THE TAXATION OF NATIVE TITLE PAYMENTS FOR INDIGENOUS GROUPS AND RESOURCE PROPONENTS: CONVERGENCE, DIVERGENCE AND REFORM

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For many years following the introduction of the Native Title Act 1993 (Cth), when native title agreements were a new concept with few precedents, parties generally paid limited attention to taxation issues, or tried to obviate the need to do so. Over the last decade, awareness of the significance of tax has grown, along with the quantum of native title payments and the sophistication of native title agreements. However, the literature is still relatively immature. This paper advances the debate in three key ways. First, it identifies the tax issues that practically matter in the context of sophisticated native title agreements and benefits management structures that are now prevalent in Western Australia. Second, it does so from the perspective of both Indigenous groups and resources proponents and therefore seeks to identify areas of convergent and divergent interests. Third, it examines the impact of the Tax Laws Amendment (2012 Measures No 6) Act 2013 (Cth) reforms on the tax issues and the respective interests. While relevant to native title payments Australia-wide, the paper is particularly informed by Western Australian developments.

This article is dedicated to Dr Peter Johnston, a gentleman, academic and practitioner who, through the lens of constitutional law, has explored native title, Indigenous rights and matters of taxation for decades.

I INTRODUCTION

Native title agreements are a very significant aspect of resource projects in Australia. In monetary terms, in Western Australia alone, existing native title agreements are projected to generate millions to tens of millions of dollars for many affected Indigenous groups every year for the life of a resources project. If

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added together, this would equate to hundreds of millions of dollars a year.[1] As project life spans typically amount to decades, these sums are substantial. However, the taxation treatment of such payments is, in many respects, shrouded in uncertainty. The literature remains relatively immature in that it typically focuses on specific tax issues, commonly from the perspective of only one of the parties and often divorced from an understanding of benefits management structures that are used to receive payments.[2] Analysis of the application of the 2013 reforms (2013 Reforms) introduced by the *Tax Laws Amendment (2012 Measures No 6) Act 2013* (Cth)[3] (NT Tax Act) has also been limited.[4]

This paper seeks to advance the debate by identifying the key tax issues that arise in practice for both Indigenous groups and resources proponents and does so in the context of the more sophisticated native title benefits management structures that are becoming more prevalent, at least in Western Australia.[5] The novelty of this approach is that it permits the identification of areas of convergence and divergence in interests, with implications for agreement drafting, approaches to obtaining taxation rulings and for compliance activities by regulators. In addition, this article examines the impact of the 2013 Reforms. The reforms represent a significant change in the taxation of native title payments, although they only address selected income tax matters and also generate new uncertainty.[6]

The first part of this paper sketches the context of native title agreements, payments and benefits management structures. The second part provides a brief overview of the key tax issues that arise. The third and fourth parts then

[1] See, eg, Chamber of Minerals and Energy of Western Australia, Submission No 5 to House of Representatives Standing Committee on Economics, Parliament of Australia, *Inquiry into the Tax Laws Amendment (2012 Measures No 6) Bill 2012*, 19 December 2012, 2.
[2] For exceptions to this statement that do adopt a more holistic analysis, see, eg, Miranda Stewart, 'Tax and Native Title' (Paper presented at the Tax Institute 28th National Convention, Perth, 13-15 March 2013); Adam Levin, Jim O'Donnell and David Murphy, 'Tax and Native Title' (Paper presented at the Tax Institute National Resources Tax Conference, Perth, 14-15 October 2008); Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1/2008, AIATSIS, May 2008).
[3] Itself amended by the *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth).
[4] Again, for exceptions to this statement, see, eg, Ian Murray, 'Native Title Tax Reforms: Bull's Eye or Wide of the Mark' (2013) 41(3) *Federal Law Review* 497; Stewart, 'Tax and Native Title', above n 2, 18-29.
[5] As to the changes in benefits management structures, see, eg, Andrew Morgan, Plan B, 'Native Title Trusts' (Paper presented at the Legalwise Native Title Conference, Perth, Friday 13 June 2014) 3-6; Rob Heferen et al, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group: Report to Government' (Report, 1 July 2013) 14.
[6] See, eg, Murray, above n 4.

explore Indigenous group and resource proponent divergent interests in the assessability and deductibility of native title payments. Part five considers areas of convergent tax interests, in particular in relation to goods and services tax treatment and PAYG withholding for failure to quote an Australian Business Number; as well as the imposition and withholding of 4% mining withholding tax. Finally the sixth part looks at the 2013 Reforms and the extent to which issues have been resolved or generated.

II Part 1 – Context: Native Title Agreements, Payments and Benefits Management Structures

A *What are Native Title Payments and When Do They Arise?*

'Native title' is a generic term that describes the rights and interests of Aboriginal and Torres Strait Islander communities, groups and individuals which exist under their traditional laws and customs and which are recognised by the Australian legal system. Native title was first recognised by the Australian legal system in the decision of the High Court of Australia in *Mabo v Queensland (No 2)*,[7] and is now recognised under the *Native Title Act 1993* (Cth) (NTA).[8] References in this paper to 'native title' are references to native title as recognised under the NTA.[9]

The term 'native title payments' is not a term of art. For the purposes of this paper, the term 'native title payments' refers to the various circumstances in which payments of money[10] are made to or for the benefit of native title claimants or native title holders, or associated entities, by reason of or in connection with their claimed or determined native title rights and interests. The NTA contemplates that government and 'grantee' parties (such as mining or petroleum explorers or producers, and land developers), and Indigenous groups, may enter into agreements under which native title payments may be made. By way of a brief overview, the main circumstances in which native title

[7] (1992) 175 CLR 1.
[8] For a more detailed explanation of native title under the *Native Title Act 1993* (Cth), see *Commonwealth v Yarmirr* (2001) 208 CLR 1, [5]-[16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, [15]-[21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [9]-[12], [32]-[35], [45], [70], [75]-[77] (Gleeson CJ, Gummow and Hayne JJ).
[9] Whether 'native title' still exists and is capable of recognition apart from the NTA is beyond the scope of this paper.
[10] Benefits can be provided to native title parties in forms other than money and this may raise particular taxation issues, for example, under the *Duties Act 2008* (WA). However this paper focusses solely on payments of money.

agreements are entered into are:

(a) To obtain the consent of a relevant Indigenous group (referred to in the NTA as a 'native title party') to the doing of a 'future act' and hence ensure the validity of that future act.[11] A '*future act*' is, generally speaking, an 'act' such as the grant of a mining or petroleum tenement, or the compulsory acquisition of native title to allow the granting of a freehold title or a lease, that affects native title and takes place after 1 January 1994 (when the NTA commenced to operate).[12]
(b) To settle a liability of a government or grantee party to pay compensation to a native title party for the extinguishment or impairment of native title rights or interests.[13]
(c) To address uncertainty about whether an act is or may be a future act or may have resulted in a liability to pay compensation.

'Future act' agreements may be entered into with, and native title payments made to or for the benefit of:

(a) native title parties who have been determined by the Federal Court to hold native title (which we will refer to as '*determined native title holders*'); or
(b) native title parties who have filed a native title claim in the Federal Court and had it registered by the National Native Title Tribunal, but whose claim is yet to be determined (which we will refer to as '*native title claimants*').

Notwithstanding a native title claim is not yet determined and therefore it is not yet established whether native title exists (and that it may be found not to exist), agreements are often entered into with native title claimants. This might be because they have legally enforceable procedural rights under the NTA as native title claimants and because an 'act' which, when done, affects native title may be invalid unless it was done in conformity with the requirements of the NTA. By entering into an agreement with the native title claimants, the government and grantee parties obtain certainty that the act will be valid.

Native title agreements may take various forms. However, three are

[11] Validity can be obtained in various ways, but two of the most common for native title agreements with resource proponents are to make an Indigenous Land Use Agreement that covers the acts and is entered in the Register of Indigenous Land Use Agreements (NTA ss 24EB(2), 24EBA(2), 24EBA(3)), or to follow the right to negotiate process under NTA pt 2 div 3 sub-div P for acts which pass the freehold test – which would apply to the grant or renewal of most onshore tenements (NTA ss 24MD(1), 26(1)(c)).
[12] NTA s 233.
[13] See, eg, NTA div 5.

common. First, an Indigenous land use agreement (often referred to as an 'ILUA').[14] These are usually in the form of a common law contract,[15] but have a special operation under the NTA when registered on the Register of Indigenous Land Use Agreements. Special features of an ILUA include that they generally bind all persons who hold native title (whether or not they are expressed to be parties to the ILUA), they allow 'acts' that affect native title to be validly done, and they generally settle the amount of compensation payable.[16]

Second, there are 'section 31' or 'right to negotiate' agreements.[17] These are in the form of common law contracts, but are entered into in specific circumstances set out in the NTA. For instance, in relation to acts that pass the freehold test (which would be relevant to the grant or renewal of most onshore tenements) where the right to negotiate process under pt 2 div 3 sub-div P of the NTA has been followed.[18]

Third, 'ancillary agreements'. These are not mentioned in the NTA, but have developed as a matter of practice. Such agreements are common law contracts, and are ancillary to an ILUA or section 31 agreement,[19] often so as to preserve the confidentiality of arrangements between grantee and native title parties. However, frequently these days it may be more apt to describe ILUAs and section 31 agreements (entered into in accordance with such an overarching common law contract) as the ancillary agreements, as the bulk of the contractual terms, including those relating to native title payments, are typically contained in the overarching common law contract.

B *Why do Resource Proponents Enter into Native Title Agreements?*

The prime motivation for resource proponents is typically to achieve 'access to land'. For instance, as discussed above in relation to future acts, native title agreements may support the validity of the grant or renewal of a particular mining tenement or associated infrastructure tenure.[20] However, additional

[14] See NTA pt 2 div 3 sub-div B-E.
[15] An ILUA may be validly entered into notwithstanding it is not executed by persons who are named as parties to the ILUA: *QGC v Bygrave (No 2)* (2011) 189 FCR 412.
[16] See, eg, NTA pt 2 div 3 sub-div E.
[17] As to the potential breadth of such agreements, see, eg, *Amangu People/Western Australia/ Tronox Western Australia Pty Ltd and Yalgoo Minerals Pty Ltd* [2012] NNTTA 86 (26 July 2012).
[18] NTA ss 24MD(1), 26(1)(c).
[19] See for example *Karingbal Traditional People Aboriginal Corporation v Santos GLNG Pty Ltd* [2011] FCA 1456.
[20] As such matters would typically amount to acts affecting native title and hence potentially amount to future acts. As to mining leases under the *Mining Act 1978* (WA) and a general purpose lease under

reasons frequently exist. For a start, agreements tend to go further and actively seek assistance in relation to the grant or renewal of a range of tenements, for example by providing consents to future tenement applications that are ancillary to or in connection with a current or proposed mining project.

Proponents also enter into agreements for assistance in relation to approvals for mining operations. Such assistance is relevant *after* the grant of tenements and includes participation in cultural heritage surveys, collaboration on environmental matters and the implementation of joint committees and activities.[21] Also relevant to on-going operations is that native title agreements can provide for integrity safeguards and administrative arrangements (via agreed benefits management structures rules) for native title payments, to ensure that intergenerational benefits are achieved for Indigenous groups in an efficient way. This is not typically intended to amount to decision-making control, albeit it is not uncommon for native title agreements to specify portions of the native title payments that are to be directed to particular purposes.[22] Finally, native title payments can also be viewed as generating a social licence to operate, as a form of benefit sharing with the local community.[23]

As these reasons extend beyond pure land access concerns, it is not unheard of for some agreements to provide for 'native title payments' to be made notwithstanding that the Indigenous group has been, or may in the future be, determined to not hold any native title rights.[24]

C *Why do Indigenous Groups Enter into Native Title Agreements?*

A key reason native title parties enter into native title agreements is to obtain an economic benefit from acts which impact on their determined or claimed native title rights and interests. In some circumstances native title agreements are entered into voluntarily, and may be considered to be an exercise by the

the *Mining Act 1978* (WA) (used for stockpiling and processing ore), see *Western Australia v Ward* (2002) 213 CLR 1, 166 [309], 176 [340]–[341] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[21] See, eg, Murray, above n 4, 506-7.

[22] As to portions of payments for purposes and the level and type of governance restrictions, see, eg, Morgan, above n 5, 3-5.

[23] See also J C Altman, 'Native Title and Taxation Reform', *CAEPR Topical Issue 2010/04,* Centre for Aboriginal Economic Policy Research, Australian National University (2010) 3; National Native Title Council, Submission to The Treasury (Cth), *Tax Treatment of Native Title Benefits*, 30 August 2012, 3

[24] See, eg, Minerals Council of Australia, Submission to The Treasury (Cth), *Tax Treatment of Native Title Benefits*, August 2012, 3.

determined native title holders or native title claimants of their determined or asserted right to 'speak for' their traditional country. That is, just as a holder of a freehold title may choose to realise a benefit from their land ownership, so too Indigenous groups may choose to realise a benefit from their native title. It is in this sense that academic and judicial descriptions of NTA procedural rights, such as the negotiation rights in relation to agreements such as ILUAs and section 31 agreements, refer to those rights as having an 'economic' dimension.[25]

In other circumstances native title agreements may be entered into in whole or in part because of an appreciation by the determined native title holders or native title claimants that the NTA does not give them a veto over the doing of future acts,[26] and that they may be better off (economically and socially) having a say in how the acts are done and in securing and defining the benefits they are to receive from the acts that are done.

Where acts have already been done which have extinguished or impaired native title, the determined native title holders (and in some circumstances, native title claimants) may enter into an agreement to settle and crystalise their right to compensation that exists under the NTA.[27] That is, like any holder of an interest in land, native title parties may prefer the certainty of a compensation agreement to the uncertainty (including cost and delay) of litigation to establish the existence and quantum of their compensation entitlement.

D *What are Benefits Management Structures?*

In the years following the commencement of the NTA (and in some cases even prior to the NTA), many, but by no means all, native title agreements simply provided for native title payments to be made to individuals, usually the individual native title claimants who filed the relevant native title claim on

[25] Stewart, 'Tax and Native Title', above n 2, 6; J C Altman, 'Equitable Treatment of Native Title Compensation and Benefits' (Topical Issue No 2/2011, Centre for Aboriginal Economic Policy Research, Australian National University, 2011) 3; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 644 (McHugh J).

[26] See in particular NTA ss 24MD(6B)(g), 38(1); and e.g. *Western Desert Lands Aboriginal Corporation v Western Australia* (2009) 232 FLR 169 at [161]-[162].

[27] Compensation rights may exist due to legislation other than the NTA, or due to other legislation that interacts with the NTA. For instance, the *Racial Discrimination Act 1975* (Cth) (breach of which by past acts might give rise to a right to compensation to be calculated in accordance with the NTA: *Western Australia v Ward* (2002) 213 CLR 1, 100 [108], 170 [321] (Gleeson CJ, Gaudron, Gummow and Hayne JJ)), or the *Land Administration Act 1997* (WA).

behalf of an indigenous group or community.[28] Such arrangements presented challenges for governance and administrative efficiency, and often led to allegations that the payments were not being shared fairly with the other members of the indigenous community.[29] They also produced uncertain outcomes from a tax point of view, as the recipients were potentially liable to pay income tax in respect of the native title payments, depending upon the proper characterisation of the payments and on the marginal tax rate of the recipients, or of those on whose behalf the payments were received.

Another approach, which became increasingly common and is still common today, has been to establish a charitable trust (or other income tax exempt entity) and make native title payments to the trustee of that trust.30 The trustee could be one or more individuals, or a private company, or, occasionally, a professional trustee company. The principal advantages of making native title payments to a charitable trust are:

(a) The payments are generally assumed[31] to be exempt from income tax (including capital gains tax) in the hands of the trustee and also in the hands of individual recipients when distributed (as cash or non-cash benefits) to members of the Indigenous group.
(b) A degree of tax exempt accumulation of income may be permitted.[32]
(c) There are, at least in theory, rigorous governance requirements and the potential for broad community benefit.

A disadvantage of using a charitable trust is that, in order for distributions to be valid under trust law, they can only be made for limited, charitable, purposes.[33] Another potential disadvantage is that a charitable trust must be established for charitable objects rather than for particular beneficiaries, and those objects must benefit a sufficient section of the public. Thus there are real issues as to

[28] As to native title agreements providing for direct payments to individuals, see generally Strelein, above n 2, 22.
[29] As to some of the difficulties inherent in individual payments, see generally, ibid, 22-3.
[30] See, eg, Miranda Stewart, 'The Income Taxation of Native Title Agreements' (2011) 39(3) *Federal Law Review* 361, 369; Levin, O'Donnell and Murphy, 'Tax and Native Title', above n 2, 22; The Treasury (Cth), 'Native Title, Indigenous Economic Development and Tax' (Consultation Paper, October 2010) 2, 5-6; Strelein, above n 2, 32.
[31] The validity of such assumptions are explored below.
[32] See, eg, See, eg, Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, 55 [230]; Australian Taxation Office, *Income Tax: Special Conditions for Various Entities Whose Ordinary and Statutory Income is Exempt*, TR 2014/D5, 13 August 2014, 5 [24]-[25].
[33] For disadvantages in using charitable trusts, see generally Miranda Stewart, 'The Income Taxation of Native Title Agreements', above n 30, 391-2; Strelein, above n 2, 33-4.

whether a charitable trust can be validly established and operated only for the benefit of a particular native title group or community. That issue is now ameliorated, at least at the federal level, by section 9 of the *Charities Act 2013* (Cth),[34] although the scope and effect of that provision is not entirely clear.[35]

Often, a portion of native title payments will also be made, directly or indirectly, to an incorporated body, typically where the members comprise the Indigenous group that has entered into the native title agreement (or a subset thereof). Where a determination of native title has been made, this incorporated entity may be the prescribed body corporate that is appointed to hold native title rights and interests on trust or as agent for the native title holders.[36] Typically the entity will be a charity and also a public benevolent institution. The inclusion of an additional incorporated entity is often because the Indigenous group would like an incorporated entity to act as the 'doer' rather than the 'funder' (ie the trustee) for projects. This provides asset protection benefits by structurally separating the potentially more risky 'doing' activities and it has been suggested that the structural separation can also provide additional accountability and a useful mechanism for consultation and decision-making.[37]

The term 'benefits management structure' is increasingly commonly used to refer to more sophisticated legal structures established to receive native title payments, often involving one or more trusts and one or more companies. In particular, several benefits management structures have been established in the Pilbara region of Western Australia that comprise a charitable trust and a discretionary trust with a single common trustee company and that also contemplate an incorporated body acting as the main protagonist to implement trust projects.[38] Native title payments are made to the trustee in its capacity as trustee of both trusts, in proportions specified in the native title agreement. Such benefits management structures are seen as striking a balance between:

(a) the tax effectiveness of a charitable trust; and

[34] See also: Australian Charities and Not-for-profits Commission, 'Commissioner's Interpretation Statement: Indigenous Charities' (CIS 2013/02).

[35] The *Charities Act 2013* (Cth) applies for federal purposes, whereas charitable trusts are typically created (and must satisfy the conditions for validity) under the laws of a particular state or territory.

[36] As to the use of prescribed bodies corporate in benefits management structures, see, eg, the example structures described in Morgan, above n 5, 7-10.

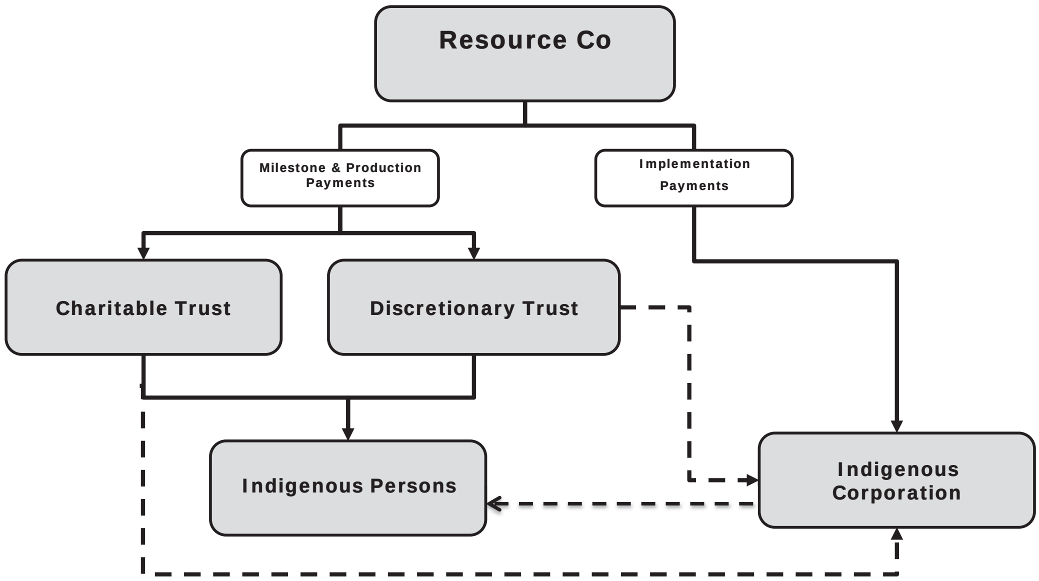
[37] See, eg, Adam Levin, 'Observations on the Development of Native Title Trusts in Australia' (Paper presented at the STEP Australasia Conference, Sydney, 28-30 May) 24-5.

[38] See generally Yamatji Marlpa Aboriginal Corporation, 'Pilbara Native Title Groups Reach Agreement with Rio Tinto' (Media Release, 3 June 2011); ibid, 15-16.

(b) the absence of any charitable purpose limitation, and the ability to distribute benefits only to specified beneficiaries, under a discretionary trust.

The following diagram provides an example of a 'benefits management structure'.

Figure 1: Example Benefits Management Structure



Using the diagram set out above, a potential scenario might then involve the following additional facts. Resource Co is an Australian company whose business involves the exploration, mining, transportation and sale of iron ore in Western Australia. Resource Co already has several operational iron ore mines, and is in the process of developing a further mine in Western Australia. Resource Co needs to obtain the grant of a mining lease from the State of Western Australia so that it can access the relevant land and develop the mine and associated infrastructure. The mining lease will partly overlap an area for which native title has been determined to be held by a group of Indigenous persons.

Resource Co and the Indigenous persons agree that:

(a) The Indigenous persons will not use their procedural rights to hinder the grant of the mining lease (from the State) to Resource Co; will assist Resource Co to arrange any necessary environmental or cultural heritage surveys (which may also be required for the grant of the mining lease or for ongoing mining activities); and will release Resource Co and the State from any obligation to pay any further amount of compensation.

(b) Resource Co will pay three types of payments under the agreement:
- Monthly production payments calculated by reference to the quantity of iron ore produced from the mine that month.
- Milestone payments which are payable on the happening of key events, such as registration of an ILUA contemplated by the agreement.
- Implementation payments which are intended to assist the Indigenous persons with administrative aspects of agreement implementation.

II Part 2 – Overview of Taxation Issues

Myriad taxation issues arise in relation to native title payments and it is not possible to address all of them in this paper. However, the principal issues that are typically relevant in practice, are:

(a) Whether native title payments received by or on behalf of native title claimants or holders are assessable income under ordinary concepts, capital gains, exempt income, non-assessable non-exempt (NANE) income under sections 59-15 or 59-50 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97), or subject to mining withholding tax under Division 11C of Part III of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).

(b) The treatment of native title payments which are indirectly received by Indigenous groups, after passing through intermediaries such as charitable or discretionary trusts. This issue is considered along with that in (a), as they involve related matters.

(c) Whether native title payments made by resources proponents are allowable deductions under the ITAA97, including under div 40 ITAA97, form part of the cost base of an asset for CGT purposes, are mining expenditure under the *Minerals Resource Rent Tax Act 2012* (Cth) (MRRT Act) or deductible expenditure under the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) (PRRT Act).

(d) Whether native title payments amount to consideration for taxable supplies that are subject to goods and services tax (GST). If so, who is, or are, the supplier(s) and what amount of GST needs to be remitted? These questions are relevant both to liability for GST on the part of the suppliers (of direct concern to the Indigenous group) and to entitlement to claim input tax credits (of concern to the payer, being the resource proponent).

(e) Essentially reflecting the issues in paragraph (d) regarding GST, is the question whether a resource proponent is required to withhold an amount under the PAYG withholding provisions if an Australian Business Number (ABN) has not been obtained.
(f) Reflecting the issue of mining withholding tax referred to in paragraph (a), is the question whether a resource proponent is obliged to withhold an amount under the PAYG withholding provisions in respect of mining withholding tax.

The particular issues and objectives of the payers (mining and other resource proponents) and the payees (native title holders and claimants, and trustees or other corporations which form part of benefits management structures) will of course differ. We have already addressed above the differences and similarities in the objectives of both sides in entering into native title agreements and establishing benefits management structures. From a purely tax perspective, there are also likely to be mutual and separate, potentially conflicting, interests.

Payers' primary concerns are likely to be maximising the deductibility of the payments and ensuring certainty as to their taxation obligations; while payees are likely to be keen to arrange their affairs, to the extent permitted, to minimise the tax payable, as well as obtaining certainty. Accordingly, the issues covered by paragraphs (a) and (b) above are largely pertinent to the Indigenous group, rather than resource proponents.[39] However, as discussed below, the characterisation of the payments may be of some relevance to the corresponding question of deductibility (covered by paragraph (c)), hence creating the potential for a divergence of interests.[40] These differing objectives are explored under the headings 'Indigenous group divergent interests: Are native title payments assessable income?' and 'Resource proponent divergent interests: Deductibility or other tax recognition for native title payments'.

There are also a number of tax areas of likely mutual interest. In particular, the mechanics of the GST treatment and PAYG withholding for failure to obtain an ABN referred to in paragraphs (d) and (e). The underlying questions raised by these issues apply equally to both parties and so there is a convergence of interests in obtaining a workable and certain outcome. Likewise, the PAYG

[39] Payers may also have an interest in minimising the tax payable, insofar as that increases the effective benefit of a native title agreement and therefore makes the agreement more attractive to the native title claimants or holders. However in the authors' experience, different payers may have policy or other reasons which militate against that consideration.
[40] Of course, as classic cases such as *Just v FCT* (1949) 4 AITR 185 and *CML Society Ltd v FCT* (1953) 89 CLR 428 demonstrate, the tax treatment for a payer and a recipient does not need to match.

obligation to withhold an amount in respect of mining withholding tax, mirrors the underlying mining withholding tax liability (if any) so that it is beneficial for both parties to determine the same question of whether mining withholding tax applies. These matters are considered below under the heading 'Convergent interests'.

III Part 3 - Indigenous Group Divergent Interests: Are Native Title Payments Assessable Income?

A *Key Issues*

The key issues for Indigenous groups negotiating or receiving native title payments are:

(a) Are the payments taxable?
(b) If so:
- Who is liable to pay the tax?
- What administrative arrangements need to be put in place to manage the tax liabilities?
- At what rate will the payments be taxed?

  The 2013 Reforms are relevant to both of the above issues and are considered further below. In addition, the applicability of mining withholding tax is considered under 'Convergent interests' below.

B *Who is the Recipient and Who Has Derived the Amount?*

The starting point in answering those questions is to identify who is the recipient or recipients. In the case of a benefits management structure involving a trust or corporation, there will be more than one recipient. For example, a native title payment may be made to a trustee, who will then distribute it to various beneficiaries who are determined native title holders or native title claimants. In some cases, the payment may be distributed by the trustee to several corporations which will in turn make distributions to individuals. The taxation implications for each such recipient will depend upon:

(a) Each one's particular status for taxation purposes (eg is it a company or trust; if it is a company, is it tax exempt as a registered charity; if it is a trust, is it a charitable or non-charitable trust?).
(b) The nature (eg is it an ILUA) and terms of the native title agreement under which the payment is made.

(c) The surrounding circumstances, including whether native title has been determined to exist or not.

A lawyer may be acting for a particular recipient in respect of an existing benefits management structure with a view to giving advice as to the tax implications for that recipient. Alternatively, a lawyer may be giving advice on how best to structure native title payments. In either case, the three matters referred to above need to be considered.

The native title agreement will need to specify the initial recipient of the native title payments. Many agreements provide for the recipient to be a trustee. That is, the terms of the native title agreement provide for the native title party to deliver valuable consideration to the government or grantee party in the form of NTA consents and/or a release of liability for compensation under the NTA[41] and for the government or grantee party to provide valuable consideration in the form of native title payments *to a third party*.

Some agreements purport to create a legal obligation to pay the native title party but then allow the native title party to direct or nominate that the native title payment be received by a third party such as a corporation or trust. Other agreements dictate that native title payments will be made to specified third parties. In either case, this raises at least two issues. The first is whether and to what extent the agreement can be enforced by the native title party or the third party recipient. This is not a tax issue, so is beyond the scope of this paper.

The second is whether the native title payments are still derived by the native title party (even if the trustee must also consider the assessability of the amounts received). For example, section 6-5(2) of the ITAA97 provides that 'your assessable income includes the ordinary income you *derive directly or indirectly* from all sources…'.[42] Section 6-5(4) provides that: 'In working out whether you have ***derived*** an amount of *ordinary income, and (if so) when you ***derived*** it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct'.[43] These provisions are statutory recognition of prior case law that had accepted the concept of constructive receipt. The critical issue here is that, in general, for derivation to occur, a taxpayer must either have a right to income (if derivation occurs on an

[41] Or under other legislation such as the *Land Administration Act 1997* (WA), or *Mining Act 1978* (WA).
[42] Emphasis added.
[43] Emphasis in original. See also ITAA97 s 6-10(3), in respect of statutory income.

accruals basis)[44] or have received income (if derivation occurs on a cash basis). The constructive receipt concept effectively means that a cash basis taxpayer cannot avoid deriving an amount merely by directing payment to a third party.[45]

Thus if a native title agreement contains terms that the grantee party will pay $X to the native title party and that the native title party directs the payment to be made to the trustee of a specified charitable trust, then for taxation purposes the native title party may derive the native title payment notwithstanding it is received by the trustee of a charitable trust. Such a conclusion may be strengthened if the native title agreement provides, for example, that the native title payments are to be made to such entity as the native title party directs from time to time. Alternatively, if the effect of the native title agreement is that the native title party never has any right to income, there can be no question of constructive receipt (or of assessment on an accruals basis), nor of a tax realisation upon any assignment of such a right. The issue is therefore whether the agreement gives rise to a payment at the direction of the Indigenous group or a revocable mandate (derivation risk), or else an irrevocable mandate to pay the third party (no derivation).[46]

If derivation of income occurs, there is then the question of how a native title party may be assessed for income tax in circumstances where, under the native title agreement, the native title party is a collection of individuals (the registered native title claimants or native title claim group, in respect of a native title claim, or the determined native title holders under a native title determination). Section 4-1 ITAA97 provides that income tax is payable by *inter alia* companies; and the definition of company in section 995-1 includes an unincorporated association or body of persons (except a partnership). The terms unincorporated association or body of persons would seem, at least, to include a group of persons with the following two characteristics: the persons

[44] Ross Parsons, *Income Taxation in Australia* (1985) [13.6]. See also *FCT v Everett* (1980) 143 CLR 440, [27] Barwick CJ, Stepehen, Mason & Wilson JJ) – the case related to partnership income. In addition, the following cases emphasise that a debt owed to a taxpayer must at least be in existence before income can be derived on an accruals basis: *Henderson v FCT* (1970) 119 CLR 612, 651 (Barwick CJ); *Barratt v FCT* (1992) 23 ATR 339, 346, 349 (Gummow J); *Business & Research Management Pty Ltd v FCT* [2008] FCA 1652 [126]. A right must be "obtained", "got" or "acquired" to be derived: *FCT v Clarke* (1927) 40 CLR 246, 261 (Isaacs J).

[45] An entitlement to receive an amount must still exist for derivation to occur as a result of applying the constructive receipt provisions: *Gair v Commissioner of Taxation* (1944) 71 CLR 388, 396 (Latham CJ); Parsons, above n 44, [13.65].

[46] As to when a revocable/irrevocable mandate will exist, see *Beswick v Beswick* [1968] AC 58; *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460.

associate to achieve a common aim or purpose; and the persons are bound by mutual obligations and rights – such that the members can be distinguished from non-members.[47] Further, it may be that a body of persons need not have a common aim or purpose.[48] Given the need under the NTA to establish the continued acknowledgment and observance of traditional laws and customs by a native title group,[49] it seems arguable that native title holders and, potentially, native title claimants, are bound by mutual obligations and rights.[50] However, it is debatable whether a group of native title claimants or holders has a common aim or purpose, except perhaps the claiming of native title rights and interests under the NTA.[51]

This suggests a native title party (collectively) may be a taxpayer in its own right, although this is far from clear cut and the group might just as easily be characterised as a 'fluctuating group of individuals'.[52] Alternatively, the Indigenous group might be treated as a partnership and hence required to calculate and report assessable income at the group level, but with the partnership income or losses then assessed at the partner level.[53] A partnership is defined in section 995-1 as including an association of persons in receipt of ordinary income or statutory income jointly (but not a company). Accordingly,

[47] See, eg, ATO, 'The New Tax System: The Meaning of Entity Carrying on an Enterprise for the Purposes of Entitlement to an Australian Business Number', MT 2006/1, 13 December 2006, 9 [47]; *Kibby v Registrar of Titles* [1999] 1 VR 861, [50]-[51] Mandie J. As to the scope of unincorporated associations, cf Myles McGregor-Lowndes and Frances Hannah 'Unincorporated Associations as Entities: A Matter of Balance Between Regulation and Facilitation?' (2010) 28 *C&SLJ* 197.

[48] Some cases describe unincorporated associations or voluntary associations as being a body of persons that has combined for a common purpose – suggesting that the purpose requirement does not apply to a body of persons: see, eg, *Cameron v Hogan* (1934) 51 CLR 358, 370-1 (Rich, Dixon, Evatt and McTiernan JJ). See also *City of Gosnells v Roberts* (1994) 12 WAR 437, 443 (Pidgeon J), 448 (cf Anderson J) (Anderson J took a narrower view of the requirements of an unincorporated association, but did still refer to the term in a way suggesting that a body of persons might be broader: the 'essential characteristic of an unincorporated association' is 'a composite body of persons in "a legal relationship … giving rise to joint rights or obligations or mutual rights and duties"').

[49] See, eg, *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, [56], [88]-[90] (Gleeson CJ, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1 [17] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[50] See, eg, *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 (29 July 2005) [365]-[369] (Merkel J).

[51] As to whether a native title group may amount to an unincorporated association or body of persons, see, eg, Warren Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?' (2000) 3(2) *Journal of Australian Taxation* 155, 157; Fiona Martin, 'Native Title Payments and Their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach?' (2010) 33(3) *University of New South Wales Law Journal* 685, 700-1.

[52] See, eg, *Kibby v Registrar of Titles* [1999] 1 VR 861, [50] Mandie J.

[53] See especially ITAA36 ss 91 and 92.

if not a company, there is a real likelihood that an Indigenous group might be treated as a partnership – if some of the native title payments amount to ordinary income or statutory income. That would likely give rise to many practical problems, not the least of which would be identifying who are the 'partners' at any particular time and what would be their respective entitlements in respect of each native title payment.

The Australian Tax Office (ATO) to date seems to have generally taken the view that native title payments are derived by the actual recipient, rather than seeking to characterise the Indigenous group as either deriving the amount,[54] or as a partnership or company.[55]

C *Income Versus Capital*

The next key issue is to determine whether the payments are assessable income in the hands of the person or persons who have derived them, as discussed above. Assessable income includes 'ordinary income' (income according to ordinary concepts) and 'statutory income' (including assessable capital gains).[56]

To determine whether any of the native title payments are ordinary income, one must ask whether they result from the exploitation of property, or arise from the provision of services or the carrying on of a business? Alternatively, might any of the payments fall within the scope of the periodic payments accepted as income in cases such as *Federal Commissioner of Taxation v Anstis*[57] and *Federal Commissioner of Taxation v Dixon*[58]? In contrast, gains from the mere realisation of a capital asset will not be income, even if the taxpayer takes steps to realise the capital asset in 'an enterprising way'.[59]

As demonstrated by *Federal Coke Co Pty Ltd v FCT*[60] and by several private binding rulings in the closer factual context of native title payments to the trustee of a discretionary or statutory trust, it is unlikely that native title payments received by a trustee/third party recipient will be characterised as

[54] The private binding rulings that exist tend to be issued in response to questions about the treatment of native title payments in the hands of a trustee recipient, without having to expressly consider whether the amounts have been derived by the native title group.
[55] In the context of the similar question of the relevant entity for GST purposes, see, eg, ATO, 'GST and Agreement', Private Binding Ruling 1012045801296.
[56] ITAA97 ss 6-5, 6-10.
[57] (2010) 241 CLR 443.
[58] (1952) 86 CLR 540.
[59] See, eg, ATO, 'Income Tax: Whether Profits on Isolated Transactions are Income', TR 92/3, 30 July 1992. See also *Scottish Australian Mining Company Ltd v FCT* (1950) 81 CLR 188.
[60] (1977) 7 ATR 519.

income on ordinary concepts in the hands of that third party.[61] In any event, some third party recipients, such as a charitable trust or charitable Indigenous organisation would likely be endorsed as income tax exempt. However, if the native title group is viewed as deriving the native title payments, the risk is greater. In this context, native title payments could be characterised as income on ordinary concepts, and *prima facie* taxable, if the native title party could be said to be carrying on a business and the payments were sufficiently linked to that business. That does not seem to be a very likely conclusion, given most native title parties could arguably be characterised as a community, being a fluctuating group of individuals associated with each other by reason of their common status as native title claimants or determined native title holders according to traditional laws and customs that have existed since time immemorial, and not a group created to achieve a common aim or purpose – at least not a profit making purpose (as discussed above).[62] However, the risk may increase if the native title party has entered into a series of agreements under which they received regular payments from government or grantee parties for successive 'acts' none of which permanently extinguish or impair native title.[63]

It might be expected that there would be a greater risk that native title payments, or a portion thereof – eg the monthly production payments identified in the above example, would be construed as being for services in relation to on-going mining operations,[64] or as being analogous to a royalty or rental amount[65] and so for the use, as opposed to the extinguishment or impairment, of native title rights. Further, where native title payments take the form of periodical payments, the question arises as to whether those payments are truly instalments of a fixed capital sum or whether they are in the nature of income, including by way of exchange of a capital asset for an annuity.[66]

[61] See, eg, ATO, 'Ruling', Private Binding Ruling 1011313296606; ATO, 'Assessable Income Under Section 97 and Section 99 of the *Income Tax Assessment Act 1936*', Private Binding Ruling 1011311599424.

[62] Cf ATO, 'The New Tax System: The Meaning of Entity Carrying on an Enterprise for the Purposes of Entitlement to an Australian Business Number', MT 2006/1, 13 December 2006; ATO, 'Income Tax: Whether Profits on Isolated Transactions are Income', TR 92/3, 30 July 1992 (both of which discuss indicia of a business). One significant criteria is a profit making purpose.

[63] Noting that all mining and petroleum tenements granted under the NTA are subject to the 'non-extinguishment principle' under s 238 of the NTA. See, eg, Miranda Stewart, 'The Income Taxation of Native Title Agreements', above n 30, 373.

[64] Since the native title parties are also typically required to provide assistance with cultural heritage surveys and other matters after the grant of tenements.

[65] For periodic payments or payments calculated, for instance, by reference to the profit made by the resource proponent or the quantity of the resource extracted.

[66] See, eg, *Egerton-Warburton v FCT* (1934) 51 CLR 568.

However, it can be argued that the ability to provide the 'services' stems from the native title rights and interests held or claimed by the native title group and hence that the payments relate to those underlying rights and interests, rather than to any services.[67] Further, compensation in respect of damage to a capital asset may be received by way of regular payments and still be treated as capital, even where the compensation is periodic or calculated by reference to the amount of minerals extracted.[68] Accordingly in several private binding rulings the ATO has accepted that regular native title payments are nevertheless compensation in respect of native title rights, rather than royalties or rental/licence payments.[69]

Generally, a capital receipt is not ordinary income but may still give rise to statutory income under the capital gains tax (CGT) provisions. In Taxation Ruling TR 95/35, the Commissioner of Taxation states that:

(a) The CGT consequences of compensation depend on whether there is an underlying asset to which the compensation has a substantial link.
(b) If an amount of compensation is received wholly in respect of an underlying asset or part of an underlying asset of the taxpayer, the compensation represents consideration received on the disposal of that underlying asset. In those circumstances, the compensation amount is not consideration received for the disposal of any other asset such as a right to seek compensation (which might otherwise be a separate CGT asset in relation to which a CGT event has occurred).
(c) Compensation received by a taxpayer for permanent damage to, or a permanent reduction in value of, the underlying asset has no CGT consequences if the underlying asset was acquired by the taxpayer before 20 September 1985.

Accordingly, to the extent that a native title payment may be characterised as being compensation for the permanent extinguishment or impairment of native

[67] This is consistent with the Commissioner of Taxation's approach in ATO, 'Ruling', Private Binding Ruling 1011313296606.
[68] *Nullaga Pastoral Company Pty Ltd v Federal Commissioner of Taxation* 78 ATC 4329; *Barrett v Federal Commissioner of Taxation* (1968) 118 CLR 666. As to whether native title payments amount to compensation, see, eg, Martin, 'Native Title Payments and Their Tax Consequences', above n 51, 696-7; Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments' (1999) 2(5) *Journal of Australian Taxation* 345.
[69] See, eg, ATO, 'Ruling', Private Binding Ruling 53360; ATO, 'Ruling', Private Binding Ruling 77829; ATO, 'Ruling', Private Binding Ruling 83511; ATO, 'Trust - Beneficiary', Private Binding Ruling 1012055735265; ATO, 'Ruling', Private Binding Ruling 1011313296606.

title rights and interests, it may give rise to a capital gain, but one that is disregarded if it relates to a pre-CGT asset. In a number of private binding rulings, the ATO has accepted that native title payments are not taxable because they are pre-CGT capital gains.[70] However, while convenient, significant doubts exist about the validity of this approach[71] and the facts of every case will be different. In any particular case, it is necessary to show that the payments have the 'substantial link' with native title and are in the nature of compensation.

One circumstance in which establishing such a 'substantial link' may be difficult is where the native title agreement provides for native title payments in consideration of a broad range of consents from the native title party, not just consents to specific acts under the NTA. It is becoming increasingly common for native title agreements to provide for the native title party to consent to and support a grantee party obtaining a range of project approvals, especially under heritage and environmental legislation. On the one hand it can be argued that the native title party only has rights (such as rights to object or be consulted) under such legislation because of its underlying native title, but in other cases it may be that the native title party would have similar rights on the basis that they are Indigenous persons who have a contemporaneous association with the land regardless of whether they are native title claimants or determined native title holders.

The argument that native title payments are in the nature of compensation is complicated where, as noted above will often be the case, the non-extinguishment principle under the NTA applies.[72] In those circumstances the native title rights and interests will be of no effect in relation to the particular act (e.g. grant of a mining lease), but will not be extinguished, will be of full force and effect upon the expiry of the mining lease, and even during the term of the mining lease will be of full force and effect as regards other acts (e.g. in relation to the proposed grant of another mining tenement such as a miscellaneous licence). In cases where the native title rights are non-exclusive, the extent of the actual inconsistency and therefore the extent to which the

[70] See, eg, ATO, 'Ruling', Private Binding Ruling 53360; ATO, 'Ruling', Private Binding Ruling 77829; ATO, 'Ruling', Private Binding Ruling 83511; ATO, 'Trust - Beneficiary', Private Binding Ruling 1012055735265; ATO, 'Ruling', Private Binding Ruling 1011313296606.

[71] See, eg, Miranda Stewart, 'The Income Taxation of Native Title Agreements', above n 30, 373-4; Julie Cassidy, 'Black Fella Land – White Fella Tax: Changing the CGT Implications of Aboriginal/Native Title' (2010) 25 *Australian Tax Forum* 397, 412-13, 420-1. As to application of the approach, see also Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments' (1999) 2(5) *Journal of Australian Taxation* 345.

[72] NTA s 238; applied in particular by ss 24EB(3) and 24MD(3)(a).

native title rights are suppressed at all, is arguably limited. The High Court has recently confirmed that even at common law the rights conferred by a mining lease do not extinguish non-exclusive native title rights but rather just prevail over them.[73]

Even if the native title agreement specifically provides that payments are compensation for impacts on native title, the issue of whether the payments are thereby pre-CGT capital gains may not be entirely straightforward. According to the decision of the High Court in *Mabo v Queensland (No 2)*, at common law, native title holders have no right to compensation for the extinguishment or impairment of native title.[74] Any right to compensation arises from the *Racial Discrimination Act 1975* (Cth), or from the NTA or particular State legislation.[75] It could therefore be argued that the relevant 'asset' which is being disposed of and for which compensation is being paid is the right to compensation for impacts on native title which, depending upon the circumstances, may have arisen post-1985.[76] If a payment is received in connection with a transaction that relates to more than one CGT event (for instance because it relates to loss or impairment of a pre-CGT asset[77] and to the ending of ownership of an intangible right under CGT event C2), apportionment will be required.[78] A similar risk arises that a portion of the native title payments are for the rights to the on-going assistance referred to in the paragraph above and thus partially in respect of CGT event D1. Hence a native title payment could be partially tax-free as being compensation in respect of a pre-CGT asset, and partially taxable in respect of a capital gain on the ending of the right to compensation.

Another circumstance in which it may be difficult to demonstrate the 'substantial link' with native title is where native title has not yet been determined to exist, but rather the native title agreement has been entered into with native title claimants and provides that the payments will continue even if native title is determined not to exist. In those circumstances it could be argued that the relevant asset is not native title which has existed since time

[73] *Western Australia v Brown* [2014] HCA 8 (12 March 2014), especially at [38], [57], [63]-[64].
[74] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15-16 (Mason CJ and McHugh J on behalf of the Court); *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J).
[75] For instance, the *Mining Act 1978* (WA).
[76] See generally Martin, 'Native Title Payments and Their Tax Consequences', above n 51, 701-3.
[77] As to which, CGT event C1 and CGT event C2, amongst others, may be relevant. However, there is uncertainty over the appropriate CGT event: see, eg, Cassidy, above n 71; Martin, 'Native Title Payments and Their Tax Consequences', above n 51, 701-5.
[78] ITAA97 s 116-40(1).

immemorial, but the native title party's statutory rights under the NTA (which only arose in 1994 at the earliest). Even if the payments are initially characterised as being compensation for impacts on a pre-CGT asset, what if the native title is subsequently determined not to exist? There is clearly a danger from the native title party's point of view that the ATO will seek to retrospectively re-characterise native title payments.

The uncertainty about whether native title payments are subject to CGT has to some extent now been clarified by the introduction of section 118-77 of the ITAA97 (which applies to CGT events happening on or after 1 July 2008). That section provides that a capital gain is disregarded if:

(a) it is derived by an Indigenous person or an Indigenous holding entity; and
(b) the gain is made because one of the following things happens in relation to a CGT asset defined in s.118-77(2):
  - you transfer that CGT asset to Indigenous persons or Indigenous holding entities;
  - you create a trust, that is an indigenous holding entity, over the CGT asset; or
  - your ownership of the CGT asset ends resulting in CGT event C2 happening.

The relevant CGT asset is defined in s.118-77(2) as being 'native title' (as defined in the NTA) or the right to be provided with a 'native title benefit' (as defined in section 59-50) (as to which see below). Accordingly even if the relevant asset is not the underlying native title which has existed since before 20 September 1985, but rather is a right to receive a benefit (whether or not it is strictly compensation), the payment may be CGT free. Nevertheless, uncertainty remains. For instance, does the temporary impairment[79] of native title rights come within CGT event C2 (which concerns ownership of an intangible asset *inter alia* being cancelled or released, expiring or being abandoned or surrendered)?[80] In this context, it may be safer to draft native title agreements so that the native title payments are made because of the settlement of the right to receive compensation for extinguishment or impairment. However, many native title agreements only contain a 'set off' clause that says the native title payments under the agreement will be set off against any compensation determined under the NTA. Such clauses have been seen as more

[79] Which would be a common situation due to the non-extinguishment principle under the NTA.
[80] ITAA97 s 104-25(1).

beneficial to native title parties because they allow for further compensation, but they would not appear to be sufficient to invoke section 118-77.

The other circumstances in which section 118-77 will apply (transfer or declaration of trust over native title or a native title benefit) appear directed to circumstances where the Federal Court makes a determination of native title and orders that the native title be held in trust by a prescribed body corporate. The section confirms that there are no CGT implications as a result.[81]

D *Benefits Management Structures and Distributions*

The discussion above has touched on the impact of using the benefits management structures identified at the start of this paper. However, an additional consideration that arises from the use of such structures is that the taxation treatment of distributions must also be considered in the hands of native title group recipients. For instance, where the trustee of a discretionary trust makes a distribution to a beneficiary, this would be subject to the normal trust taxation rules.[82] This would typically give rise to the inclusion of an amount in the assessable income of the beneficiary if the trust law income distributed reflects assessable income of the trustee and thus a share of the net income of the trust.[83] If income (including as a result of trust investments) is retained rather than distributed, then there may be no beneficiary presently entitled to that income and a corresponding portion of the net income of the trust would then be subject to tax in the hands of the trustee at the top marginal rate.[84] On the other hand, an amount of capital received by the trustee (not reflecting a capital gain) could potentially be distributed tax-free to beneficiaries.[85] However, recurrent distributions of capital to individuals in circumstances where the trustee has created an expectation that they will continue for a certain period and the recipient relies on those payments for regular expenditure and support, may be assessable income.[86]

In the context of charitable trusts or Indigenous corporations that are

[81] See Explanatory Memorandum to the Tax Laws Amendment (2012 Measures No.6) Bill 2012 (Cth) at [1.33] and Example 1.12.

[82] ITAA36 pt III div 6 and as adjusted under ITAA36 pt III div 6E.

[83] ITAA36 s 97(1). See also Martin, 'Native Title Payments and Their Tax Consequences', above n 51, 706-7. Taxation may occur at the trustee level on behalf of a beneficiary who is subject to a legal disability (for instance, because the beneficiary is a minor): ITAA36 s 98(1).

[84] ITAA36 s 99A.

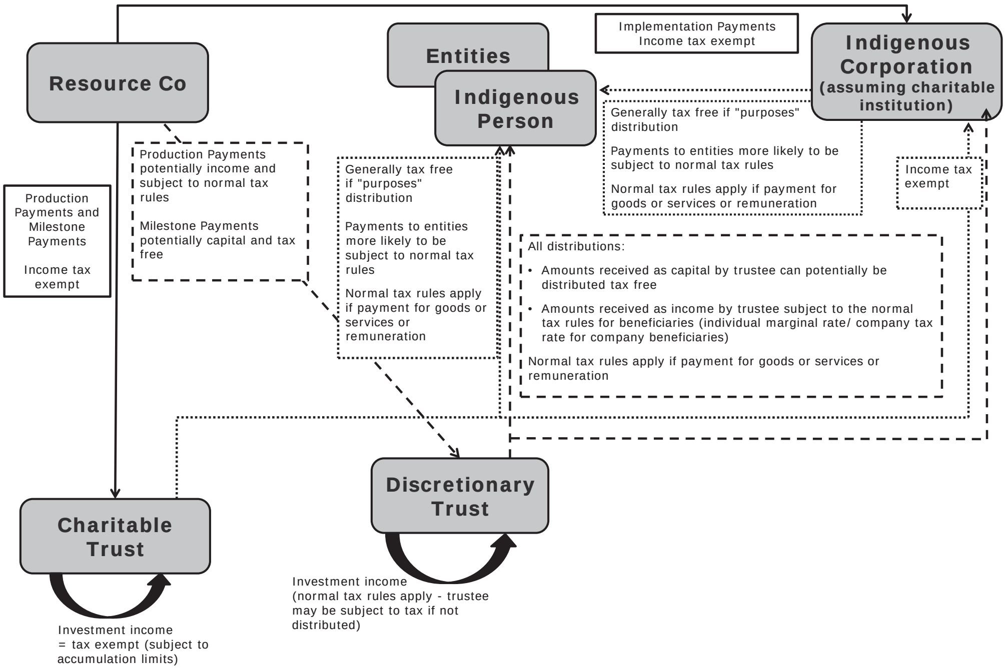
[85] As CGT event E4 should not apply to discretionary objects of a discretionary trust and section 99B ITAA36 should not apply due to the exception for trust corpus in s 99B(2)(a).

[86] On the basis of *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443; *Federal Commissioner of Taxation v Dixon* (1952) 86 CLR 540.

registered charities, a mere gift received from the charity would not typically be assessable income.[87] However, as for a discretionary trust, recurrent distributions may lead to a different result for native title group recipients.

The following diagram acts as a summary of the various benefits management structure tax issues explored above:

Figure 2: Assessability of Payments Flowing Through a Benefits Management Structure



IV Part 4 – Resource Proponent Divergent Interests: Deductibility or Other Tax Recognition for Native Title Payments

Tax recognition of native title payments is clearly a key issue for proponents. The 2013 amendments do not provide any additional certainty on this matter, which is unfortunate as the relevant authorities are relatively sparse, with the only case directly on point being a first instance decision of the Federal Court:

[87] See, eg, ATO, 'Income Tax: Is Disaster Relief Money Received from Charities, to Which Local, State or Federal Government or Their Agencies Have Made Payments, Assessable Income of Taxpayers Carrying on a Business?', TD 2006/22, 26 April 2006, 1 [1], 3 [5]. As to the assessability of gifts more generally, see, eg, *Scott v FCT* (1966) 117 CLR 514.

Cape Flattery Silica Mines Pty Ltd v FCT.[88] The case found that quarterly native title payments (made to the trustee of freehold land held for the benefit of Indigenous inhabitants) calculated by reference to gross revenue from sale of the commodity extracted were immediately deductible under section 8-1 ITAA97. The payments were held to have the essential character of payments in the nature of rental for a right of occupation.[89]

The capital/revenue distinction is likely to be the critical factor in applying section 8-1. After all, the nexus between:

(a) native title payments that are made to obtain consents to the grant of resource tenements, on-going assistance with resource operations and for a social licence to operate a resources project; and

(b) the resource project activities or business activities, would ordinarily be sufficiently close for the payments to be incurred 'in' gaining or producing assessable income or carrying on the business.[90] That is because each set of rights obtained demonstrates an objective purpose that relates directly or indirectly to carrying out the resources operations or to facilitate the carrying on of those operations.[91] To the extent that payments are made as a result of the past grant of tenements and the desire to confirm validity and to settle compensation claims, it would also be possible to point to an objective cause for the payments.[92]

As to capital/revenue, recurrent payments by a proponent under native title agreements that relate to land access (for instance, the production payments in the above example) should potentially be deductible on revenue account under section 8-1(1) of the ITAA97 where they exhibit the following types of factors:

[88] (1997) 97 ATC 4552.

[89] Ibid, 4563 (Spender J).

[90] As required by ITAA97 s8-1(1). As to the importance of focusing on the connection between a loss or outgoing and the activities which are productive of assessable income, see, eg, *FCT v Day* (2008) 236 CLR 163, [30] (Gummow, Hayne, Heydon and Kiefel JJ); *Spriggs v FCT* (2009) 239 CLR 1, [55] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[91] As to the relevance of an objective purpose of achieving direct or indirect benefits for business operations, see, eg, *W Nevill & Co Ltd v FCT* (1937) 56 CLR 290, 300 (Latham CJ) quoting *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205, 212 (Viscount Cave LC). Indeed, administration expenses can be sufficiently closely linked (*Ronpibon Tin NL v FCT; Tongkah Compound NL v FCT* (1949) 78 CLR 47) and one would expect that on-going assistance with resource operations would be at least as directly linked as administration expenses.

[92] As to the relevance of the objective cause, see, eg, *Herald & Weekly Times Ltd v FCT* (1932) 48 CLR 113.

(a) (the means) the payments are a series of regular and recurrent payments[93] - this should be standard;
(b) (the advantage sought) the rights obtained have a limited life and the payments are recurrent and linked to the life of the rights, which:
  - it should be possible to say about the mining tenements obtained[94] on the basis of *Cliffs International Inc v Commissioner of Taxation*, if it is possible to look through the consent rights to the mining tenements,[95] or on the basis that the payments are for on-going mining operations (see paragraph (c) below)[96] or for consent rights acquired on an on-going basis[97] for on-going mining operations;[98]
  - could certainly be claimed for the on-going assistance and social licence to operate;[99]
(c) (the manner in which the advantage is enjoyed) the amount of the payments is calculated by reference to the extent of use of the rights obtained,[100] for instance, because:
  - it is based on the value of the mining product obtained from a tenement,[101] which *Cliffs International* would suggest can be linked to use of the underlying tenements[102] or to operation of the resource proponent's general business;[103] and
  - the payments can be characterised as being akin to a rental payment for access to land (with consequent deprivation of native title rights), rather

[93] *Cliffs International Inc v FCT* (1978) 142 CLR 140 (half-yearly payments for as long as mining continued); *Cape Flattery Silica Mines Pty Ltd v FCT* (1997) 97 ATC 4552 (quarterly payments for the duration of mining operations).
[94] Despite their importance to a resource proponent's business structure.
[95] *Cliffs International Inc v FCT* (1978) 142 CLR 140, 175 (Jacobs J).
[96] Ibid, 150-1 (Barwick CJ).
[97] Which would be more common for native title agreements that contemplate a range of future mining activities and tenure.
[98] An analogy could be drawn with the licence fees in *Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1 or with the on-going payments to service station owners in *BP Australia Ltd v FCT* (1965) 112 CLR 386.
[99] By analogy with the annual bursary (essentially social licence to operate payments) considered in *Cape Flattery Silica Mines Pty Ltd v FCT* (1997) 97 ATC 4552, 4564 (Spender J).
[100] There should be no issue about this where payments are for on-going assistance or for a social licence to operate: by analogy with the annual bursary (essentially social licence to operate payments) considered in *Cape Flattery Silica Mines Pty Ltd v FCT* (1997) 97 ATC 4552, 4564 (Spender J).
[101] *Cape Flattery Silica Mines Pty Ltd v FCT* (1997) 97 ATC 4552 (3% of gross sales proceeds of silica, sand and other products won from the relevant tenements); *Cliffs International Inc v FCT* (1978) 142 CLR 140 (15c per ton of iron ore mined).
[102] *Cliffs International Inc v FCT* (1978) 142 CLR 140, 150-1 (Barwick CJ –payments were in the nature of royalties), 175 (Jacobs J), 176 (Murphy J).
[103] Ibid, 150-1 (Barwick CJ).

than for reduction in value of the rights due to mining activities – on the basis of *Cape Flattery*.[104]

Milestone payments for events such as signing or ILUA registration, which can be more directly linked to the obtaining of a framework of rights, rather than the operation of those rights, are more likely to be capital in nature. However, even if this is the case, so that a deduction is not available under section 8-1(1),[105] tax recognition may be obtained in the form of uniform capital allowance deductions under division 40 ITAA97 (eg for a depreciating asset) (although, often spread over time) or inclusion in the cost base of an asset for CGT purposes (which would typically defer the benefit of tax recognition).[106] Implementation payments should typically be construed as being at least as directly linked to resource operations as administration expenses (satisfying the incurred 'in' nexus) and as a series of regular payments linked to the improved operation of the native title agreement for a finite period (therefore comprising revenue outgoings under the business structure test[107]).

Accordingly, in general terms, resource proponents are likely to favour a greater proportion of payments made by way of production payments (or implementation payments) rather than milestone payments. As milestone payments tend to be made earlier in the life of a native title agreement, native title parties may hold opposite views. Further, resource proponents will bolster their argument for immediate deductibility under section 8-1 ITAA97 to the extent that payments can be characterised as being for on-going assistance or a social licence to operate, which tends to make the connection to underlying native title rights and interests more remote and hence harms the native title party's pre-CGT capital arguments (as well as their ability to apply the NANE concessions under the 2013 Reforms). Construing payments as being for consent to the grant of tenements clearly does not eliminate deductibility, especially due to *Cliffs International* and the advent of the uniform capital allowance regime in ITAA97 div 40. Nevertheless, because decisions such as *Western Australia v Brown* emphasise that native title rights and interests are affected (as a matter of law) on the grant of tenements, not on the exercise of rights under the granted tenements, there may be a greater preference on the

[104] *Cape Flattery Silica Mines Pty Ltd v FCT* (1997) 97 ATC 4552, 4563 (Spender J).
[105] Due to the operation of the exclusion in ITAA97 s 8-1(2)(a).
[106] For instance, capital allowances under sub-div 40-B ITAA97, project or business black hole expenditure under sub-div 40-I ITAA97, or CGT cost base under part 3-1 ITAA97.
[107] As to which, see, *Sun Newspapers Ltd v Associated Newspapers Ltd v FCT* (1938) 61 CLR 337, 359-63 (Dixon J).

part of resource proponents to more explicitly link payments to on-going consents or use, rather than to the impact on native title rights and interests. Again, this is likely to run counter to the desires of native title groups.

For both MRRT and PRRT purposes, the key concern is that production payments might be classified as private mining royalties or private override royalties if calculated by reference to the quantity of production (including indirectly relating to quantity, for instance by reference to value), and hence not 'mining expenditure' or 'deductible expenditure'.[108] That is because, given the broad words 'of a kind known as' (PRRT) or the broad definition (MRRT), private mining royalties and private override royalties are likely to include payments made to persons who do not own the commodities in land[109] where the payments are calculated by reference to the extent of commodities taken from the land (and, expressly in the case of MRRT, where calculated by reference to value, revenue, profits or expenditure).[110] Of course, the MRRT impact will only be relevant for a finite range of native title payments as a result of the abolition of the MRRT.

Both resource rent taxation regimes contain an exception from such royalties for native title payments, but with the proviso that the native title payment must be 'paid to' specified recipients, that include native title holders or claimants and a prescribed body corporate, where there has been a determination that native title exists and that it is held by the prescribed body corporate.[111] The issue is whether payments to the trustee of a charitable trust or discretionary trust (or to an Indigenous corporation that is not a prescribed body corporate holding native title) would satisfy the above requirement. Despite the apparently strict wording of the legislation, it is arguable that payments would do so, if the native title holders or claimants could be said to have constructively received the production payments by reason of a payment to the trustee at the direction of the native title group.[112] However, as discussed

[108] PRRT Act s 44(1)(e); MRRT Act s 35-40(1).
[109] The state would typically own the minerals or petroleum.
[110] *Cliffs International v Federal Commissioner of Taxation* (1979) 142 CLR 140 (Barwick CJ).
[111] *PRRT Act* s 44(2)(b); *MRRT Act* s 35-40(4).
[112] This would be consistent with the purpose of the respective provisions. For instance, in the PRRT context the Explanatory Memorandum to the Petroleum Resource Rent Tax Assessment Amendment Bill 2011 (Cth) stated (at 55) that the provision was intended to 'ensure that native title payments made under the *Native Title Act 1993* are deductible under the PRRT and not treated as excluded expenditure'. That is, payments made by way of compensation for the impact of upstream activities on native title rights and interests, or as a result of the exercise of NTA procedural rights in relation to proposed upstream activities. There is also a reasonable argument that the expression 'paid to' can be interpreted as broad enough to apply in a situation where there is 'a monetary obligation, the offer of

in relation to assessability, the native title holders or claimants are likely to be keen to avoid constructively receiving amounts so as to be able to argue that they have not derived native title payments.

In addition to tax recognition for payments, proponents would typically be keen to ensure that they are not subject to penalties for failure to withhold under the PAYG withholding provisions in respect of mining withholding tax (to the extent it applies) or in respect of failing to obtain an Australian Business Number (discussed below in conjunction with GST). The 2013 reforms may affect these considerations, as these PAYG withholding obligations would not apply to the extent that the native title payments are NANE under the 2013 Reforms.[113]

V Part 5 - Convergent Interests

A *GST and PAYG Withholding Tax*

In broad terms, GST is payable on taxable supplies and taxable importations. Taxable supplies are the relevant concept for native title agreements. For a supply to be a taxable supply, there must be a supply, consideration, the requisite link between the supply and the consideration, the supply must be made in the course or furtherance of an enterprise carried on by the supplier, the supply must be connected with Australia and the entity must be registered or required to be registered for GST.[114] Where GST applies to a taxable supply, it is typically the supplier who is liable. Under native title agreements, the question is often whether some or all of the native title parties are making taxable supplies for the native title payments and hence have a liability for GST.

From the proponent's perspective, there are two key issues. First, the proponent's entitlement to claim input tax credits for a creditable acquisition will depend, inter alia, on the supply to the proponent being a taxable supply.[115] In essence, amounts passed on in respect of GST to the native title parties (and

an act by the debtor in discharge of it, and an acceptance of that offer by the creditor' (*ABB Australia Pty Ltd v FCT* [2007] FCA 1063, [166] (Lindgren J). Reasoning applied to a payment at the direction of a shareholder in *R v Jo* [2012] QCA 356, [50]. See also *Brookton Cooperative Society Ltd v FCT* (1981) 147 CLR 441, 456 (Mason J)). That is, where there is a pre-existing liability that is satisfied by making a payment to a third party, at the direction of the creditor.

[113] Section 12-1(1A) of Schedule 1 to the *Taxation Administration Act 1953* (Cth); ITAA36 s 128U(1) (definition of 'mining payment' does not include a 'native title benefit' under the 2013 Reforms).

[114] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 9-5.

[115] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 11-5(b).

remitted to the ATO) ought ordinarily to net out with equivalent amounts of input tax credits that can be claimed by the proponent. The issue is the correct amount, if any, of GST and input tax credits.

Second, PAYG Withholding. To the extent that the proponent makes a payment for a supply that the supplier has made or proposes to make in the course or furtherance of an enterprise carried on in Australia by the supplier, then the proponent may be required to withhold 49% of the payment unless they obtain an ABN, or an exception applies.[116] Failure to withhold would constitute an offence[117] and expose the proponent to the risk of an administrative penalty equal to the amount which should have been withheld.[118] Whether an ABN is required obviously turns in large part on the same issues that are relevant to whether there are taxable supplies for GST purposes.

The GST and ABN issues do not relate to any net revenue leakage and so may be viewed as less pressing than the issues of assessability and deductibility. Nevertheless, they do raise difficult issues for the administration and implementation of payments and agreements. For instance, who are the potential suppliers? That is, who potentially needs to remit GST, issue a tax invoice and provide an ABN to the proponent? As discussed further above, there are likely to be a range of obligations entered into under a native title agreement, some of which will relate more directly and some less directly to underlying native title rights and interests. Even if all the material supplies could be linked to the native title holders or claimants, should an Indigenous group be treated as a fluctuating body of individuals, or as a single entity in the form of a 'partnership' or an 'unincorporated association or body of persons'?[119] If a determination of native title occurs and a prescribed body corporate is determined to hold native title rights and interests, does the prescribed body corporate become the supplier (and in its own capacity or in a trustee capacity, if it has been determined under the NTA to hold the native title rights and interests under a statutory trust)?

Further, what amount of GST needs to be remitted and what amount of input tax credits can be claimed – that is, to what extent are any supplies taxable

[116] Section 12-190 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).
[117] Section 16-25 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).
[118] Section 16-30 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).
[119] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 184-1 (definition of 'entity'). As to an instance of the ATO's view on whether a native title group may amount to an entity, see, eg, ATO, 'GST and Agreement', Private Binding Ruling 1012045801296.

supplies? While there is no net revenue leakage, remitting or claiming incorrect amounts could lead to penalties and interest. Key issues to consider include:

(a) Are the suppliers carrying on an enterprise? This has been covered to some extent above in relation to the carrying on of a business, although the concept of an enterprise is broader and also includes an activity or activities done 'in the form of' a business or in the form of an adventure or concern in the nature of trade, or on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property.[120] Clearly the risk that native title parties may be carrying on an enterprise is greater than the risk that they are carrying on a business such that the payments are ordinary income.[121] Therefore even if native title payments are capital in nature, they may still be subject to GST. To date the Commissioner of Taxation has accepted in several private binding rulings that a native title group is not carrying on an enterprise,[122] althought it is worth noting that if the supplier is deemed to be one entity, rather than a large fluctuating body of individuals, this may increase the likelihood that the supplier is carrying on an enterprise.

    If native title has been determined and there is a registered native title body corporate which is a party to the native title agreement then it is likely that body corporate will be carrying on an enterprise. This is because the performance of the functions of a registered native title body corporate (i.e. holding native title on trust or acting as agent for the common law holders) is likely to constitute an enterprise. Furthermore, many registered native title bodies corporate are charities and as such their activities constitute an enterprise.[123]

(b) Are native title payments sufficiently linked to the supplies? This may not be the case in some circumstances where extinguishment, and possibly impairment, will occur without action on the part of the native title party and the payments are made by way of compensation for the loss.[124] In the

[120] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 9-20.
[121] See generally Strelein, above n 2, 42.
[122] ATO, 'GST and Supplies by Native Title Applicants to an Enterprise', Private Binding Ruling 43869; ATO, 'GST and Surrender of Rights', Private Binding Ruling 1011736542456. See also Stewart, 'Tax and Native Title', above n 2, 33-4.
[123] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 9-20(1)(e).
[124] In the context of the compulsory acquisition of land by a government authority that effects an extinguishment of native title, see, eg, ATO, GSTR 2006/9 [88]; ATO, 'GST and Treatment of Payments', Private Binding Ruling 45857.

context of benefits management structures, this question also raises the issue of tripartite arrangements where the supplier differs from the recipient of the payment.[125]

For PAYG withholding purposes, a further question is whether the constructive receipt provisions under the *Taxation Administration Act 1953* (Cth)[126] apply such that it does not matter that payments are made to the trustee of a charitable trust or discretionary trust, rather than to the suppliers under the native title agreement.

From an administration perspective, how will internal accounts and payments systems deal with the above uncertainty, or with complicated agreement terms that strive to address the various possibilities? Further, if the entities receiving native title payments (eg the trustee of a charitable trust and trustee of a discretionary trust) are not the suppliers (typically the trustee would not be a counterparty to the native title agreement and would not hold or claim native title rights and interests, so should not be a supplier in respect of the payments), how will the parties deal with the fact that the liable supplier may not have received funds in order to meet the GST liability? Some agreements now provide for a trustee to act as agent for the potential suppliers in remitting GST amounts to the ATO. One possibility is to pay the GST component to the native title party rather than to the benefits management structure, however that is likely to create an administrative burden on the native title party and exposes the native title party to potential liability to the Commissioner in the event that the GST is not remitted.

As a practical matter, there are some steps that can be taken to deal with the administrative and mechanical difficulties identified above. First, native title agreements could be drafted with a view to being clearer about the relevant native title party that is undertaking the primary obligations for which payments are made. In particular, although not necessarily common, if there has been a native title determination and the determination is that a prescribed body corporate holds the native title rights and interests, then it may be possible to ensure that the prescribed body corporate is the primary supplier

[125] See generally *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41 (2 October 2012) [14] (breadth of the link); ATO, 'Goods and Services Tax: Supplies', GSTR 2006/9, 20 August 2014; ATO, 'Goods and Services Tax: Financial Assistance Payments', GSTR 2012/2, 3 September 2014, 22-3 [121]-[122], 25 [132]-[133] (as to the position of the third party trustees); ATO, 'GST and Supply of a Motor Vehicle Where Payment for the Supply is Provided to an Entity Other Than the Supplier' ID 2004/725, 12 February 2003.

[126] Section 11-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

under the agreement.

Second, proponents would be well advised to seek ABNs from all potential suppliers. Third, the parties may contemplate warranties or indemnities to cover issues that depend on information that is better known to one of the parties (for instance, whether a native title party is carrying on an enterprise[127]). Finally, the parties may contemplate applying for private rulings. Given that the matters are revenue neutral, it is likely that the ATO would be amenable to a pragmatic approach.

B *Mining Witholding Tax*

Regardless of the assessability matters discussed above, resource proponents and native title parties must consider whether native title payments are subject to 4% mining withholding tax under section 128V of the ITAA36,[128] unless the payments constitute native title benefits under the 2013 Reforms, as explored below.[129] The recipient is liable for mining withholding tax, but the payer is obliged to withhold and remit an equivalent amount to the ATO.[130] In effect, this means that the native title payment, net of the mining withholding tax, is then NANE income under section 59-15 of ITAA97:

(a) in the hands of a 'distributing body' (see below) which receives the payment;
(b) in the hands of an Indigenous person who receives the payment directly from the resource proponent or indirectly from a distributing body; and
(c) when applied for the benefit of an Indigenous person.

Two issues need to be determined in order to conclude that native title payments are subject to mining withholding tax. First, are the native title payments 'mining payments' under section 128U of the ITAA36? This in turn raises the questions:

(a) Except for payments covered by certain pieces of Northern Territory legislation, are the payments made under an agreement made in accordance with provisions of a law of the Commonwealth that relate to Indigenous persons?

[127] Albeit that is at least partly a conclusion of law and therefore a question the native title party may not be confident to answer.
[128] On the basis that these provisions are likely to be the most specific. See also, ITAA97 s 6-25.
[129] See subsection 128U(1) of ITAA36.
[130] Section 12-320 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

(b) Are they made in consideration of the granting of permission to enter or remain on Indigenous land or to do any act on Indigenous land in relation to prospecting or exploring for, or mining, minerals; or by way of payment of mineral royalties or of an amount determined by reference to an amount of mineral royalties received by the Commonwealth, a State or the Northern Territory?

Second, will they be made to a distributing body or made to, or applied for the benefit of, Indigenous persons?

A payment made under an ILUA would satisfy the first part of the first requirement. It is not clear whether a payment made under an ancillary agreement to an ILUA would qualify. Potentially a payment made under such an ancillary agreement is also made 'under' an ILUA if the ILUA provides (as is often the case) that the compensation under the ancillary agreement is all the compensation to which the native title parties are entitled. However, where the ILUA is truly ancillary to the other agreement, this argument may be more difficult to make.

'Indigenous land' is defined as meaning 'any estate or interest in land that, under an Australian law relating to Indigenous persons, is held for the use or benefit of Indigenous persons'.[131] The term 'estate or interest in land' (including as expanded under the *Acts Interpretation Act 1901* (Cth)) usually refers to a proprietary interest[132] and, perhaps, might sometimes be stretched to a quasi-proprietary interest.[133] Exclusive possession native title may possibly be said to be an 'estate or interest in land'.[134] Whether non-exclusive native title rights may constitute a proprietary interest in land is not so clear and it may depend on the particular rights claimed.[135] Some commentators have nevertheless

[131] ITAA36 s 6; ITAA97 s 995-1.

[132] See e.g. *Commissioner of State Revenue v Westnet Rail Holdings No 1 Pty Ltd* (2013) 45 WAR 140, [85],[104] (McLure P), [153] (Pullin and Newnes JJA).

[133] The *Acts Interpretation Act 1901* (Cth) defines an 'estate' to be 'any estate, interest, charge, right, title, claim demand, lien or encumbrance at law or in equity'. See, eg, *Hornsby Council v RTA (NSW)* (1997) 41 NSWLR 151, 152 (Mason P), 155 (Meagher JA); *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads* [2007] 2 QdR 373, [8]-[10],[14] (McMurdo P), [37],[40]-[41] (Chesterman J) (with reference to limb (b) of a definition of 'interest in land' that referred to (a) 'a legal or equitable estate or interest in the land' or (b) 'an easement, right, charge, power or privilege over, or in connection with, the land').

[134] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 51-2 (Brennan J).

[135] Cf *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 61,70 (Brennan J) where reference is made to native title in some circumstances being personal or usufructuary as opposed to proprietary, 89,110 (Deane and Gaudron JJ) (sui generis personal rights and not proprietary); and *Wik v Queensland* (1996) 187 CLR 1, 92 (Brennan CJ) (interest in land) 169 (Gummow J) (referring to native title rights as ranging from personal or communal usufructuary rights through to rights approximating a legal or

questioned whether native title rights amount to an estate or interest in land held under an Australian law, for the purposes of the mining withholding tax provisions.[136] In any event, native title would only constitute 'Indigenous land' where it was determined native title, as only then could it potentially be said to be held under a relevant Australian law (the NTA) for the use or benefit of Indigenous persons. Even then, it may only be 'held' in such fashion if a prescribed body corporate is determined to hold the native title rights and interests on trust in accordance with section 56 NTA.

As to the second part of the first requirement, it is unclear whether native title payments are truly made in consideration of the granting of permission to enter or remain on Indigenous land or to do any act on Indigenous land in relation to prospecting or exploring for, or mining, minerals, given that it is the State that grants the relevant tenements and those tenements encompass the relevant rights to enter onto the land and carry out acts on the land.[137] A contrary argument is that this requirement is satisfied where the native title payments are made in consideration for the giving of consent by the native title holders under the NTA to the grant of a mining tenement in circumstances where, under the NTA, the mining tenement *may not* otherwise be granted. Where native title rights are exclusive, the native title agreement may also grant permission to the proponent to travel over native title land to access the tenement.

Since the native title holders would not typically hold rights to the minerals,

equitable estate in land). However in *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391 the Full Federal Court said that characterising native title rights as either proprietary or usufructuary was unhelpful, at least in the context of making findings as to whether the native title rights were exclusive. See also *Bodney v Bennell* (2008) 167 FCR 84, [139], [143] (Full Federal Court). It would seem to be at least arguable that communal native title recognised under the NTA is an interest in land, even if non-exclusive and even if the individual native title rights may be characterised as usufructuary in nature at common law. The ATO has taken this view in Private Binding Ruling Authorisation Number: 1011355966185 and 1011356170176.

[136] Fiona Martin, *An Evaluation of Existing Income Tax Regimes for Mining Payments Made Pursuant to the Native Title Act and the Aboriginal Land Rights (Northern Territory) Act and of Five Proposals for Legal Reform* (UNSW, February 2013) 79, 81. For instance, due to the unique nature of native title rights and interests.

[137] The phrase 'in consideration of' indicates that the payment made must move the issue, grant or renewal of the relevant resource proponent's right or mining interest in a causative sense: see, eg, *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143, 152 (Dixon J); *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496, 518 (Gummow, Kirby and Hayne JJ).

the production payments would not typically constitute 'royalties',[138] and nor would they be calculated by reference to mineral royalties received by the Commonwealth or the relevant state or territory.

A 'distributing body' is defined in section 128U of ITAA36. It includes a corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) (and so may apply to the Indigenous corporation in our example) but not a trust. Nevertheless, under the definition of 'mining payment' in section 128U of ITAA36, mining withholding tax may still apply if it can be said that the payment is 'applied for the benefit of' Indigenous persons. It is not clear whether making a payment to the trustee of a trust would constitute applying the native title payment for the benefit of Indigenous persons. It is suggested that the better view is that a native title payment is only 'applied for the benefit of' indigenous persons within the meaning of those words in the definition of 'mining payment' where the payer (the mining proponent) applies the monies directly for the benefit of indigenous persons such as by paying for goods or services for Indigenous persons or paying the money to an entity on behalf of Indigenous persons. Compare the express reference to monies being applied for the benefit of Indigenous persons 'either directly or indirectly' in the definition of 'distributing body'. On that view a payment to the trustee of a fixed or discretionary trust the only beneficiaries of which are indigenous persons may satisfy the requirement, but a payment to a trustee of a charitable trust may not even though the charitable trustee may apply the monies to projects that benefit Indigenous persons.

The ATO has taken the view in two private binding rulings that native title payments may be subject to mining withholding tax.[139] However, this approach is inconsistent with a number of statements by the federal government, including a 1998 media release by the Treasurer and Attorney-General[140] and a 2010 Treasury Consultation Paper on native title and tax,[141] both of which canvassed an extension of mining withholding tax to native title payments, on

[138] *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630, 641-642; *Barrett v Commissioner of Taxation* (1968) 118 CLR 666, 671 (Owen J); *Cape Flattery Silica Mines Pty Ltd v Federal Commissioner of Taxation* (1997) 97 ATC 4552, 4559 (Spender J). The statutory extension to the meaning of the term 'royalties' does not alter this position: ITAA36 s 6(1).

[139] ATO, 'Mining Withholding Tax', Private Binding Ruling 1011355966185; ATO, 'Mining Withholding Tax', Private Binding Ruling 1011356170176.

[140] Treasurer, The Hon. Peter Costello and Attorney-General, The Hon. Daryl Williams, 'Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters' (Press Release, 13 February 1998).

[141] The Treasury (Cth), above n 30.

the assumption that mining withholding tax does not currently apply to native title payments.

The net result is that whether or not mining withholding tax will apply to native title payments in any particular circumstance raises a number of potentially complex questions. From an indigenous perspective, it would be preferable if the payments were not taxable at all, but if the payments are to be taxable, then (the current) 4% mining withholding tax may be preferable to paying what may otherwise be a higher marginal rate of tax. Mining withholding tax (if it applies) also has the advantage that it avoids the administrative complexities of the native title group having to assess and remit tax on the native title payments, particularly having regard to the discussion above as to whether a native title group is deriving income and if so whether it is a partnership, because the tax is paid directly by the proponent to the ATO in satisfaction of the payer's liability. From the resource proponent's perspective, the issue is not so much the imposition of mining withholding tax (unless it leads to a call for a corresponding gross-up of native title payments), but the risk of penalties and interest for failure to withhold – hence bolstering the need for certainty.

VI The 2013 Reforms: Issues Resolved and Issues Created

The NT Tax Act amendments introduced,[142] in respect of certain native title payments, a new category of NANE income and provided for certain CGT events to be disregarded. The measures have effect in relation to income years starting on or after 1 July 2008 and may be seen as reflecting the views that:[143]

(a) native title payments can effect an improvement in the economic and social prospects for Indigenous Australians and subjecting such payments to tax would be inconsistent with this view and with the wider government objective of 'closing the gap';[144] and
(b) the application of existing tax laws to the new circumstance of native title and native title agreements was unclear and needed to be clarified in the interests of all stakeholders.

The CGT specific provisions have already been outlined in the assessability

[142] As amended by the *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth).
[143] As to the rationales for the reforms and the details of the reforms, see generally Murray, above n 4.
[144] And potentially also with the view that native title payments are in the nature of compensation for impacts on a capital asset (native title) which has existed since time immemorial.

discussion above. The NANE provisions are found in section 59-50 ITAA97, with sections 59–50(1) and (2) providing that an amount or other benefit is NANE:

(a) to the extent that it is a 'native title benefit' or arises directly or indirectly from a 'native title benefit'; and
(b) if it is received or derived by:
  - an 'Indigenous person'; or
  - an 'Indigenous holding entity' (see below).

A native title benefit is defined in section 59-50(5) as an amount, or non-cash benefit, that is compensation determined in accordance with Division 5 of Part 2 of the NTA; or that arises under:

(a) an agreement made under an Act of the Commonwealth, a state or a territory, or under an instrument made under such an Act; or
(b) an ancillary agreement to such an agreement, to the extent that the amount or benefit relates to an act that would extinguish native title or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title.

A note appearing under the definition of 'native title benefit' states that a determination of native title is not required in order for a benefit to qualify as a native title benefit. In this regard, it makes sense that native title payments may qualify even in circumstances where native title has been claimed but not determined. After all, it seems appropriate to characterise an act as extinguishing or being inconsistent with native title even if that native title is not formally recognised until a later point in time by way of a determination under the NTA, since the determination recognises existing rights.[145] However, where a subsequent determination is made that no native title exists, it may be inappropriate to characterise any native title payments as relating to acts that would extinguish or be inconsistent with native title, despite suggestions to the contrary in the Explanatory Memorandum.[146] The note does not clearly cover such a permissive construction and it would constitute a relatively strained reading of the literal words of the provision,[147] unless perhaps the reference to a benefit that relates to 'an *act* that *would* extinguishment native title or that *would* otherwise be wholly or partly inconsistent with the continued existence,

[145] NTA ss 51, 223(1).
[146] Explanatory Memorandum, Tax Laws Amendment (2012 Measures No 6) Bill 2012 (Cth) 17 [1.28].
[147] Particularly since the provision must be applied to the benefits each income year.

enjoyment or exercise of native title' (emphasis added) was interpreted as referring not just to the application of the non-extinguishment principle (i.e. would but for the non-extinguishment principle) but also to the circumstance where the agreement under which the benefit is provided contemplates that the act would affect native title on the assumption that native title exists regardless of whether or not it actually does. While one paragraph of the Explanatory Memorandum supports that interpretation, another describes the purpose of the 2013 Reforms as being to confirm that 'benefits are not subject to income tax if they are provided for the extinguishment or impairment of native title',[148] which indicates that NANE treatment is due to an actual impact on native title rights.

'Ancillary agreement' is not defined for the purposes of section 59-50. The term should therefore be given its ordinary and natural meaning. In most cases it should not be difficult to conclude that an agreement is an ancillary agreement. For example, many native title agreements which are not in the form of an ILUA or section 31 agreement expressly provide that the native title party will execute a separate section 31 agreement or ILUA in respect of a particular future act or specified classes of future acts. There may, however, be a residual question as to whether the common law contract is the ancillary agreement, as opposed to the ILUA or section 31 agreement.

A more difficult question is likely to be whether, for the purposes of section 59-50(5)(a), a native title payment relates directly or indirectly to an act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title. This is because, as stated above, many native title agreements require the native title party to give consents not just for the purposes of the NTA but also under or in respect of Aboriginal heritage and environmental approval processes. Some portion of the payment may also be for a social licence to operate. However, native title agreements are unlikely to expressly apportion particular contributions to particular acts that have or will affect native title.[149]

Arguably 'relates to' should be given a broad interpretation, so the fact the native title payments may also relate to some extent to heritage and environmental approvals should not prevent the whole of the contributions from being characterised as relating to acts that affect native title. Further,

[148] See, eg, Explanatory Memorandum, Tax Laws Amendment (2012 Measures No 6) Bill 2012 (Cth) 13 [1.15].
[149] See, eg, Altman, 'Native Title and Taxation Reform', above n 23, 3.

arguably the fact (if it is the case) the native title payments are likely to exceed the quantum of compensation for effects on native title which may be payable at law does not prevent the whole of the payments from relating to effects on native title. That is on the basis that is the quantum the parties have been willing to negotiate in order to reach an agreement that gives the government or grantee party the native title consents its requires. Nevertheless, commentators have raised serious questions about the need for and extent of required apportionment.[150]

To the extent some apportionment is required, the way the native title payments are dealt with under the relevant benefits management structure may be relevant. For example, if the native title payments are apportioned in part to a charitable trust for charitable objects that benefits a broader section of the community and in part to a discretionary trust just for the benefit of determined native title holders, it may be arguable that the discretionary payments relate to effects on native title and charitable payments relate to non-native title matters (e.g. broader heritage and environmental support and a 'social licence'). Alternatively, it may be arguable that milestone payments for events such as signing or ILUA registration might be more easily linked to obligations relating to grant or renewal of tenements (or the validity thereof) and hence as relating to acts that affect native title rights and interests. Production payments are more likely to need apportionment, as they may typically relate to the initial grant or renewal (or the ongoing grant or renewal) of tenements, as well as to on-going obligations that are less directly linked to such acts - such as the environmental and heritage obligations identified above. Given resource proponents' historical preference for payments to charitable trusts and also due to the improved deductibility position for production payments compared with milestone payments, some tension is likely to remain between native title parties and proponents.

Returning to the NANE provisions, the reference in section 59-50(2) ITAA97 to an amount arising indirectly from a native title benefit covers the situation where a native title payment passes through a number of hands before being received by the taxpayer in question. The monies will remain NANE income in the hands of each entity provided it is an Indigenous holding entity, or an Indigenous person. Thus, for example, a native title benefit paid to a trustee of a discretionary trust which pays it to a corporation which is a

[150] Murray, above n 4, 508-513.

distributing body (and therefore an Indigenous holding entity) which in turn pays it to an Indigenous person, may remain NANE income at each stage. However if the corporation was not an Indigenous holding entity, then the monies received by the Indigenous person from that corporation would not be NANE under section 59-50.[151]

Additionally, express limitations on native title payments being NANE income are contained in sections 59-50(3) and (4) ITAA97. Section 59-50(3) provides that NANE status does not apply to an amount or benefit to the text that it is:

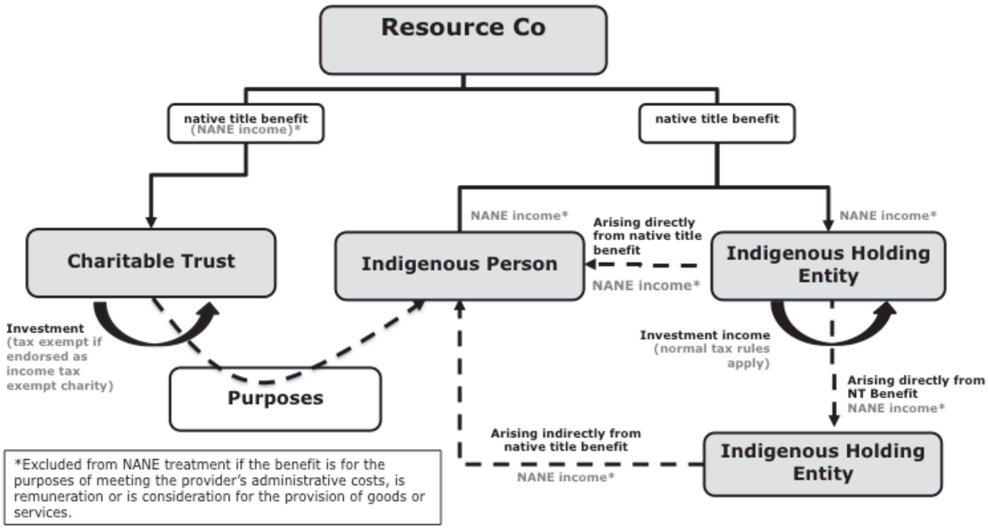
(a) for the purposes of meeting the provider's administrative costs; or
(b) remuneration or consideration for the provision of goods or services.

The reference to a 'provider's' administrative costs is obtuse, but would appear to cover each of the original payer of the native title payment (eg the resource proponent) and a trustee or corporation or individual Indigenous persons through whose hands the native title payment passes. Section 59-50(4)(b) provides that an amount or benefit is not NANE income under section 59-50(2) 'to the extent that it arises directly or indirectly… from an entity investing any or all of' the native title benefit or an amount or benefit arising directly or indirectly from the native title benefit. Accordingly if a native title benefit is invested the investment income is likely to be income on ordinary concepts.

A diagrammatic summary of the key 2013 Reforms is set out below:

[151] Its taxation status in the hands of the Indigenous person would fall to be determined on the basis of the relationship between the corporation and the person and the circumstances in which the payment was made.

Figure 3: The NANE 2013 Reforms



Issues Resolved

If a native title payment is NANE under section 59-50 of the ITAA97 in the hands of an entity, then that entity does not have to pay income tax on it.[152] Nor does mining withholding tax apply.[153] Accordingly from the perspective of a taxpayer receiving a native title payment, the starting point is to determine whether the payment falls within section 59-50. This avoids the complexities of determining whether such payments are ordinary or statutory income. Subject to the question of apportionment, the derivation issues discussed above may also become less significant, because provided each person or entity involved in a benefits management structure is an Indigenous person or Indigenous holding entity, the native title benefits will be and remain NANE income regardless of who has derived them.

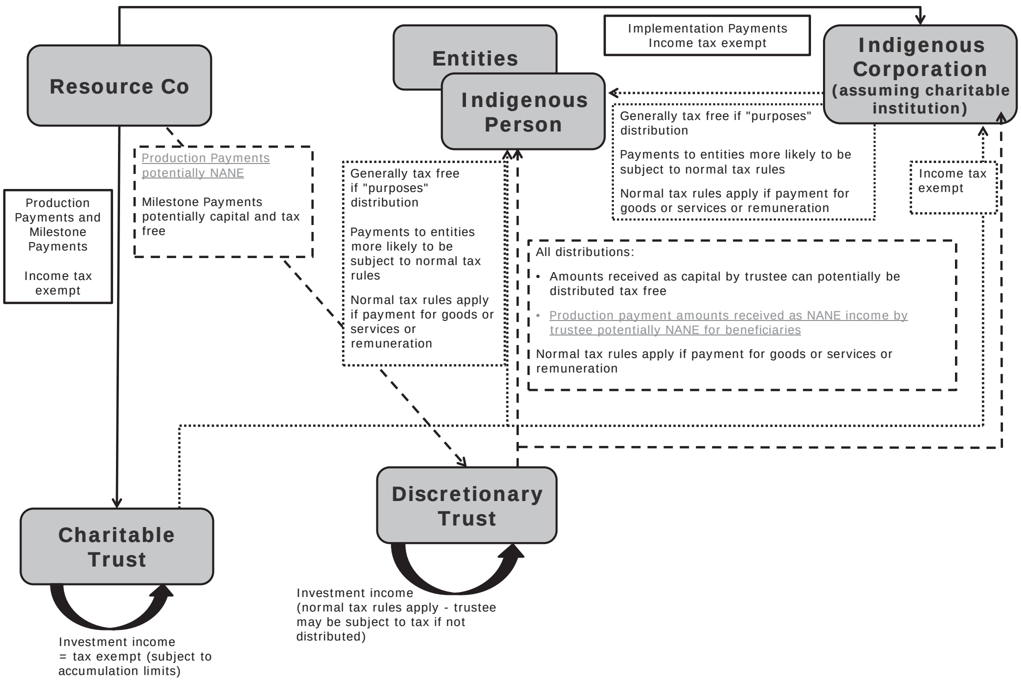
Also from the Indigenous perspective, providing for native title payments to be tax-free results in a greater quantum of benefits flowing directly to Indigenous people and therefore assists to 'close the gap' between the living standards of Indigenous and non-Indigenous Australians. The amendments

[152] ITAA97 ss 6-15 and 6-23.
[153] As a native title benefit is not a mining payment: ITAA36 s 128U(1).

also provide greater flexibility in how native title payments can be distributed and applied, as there is no longer so great a tax driven incentive to limit native title payments to charitable trusts or charitable institutions. That allows greater flexibility for native title payments to be used for purposes such as business development. It also allows for native title payments that are NANE income to be retained within a discretionary trust without negative tax consequences, although investment income earned on that NANE income would be subject to the normal tax rules.

When applied to the benefits management structure diagram included further above, the key practical changes are set out in underlining and light grey text and are made on the ambitious assumptions that the intermediary entities are Indigenous holding entities and that all of the native title payments potentially qualify as native title benefits:

Figure 4: Name of the diagram



However as already outlined above, the new provisions in sections 59-50 and 118-77 of the ITAA97 are limited in their scope. Like many provision in the tax law, they are also open to various interpretations and create uncertainties in particular situations.

Additionally, the express limitations in sections 59-50(3) and (4) restrict the benefits. From the Indigenous perspective, it may therefore not be optimal simply to ensure that a native title payment is a 'native title benefit' and that the recipient of the payment is an Indigenous holding entity. A benefits management structure involving a fixed or discretionary trust as well as a tax exempt charitable trust or charitable corporation may enable some of the native title payments to be distributed as NANE income, and some of the payments to be invested (tax free) for future generations or for the investment income to be distributed to a tax exempt entity.

Further, the 2013 Reforms only address selected income tax matters: primarily assessability and applicability of mining withholding tax. While this is a welcome development, they do not address a number of the other tax uncertainties raised earlier. For instance:

(a) Deductibility for mining proponents.
(b) The GST and ABN withholding issues identified earlier. Despite the NANE treatment of income, the ABN issue remains[154] wherever apportionment means that some part of the payment is still subject to the normal tax rules.

C *Issues Created*

As discussed above, while the reforms decrease the relevance of distinctions such as income/capital, they raise the new question over what portion of native title payments might relate directly or indirectly to an act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title, as opposed to relating to other matters, such as benefit sharing to generate a social licence to operate, or, potentially, on-going assistance such as in relation to heritage and environmental matters. As is evident from the discussion, this apportionment will not be a simple matter to determine in practice and the component of native title payments at risk of being classified as non-NANE will potentially be subject to the rules discussed in the earlier part of this paper.

Further, as the 2013 Reforms contemplate NANE income flowing through Indigenous holding entity intermediaries, this raises a number of administrative and timing issues. For instance:

[154] Under s 12-1 of Schedule 1 to the *Taxation Administration Act 1953* (Cth), an entity need not withhold an amount under s 12-190 from a payment if the whole of the payment is exempt income of the entity receiving the payment.

(a) What systems might an Indigenous holding entity put in place to separately account for NANE and non-NANE (such as investment) income? These systems would also need to capture the various ways in which NANE income can cease to be NANE income. For example, if paid as remuneration or consideration for the provision of goods or services.

(b) If an entity ceases to be an Indigenous holding entity after receiving a native title benefit, does this then preclude a subsequent distribution of the benefit from being NANE income? Would it make a difference if the entity regained Indigenous holding entity status after a hiatus? On their face, sections 59-50(2) and 59-50(4) appear to test NANE status only at the point of derivation, which may mean that ceasing to be an Indigenous holding entity is not fatal.

The other key issues created are likely to be largely behavioural. Inevitably, the behaviour of native title parties to negotiations will be influenced by the desire to get the most favourable tax treatment under the new regime. There may also be attempts to revisit existing structures to attempt to procure a better outcome. For instance, parties may seek to explicitly agree apportionment in a native title agreement, as discussed further above. In addition, there may now be a slightly greater incentive for a portion of payments to be made directly to Indigenous individuals, assuming they fall within the NANE treatment. This incentive may run counter to attempts (and, frequently, resource proponent preferences) to use intermediary entities in benefits management structures to provide administrative efficiencies and governance safeguards.

Given some uncertainty over the extent of excluded administrative costs, parties may also reduce or replace 'implementation' style payments. Further, native title parties are likely to require that payment recipients under benefits management structures qualify as Indigenous holding entities. While charitable trusts, discretionary trusts and certain incorporated entities can all qualify, the Indigenous holding entity definition may necessitate some changes to the structures that have been used in the past. As to this, see below.

D *Indigenous Holding Entities*

As discussed above, the 2013 Reforms only apply insofar as the 'native title benefit' would otherwise be included in the assessable income of an Indigenous person or an 'Indigenous holding entity'. An Indigenous holding entity is defined in section 59-50(6) ITAA97 as:

(a) a distributing body (referred to above, eg a CATSI Act corporation);
(b) a trust, if the beneficiaries of the trust can only be Indigenous persons or Indigenous holding entities; or
(c) a registered charity.

A 'registered charity' is defined in section 995-1 of the ITAA97 as an entity (including a trust, despite its lack of separate legal personality) that is registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). In order to be registered under that Act, the entity must be a charity within the meaning of the *Charities Act 2013* (Cth) and meet certain additional requirements.[155] Ordinarily, a charitable trust would be able to obtain registration.

In order for a discretionary trust to qualify as an Indigenous holding entity, the beneficiaries of the trust '*can only be*' Indigenous persons, distributing bodies, registered charities, or other trusts the beneficiaries of which can only be those entities. That requirement is open to two interpretations:

(a) a trust will be an Indigenous holding entity at a particular time if, as a matter of fact, the only persons or entities who can benefit under the trust at that time are Indigenous persons or other Indigenous holding entities; or
(b) it must be the case that under the terms of the trust deed, only Indigenous persons or Indigenous holding entities can potentially be beneficiaries.

Arguably the second interpretation is preferable. Had Parliament intended the first interpretation, it could have said 'if the beneficiaries of the trust *are only* Indigenous persons or Indigenous holding entities...' (emphasis added). The words '*can only be*' in section 59-50(6)(b) arguably direct attention to the terms of the trust deed, rather than to matters of fact such as, for example, whether a beneficiary is a registered charity at any particular time. This would be consistent with section 59-50(6)(a), which refers to a 'distributing body', the definition of which includes 'any other incorporated body… established by or under provisions of a law… that relate to Indigenous persons' and that 'is empowered or required (whether under that law or otherwise) to pay moneys

[155] *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 25–5(1), (3), (5). The additional registration requirements are that the entity be a not-for-profit entity, have an Australian Business Number, be in compliance with governance and external conduct standards and not be included in a written decision of an Australian government agency under an Australian law relating to the characterisation of entities as engaging in or supporting terrorist or criminal activities.

received by the body to Indigenous persons…'.[156] Thus if a discretionary trust is to be included in a benefits management structure and to have the ability to make distributions to a charitable trust, it may be necessary for the trust deed to specify that the charitable trust can only be a beneficiary if and during such time it is a registered charity.

Indeed, for all beneficiaries other than Indigenous persons, it may be prudent to include a term that the entity will only be a beneficiary if and during such time it continues to be an Indigenous holding entity. For instance, the native title parties may wish to include a prescribed body corporate as a specified beneficiary.

The early indications are that this is the approach the ATO is taking.[157] This is potentially problematic for two reasons. First, the federal government has introduced legislation to abolish the Australian Charities and Not-for-profits Commission,[158] which currently registers charities. If successful, depending on the legislative transitional arrangements and the description of beneficiaries and/or the definition of 'registered charity' adopted in the relevant trust deed, it may be necessary to amend discretionary trust deeds to ensure continued Indigenous holding entity status. Second, a charitable trust may serve a significant role as default beneficiary of trust income or as the default recipient of surplus property on a winding up. If the discretionary trust deed automatically removes a particular charitable trust upon loss of charity registration, then a back-up default mechanism may be required.

A trust the only beneficiaries of which can be determined native title holders may qualify as an Indigenous holding entity without a specific qualification to the description of the beneficiaries, on the basis that only Indigenous persons can be native title holders. Of course, if the beneficiaries can include native title claimants, it may be advisable to add a qualification that they must also be Indigenous persons, to cover the possibility that the Court could find some or more of the claimants are not native title holders because they are not Indigenous persons.

Many existing benefits management structures may not comprise Indigenous holding entities and therefore may not be able to take advantage of the NANE provisions unless amendments are made to the structures or to the

[156] ITAA36 s 128U(1) (definition of 'distributing body').
[157] See, eg, ATO, 'Income Tax: Non-assessable Non-exempt Income – Native Title Benefit, Indigenous Holding Entity', Private Binding Ruling 1012579850256.
[158] Australian Charities and Not-for-profits Commission (Repeal) (No 1) Bill 2014 (Cth).

constituting documents. When considering making amendments to trust deeds, it is advisable to consider:

(a) the source of the variation power;
(b) any relevant processes and limits in the trust deed or the overarching native title agreement (for example, a variation to remove certain discretionary beneficiaries may not be permissible under the trust deed and under the relevant native title agreement); and
(c) whether the variation might itself generate a tax event (for instance, if the effect of the variation is substantial enough to terminate the trust and/or create a new trust over some or all of the trust assets, this may give rise to CGT implications).[159]

VII Conclusion

Awareness of taxation issues under native title agreements has grown over the last decade amongst Indigenous people, as well as resource companies and governments, especially as the quantum of native title payments (at least in Western Australia) has grown. This awareness, along with the associated desire to achieve improved governance of native title payments, has led to more sophisticated and complex native title agreements and benefits management structures. It is no longer the case, if it ever was, that taxation considerations can be left to the end of the agreement making process. Rather, it is important for legal practitioners involved in native title negotiations to have an understanding of the issues identified in this paper and to take them into account at a relatively early stage in the drafting of native title agreements and the design of benefits management structures.

As discussed in this paper, taking account of the key tax issues will be a nuanced process, especially given the range of areas where the tax treatment of each party will overlap. Indeed, there is a significant convergence of interests between proponents and native title parties in relation to the administrative arrangements in a native title agreement to deal with certain tax issues. For GST and PAYG withholding for failure to quote an ABN, the parties have an administrative incentive to adopt a uniform approach to whether native title payments are for taxable supplies. For mining withholding tax, the tax is

[159] See, eg, ATO, 'Income Tax: Does CGT Event E1 or E2 in Sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 Happen if the Terms of a Trust are Changed Pursuant to a Valid Exercise of a Power Contained Within the Trust's Constituent Document, or Varied With the Approval of a Relevant Court?', TD 2012/21, 24 October 2012.

imposed on the native title party recipient of the native title benefit but the resource proponent payer is obliged to withhold an equivalent amount under the PAYG withholding provisions. Accordingly both parties would benefit from certainty as to the amount that is subject to tax and that must be withheld.

However, there are also some matters in relation to which interests may diverge. For instance, whether payments have been constructively received by the native title holders may affect the question of derivation for the native title parties, but also the deductibility of payments for MRRT (likely less pressing following its abolition) or PRRT purposes. To assist with income tax deductibility, resource proponents are also likely to prefer making a greater portion of payments in the form of production payments (or implementation payments) rather than up-front milestone payments, which would generally be expected to be contrary to the views of native title parties. Further, characterisation of native title payments as being for on-going assistance or a social licence to operate would bolster deductibility arguments, but would render the connection with underlying native title rights and interests more remote, thus harming the native title party's pre-CGT capital arguments as well as their ability to apply the NANE concessions under the 2013 Reforms. Again, this may result in divergent approaches to negotiations over the tax issues.

The 2013 Reforms only address a limited range of these tax issues. Primarily, income tax assessability and, to some degree, applicability of mining withholding tax. While this is a welcome development, they do not resolve a number of the other tax uncertainties, such as income tax deductibility or the application of GST and PAYG withholding for failure to obtain an ABN. In addition, even to the extent that the 2013 Reforms tackle assessability, they raise significant impediments. In particular, the amendments require determination of the portion of native title payments that relates directly or indirectly to an act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title, as opposed to relating to other matters, such as benefit sharing to generate a social licence to operate. This apportionment will not be a simple matter to determine in practice. Further, as the reforms contemplate NANE income flowing through Indigenous holding entity intermediaries, they also pose a number of administrative and timing issues.

Given their limited scope, the 2013 Reforms are unlikely to have a significant impact on the extent to which native title party and resource company interests diverge and converge. However, they are likely to cause parties to revisit existing agreements, which could reopen other areas of dispute.

Additionally, due to the limitations on administration payments and investment income being NANE, the 2013 Reforms may have the effect of encouraging the distribution of native title payments into the hands of Indigenous people rather than encouraging long term investment and governance of native title payments. As the class of Indigenous holding entities is wider than merely charitable trusts and as the 2013 Reforms contemplate NANE treatment for payments to individuals, divergence may also arise over the extent to which payments ought to be made to a charitable trust. Finally, the requirements that must be met for a trust to be an Indigenous holding entity may also play a subtle role in reducing the relevance of charitable trusts in benefits management structures, by forcing the parties to contemplate back-up arrangements in circumstances where a charitable trust ceases to be a registered charity.

Accordingly, the 2013 Reforms are unlikely to resolve the tax tensions between native title parties and resource proponents, nor to be the end of the debates about native title taxation reform. In the current economic and political climate, it remains to be seen how government might respond to continued debates. However, it is worth noting that the former Labor Government established a Native Title & Tax Working Group, that produced a report in July 2013.[160] The report, which was endorsed by the former government,[161] contained far-reaching tax and governance reform recommendations. These included, in particular, the creation of a new category of entity for tax concessions such as income tax exemption and deductible gift recipient status: an 'Indigenous Community Development Corporation' (ICDC Entity). The ICDC Entity was to have a broader range of purposes than a charity, finally permitting the pursuit of a range of purposes of relevance to Indigenous communities, such as social, cultural and economic development, using the one vehicle. Accumulation of income was also to be permitted with greater certainty and some non-purpose direct payments to individuals allowed. The quid pro quo for the concessions was that ICDC Entities would be subject to mandatory governance standards and to appropriate regulation. While the report left significant further development work to be undertaken, the case for structures that provide certainty to native title parties and resource proponents and that

[160] Heferen et al, above n 5.
[161] David Bradbury, Assistant Treasurer, Jenny Macklin, Minister For Families, Community Services and Indigenous Affairs, and Mark Dreyfus, Attorney-General, 'Benefiting Indigenous Communities Through Native Title Reform' (Media Release, No 150, 3 August 2013).

encourage long term investment and expenditure on community development, remains.