairer tax system for all Australians into the future as all taxation derived from Native Title projects is put into investment schemes that promote a union between the Government and the Indigenous population. This system enables Indigenous Australians to own their own assets that are profitable into the future while also protecting them from self interest groups and the undermining of the investment.

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

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?

How could government agencies assist to provide greater clarity regarding the tax treatment of payments made under native title agreements?

A PROPOSAL THAT SEEKS TO DEAL WITH THE ABOVE QUESTIONS

The potential tax implications of an agreement should be based on two limited avenues. I am in favour of native title parties establishing their claim through private legal representation but when native title is granted the claim is handed over to the Native Title Office for a royalty determination as described above. The claimant group represented by the Native Title Office would request the royalties on behalf of the Native Title party. When the payment has been made the native title party would then be given the choice to either take a payment that may or may not attract a Capital Gains Tax shown in Option A and Option B.

OPTION A: - The conditions for payment of Capital Gains Tax at 40% would be that;

Their native title settlement has been determined by a figure based on precedence and that they are seeking settlement outside the realm of investment and therefore the royalty payment is determined as a capital gain. This 40% tax on settlement would go straight into **investment** (See Diagram below) based on region. Because it is treated like any other tax the native title parties who take Option A have no right to determine where these monies are spent. 30% goes into direct **investment** choices with 10% going into **Government Appointed Schemes.**

OPTION B:-The conditions and outcome for a claim that settles for **investment** purposes;

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Under Option B the native title settlement has been determined by a figure based on precedence as in Option A but the native title party indicates to the Native Title Office that in seeking settlement they are seeking the Indigenous **investment** vehicle and is therefore totally tax deductible apart from 4% for administration costs for Native Title Office operations.

What qualifies as an Indigenous Investment

Investment schemes are determined by the Native Title Office who provides the most culturally and environmentally sensitive investments that provide the best dividend to Indigenous Groups.

Indigenous Investment Groups are divided into larger regions that already exist such as the Pilbara/Kimberly's /Gascoyne/Great Southern etc.

A model investment scheme which provides economic development beyond the life of the mine (AGDP p.11) and its tax implications would look like the following diagram although allocation amounts could be adjusted after further consideration.

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INDIGENOUS INVESTMENT GROUP
Registered with Native Title Office

4% tax Native Title Office Investment Determination fee.

30% of 40% CGT rate on Option A upon settlement goes into Investment

10% of 40% CGT goes into Government appointed Schemes

INVESTMENT DETERMINATIONS Based on Reports

Native Title Parties with Native Title Office determine what tax free scheme they want to invest in within their region and sign off on an agreement

Example: - SOLAR POWER GENERATION PLANT FOR KARRATHA

Consultants are sought to draw up contracts and tenders are offered to construct and maintain Solar Powered Plant for a period of 3 years with an option to tender on it's maintenance after that period.

Energy is sold to Towns and Resource companies with carbon credits also being sold to mining companies in the future. Proportion of Investment is determined in Scheme alongside other native title parties and a tax free minimum royalty payment (based on the minimum wage) is paid fortnightly to each member of the investment group 6 months after the agreement is signed.
If a person within a claimant group receives any other income outside the agreement it (not the royalty payment) is determined to be taxable income.
After this minimum wage obligation is met 50% of profits are re-invested into other investment vehicles.

TRUST FUND

GOVERNMENT ADMINISTERED SCHEMES

Tax Free 20**%** of **investment profits** gained from the above investment is put into Government projects for Indigenous communities. The government reserves the right to re-invest monies back into investment vehicles.

INDIGENOUS MINISTERED SCHEMES

Tax Free 30% of **Investment profits** go into grants for cultural awareness/ rehabilitation programs/educational funding and scholarships are administered through a **trust fund**. Funding is determined on the basis of need. A Small panel of elected representatives from each investment group determine where this money is to be spent. Strict criteria for assessment should be adhered to comply with a tax free status. Elected officials are paid an agreed consultation fee which is also tax free.