# THE INCOME TAXATION OF NATIVE TITLE AGREEMENTS

*Miranda Stewart*[*]

## I INTRODUCTION

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

This article examines the tax issues that arise in respect of native title agreements and recent proposals for tax reform by the Australian Government. Native title agreements sit at the intersection of indigenous economies, the market economy and the state. They contribute to sharing the benefits of resource development with traditional owners and compensate for the replacement value of non-renewable resources to the future generations.

The recognition of native title in *Mabo v Queensland (No 2)*[2] and in the *Native Title Act 1993* (Cth) ('NTA') has led to significant changes in the status of indigenous peoples in negotiating with governments and private stakeholders. Although the legal content of native title has disappointed many and there have been only a small number of successful compensation claims, native title agreement-making has become increasingly widespread across Australia and payments and benefits provided under native title agreements have become increasingly valuable in some regions. It is not surprising, then, that the tax treatment of payments provided under native title agreements has become a matter of concern to traditional owners and other

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[*] Associate Professor, Melbourne Law School; Chief Investigator on the Australian Research Council Linkage Project 'Poverty in the Midst of Plenty' (LP0990125). The author acknowledges the support provided by the Australian Research Council, the Australian Institute for Aboriginal and Torres Strait Islander Studies and the project linkage partners: Department of Families, Community Services and Indigenous Affairs; Marnda Mia Ltd; Rio Tinto Services Ltd; Santos Ltd; and Woodside Energy Ltd. The views expressed in this work are solely the views of the author. My thanks go to my colleagues on this project for their patience as I began to find my way around the Native Title Act and to an anonymous reviewer for their insightful and provocative comments. All errors are, of course, my own.

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

2 (1992) 175 CLR 1 ('*Mabo*').

stakeholders (in particular the resources industry) in recent years. A number of studies of tax issues have been carried out,[3] and several workshops held that have brought together indigenous peoples and their representatives, resource companies, governments and other stakeholders, leading to the current consideration by the Australian Treasury of tax reform for native title agreements. In May 2010, the Treasury released its Consultation Paper on *Native Title, Indigenous Economic Development and Tax* (the 'Treasury Paper').[4] As at the date of writing, no final reform proposal or draft legislation has been released by the government. The Treasury Paper presents three main options for reform:

(1) A legislated income tax exemption for native title payments;

(2) A tax-exempt Indigenous Community Fund;

(3) Native title withholding tax.

Most attention to date has focused on the question of how to interpret native title payments in the existing tax law framework, and the uncertainty generated in this interpretive process. Current tax treatment is complicated because it involves the intersection of two highly complex and technical legal regimes: native title law and tax law. There is a risk, in the words of Attorney-General Robert McClelland, that experts in native title and tax law will become 'intoxicated by their expertise' in this analysis.[5] The complexity of these two legal regimes also obscures the more fundamental conceptual issue of how, and whether, one should apply income tax at all to native title.

Part II explains the fundamental legal concepts of native title and compensation, which forms the context for the income tax analysis. Part III briefly examines the income tax treatment of native title payments in current law. Part IV presents the core

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3 Lisa Strelein, 'Taxation of Native Title Agreements' (2008) 1 *Native Title Research Monograph*; Commonwealth of Australia, Department of Families, Housing, Community Services and Indigenous Affairs, *Optimising Benefits from Native Title Agreements*, Discussion Paper (2008) <http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_discussion_paper/default.htm>; ATNS Project, 'Optimising Benefits from Native Title Agreements' (Submission to Department of Families, Housing, Community Services and Indigenous Affairs Discussion Paper, 6 December 2008); A Levin, *Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts* (Discussion paper presented at the Indigenous Community and Economic Development and Tax Policy Workshop, ATNS Project, 28 August 2007); Minerals Council of Australia ('MCA') with Jackson McDonald Lawyers and AIATSIS, 'Improving the Tax Treatment of Benefits and Payments to Indigenous Communities from Resource Agreements, Introducing an Alternative: Indigenous Community Development Corporations' (Consultative Discussion Paper, Minerals Council of Australia, August 2009).

4 Commonwealth of Australia, Treasury, *Native Title, Indigenous Economic Development and Tax,* Consultation Paper (2010), <http://www.treasury.gov.au/documents/1890/PDF/20101020_Native_Title_Tax _Consultation_Paper.pdf>. The consultation process was suspended during the 2010 election but recommenced in October 2010; 32 submissions were received by November 2010, available at <http://www.treasury.gov.au/contentitem.asp?ContentID= 1916&NavID=037>.

5 Robert McLelland, 'Negotiating Native Title Forum' (Speech delivered at the Negotiating Native Title Forum, The Novotel Brisbane, 29 February 2008) [17] <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum>.

analysis as to whether native title payments *should* be subject to income taxation. It is concluded in Part IV that there are a number of good arguments for the position that payments under native title agreements are not 'income' as a matter of income tax principle, because they are compensation for a loss or damage in property or personal rights, or for non-economic benefits or value, or alternatively because they do not accrue as individual gain but are a social, or collective benefit. However, the matter is not free from doubt, and may not be resolvable in traditional tax policy terms. The analysis in Part IV reveals a clash of discourses, or conceptual frameworks that underpin native title and income taxation and the limitations of the legal and economic approaches to fundamental concepts such as property, compensation and income. Further, even if the analysis is accepted for payments for native title holders, it cannot address the issues of justice and development for traditional owners, or other indigenous people, who are unable to demonstrate native title.

In light of the conceptual analysis in Part IV, it is argued that there are good social and economic policy reasons to justify the exemption of all native title payments from income tax. Part V considers the detail of Treasury's option (1) relating to this exemption, including an examination of the range and diversity of native title agreements to be covered and the design of the legislative exclusion. In Part VI, this article finally turns to Treasury's option (2), which proposes the establishment of a tax-exempt Indigenous Community Fund that may receive native title payments and other forms of payment for the benefit of indigenous communities. Part VI explains the context of this proposal, being the widespread and unsatisfactory use of charitable trusts to receive payments under native title agreements, and considers the various features of such a fund. It is concluded that there are good arguments in support of option (2), however significant further community consultation will be required to establish the best model.

This article does not address the merits of option (3) in the Treasury Paper, concerning a native title withholding tax. A native title withholding tax was proposed by the Howard government in 1998 but was not enacted at that time.[6] The proposal was modeled on the existing Mining Withholding Tax ('MWT') which is levied at 4 percent on 'mining payments' made to Aboriginal people or a distributing body in respect of Aboriginal land.[7] It is the view of this author, consistent with the majority of submissions to the Treasury consultation, as well as the weight of academic opinion, that the option of a native title withholding tax should not be pursued.[8] Further, it may be appropriate to repeal the existing MWT. In short, the MWT is inequitable, creates a two tier tax system, applies tax where recipients of payments would be under the

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6 Commonwealth of Australia, Treasury, above n 6, 14.

7 *Income Tax Assessment Act 1936* (Cth) Div 11A, applying among other things to mining payments under the *Aboriginal Land Rights Act 1976* (NT).

8 See especially Strelein, above n 3; Jon Altman, Submission to the Treasury (Cth), *Consultation Paper: 'Native Title, Indigenous Economic Development and Tax'* 25 November 2010 <http://www.treasury.gov.au/documents/1916/PDF/Altman.pdf>; Jon Altman, 'Native Title and Taxation' (CAEPR Topical Issue 4/2010, Centre for Aboriginal Economic Policy Research, the Australian National University, September 2010) <http://caepr.anu.edu.au/sites/default/files/Publications/topical/Topical_Altman_Native%20Title%20and%20tax.pdf>; Fiona Martin, 'Native Title Payments and their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach?' (2010) 33 *University of New South Wales Law Journal* 685.

normal income tax threshold in any event, and would be difficult to apply to the diversity of payments and agreements in the native title context (these are discussed further below). More fundamentally, the withholding tax model is based on the premise that income tax should be levied on the payment. In contrast, it is argued as a matter of principle and policy, that payments related to native title should be exempt from income tax.

The Treasury Paper also raises other tax issues, including the tax deductibility of native title payments for the payer, and the possibility of deductible gift recipient status for indigenous organisations. Further issues include the treatment of native title in the Goods and Services Tax ('GST'), the proposed Minerals Resource Rent Tax, and various State taxes. There have also been a number of other proposals for tax reform to enhance indigenous economic development.[9] All of these warrant further consideration, but there is no scope to do that here.

## II NATIVE TITLE AND THE RIGHT TO COMPENSATION

> Here, it says that Traditional Owners can't claim any compensation money from Argyle for things that happened in the past. Everyone agrees that the money and other benefits in this agreement are enough compensation for things that happened before. Traditional Owners can't claim any more.[10]

Prior to the recognition of native title, claims by Australian indigenous peoples to recognition of legal rights and interests in their traditional lands failed.[11] State and Territory land rights schemes created various frameworks for returning land to collective indigenous ownership but did not recognise native title rights and interests in traditional land.[12] The High Court's belated recognition of native title in *Mabo* established that customary title to land predated and, under certain conditions, survived British sovereignty.[13] Justice Brennan stated in the majority judgment:

> Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[14]

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9 Gunya Australia, 'Indigenous Economic Development Scheme: a solution to create employment opportunities within Indigenous communities' (Gunya Discussion Paper, August 2007); Cape York Institute for Policy and Leadership, 'Can Cape York communities be economically viable?' (November 2005) *Viewpoint* <http://www.cyi.org.au/WEBSITE%20uploads/Economic%20Viability%20Attachments/SPEECH_Can%20CY%20communities%20be%20economically%20viable.pdf>; Miranda Stewart, 'Tax Law and Policy for Indigenous Economic Development', *University of Melbourne Legal Studies Research Paper No 436* (December 2009), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1519603>.

10 *Argyle Diamond Agreement*, above n 1, cl 10.

11 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Coe v Commonwealth* (1979) 53 ALJR 403.

12 See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Aboriginal Land Trusts Act 1966* (SA).

13 Marcia Langton et al, 'Introduction' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 17.

14 *Mabo* (1992) 175 CLR 1, 58.

The concept of native title, as explained by Justice Brennan in *Mabo*, was translated into s 223 of the NTA. Section 223(1) defines 'native title' or 'native title rights and interests' as:

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

Where native title is determined, it is required to be held for the community by a Prescribed Body Corporate ('PBC'), which is a corporate structure that may operate as a statutory trust or agency of the title for the native title holders.[15] *Mabo* established native title as a *sui generis* right at law.[16] It was unclear after *Mabo* whether native title was proprietary or personal in nature, in particular as it was found to be communal and inalienable and whether it amounted to a right to exclusive occupation of land or whether lesser rights were created.[17] In *Wik v Queensland*,[18] Gummow J described the 'nature and incidents' of native title as varying from case to case:

> It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein.[19]

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15 *Native Title Act 1993* (Cth) Pt III, Div 6. See also Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010) 170.

16 The concept has been widely analysed. See, eg, Langton et al, above n 13; Noel Pearson, 'Land is Susceptible of Ownership' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004); Katy Barnett, '*Western Australia v Ward;* One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) 24 *Melbourne University Law Review* 462; Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 114-115; Kent McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil (ed), *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (University of Saskatchewan, Native Law Centre, 2001) 416, 420–3, 435.

17 Contrast the approach of Deane and Gaudron JJ in *Mabo* (1992) 175 CLR 1, 109-110 to the majority judgment by Brennan J at 77. The different approaches were considered in the judgments in *Western Australia v Ward* (2000) 170 ALR 159, 178-179 (Beaumont and von Doussa JJ), and are discussed in the references, above n 16.

18 (1996) 187 CLR 1.

19 Ibid 169.

One suggested approach is that native title comprises both personal and proprietary aspects, that is, 'Aboriginal land is an extension of the person and the group—rights in *rem* and in *personam* are at the same level and centred within a spiritual framework.'[20]

In *Western Australia v Ward*,[21] the High Court held that native title consisted of a bundle of rights that could be extinguished one by one.[22] In *Members of the YortaYorta Aboriginal Community v Victoria,*[23] the High Court also effectively applied a 'bundle of rights' approach.[24] More controversially, the Court took the view that native title is defined by reference to s 223 of the NTA and not by reference to the common law.[25] Following *Ward* and *YortaYorta,* an increasingly heavy burden rests with indigenous people to identify traditional laws and customs, articulate the rights conferred by them and to prove 'their continued identity and existence as a group and their ongoing connection to lands from which many have been dispossessed'.[26] While the courts acknowledge the inevitability of some change in indigenous societies,[27] they require proof that the society and the system of law and custom remain intact.

Government actions, such as the grant of freehold or leasehold estates, which are inconsistent with the continued existence of native title rights and interests, operate to extinguish or override common law recognition of native title. In 1998, substantial amendments to the NTA extended the rules of extinguishment. Lisa Strelein has described the 'ever-expanding doctrine of extinguishment' and comments that this seemingly leaves an 'empty vessel' for Aboriginal rights.[28] Noel Pearson argues that

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20 Diane E Smith, 'Valuing native title: Aboriginal, Statutory and policy discourses about compensation' (Discussion Paper No 222, Centre for Aboriginal Economic Policy Research, 2001) 20, citing P Sutton 'Aboriginal common law and native title', Unpublished paper presented to the NNTT, Perth (1998).

21 (2002) 191 ALR 1 ('*Ward*').

22 Ibid 35–6, 40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

23 (2002) 214 CLR 422 ('*YortaYorta*').

24 James Cockayne, 'Members of the YortaYorta Aboriginal Community v Victoria: Indigenous and Colonial Traditions in Native Title' (2001) 25 *Melbourne University Law Review* 786, 805.

25 (2002) 214 CLR 422, 440; Lisa Strelein, 'Symbolism and Function: From Native Title to Indigenous Self-Government' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010) 127, 128. Some have expressed doubt as to whether there really is, any more, a common law native title claimable in Australia: Kent McNeil, 'The Relationship Between the Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison' (Paper presented at Section 223 ATNS Workshop, Melbourne University Law School, 14 May 2007); Lisa Strelein, 'Native Title: A captive statute' (Paper presented at Section 223 ATNS Workshop, Melbourne University Law School, 14 May 2007).

26 Odette Mazel, 'Returning ParnaWiru: Restitution of the Maralinga Lands to Traditional Owners in South Australia' in Marcia Langton et al (eds), *Settling with Indigenous People: Modern treaty and agreement-making* (Federation Press, 2006) 159, 178.

27 See, eg, *Mabo* (1992) 175 CLR 1, 61, 70 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J); *Ward* (1998) 159 ALR 483, 502, 541; *YortaYorta* (2002) 214 CLR 422, 439-440 (Gleeson CJ, Gummow and Hayne JJ).

28 Lisa Strelein, 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 189.

the concept of native title 'of the community as a whole, as against the world, is a mundane possession'.[29]

Section 51 of the NTA provides a legal right to compensation for loss or extinguishment of native title:

> on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

The right to compensation arises as a result of the operation of the *Racial Discrimination Act 1975* (Cth), which ensures that any right to compensation for the loss of property under the *Constitution* or any compulsory acquisition legislation extends to native title holders. The NTA does not provide for the payment of compensation prior to the operative date of the *Racial Discrimination Act 1975* (Cth). Compensation may be payable to registered native title claimants; native title holders, and/or their PBCs; claimants; and possibly to other indigenous holders of statutory rights and interests over land which have compulsorily converted or replaced native title rights and interests.[30] Compensation is available for the extinguishment of native title by certain past, intermediate and future acts. Importantly, in many cases, negotiations which generate compensation do not extinguish native title as a result of the non-extinguishment principle in the NTA; in some cases, a notion of 'compensable interest' may be applied to determine compensation where native title is not extinguished.[31] Compensation for native title, in cash, property or other benefits (if approved), may be paid directly by governments for extinguishment or suspension of native title rights or interests.

The right to compensation in itself has failed to generate significant direct benefits for native title claimants. There is only a very small number of compensation claims extant; as at 3 June 2011, there were only 8 compensation claims in the National Native Title Tribunal, compared to 471 native title claims.[32] One reason for the small number of compensation claims may be that the content of the right to compensation is difficult to identify and value: the right to compensation, like native title itself, is *sui generis*.[33] Many indigenous compensation regimes, including that in the NTA, draw inspiration from pre-existing State mining compensation laws.[34] However, there are difficulties in interpreting 'compensation' in the NTA because of the unique features of native title,

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29 Pearson, above n 16, 95.

30 *Native Title Act 1993* (Cth) ss 17, 29, 20, 22D, 22E, 24EB(7), 24GB(8), 24GHA(6), 24ID(2), 24KA(6), 24MD(4), 24NA(7), 51 all relate to compensation. See Smith, above n 20, 22; Tina Jowett and Kevin Williams, '*Jango*: Payment of Compensation for the Extinguishment of Native Title (May 2007) *Issues Paper 3(8)*.

31 *Native Title Act 1993* (Cth) s 24AA(6) for 'future acts', and s 238(8) for past acts.

32 National Native Title Tribunal ('NNTT'), *National Report: Native Title* (August 2011) 1 <www.nntt.gov.au>.

33 Smith, above n 20.

34 Jon Altman and David P Pollack, 'Native title compensation: historic and policy perspectives for an effective and fair regime' (Discussion Paper No 152, Centre for Aboriginal Economic Policy Research, 1998) <http://caepr.anu.edu.au/Publications/DP/1998DP152.php>. Appendix A identifies relevant State mining statutes. See also Altman, above n 8 and the references on native title compensation available from Native Title Research Unit, *Native Title Compensation Annotated Reference List* (2009) Australian Institute of Aboriginal and Torres Strait Islander Studies <http://www.aiatsis.gov.au/ntru/compensation.html>.

and traditional law and custom more generally. How are traditional owners 'to place a value on loss or damage to this culture[?] What value should be placed on native title? And when compensation is received how should it be managed and distributed so as to ensure effective outcomes and minimize the social impact of contestation over mining moneys?'[35]

In contrast to direct compensation claims, the ever-increasing number and scale of native title agreements reveals that the process of agreement-making *has* generated benefits for native title holders from governments and private stakeholders. These agreements, as indicated by the extract from the Argyle Diamond Agreement, above, do operate as compensation. However, there are difficulties with fitting all payments and benefits under native title agreements into a clearly defined legal category of compensation for loss, damage or impairment of an asset. Agreements are increasingly used for revenue-sharing and the broader goal of economic development for traditional owners. Of course, the mere entering into of native title agreements by traditional owners does not ensure positive economic or social outcomes; as Krysti Guest explained, there is a real challenge for governments, to recognise 'the living political economy' of native title holders and other indigenous groups.[36]

There is a tension in the native title cases and in academic and policy commentary, concerning the extent to which exploitation and uses of rights under the NTA, such as the right to negotiate native title agreements, can be considered as generating commercial reward or economic development as well as compensation. In 2008, Indigenous Affairs Minister Jenny Macklin announced that native title would be recognised as 'critical to economic development'[37] and the Attorney-General stated that native title should be fully used as 'an effective mechanism for providing economic development opportunities for Indigenous people'.[38] Active support of

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35 Altman and Pollack, above n 34, 12.

36 Krysti Guest, 'The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements' (Research Discussion Paper No 27, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009) <http://www.aiatsis.gov.au/research/docs/dp/DP27.pdf> 8. See also Ciaran O'Faircheallaigh, 'Resource Development and Inequality in Indigenous Societies' (1998) 26 *World Development* 381–394; Ciaran O'Faircheallaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 303; Deirdre Howard-Wagner, 'Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities' (2010) 14(2) *Australian Indigenous Law Review* 100; Deirdre Howard-Wagner and Amy Maguire, '"The Holy Grail" or "The good, the bad and the Ugly"?: A Qualitative Exploration of the ILUAs Agreement-making Process and the Relationship between ILUAs and Native Title' (2010) 14(1) *Australian Indigenous Law Review* 71; Sarah Burnside, '"We're from the mining industry and we're here to help": The impact of the rhetoric of crisis on future act negotiations' (2008) 12(2) *Australian Indigenous Law Review* 54; Lee Godden et al, 'Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability' (2008) 26 *Journal of Energy and Natural Resources Law* 1, 4.

37 Jenny Macklin, 'Beyond Mabo: Native title and closing the gap' (Speech delivered at James Cook University, Townsville, 21 May 2008) <http://www.nswbar.asn.au/circulars/macklin.pdf>.

38 McClelland, above n 5, [26].

native title agreement-making has been identified as an important element of the Commonwealth Government's Indigenous Economic Development Strategy, with the goal of generating sustainable intergenerational benefits.[39] The Strategy states that 'Indigenous-held land provides real economic opportunity' and aims to ensure that agreement-making supports economic participation.[40]

Many indigenous communities have similar aspirations.[41] The taxation issues considered in the Treasury Paper must be addressed in this broader policy context.[42] One approach to the issue is to accept that even where not called 'compensation' or legally qualifying as such, *all* payments and benefits under native title agreements are *de facto* compensation. Smith suggests that all types of payments and benefits available under the NTA can be regarded broadly 'as different aspects of the legislation's overall compensation regime, ranging across a practical continuum related to mitigation, restoration, reparation, recompense, agreement and benefit.'[43] Marcia Langton argues that native title payments are 'private transactions' that operate 'as substitution for crown compensation' and hence should not be taxable.[44]

To date, the issue of taxation of native title payments has been largely avoided by corporate and indigenous parties to agreements, by ensuring that the recipient entity for payments is tax-exempt, for example, a charitable trust. As explained further in Part VI, this has its own limitations in respect of the use and management of funds by the traditional owners and there has been increasing dissatisfaction with this model as a solution. In some cases, the alternative route has been taken of claiming that the native title payments are capital compensation that is exempt from tax. This article now turns to the question of income taxation of native title.

## III NATIVE TITLE AND CURRENT INCOME TAX LAW

The Treasury Paper suggests that '[a]pplying the current rules of the income tax system, payments provided under a native title agreement may or may not be assessable income' for a claimant group.[45] The current tax law treatment of native title payments depends not on the purpose of the agreement or the compensation framework of the NTA, but on the legal form, mode of payment and character of the

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39 Commonwealth of Australia, Department of Families, Housing, Community Services and Indigenous Affairs, *Indigenous Economic Development Strategy 2011-2018*, (2011) 17, < http://www.indigenous.gov.au/ieds/>.

40 Ibid.

41 See, eg, Cape York Institute for Policy and Leadership, *Economic Viability* <http://www.cyi.org.au/economicviability.aspx>.

42 Other relevant government papers include Commonwealth of Australia, Department of Families, Housing, Community Services and Indigenous Affairs and Attorney-General's Department, *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*, Discussion Paper (July 2010) <http://www.ag.gov.au>; Commonwealth of Australia, Department of Families, Housing, Community Services and Indigenous Affairs, *Indigenous Home Ownership*, Issues Paper (May 2010) <http://www.facs.gov.au/sa/indigenous/pubs/housing/indig_home_ownership/Documents/Indigenous_Home_Ownership_Issues_Paper.pdf>.

43 Smith, above n 20, 29.

44 Marcia Langton, 'The Mabo Lecture: Native Title, Poverty and Economic Development' (Speech delivered at the Native Title Conference, 3 June 2010) 17.

45 Commonwealth of Australia, Treasury, above n 3, 4.

underlying rights. Others have made a detailed examination of the current tax law treatment of native title payments, essentially revealing the complexity and uncertainty in applying current tax law.[46] This analysis is not repeated here, however, a brief discussion is useful to show how the Commissioner of Taxation (and the Treasury) apply a 'compensation' analysis in current tax law.

A native title payment may be taxable as ordinary income or be specifically included by a statutory provision, including a net capital gain under the capital gains tax ('CGT') regime, under the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997') or the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936'). There are no court decisions on the income tax treatment of native title in Australia, nor has the Commissioner of Taxation issued any public binding guidance as to the income taxation of native title payments.[47] However, the Commissioner has applied a 'compensation' analysis to find that native title payments will not be taxable, in a handful of private binding rulings ('PBRs') provided to native title claim groups.[48] In these private rulings, the view is expressed that the native title payments under consideration have a 'capital' character and not the character of ordinary services, business or property income. Traditionally in income tax law, a payment that compensates for the loss, damage or extinguishment of a capital asset, diminution of value of an asset, or loss or impairment of earning capacity, would be capital in nature. To determine whether compensation is capital in

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46 See references at above n 3; Martin, above n 8; Julie Cassidy, 'Black Fella Land — White Fella Tax: changing the CGT implications of aboriginal/native title' (2010) 25 *Australian Tax Forum* 397; Julie Cassidy, 'Black Fella Land: White Fella Tax: Changing the CGT Implications of Aboriginal/Native Title' in Georg Kofler et al (eds), *Taxation and Human Rights in Europe and the World* (IBFD Publications, 2011) 327; Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments' (1999) 2 *Journal of Australian Taxation* 344; Warren Black, 'Transferring Native Title to a Body Corporate under the Native Title Act 1993 (Cth) — Can CGT Arise?' (2000) 3 *Journal of Australian Taxation* 155.

47 Goods and Services Tax Ruling 2006/9 accepts that in the case of a 'government authority compulsorily acquiring land and interests relating to that land, including the native title rights under a particular statute where the effect of compulsory acquisition is that every registered and unregistered interest in the land is extinguished, and each person who formerly held such an interest has that holding converted into a claim for compensation', then 'the compensation relates to the loss suffered by the claimants on the extinguishment of their interest in the land' and so is not subject to GST: [89]. However, this GST ruling does not address payments by private parties, or payments where there is no extinguishment of native title, or the income tax treatment of such payments.

48 Australian Taxation Office, Private Binding Ruling 53360, 2003-2007; Australian Taxation Office, Private Binding Ruling 77829, 2008-2011; Australian Taxation Office, Private Binding Ruling 83511, 2005-2011; Australian Taxation Office, Private Binding Ruling 1011313296606, available from the ATO Register of Private Binding Rulings <http://www.ato.gov.au/rba/>. Private Binding Ruling 77829 is an extension of Private Binding Ruling 53360 in respect of the same facts. The Register contains anonymised texts of private rulings provided to specific entities or individuals who requested the ruling. Private rulings are binding on the ATO only in respect of the particular applicant, years and arrangement ruled upon, and strictly speaking have no precedential value; however, in the absence of other issued guidance, the rulings in the database provide an indication of how the ATO may approach similar fact situations.

nature, it is necessary to examine 'the nature of the claim or cause of action in respect of which the payment was made'.[49]

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

> It has been suggested that the payments made under the agreement are compensation payments made for the effect that the project has and will have on the 'claimed' Native Title rights and interests of the Claim Group. We note that Native Title has not yet been granted, however, it is apparent that the payments are being made on the assumption that there is a genuine Native Title right to the area involved and thus an 'asset' has been established.[50]

As noted above, the NTA compensation regime has some similarities to older State mining compensation regimes. These mining compensation regimes also provide some legal precedents for the tax treatment of native title payments under current income tax law. The Commissioner in PBR 53360 relies on cases concerning compensation payments for landowners in respect of mining operations: *Barrett v The Commissioner of Taxation of the Commonwealth of Australia*[51] and *Nullaga Pastoral Company Pty Ltd v Federal Commissioner of Taxation*.[52] In *Barrett*, payments to the owner of a farming property from a mining company who mined soapstone on the property were held to be capital in nature. The mining was conducted under a licence granted by a State corporation, which owned the minerals. The mining company paid the farmer in each year in instalments, an amount of 5s for every ton of soapstone removed from the land during the year. Owen J accepted that the payments were 'to make good the estimated diminution in the value of the land and the amount of damage to it which it was anticipated might result from the carrying on of mining operations'.[53] In *Nullaga*, the Supreme Court of Western Australia held that two annual payments of $10 000 received by a pastoral company in exchange for granting a right to explore for and mine bauxite for 5 years on its farmlands, were capital (and hence not taxable). Wickham J held that the payments, agreed under the *Mining Act 1978* (WA), were made as 'compensation to the taxpayer for interference with and damage to the land and diminution in its value resulting from operations carried on or proposed to be carried on'.[54] He explained that the agreement:

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

50 Australian Taxation Office, Private Binding Ruling 53360, above n 48.

51 (1968) 118 CLR 666 ('*Barrett*').

52 (1978) 78 ATC 4329 ('*Nullaga*').

53 *Barrett v The Commissioner of Taxation of the Commonwealth of Australia* (1968) 118 CLR 666, 672 (Owen J).

54 (1978) 78 ATC 4329, 4331.

> embraces a kind of license, but this does not make the consideration for the total agreement, income. … the money in my opinion was paid and received as consideration for the deprivation of part of a capital asset and in order to replace that capital.[55]

*Barrett* was applied in another pastoral case, *Case B79*[56] in which a farmer who grazed sheep on Queensland Crown leasehold land received payments of $200 annually, for wells drilled for petroleum on the land, by agreement with an oil company which held an authority to prospect issued under the *Petroleum Acts 1923-1967* (Qld). The payments were held to be 'convenient instalments of a total sum of compensation which may not yet be known with certainty.'[57]

The analogy between native title payments and mining compensation is appealing in a number of respects. It will be obvious in many cases that mining or other activity will cause damage or impairment to native title land, its access or use by traditional owners, similar to that compensated, under the mining laws. As in the mining cases, native title compensation may be paid by a private party in advance of the anticipated damage to the land, or periodically during the course of the exploration or mining, under a legislative regime that provides for registration of agreements and provides a right to sue for compensation if agreement cannot be reached. Extinguishment of title is not needed to establish an agreement for compensation under the Mining Acts; this also applies in the native title context. More generally, the mining cases indicate that compensation is provided in relation to 'a kind of licence' to access and mine on land, in the words of Wickham J in *Nullaga*, but which is not a licence in strict legal terms. This is comparable to the notion of a social licence to operate, or a 'local social mandate' that resources companies may seek, in their negotiations with native title claimants.[58]

Yet it is, today, *irrelevant* whether a payment is compensation that is capital in nature under the tax law. This is because CGT would now apply to any net capital gain generated by capital compensation payments, including those received in *Barrett* and *Nullaga*. The Commissioner of Taxation avoids the application of CGT in the private rulings summarised above, only by virtue of an assumption that native title is a 'pre-CGT' asset (ie, it was acquired prior to 20 September 1985). The Commissioner explains:

> As regards a 'pre CGT asset', it is stated in TR 95/35 at paragraph 5: 'It follows that if the underlying asset disposed of was acquired by the taxpayer before 20 September 1985, the receipt of compensation has no CGT consequences for the taxpayer.' Native Title is a traditional entitlement said to have been held since time immemorial. The capital receipt would not be subject to capital gains tax as the Native Title Rights and interests have been owned by the X people since prior to the introduction of capital gains tax and the Native Title rights and interests would therefore be pre CGT assets.[59]

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

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55 Ibid.
56 (1970) 70 ATC 366.
57 Ibid 367.
58 Peter Crooke, Bruce Harvey and Marcia Langton, 'Implementing and Monitoring Indigenous Land Use Agreements in the Minerals Industry: The Western Cape Communities Co-Existence Agreement' in Marcia Langton et al (eds), *Settling with Indigenous People: Modern treaty and agreement-making* (Federation Press, 2006) 95, 95.
59 Australian Taxation Office, Private Binding Ruling 53360, above n 48.

presumably the native title itself. This analysis by the Commissioner has provided a solution for some native title claimants. However, such a pragmatic approach is of little use to participants in native title negotiations if it is not stated clearly in a public, binding ruling applicable to *all* such negotiations. The Commissioner has so far failed to do this, leaving native title claimants and private stakeholders engaged in negotiation uncertain about the ATO approach to native title payments in other cases.

More fundamentally, there are a number of legal weaknesses in the Commissioner's analysis. While there are similarities, the situation of native title claimants is not fully analogous with that of landowners dealing under the mining compensation regimes. The mining compensation cases are concerned only with physical damage and loss of economic earning capacity of land. The private rulings cite the mining cases without commenting on the difference between physical damage and other kinds of impacts on 'looking after country', the inability to exercise traditional legal rights of governance in respect of the land, or spiritual welfare. The private rulings also sidestep the issue of what the tax outcome should be if native title is not ultimately established, or if the native title claim is not pursued following the agreement, but rather is given up or withdrawn. Is it enough that the parties proceed, perhaps only for the purpose of coming to an agreement, 'as if' native title exists? It is doubtful if the approach in these private rulings cannot be relied on to assist parties in the majority of agreements in respect of which native title, as defined in s 223 of the NTA, is not ultimately determined.

Third, native title agreements are increasingly being negotiated on commercial terms. The exploitation of native title in a business-like way, with a profit-making intention, would lead to the characterisisation of receipts as income under current tax law.[60] If 'compensation' is not made out, then it seems inevitable that the current law will tax native title payments as income and the analysis in these private rulings cannot apply.

Fourth, the treatment of native title as an exempt pre-CGT asset is not well supported by the terms of the income tax law. Uncertainties in the CGT analysis have been exhaustively explored by others.[61] Issues include whether native title, or associated rights, are an 'asset' as defined in the CGT rules; the time of the acquisition of this asset (that is, whether it is really a pre-1985 asset as defined in the law); who is the taxpayer affected; what is the particular CGT 'event' or statutory provision applicable on entering into a native title agreement or on receipt of payments; the time of that CGT event; and how to ascertain the cost base of the relevant asset. The law does not, in sum, comfortably support the assumption in the Treasury Paper that '[c]ompensation payments for the extinguishment or voluntary surrender of native title rights would generally be regarded as compensation for the loss of a pre-CGT capital asset and therefore any capital gains or losses would be disregarded'.[62]

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

61 Cassidy, above n 46. See also Martin, above n 8; Black, above n 46.

62 Commonwealth of Australia, Treasury, above n 3, 4.

Ultimately, the Commissioner's pragmatic approach fails to justify the exemption of native title compensation on any coherent tax policy basis. Rather, it grounds the exemption on the basis of an indefensible transition rule embedded in our tax law as a result of the 1985 political compromise required for introduction of CGT. The recent Henry Tax Review observed that the pre- and post-CGT distinction in our income tax law causes significant complexity and that consideration should be given to its repeal.[63] A more secure basis is needed for the exemption of native title payments from income tax.

## IV SHOULD NATIVE TITLE PAYMENTS BE SUBJECT TO TAX?

> 'The essential connotation of income … is gain — gain to someone during a specified period and measured according to objective market standards'.[64]

I now turn to examine the question as to whether native title payments are 'income' that *should* be subject to income tax as a matter of principle, applying the concept of 'income' established in the tax policy literature, sometimes known as the 'economic' or 'Schanz-Haig-Simons' concept of income.[65] The concept was described in classic terms by US economist Henry Simons as in the above quote, and as follows: '[p]ersonal income connotes, broadly, the exercise of control over the use of society's scarce resources'.[66] This concept is commonly referred to today as the 'comprehensive' notion of income.[67]

The 'comprehensive' notion of income is very broad, and it includes all types of payments (monetary and non-monetary) that provide a *gain*, or what is considered to be a net increase or accretion to economic power of the individual taxpayer. Australian income tax law does not measure up to this notion of comprehensive income. As explained by the Asprey Committee in a review of the tax system in 1975:

> the economists' definition would in general include … a great many gains that … have not been brought in, or have been brought in only to a very limited extent, by judicial and legislative extensions and refinements of that usage.[68]

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63 Commonwealth of Australia, Attorney-General's Department, *Australia's Future Tax System, Final Report* (December 2009), Overview (Part 1), Recommendation 17 <www.taxreview.treasury.gov.au>.

64 Henry Simons, *Personal Income Taxation: the definition of income as a problem of fiscal policy* (University of Chicago Press, 1938) 51.

65 Named after US economists Henry Simons and Robert Haig, and German economist Georg Schanz; Simons essentially synthesised the work of Haig and Schanz and developed the now-classic definition.

66 Simons, above n 64, 49.

67 In Australia, various scholars and tax reform bodies have adopted this 'comprehensive' notion of income, including: Commonwealth Taxation Review Committee, *Full Report 1975* (Australian Government Publishing Service, 1975) ('Asprey Committee'); Commonwealth of Australia, Treasury, *Reform of the Australian tax system: draft white paper* (Australian Government Publishing Service, 1985); Review of Business Taxation, *A Tax System Redesigned: more certain, equitable and durable: report* (1999, Commonwealth of Australia). The Review of Australia's Future Tax System moves away from 'comprehensive' income towards a 'consumption' tax base for some purposes, however this is not relevant to the discussion here: Commonwealth of Australia, Attorney-General's Department, above n 63.

68 Asprey Committee, above n 67, [7.5].

Nonetheless, 'comprehensive income' has operated as a benchmark for assessing the income tax base as defined in law and has been a significant driver of tax reform as the policy basis for the introduction of CGT in 1985 and various other measures to remove exemptions and thereby expand the tax base.

Comprehensive income is not an accounting concept, nor does it refer to a flow or receipt of cash or other benefits. Rather, it aims to tax the *net economic gain* for an individual. In applying the concept, one must first identify who is the relevant individual taxpayer and second, ascertain whether the relevant payments or benefits generate a net gain to this taxpayer in a particular period (usually a year). The concept aims to identify the relative capacity to pay tax of one individual taxpayer as compared to another, measured by the index or proxy of their 'income'. As explained above, a PBC that holds native title does so either as trustee or agent for the native title holders, not as a separate entity in its own right, so it is appropriate to consider as a matter of policy and law the application of income tax to the underlying native title holders.

I discuss here two main arguments that may establish that native title payments are not 'income' as a matter of principle. First, it may be argued that these payments are compensation for the loss of property or personal rights and so do not generate economic gain. Second, it may be argued that these payments generate collective or social economic gain, instead of individual or personal gain — that is, they are in some sense public or community gains, rather than private gains that should be taxable.

The question of how to treat compensation payments is not directly addressed by Simons in his classic text, and there is surprisingly little analysis of it in academic or legal commentary.[69] The compensation analysis can be separated into a discussion of compensation for loss of property or similar rights, and compensation for harm to the person such as physical injury or personal wrong. It can be argued that compensation for loss, extinguishment or damage to property owned by a taxpayer is not 'income' because there is no *gain* to the taxpayer, merely the 'making good', replacement or recovery of the taxpayer's 'capital' or investment in the property.

This principle is straightforward, but the problems of applying it in the native title context soon become apparent. As native title is a proprietary right or a bundle of rights that are 'possessed' by native title holders, it may be accepted that the extinguishment, loss or impairment of those rights or interests causes a loss or diminution in value of the native title holders' property that may be compensated under the NTA. For tax purposes, however, it will be necessary to ascertain who are the individual native title holders being compensated. It is generally accepted that even though there are 'native title holders' (past, current and future), native title is communal in nature.[70] Native title claim groups are defined by identifying individuals where possible, but this is often not possible and they are defined as a class 'by reference to particular ancestors and the laws or customs that bind the group' (and that would also include future generations).[71] In this context, is it possible to identify an

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69 These issues have been most debated in the US: see, eg, Victor Thuronyi, 'The Concept of Income' (Fall 1990) 46 *New York University Tax Law Review* 45; Paul B Stephan III, 'Federal Income Taxation and Human Capital' (1984) 70 *Virginia Law Review* 1357.

70 See *Mabo* and other cases discussed in Part II; Stuart Bradfield, 'White picket fence or Trojan horse? The debate over communal ownership of Indigenous land and individual wealth creation' (June 2005) 3(3) *Land, Rights, Laws: Issues of Native Title*.

71 Strelein, above n 3, 17.

individual 'taxpayer' as this is understood by Simons? I suggest that it is not possible to 'subdivide' native title rights into individual shares such that personal benefit can be said to be obtained. Although a PBC or a native title representative body ('NTRB') in a claim is the agent or trustee for multiple native title owners or claimants, it is difficult to say that these entities hold native title for the *individual* benefit of native title holders rather than as a collective right.

Second, even if individual native title holders can be identified, is native title able to be exploited for their personal economic gain such that the gain is 'income' of the individuals? Legally, native title as such is inalienable even though it is described as a 'bundle of rights' which are proprietary in nature. This raises the question as to whether any dealings in respect of native title — and consequently, any compensation for its loss or impairment under an agreement — can be properly considered to be economic in nature. If native title is extinguished by law, and compensation paid, but that native title could not, in the first place, be exploited for value, has 'the value of [any] person's store of property rights'[72] that may be exploited for economic value been *decreased* by the extinguishment or impairment or made good by the compensation? If not, is the compensation fully taxable, essentially as a windfall economic gain to the recipient native title group?

Third, native title compensation will only be taxable under a comprehensive income tax to the extent that the compensation exceeds the cost or capital invested in the native title rights or interests by the native title holders. Legally, native title rights and interests are 'possessed' by native title holders under traditional law since time immemorial. How can we ascertain any original 'cost' or investment in these rights and interests? One possible view is that native title rights and interests have no 'cost' at all. The consequence of this view is that *all* native title payments, even if correctly characterised as compensation for loss of property, would be taxable net gain under the comprehensive income tax. On the other hand, the view could be taken that compensation received for native title is either less than, or else exactly measures and essentially replaces the 'cost' of acquisition of the native title. The logical consequence of this alternative view is that *none* of the compensation should be taxable. This alternative approach, however, requires a legal fiction concerning the cost of acquisition of native title.

It may be easier to analyse native title compensation by analogy with compensation for harm or physical injury to a person.[73] This approach may more accurately reflect the personal nature of native title as a right, and the personal wrong or harm that is done through its impairment as a loss of *solatium* or enjoyment of life. One approach to the personal injury analysis is by analogy to compensation for property rights. Under this approach, the compensation for personal injury will be taxable gain, except to the extent that it makes good a loss of the taxpayer. This analysis assumes a concept of

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72 Simons, above n 64, 49.

73 There has been little written on this issue in Australia. In the US, there has been substantial academic debate about the principled basis for the legal exemption of personal injury damages: see, eg, Stephan, above n 69; Jennifer J S Brooks, 'Developing a Theory of Damage Recovery Taxation' (1988) 14 *William Mitchell Law Review* 759; Joseph Dodge, 'Taxes and Torts' (1992) 77 *Cornell Law Review* 143; Thomas D Griffith, 'Should "Tax Norms" be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries' (1993) *Wisconsin Law Review* 1115.

'human capital' — what economists term the individual's *endowment* (or capacity to earn income) — that is made good by the compensation. Applying the personal injury analogy to native title, we again face the problem that the extent of any gain or the underlying 'cost' of that personal right cannot be ascertained except by making arbitrary assumptions.

An alternative approach suggests that compensation for personal injury or other wrong incorporates a psychic aspect that does not relate to the ability to earn income, and that may be considered as 'non-economic', and so outside the concept of 'income' altogether. Under this approach, the compensation 'substitutes' or makes good that non-economic aspect of one's own person, which itself would be non-taxable, so that the compensation should also not be taxable.

The Asprey Committee considered that comprehensive income would include 'compensation for physical injury to a person received in a lump sum or for injury to reputation'.[74] However, it concluded that the 'exclusion from income of compensation for physical injury must rest primarily on the importance of the element of non-economic loss reflected in the compensation' and that 'whatever the theory of the comprehensive tax base may suggest, it would be a significant departure from accepted ideas to include in income amounts received which are in respect of physical suffering and disability as distinct from being for the reduced capacity of a person to earn which may attend that suffering and disability'.[75] Thus, the Committee decided that as a matter of 'accepted ideas' (or common sense), compensation for personal injury should be excluded from taxation. This approach drives the legal treatment of capital personal injury compensation in Australian income tax law, which is specifically excluded from tax under s 118-37 of ITAA 1997. For example, this approach has been taken in respect of reparations paid to indigenous individuals by the Queensland government for discriminatory harm suffered by them as a result of the Protection Acts under which their wages or savings were controlled by the Queensland government.[76] The reparations received were held to be capital compensation for a personal wrong so non-taxable under s 118-37 of ITAA 1997.

The difficulty with the analysis of native title compensation as 'non-economic' in nature is that the NTA *does* grant an economic dimension to native title rights and interests. This economic dimension is being realised for traditional owners through native title agreement-making, and is relied upon by governments and communities alike as an integral element of economic development building on agreements. Native title agreements bring traditional rights and custodial responsibilities in respect of land into Australia's contemporary market economy and settler legal system. The economic character of the 'right to negotiate' of native title claimants under the NTA is illustrated in the following comments by McHugh J in *North Ganalanja Aboriginal Corporation and Waanyi People v Queensland*:[77]

> At the very least, the Waanyi People had a real chance of reaching an agreement with the second respondents [a mining consortium] by exercising the negotiation and mediation rights conferred by the Act. … Parliament has laid down the law. It has attached valuable

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74 Asprey Committee, above n 67.
75 Asprey Committee, above n 67, [7.37].
76 Australian Taxation Office, Class Ruling CR 2003/35 (7 May 2003) <http://law.ato.gov.au> [19].
77 (1996) 185 CLR 595, 644 (McHugh J).

> rights to an accepted claim, rights that are exercisable by a claimant before the validity of the claim is judicially determined. *The Act has given claims of native title an economic as well as a spiritual and physical dimension*. (emphasis added)

Native title agreements both compensate for incursions upon claimed native title rights and constitute a major form of economic engagement between indigenous peoples, governments and industry. As explained above, the government has a public policy to use native title agreements as a vehicle for indigenous economic development. In this context, native title payments are not personal or individual but are, rather, collective, 'social' or community gains from economic development.

In his classic text, Simons drew a distinction between 'personal income' and the concept of 'social income' which is a measure of collective welfare in a society or economy. He observed that 'increases in the social income suggest progress towards "the good life", towards a world better in its economic aspect, whatever that may be'.[78] This statement by Simons fairly accurately represents the goal of economic growth that is defined and measured by economists as an increase in the total product of goods and services (Gross Domestic Product) in an economy, and is one measure of economic development.[79] Australia has established in the NTA, a regime for agreement-making that demonstrably facilitates both the recognition of native title and some compensation in case of extinguishment *and* the establishment of payments, transfer of assets and building up of resources that aim to enable indigenous peoples to generate social income. Another way to express this analysis may be to argue that native title payments have a 'public' character rather than a character of private gain, and hence are not susceptible of income taxation.

The analysis above reveals the lack of fit between the legal and economic concepts of property, compensation and personal economic gain that underlie income tax theory, and the concept of native title which is collective, inalienable, and handed down through generations who are essentially custodians rather than 'owners'. As Altman and Pollock, Smith and others suggest, similar problems apply in ascertaining how native title claimants, or compensating governments and other parties, should value, in economic terms, the loss or impairment of native title.

There is a further issue that must be considered in analysing the tax treatment of native title payments. How should the tax law treat indigenous people who cannot establish native title at law? The vast majority of native title agreements are negotiated on the basis that native title may be made out, but it is never finally determined. More generally, the majority of Australian indigenous people have been entirely dispossessed of their traditional ownership, so that native title cannot be established by them at all. If some kinds of native title payments categorised as 'compensation' or for native title are found not to be income, but other payments may be assessable, this could lead to the perverse result that those least able to establish native title — in a broad sense, most harmed by dispossession and with their connection to land most completely obliterated — would be subject to taxation on any payments they receive under native title agreements, whereas those who could be said to be 'less' harmed

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78 Simons, above n 64, 46.

79 Amartya Sen, 'Development: Which Way Now?' (1983) 93 *The Economic Journal* 745; on development more broadly, see Sen, *Development as Freedom* (Oxford University Press, 1995); Sudhir Anand and Amartya Sen, 'The Income Component of the Human Development Index' (2000) 1(1) *Journal of Human Development* 83.

through a finding of native title are not. It would be unfair to those who *cannot* establish native title that the lucky few who *can* establish native title and receive compensation, are not required to pay tax on it.

In this context, it is important to understand the role of the income tax in establishing a just distribution of economic resources in Australia. Tax lawyers rely on the benchmark of 'comprehensive income' to assist in determining whether a tax system operates in a fair manner. However, the tax law is just one element of the overall legal system established in our democratic, governmental and market framework. The income tax, like the legal concept of property, itself *constitutes* the distribution of economic resources across individuals and communities. This point is made strongly by legal philosophers Liam Murphy and Thomas Nagel:[80]

> we have to think about property as what is *created* by the tax system, rather than what is disturbed or encroached on by the tax system. Property rights are the rights people have in the resources that they are entitled to control *after taxes*, not before. (emphasis added).

Murphy and Nagel remind us that we cannot avoid addressing difficult questions of social justice in the distribution of economic resources, property and power, by reference to a prior natural or lawful state or distribution of 'income' or 'property' among taxpayers or citizens that could be subject to an income tax. The income tax 'is among the conditions that *create* a set of property holdings, whose legitimacy can be assessed only by evaluating the justice of the whole system, taxes included.'[81] Consequently, resolution of the income tax treatment of native title is just one element of the overall, legitimate settlement of land justice in Australia. To the extent that payments under native title agreements might be classified as generating personal economic gain that could be 'income', their exclusion from income tax would comprise a 'tax expenditure', being a subsidy or departure from the benchmark of the comprehensive income tax (although it may be difficult to estimate the revenue foregone from this tax expenditure).[82] Such a tax expenditure is supported as a matter of social or public policy relating to indigenous economic development and justice in native title agreements.

## V A LEGISLATIVE EXEMPTION FOR NATIVE TITLE PAYMENTS

Based on the analysis in Part IV above, there are good arguments to support the exclusion of native title payments from income tax on the basis that they are not 'income' as a conceptual matter, in particular where they can be analysed as compensation. However, the analysis is conceptually difficult and does not solve the issue of social and economic justice for traditional owners who cannot establish native title. A legislative exclusion from tax is needed to eliminate uncertainty and inequitable differences in treatment in respect of different native title agreements and would obviate the need for strained attempts to fit payments into the category of 'pre-CGT compensation'. There is therefore a strong argument in support of option (1) in the

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80 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2nd ed, 2004) 175.

81 Ibid 37.

82 This concept is discussed and analysed in Lisa Philipps, Neil Brooks and Jinyan Li, *Tax Expenditures: State of the Art* (Canadian Tax Foundation, 2011); see also, Commonwealth of Australia, Treasury, *Tax Expenditure Statement 2010* (28 January 2011) <http://www.treasury.gov.au/contentitem.asp?NavId=022&ContentID=1950>.

Treasury Paper, being a legislated tax exclusion for 'payments made under native title agreements'.[83] The question then becomes, how should such an exclusion be legislated, so as to best achieve the justice and economic development goals?

### A An exemption for native title agreements

As is suggested by the Treasury Paper, an exemption should be designed by reference to native title *agreements* rather than on particular kinds of payments or benefits (such as compensation). The primary aim of legislative reform is to ensure that there is no disincentive to agreement-making, to provide clarity, practical certainty and maximum flexibility for the negotiation participants — traditional owners, claimants, private stakeholders, and governments at all levels.

This requires an analysis of the range of different types of native title agreement. Agreements may be narrow, focused on discharge of one-off rights, or may cover entire projects, regions and a suite of rights.[84] Many native title resource agreements comprise an overall, or undifferentiated package of benefits.[85] As one mining company has pointed out, 'although the financial benefits payable in accordance with these kinds of agreements may include "compensation" for the impairment or extinguishment of native title, the payments are made in consideration for a range of agreements and commitments, not only in relation to native title'.[86]

#### *1 Indigenous Land Use Agreements*

The main form of native title agreement envisaged in the NTA, since 1998, is the Indigenous Land Use Agreement, or ILUA, established under NTA Division 3, Subdivisions B, C and D. As at 30 June 2011, there were 497 registered ILUAs, in all states, but with a significant majority in Queensland.[87] ILUAs have the advantage that they may be entered into based on a determination of title or where a claim exists; they must be registered with the National Native Title Tribunal ('NNTT'); and a range of steps are required by law that assist in ensuring due process in negotiation and registration of the ILUA. The ILUA negotiating framework assists in a consideration of the economic, social and cultural needs of the native title claimants and so may enable a more holistic compensation settlement to be achieved.

Many ILUAs are negotiated 'as if' there is native title, or on the assumption that native title may be established in due course. Registered ILUAs will stand even if native title is not, ultimately, made out. When registered, ILUAs bind all parties,

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83 Commonwealth of Australia, Treasury, above n 4, 2, 8–10, and Section 3.1.

84 Many examples and case studies of the benefits and payments in a range of types of agreements are included in Strelein, above n 3; O'Faircheallaigh, above n 36. Summaries of agreements, including location, date, parties and basic content, sometimes with primary documents, are searchable at <www.atns.net.au>.

85 A diversity of financial models are illustrated in Ciaran O'Faircheallaigh, 'Financial Models for Agreements between Indigenous Peoples and Mining Companies' (Research Paper No 12, Centre for Australian Public Sector Management, January 2003); and see MCA et al, above n 3; Strelein, above n 3, 26.

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

87 NNTT, *National Native Title Report* (August 2011), <www.nntt.gov.au> 4. Some registered ILUAs have expired and been removed from the register.

including later native title claimants even if they were not party to the ILUA. A significant majority of ILUAs are so-called area agreements, which may be made where there are no native title PBCs in the entire area to be covered (otherwise, a body corporate agreement is made). This indicates that the majority of ILUAs are reached with native title claimants who have yet to achieve a determination of native title.[88] Two examples of larger ILUAs, the Western Cape Communities Co-existence Agreement ('WCCCA') and the Argyle Diamond Agreement, illustrate the kinds of benefits and payments that may be provided and the legal structures that may be adopted. Both of these ILUAs were agreed with companies in the Rio Tinto conglomerate, and are evidence of a 'paradigm shift' in Rio Tinto towards recognition of indigenous peoples and support for negotiation to create a more durable and productive long term relationship with them.[89]

The WCCCA between Comalco, Indigenous entities of the Cape York Peninsula and the Queensland Government, was registered with the NNTT in 2001. The intent of the agreement is that the indigenous parties support Comalco's future mining operations in return for financial support, employment, business development and educational opportunities as well as full recognition of status as traditional owners of the land, and ongoing mutual recognition and partnership. Without any legal imperative to do so,[90] the WCCCA was signed by eleven traditional owner groups (Alngith, Anathangayth, Ankamuthi, Peppan, Taepadhighi, Thanikwithi, Tjungundji, Warranggu, Wathayn, Wikand Wik-Way and Yupungathi) and four Aboriginal community councils (New Mappoon, Mapoon, Napranum and Aurukun).[91] The WCCCA provides for the following:

- $2.5 million annual contribution by Comalco, indexed to mine revenue and the Consumer Price Index ('CPI');
- $1.5 million annual Queensland government contribution indexed to mine revenue and the CPI;
- $500 000 Employment and Training Budget for employment, training and youth education programs managed by Comalco. If the trajectory of local Aboriginal employment fails to remain on track for a target of 35 percent by 2010, Comalco is obliged to increase the level of pre-employment spending on education and training. However if the level of Indigenous year 10 graduation in the region drops below the stated trajectory, the company does not have to fulfill this obligation;
- $150 000 Cultural Awareness Fund, cultural heritage survey, site protection plans and ranger programs and a Cultural Awareness Course run by the traditional owners which all Comalco staff must complete;

88 Strelein, above n 3, 12.

89 Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a context of Globalisation' in Langton, Tehan, Palmer and Shain (eds), above n 13, 239.

90 Early in the negotiations, the High Court found in *Wik Peoples v Queensland* (1996) 187 CLR 1 that the Comalco mining lease was valid and had extinguished native title. The 1998 amendments to the NTA further reduced any legal imperative to negotiate for Comalco.

91 Harvey, above n 89, 241.

- Progressive relinquishment of parts of the Comalco mining lease, no longer needed for mining, to the State Government for return to Aboriginal ownership; and
- Support for community development and Aboriginal business enterprises.

The Argyle Diamond Agreement was negotiated between the traditional owners and the Ashton Joint Venture in 2001. The agreement was registered as an ILUA in 2005. Under the agreement, the traditional owners agree to support Argyle's current and future mining operations in return for financial assistance, benefits directed toward the economic development of communities and the recognition of indigenous interests and status as traditional owners. Annual payments are provided to traditional owner groups, and both a discretionary trust and a charitable trust are utilised to receive payments. This meant that there were live tax issues in relation to this agreement. The annual payments from the miner to each traditional owner group are set out separately (all amounts indexed for the CPI from January 2004):[92]

- $ 309 300 to Mandangala Community;
- $ 116 610 to Woolah Community;
- $ 288 578 to Warmun Community;
- $ 45 000 to Juwulinypany Community; and
- $ 25 000 to Crocodile Hole communities.

The payments to traditional owner family groups (based on senior named traditional owners) in the Argyle ILUA, are made into a discretionary trust, the Kilkayi Trust.[93] The majority of payments under the agreement go into the Gelganyem Trust, a charitable trust which funds current community development projects and a significant proportion of monies is allocated to a Sustainability Fund for investment to benefit future generations of Murriuwung and Gidja people in the East Kimberly Region. The Sustainability Fund cannot be used (except for administration costs) until Argyle ceases operation, providing an endowment for long term community development.[94] The Argyle ILUA also provides for the surrender by Argyle to traditional owners of a grazing lease, to be transferred to freehold title at the end of mining operations.

At the other end of the scale, there are many smaller ILUAs. For example, the Mackay Surf Lifesaving Club ILUA provides for the BirriGurra, Yuibera and Wiri/Yuwiburra peoples to agree to a 75 year lease of land for the Club and the construction of a new club house.[95] The Owen Springs Transmission Line ILUA provides for consent from the Central Land Council to installation of power lines in the

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92 Argyle Diamond Agreement, above n 1, cl 5.2-5.3.

93 Ibid cl 6.8.

94 Rio Tinto, *Sustainable development report, Argyle Diamonds 2007 - Innovation brings rewards* (2007) <http://www.argylediamonds.com.au/docs/AD_11477_SD%20Report.pdf> 20.

95 NNTT File No: QIA1999/00; see also NNTT, *Registered ILUA summary - Mackay Harbour Beach Park* <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Mackay_Harbour_Beach_Park_QIA1999001.aspx>; ATNS Database, *Mackay Harbour Beach Park Indigenous Land Use Agreement* (15 February 2005) <http://www.atns.net.au/agreement.asp?EntityID=1234>.

Alice Springs Municipality in the Northern Territory.[96] The benefits received by traditional owners under these ILUAs are not publicly known.

### *2 'Future Act' agreements negotiated under ss 29 and 31 of the NTA*

A 'future act' under the NTA is any proposed act that may affect native title. A 'future act' agreement (that is not an ILUA) deals with any act that affects or impairs native title in the future. A future act negotiation, like an ILUA, may apply to lands where title is determined, or may be negotiated 'as if' there is native title, applying the 'right to negotiate'. Where property interests are at stake (such as the issue of a licence by the State), the future act provisions are triggered by the State government notifying all relevant native title holders or potential holders in the relevant region. Payments under future act agreements, like those under ILUAs, may be in a range of different forms.

There are thousands of future act applications made each year, but only a small number of agreements are fully mediated by the NNTT (and hence recorded by it). Between 2008 and 2010 there were more than 9000 future act applications, many in Western Australia and Queensland.[97] Most applications are withdrawn, the majority because they are resolved by private agreement, although it is difficult to track these outcomes. The NNTT administers the 'future act' processes where there is a right to negotiate in the claimant group, that is, basically in relation to mining. Only a small proportion of future act agreements are actually mediated by the NNTT and hence recorded.[98]

### *3 State settlements and compensation frameworks*

There are a range of State settlement frameworks, some of which are directly linked to native title and explicitly recognised in the NTA (eg, under ss 22L and 87), while others have a separate basis in State settlement and land rights legislation. These agreement frameworks are not referred to in the Treasury Paper but are becoming increasingly important in establishing certain, fair and general compensation settlements for traditional owners and other indigenous peoples within each State and Territory. It is important from a perspective of fairness and national coverage that they are included in any provision to exempt income under native title agreements. ILUAs and future act agreements are geographically concentrated in Western Australia and Queensland. State settlement and compensation frameworks are of great importance in other states, where traditional owners have been dispossessed of their land more completely than in more remote regions.

Existing State and Territory land rights regimes provide for a range of compensation payments, shares of mining royalties, land transfers and other benefits in relation to Aboriginal land. A right to compensation arising from NSW government extinguishment is specifically provided for in s 22L of the NTA. State governments have also made specific agreements to settle traditional owner claims, outside a native

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96 NNTT, *Registered ILUA summary-Owen Springs Transmission Line ILUA* <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/NT-Registered_ILUA_Owen_Springs_Transmission_Line_ILUA-DI2008_001.aspx>.

97 NNTT, above n 32, 13.

98 The NNTT records 72 future act agreements concluded in 2009–2010, above n 32, 43.

title framework.[99] More recently, settlement frameworks have been developed by the States of South Australia and Victoria. Although sometimes referred to as 'non-native title' agreements, the agreements made in these processes aim to provide compensation for loss of native title and the establishment of a comprehensive land management process across the state in future. In Western Australia, the State has begun work to establish a state-wide post-determination land management framework.[100]

The South Australian Settlement process focuses on two alternative paths to litigation under the NTA — use of the ILUA process or through consent determinations.[101] A continued right to practise traditional laws and customs on the land is recognised and there is a continuing right to compensation from the Crown against acquisition of land or water rights. A South Australian Native Title Resolution process operates in parallel to the ILUA process, bringing together the Congress of Native Title Management Committees, the South Australian Native Title Services, the SA Farmers Federation, the SA Chambers of Mines and Energy, Wildcatch Fisheries SA, the Local Government Association and the South Australian Government. That process can result in a court determination, a consent determination, or an agreement not to pursue. Consent determinations, following negotiations and compulsory mediation, take legal effect when confirmed by the Federal Court. Claimants must provide evidence as to a continued connection to the land under the requirements of the NTA for consent determinations, but this is significantly cheaper and simpler than preparation for a full trial. Compensation is determined either under a consent determination or an ILUA. The Resolution process does not specify particular heads of compensation.

Under the new Victorian Government Settlement Framework in the *Traditional Owner Settlement Act 2010* (Vic), the Victorian Native Title Unit is supposed to conduct agreement-making and respond to relevant applications for determinations of native title in the court system.[102] Both of these pathways are open to applicants, and failure in one avenue does not necessitate failure in the other (for example, the YortaYorta people came to an agreement under the Settlement Framework with the Victoria Government, despite failing to establish native title in their appeal to the High Court). The Settlement Framework seeks to pre-empt court decisions by conducting direct negotiations with traditional owner groups. Agreements under the Victorian Framework generally include a declaration that the group will cease native title applications in relation to the agreed land and promises not to commence any such action in the future. The Land Use Activity Regime accounts for future acts such as

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99 An example is the *Maralinga Tjarutja Land Rights Act 1984* (SA) under which the South Australian government transferred inalienable freehold title of lands to the Maralinga Tjarutja peoples: Strelein, above n 28.

100 NNTT, above n 32, 5.

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

102 Department of Justice (Vic), *Native Title* (24 December 2010) <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/>.

mining and large-impact land-use, providing for community benefits targeted to assist economic, social and cultural development goals.

#### *4 'Ancillary' and 'other' agreements*

In many situations, an ILUA or future act agreement, or an agreement under a State settlement regime, may be signed together with one or more so-called 'ancillary' agreements such as a long term management agreement (as is the case for the Argyle Diamond ILUA). These 'ancillary' agreements were particularly common prior to the establishment of the ILUA process.[103] It is frequently the 'ancillary' agreement that contains the real economic deal and that may generate payments and other benefits that are significant to the economic development of traditional owners. These 'ancillary' agreements remain common in relation to future act agreements, and in some states, in particular Western Australia, and they will generally need to be recognised as part of the native title agreement process in the income tax law.[104] Both the WCCCA and the Argyle Diamond Agreement replace the 'future act' negotiating rules with a privately agreed process of consultation and negotiation in relation to future mining or other activity by the relevant parties on the subject land. These future agreements by existing ILUA participants are not publicly registered or disclosed. The *Traditional Owner Settlement Act 2010* (Vic) allows for a range of supplementary agreements. Another, massive agreement has just been announced by the Kimberley Land Council, Woodside and the Western Australian State government regarding the Browse basin Liquified Natural Gas precinct.[105] This agreement has not been done as an ILUA, and will be implemented by a State Act.

### B Design of a legislative tax exemption

The best approach in legislating the exemption is likely to be to categorise all payments or benefits under eligible native title agreements using the concept of 'non-assessable, non-exempt income' that exists in the income tax statute.[106] Essentially, amounts treated as non-assessable non-exempt income sit entirely outside the income tax law.

A useful precedent for design of a legislative exemption from CGT is the exemption rule for compensation payments in s 118-37 of the ITAA 1997, which disregards any capital gain relating directly to compensation or damages for any wrong, injury or illness suffered in an occupation or personally (s 118-37(1)(a) and (b)). A range of other payments under various statutory schemes, have also been legislated as exempt under this provision, including industry exit grants in relation to sugar and tobacco industries and, formerly, re-establishment grants under a farm household support scheme (ss 118–37(1)(d), (f) and (g)). Anything of economic value provided by a State or Territory government department or public agency in relation to the National Rental Affordability Scheme is exempt under s 118–37(1)(j). The exemption would need to be drafted so as to ensure that payments under eligible agreements would not be taxed as ordinary income, for example from a business, as rents or royalties, or as

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103 Smith, above n 20, 25.

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

105 See Government of Western Australia, *Browse LNG Precinct: Native Title Agreements* (10 August 2011) <http://www.dsd.wa.gov.au/8416.aspx#8424>.

106 ITAA 1997 s 6–23.

profits from a profit-making venture. Analogies are found in the existing law, where certain gains on venture capital investment are exempt both from CGT under Subdiv 118–F of the ITAA 1997 and from taxation as ordinary profit under Div 51 of ITAA 1997. Another potential model is the exemption for personal injury structured settlement annuities in Div 54 of the ITAA 1997.

As already explained, it is crucial that the legislative tax exemption support the native title agreement-making process. It is not recommended that a legislative rule simply provide for the exemption of native title 'compensation' or types of payment. This would generate legal and compliance complexity as advisers and the ATO attempt to characterise the bundle of payments under an agreement. The exemption should apply to payments arising under all types of agreements that are a result of a negotiating process under the NTA or under the other specified settlement frameworks or laws that are set out above. The Treasury Paper suggestion that an exemption could be tied to 'any agreement recognised or authorised under the NTA'[107] may be wide enough to achieve this goal, however this may not be adequate to capture all State settlement frameworks or 'ancillary' agreements. One approach could be for the legislation to refer to the specific types of agreements discussed above, possibly by reference to the relevant provision or Part of the NTA under which the agreement is negotiated, registered or otherwise authorised. Alternatively, instead of incorporating such a list into the income tax law, the general principle of exemption for native title agreements could be stated and reference made to regulations under which the relevant provisions and types of negotiation or agreement could be listed. This may make the regime more responsive to changes in the native title environment.

A legislative exemption should apply to money, property or other benefits received. For example, leasehold or freehold land may be received, as in both the WCCCA and the Argyle Diamond ILUA. Commitments to establish jobs, education and training, as well as for general recognition and respect of traditional owners and cultural heritage, are unlikely to be treated as taxable, however, a general exemption of all benefits would avoid any uncertainty in this regard.

The legislative exemption should be 'up front' and clear at the commencement of native title negotiations. The Treasury Paper suggests that one option could be 'to allow an independent decision maker (such as the Commissioner of Taxation or the NNTT) to declare that an agreement is a native title agreement to which the income tax exemption extends'.[108] A difficulty with this proposal is that there would not be certainty as to the tax treatment of the native title agreement until after it was made. In the case of ILUAs, although registration occurs only at the end once an agreement is finalised, all parties would know from the beginning of negotiations that if the agreement is registered as an ILUA, payments and benefits under it will be exempt.

As discussed above, most 'future act' negotiations are finalised privately and their content is not disclosed. This may make it more difficult to administer the tax exemption; nonetheless, it is appropriate to apply the general principle of tax exemption to benefits provided under future act agreements, as they clearly relate to acts that will affect native title in the future and the same framework is therefore appropriate. For consistency and clarity, it should be made clear from the outset to all participants that a consent agreement, even completed privately, under a future act

107 Commonwealth of Australia, Treasury, above n 4, 8.
108 Ibid 9.

process is tax exempt. An issue in this regard is that for a native title claim group to establish that they qualify for the exemption, it may be necessary for them to disclose the existence and terms of the future act agreement to the Commissioner of Taxation. Many future act agreements are small in value and scope, and the administrative cost of requiring supervision or registration would be high. At least a basic disclosure of the existence of an eligible agreement would seem appropriate, and this could support transparency of agreement-making more broadly. An alternative is to require that benefits under privately negotiated future act agreements are only exempt if paid into an entity that is tax-exempt entity. This option is discussed in Part VI below. If a native title claim group already has a tax-exempt PBC or charitable trust which carries out the future act negotiation and receives any payments, this may not be a problem. However, not all traditional owners are in this position. It would be unfair to require additional administrative steps to be taken for small future act negotiations in this case.

The Treasury Paper considers whether there should be any restrictions on the use of tax-exempt native title payments. I suggest that there should be no limit on the use of a tax-exempt native title payment. It is a matter for the native title claim group who is in negotiation with the government or private party to determine the best short and long term use of native title payments.[109] For example, it should not be expected that such payments be utilised for infrastructure funding or services in a remote community where such facilities and services should be provided by government. The communal nature of the underlying asset and the requirements of the NTA in relation to consultation on native title decisions and authorisation of ILUAs, as well as other protections under corporations and trust laws provide sufficient safeguards for members and beneficiaries.

FaHCSIA and the Attorney-General's Department have concurrently with the tax reform process, been consulting on governance reforms aimed at generating 'leading practice' native title agreements. One proposal put forward in that reform process is that 'any new tax treatment should be conditional on adopting the governance measures and leading practice principles' that the government suggests are important.[110] Governance and transparency in native title agreement-making certainly need to be enhanced. However, a requirement for the tax exemption to be conditional on outcomes at the end of agreement-making is not appropriate. Such a restriction at the end of the process would work against providing certainty and fairness upfront in native title negotiations. It would also potentially undermine indigenous autonomy and decision-making about agreements and benefits.

A payment under an exempt native title agreement or other form of compensation received by an individual should not be taxable (just as, under current law, a payment in compensation for injury to that individual is not taxable under s 118–37 of ITAA 1997). Importantly, however, where the individual is in receipt of government benefits, a payment received by that individual, either directly or from a trust, may affect his or her eligibility and the amount of benefits, through the application of income or assets tests under the *Social Security Act 1991* (Cth). This issue will need to be addressed by policy-makers.

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109 Not all stakeholders who participate in native title agreements concur with this view: eg, see BHP Billiton, above n 86.

110 Commonwealth of Australia, Department of Families, Housing, Community Services and Indigenous Affairs, above n 42, 7.

A tax-exempt payment may be invested or dealt with to generate further income or gains. For example, the Argyle ILUA provides for some amounts to be paid into a discretionary trust. The trustee may invest those amounts to derive income in the trust which also accrues to the beneficiaries. Land subject to freehold or leasehold title may be received in a settlement, and this could then be sold or rented out.[111] Any income or gains generated as a result of an investment or dealing in such payments or assets would be taxable in the usual way to the individual or entity. The only exception would be if the invested capital or asset is owned by a tax-exempt entity. For example, under the WCCCA charitable trust, a Western Cape Centre Property Trust operates as an investment arm and its function is to quarantine real estate and property investments under a discrete entity.[112] It is only if this operates to invest amounts of the charitable trust that income and gains would be tax-exempt.

However, there may be some kinds of payments which should be specifically carved out from the basic exemption provision. One example is the payment of salary or wages. The Argyle ILUA and the WCCCA both provide for employment and business opportunities to be created for traditional owners and other indigenous people in the region. The employment opportunity itself should be an exempt benefit (and likely would not be taxable in any event under current law). However, salary paid to employees is clearly separate from the native title agreement itself and should be taxable in the ordinary way. Similarly, payments under a personal contract for provision of goods or services supplied by a business or services of a traditional owner should be taxable.[113] This raises an issue about payments to individuals that may require further analysis. If payments to individuals under native title agreements are tax-exempt, this may provide an incentive for parties to draft agreements that make 'compensatory' payments to individuals instead of providing meaningful employment or business opportunities. This could have the negative effect of exacerbating dependence on the mining company, rather than enhancing active engagement in the 'real economy'.

## VI A TAX-EXEMPT INDIGENOUS COMMUNITY FUND

This Part addresses option (2) in the Treasury Paper, which proposes the establishment of a tax-exempt Indigenous Community Fund that could receive native title payments and other forms of income or gain, free of income tax, to be utilised for the benefit of an indigenous community.[114] The Treasury notes that this second option could be either

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111 As in both the WCCCA and the Argyle Diamond Agreement. Further examples are Mt John Valley ILUA, NNTT Number: DI2009/002, registered 6 May 2009 and Broome ILUA: Yawuru Prescribed Body Corporate ILUA, NNTT Number: WI2020/003, registered 24 May 2010 and Yawuru Area Agreement ILUA, NNTT Number: WI2010/004, registered 6 August 2010.

112 Western Cape Communities Trust and Western Cape Communities Co-ordinating Committee, *Strategic Plan 2009–2012* (2009) 5 <http://www.westerncape.com.au/> 5.

113 Remuneration for services is prima facie taxable. A receipt may not be taxable where it is derived in respect of performance of a duty as traditional owner in relation to land: for example, an occasional cultural heritage survey may be characterised as private in nature, part of 'looking after country'. A statement would need to be provided to the mining company in accordance with the Pay-As-You-Go withholding rules in this situation; see Argyle Diamond Agreement, above n 1, cl 19.

114 Commonwealth of Australia, Treasury, above n 4, 10.

an alternative to the first option of an exemption for native title payments, or could be complementary and in addition to the first option.

The proposal for a tax-exempt Indigenous Community Fund is both broader and narrower than the proposal for a tax exemption for native title agreements. The proposal is broader, as it would ensure an exemption from tax for income and gains derived in the Fund, even if these were not connected to native title agreements. It is also broader, as it may be available to indigenous people and communities who do not have native title rights or interests. The proposal is narrower, as it would require the use and application of those tax-exempt funds for particular, eligible purposes and under a specific governance and regulatory process.

Option (2) has been developed as a response to dissatisfaction with the current practice in which, to avoid the uncertainty relating to tax treatment of native title payments, many traditional owners and private stakeholders have negotiated for native title payments to be made into tax-exempt charitable trusts, or PBCs that qualify as charitable institutions. For example, this is done in respect of both the Argyle ILUA and the WCCCA. In the WCCCA, all financial contributions from Comalco and the government are directed to a charitable trust (the Western Cape Community Trust) so that the issue of whether the payments under the WCCCA would be taxable income did not arise. The charitable trust structure both ensures tax-exempt status and provides strict governance rules for investment and use of funds for eligible purposes of public benefit established under the trust deed. Anecdotally, it is understood that some large private stakeholders, including resource companies, require the use of a charitable trust in their negotiations with traditional owners. However, while charitable trusts appear to have facilitated native title agreement-making, there has been considerable criticism of the various limits, complexities and governance rules associated with charitable trusts that may not fit well with indigenous community and governmental economic development goals.

Option (2) is also a response to the call by indigenous leaders in the last few years for assistance from the government, as a part of economic development strategies, to establish a fund or entity to help increase capacity of communities over the long term as well as for the immediate relief of poverty, with a suitable governance structure and tax-exempt status.

The existing exemption for qualifying charities from taxation can be seen as a government subsidy, or a form of indirect government expenditure in respect of the eligible charitable purpose.[115] Structurally, the tax exemption depends on the status and eligible purpose of the entity, rather than on the source of the income or gain. The government subsidy, delivered through the tax system, may be analysed as a 'tax expenditure' which is a departure from the comprehensive income benchmark

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115 A detailed examination of the charitable tax exemption is being conducted by the Melbourne Law School Not for Profits research project; see <http://tax.law.unimelb.edu.au/go/research-and-resources/current-research-projects/index.cfm>. There is a significant analysis in US sources about the principle and policy of the charitable exemption, see, eg, Edward H Rabin, 'Charitable Trusts and Charitable Deductions' (1966) 41 *New York University Law Review* 912; R Musgrave, 'In Defense of an Income Concept' (1967) 81 *Harvard Law Review* 44; L M Stone, 'Federal Tax Support of Charities and Other Exempt Organisations: The Need for a National Policy' (1968) 20 *University of Southern California School of Law Tax Institute* 27.

discussed above in Part IV.[116] The regulatory and tax treatment of charitable organisations is in a state of flux at present. There are government proposals to tax unrelated business income of charities, to reform regulation and governance and to tighten up the statutory definition of not for profit organisations.[117]

To the extent that option (2) would create an exemption for an entity that would be receiving non-taxable native title payments, it simply operates to implement a particular governance structure for these exempt payments. However, to the extent option (2) has a broader scope, potentially exempting other forms of income or gains that are received by the Indigenous Community Fund, it may be characterised as a tax expenditure being a form of indirect government spending through the tax system, justified on policy grounds because of the social and economic public benefit achieved. As discussed in Part IV, native title payments may be characterised as 'social income' with a public character. Arguably, such payments should be dealt with through a process and entity established for the *collective benefit* of native title holders, the native title group as a whole, or, possibly, for multiple groups of traditional owners or indigenous peoples, by agreement, in a region. It has been suggested by some stakeholders, and it is implicit in some aspects of government policy in this arena, that an exemption from income tax for benefits or payments under native title agreements should only be provided where a particular governance structure is established, so as to ensure that the payments are put to collective benefit.[118]

The remainder of this part considers the reasons for dissatisfaction with the charitable trust structure in achieving the broad goals of a proposed Indigenous Community Fund, and a number of particular issues that would need to be considered — and subject to further consultation — if this proposal were to proceed.

### A Problems with charitable trusts

As discussed by a number of commentators, including the Minerals Council of Australia and various native title representative bodies, charitable trusts are 'not a neat fit' for all goals of traditional owners or other stakeholders in agreement-making.[119] Furthermore, the current reform processes in relation to charitable trusts is generating some uncertainty in how the law will apply to aspects of indigenous charitable trusts. Problems in the use of charitable trusts arise from inherent limitations in the common law and statutory definitions of charity and the administrative approach, or perceived approach, of the Commissioner of Taxation to endorsement of entities as tax-exempt.

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116 Australian Government *Tax Expenditures Statement 2010* lists the charitable exemption but does not estimate a revenue cost of this exemption as a result of a lack of good data about the size of the sector; see Commonwealth of Australia, Treasury, *Tax Expenditures Statement 2010*, above n 82.

117 Commonwealth of Australia, Treasury, *Better Targeting of Tax Concessions (Consultation Paper)*, (27 May 2011), <http://www.treasury.gov.au/contentitem.asp?ContentID=2056&NavID=035>; Commonwealth of Australia, Treasury, Final Report on the Scoping Study for a National Not for Profit Regulator, (4 July 2011) <http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=2054>.

118 See, eg, BHP Billiton, above n 86.

119 MCA et al, above n 3; Strelein, above n 3, 25; Levin, above n 3, 6; Lisa Strelein and Tran Tran, 'Taxation, trusts and the distribution of benefits under native title agreements' (Native Title Research Report No 1/2007, 2007) 9–10.

Eligible charitable purposes date back to the Statute of Elizabeth of 1601 (*Charitable Uses Act*), as interpreted in *Commissioners for Special Purposes of Income Tax v Pemsel*,[120] and are essentially: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community (which has come to be known as purposes of 'public benefit').[121] It is clear that PBCs that hold native title may be eligible for charitable status, and that indigenous communities may establish charitable trusts for the purpose of poverty relief and other community benefits.[122] However, there is concern that eligible charitable purposes are too narrow and prevent traditional owners from carrying out substantial community and economic development goals. In particular, there has been uncertainty about whether business or commercial activity is allowed to be conducted in a charitable entity, where it is not merely incidental to a main, charitable purpose. The recent High Court decision in *Commissioner of Taxation v Word Investments Ltd*[123] indicates that a charity may conduct a business for profit, as long as the profits are used for the eligible charitable purposes of the entity. However, a charity could not adopt a purpose of commercial or business development as one of its core purposes, even where this is to enable the native title community to benefit from economic development so as to become sustainable in the longer term. A government proposal to tax unrelated business income of charities is currently under consultation.[124]

Second, there is concern about the scope of the definition of 'public' or 'public benefit' required to be a charitable trust. There are two aspects to this. There may be a problem with benefiting native title holders related by blood (by virtue of defining the group by their ancestors) or small groups of native title claimants. For example, the Argyle Diamond Agreement provides for a portion of benefits to be paid to seven specific family groups; this is done in a discretionary trust structure, not a charitable trust. The issue is whether a PBC, holding title for native title claimants, benefits a sufficiently broad class to qualify as a section of the 'public'.[125] In New Zealand, an amendment has been made to the tax exemption relating to charities, which essentially ensure that funds for the benefit of Maori clans are not excluded from eligibility

120 [1891] AC 531.

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

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

123 (2008) 236 CLR 204.

124 Commonwealth of Australia, Treasury, above n 117.

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

because they benefit people related by blood.[126] There is also concern about a conflict between broader community purposes or 'public benefit' and the specific obligations of native title holders in law and culture.

Third, there is concern about whether charitable trusts are able to accumulate funds for the long term.[127] This concern arises because of the general law requirement that funds of a charity must be used for its defined charitable purposes. There has been some anxiety about the ability to accumulate funds beyond 10 years; however, there is no such rule in the law, and where there is a clear purpose in the fund to accumulate for the long term sustained benefit of a community, as in the Argyle Diamond trust, this may be acceptable.

Finally, there are concerns among indigenous communities and in government about the substantial governance and administration requirements for charitable trusts. Trusts with significant funds, such as the WCCCA and Argyle Diamond trusts, have less of a problem in this regard than smaller PBCs: although governance needs are concomitantly greater, expertise can be bought in. For example, the WCCCA Trust has a Board of Directors that consists of 3 directors from each sub regional trust (elected from traditional owner groups), one director from each of the regional shire councils, one independent director to be elected and one invitee from each of the State, CYLC and Comalco.[128] The trustees have stipulated that 60 percent of the annual funding for the Trust is placed in long term secure investments to provide a sustainable economic base for all of its beneficiaries and future generations. The balance of the funds is for current expenditure under caveats for specific purposes to be distributed amongst the regional sub trusts.[129] A coordinating committee made up of all parties meets regularly and consults with traditional owners on issues such as land management, regeneration plans and environmental applications.[130]

A review of the WCCCA published in 2006 showed that while progress had been made in employment and training, cultural heritage protection and the initial establishment of governance and administration systems, areas in need of improvement included weaknesses in the ongoing governance and administrative capacity of the WCCCA trusts, and indigenous participation which was not keeping pace with economic opportunities.[131] Smaller charitable trusts struggle with governance and investment requirements. In all contexts, there is a significant need for capacity building among traditional owners. The governance needs of any organisation that holds, invests and distributes funds for the benefit of a community will be significant, and governance must be robust, both in terms of traditional owner participation, consultation and decision-making and for the usual prudential and ethical reasons.

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

127 Strelein, above n 3, 26, suggests that native title prescribed bodies corporate have sometimes been wound up due to failure to 'get the money out on the ground'.

128 Crooke et al, above n 58, 100.

129 Ibid.

130 Harvey, above n 89, 243.

131 Crooke et al, above n 58, 105–6.

### B Legislative design of a tax-exempt Fund

A reform that establishes a specific exemption for an Indigenous Community Fund could provide clarity for the long term governance of income and assets from native title agreement-making, for benefit of the indigenous community. I argue that such a reform should complement the basic exemption of payments made under native title agreements from tax, discussed in Part V. However, substantial community consultation is required to achieve the most suitable outcome and the suggestions below are necessarily preliminary in nature. It is a matter of fundamental importance that indigenous communities are able to decide on the governance and institutional form for the investment and expenditure of the 'social income' of native title payments.

An Indigenous Community Fund may have key objectives of addressing economic and social disadvantage through direct provision of community services and payments to individuals, contributing to 'closing the gap'; allowing for provision of assistance for long term well-being of individuals, for example including tax exempt contributions towards individual superannuation; and accumulation for future generations. Accumulation limits may need to be set: these might include maximums and minimums, and the accumulation requirement might not apply where the annual revenue stream is below a certain amount. The MCA has suggested accumulation of 50 percent of benefits for life of mine, or else a dollar amount, such as $500 000 per annum.[132] Finally, a Fund might be able to support ongoing administration costs for PBCs, as these are the key corporate entities that must manage the native title rights and system indefinitely in the future.

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

In its list of potential activities or uses of the Fund, the Treasury Paper misses the important purpose of ensuring economic development of communities. The development of indigenous business and entrepreneurship and the establishment of financial security and independence is acknowledged as central in the government's Indigenous Economic Development Strategy, and is of great importance to indigenous communities.

For example, an Indigenous Community Fund should have the ability to invest some of its capital in economically beneficial activities and businesses including indigenous businesses and business activity in indigenous communities. For example, the Fund could decide to invest in a separate proprietary limited company which would carry on a business, or to use a portion of funds for business loans or subsidies and for business reinvestment. The Fund could prioritise indigenous business ventures in conjunction with other mechanisms such as Indigenous Business Australia and the Indigenous Land Corporation. These kinds of investments may not normally be

132 MCA et al, above n 3.

allowed under the rules for trustees to invest prudently in respect of a charitable trust. The proportion of capital that may be permitted to be used in this way should be capped because of the risk involved in commercial enterprises. The Fund should also be eligible to receive profits from businesses (whether held directly or by investment in a taxable company) which would, if used for eligible purposes of the Fund, be tax-exempt, as is the case for all charities since *Word Investments* (and will remain the case under the government's proposed reforms in relation to business income of charities).

An Indigenous Community Fund should be an optional alternative to other entity structures including a charitable trust. A place remains for charitable trusts for particular purposes for indigenous communities and individuals, such as educational scholarships, as for any other Australian citizen or group. However, if a Fund were to be established with the above purposes, a charitable trust would not be necessary, as it could be empowered to invest for and provide such scholarships.

### *1 A new category of exempt entity*

A reform to establish a tax-exempt Indigenous Community Fund could be carried out by inserting a new, separate category of exempt entity in Division 50 of ITAA 1997. Potential models for the exemption include the current rules under which a municipal corporation is exempt under s 50–20 of ITAA 1997, or a society or association for the purposes of promoting the development of agricultural or industrial resources in Australia is exempt under s 50–40 of ITAA 1997. Endorsement may be required by the Commissioner of Taxation or registration could be carried out by another government body. An existing model requiring separate cross-departmental registration is that adopted for deductible gift status for environmental organisations (s 30–55 and Subdiv 30–E of ITAA 1997), which must be included on a register maintained by the Environment Secretary, under the federal Environment Minister. Various conditions are set out in Subdiv 30–E, including a definition of principal purpose; of a public fund; no payment of profits to members; various conditions if the entity is a body corporate or a co-operative society; and reference to additional rules made by the Environment Minister or Treasurer.

The Treasury Paper suggests that Funds of various scales could be established, ranging from a small local group to a regional Fund covering a number of groups (and not limited to native title holders). A Fund established for the purposes of a limited group of beneficiaries would likely delineate that group on the basis of Aboriginal law and custom.[133] A larger scale Fund such as a regional or State based one might be one way of accommodating some pooling of resources to achieve economies of scale and better returns. This would be a matter for each native title group or indigenous community to determine in negotiation and consultation with other groups, State governments and private actors.

### *2 Not for profit*

The Indigenous Community Fund should be 'not for profit' in the sense of being required to use its funds for designated purposes and not for distribution, except in

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133 This would be based on the information provided in evidence led to establish the native title claim in the first place — see *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2)* [2009] FCA 359 — Determination made 30/03/2009, among others. It should not, however, be necessary that a native title claim is established, in order to set up an Indigenous Community Fund.

specific, designated and limited circumstances. This would be consistent with existing treatment of tax-exempt entities.

However, there may be a case for allowing a Fund to make limited cash payments to individuals, for example elders in a community, without putting at risk its tax exemption. Such payments can provide recognition of individual native title claimants' interests and contribute to ownership of the process because they enable individuals to benefit immediately, in a small and visible way, from the native title agreement. Up to a designated limit, such payments could be legislated to be exempt in the recipient hands and not income for the purposes of social security payments. Payments in excess of that limit may be not allowed or may be taxable. A further justification for this exemption could be that many recipients will be below the threshold for payment of income tax in any event.[134]

The ability to make such payments to individuals could extend to distribution of payments where they are compensation for individual loss of particular native title rights. For example, in the Torres Strait where individual interests in land are well defined, compensation is often paid to the individual land owner. If this was done directly, the legislated tax exemption for payments under native title agreements, recommended above, should apply. If such payments were made indirectly, by distribution from a Fund, it would be consistent for the exemption to apply in that case also. However, this may generate undue complexity for Fund managers in the regime, potentially requiring tracing of native title compensation payments over time. If distributions to individuals were to be allowed, a general rule with a cash dollar maximum per year would be simpler to administer.

### *3 Legal form and governance*

Governance rules for an Indigenous Community Fund should be designed to ensure strong prudential regulation and investment expertise combined with indigenous community leadership and consultation. The legal and governance issues for a Fund should be the subject of further detailed consultation in their formulation.

The Treasury Paper suggests that a particular legal form, such as incorporation as a corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (a 'CATSI' corporation), could be required for the Fund. However, it is not necessary to limit the entity form of a Fund in this way for the purpose of defining the tax exemption. Again, to give the example of environmental organisations regulated under Subdiv 30–E of ITAA 1997, additional conditions apply to organisations that are a body corporate, but there is no specific kind of organisation prescribed.

The decision-making processes of the Fund would need to reflect indigenous law and custom, contributing to effective participation, engagement and legitimacy. Issues about administrative and compliance burden must be balanced with the goal of good governance, especially for smaller Funds. Key requirements could include:

- At least one and no more than half of the directors be experienced in corporate and financial management;

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134 This is particularly the case if the proposed carbon tax compensation reform is carried out, which will raise the tax-free threshold to $18 200 for an individual: *Clean Energy Act 2011* (Cth).

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

A key question is who is the regulator for the Fund? Currently, many indigenous corporations are regulated by the Office of the Registrar of Indigenous Corporations, which regulates CATSI corporations (not all of these corporations are not for profit).[135] The government has recently announced the Australian Charities and Not for Profits Commission, to be established as an independent office under the auspices of the ATO.[136] There are issues as to whether a new tax-exempt Fund should be subsumed into the regulatory framework for not for profits, or whether there are sufficient differences that this issue should be pursued independently. As a key purpose of the Fund is accumulation and saving for the long term benefit of communities, some of the prudential regulation applicable to superannuation funds may also be relevant.

### *4 Transition*

Existing agreements rely on charitable trusts or PBCs that have achieved tax-exempt status as charitable institutions. Transitional rules will be required to enable 'migration' of some or all of the existing assets in these other entities to the Indigenous Community Fund without attracting tax consequences.

Communities may wish to leave some funds in a charitable trust with, for example, a purpose of educational scholarships, but to invest some assets into a community or regional Fund for purposes of long term wealth creation and economic development. It may be desirable to merge a number of separate, small charitable trusts, possibly held for the benefit of a single community, or for the benefit of different communities in a region and arising out of different agreements made over time, into a single Fund for the benefit of all of the communities in the region. This would assist in eliminating some of the governance, fees and compliance cost issues associated with a multitude of small funds.

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

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135 See Office of the Registrar of Indigenous Corporations (Cth) (2011) <www.oric.gov.au>.

136 See Youtube, *ACNC Taskforce* (11 October 2011) <http://www.youtube.com/user/acnctaskforce>.

## VII CONCLUSION

> The native title regime has reached the crossroads where the 'market' and 'non-market' pathways of human social development intersect.[137]

Native title agreement-making brings more indigenous individuals and communities into exchange relations with the wider economy and the state. Tax law may seem remote from native title, but taxation is integral to defining the scope of these property rights, and of the market exchange relationships and obligations between governments, business entities and citizens. This article has considered the tax treatment of native title payments as a matter of income tax law and principle. Some native title payments received by particular groups have been found to be exempt from tax by the Commissioner of Taxation because they are 'compensatory', however this would not apply in all cases. As explained in Part III, this interpretation is not well supported by the terms of the tax law. A more secure basis for the tax treatment of native title payments is needed.

Part IV examined whether as a matter of tax principle, native title payments would be treated as 'income' under the classic tax policy concept of personal net economic gain. It was concluded that there are good arguments that native title payments are not personal income, either because they are compensation for loss or diminution in value of property rights, or for the non-economic aspects of personal rights, or because they are better characterised as 'social income' for collective benefit rather than as personal gain. The analysis revealed that there are conceptual difficulties in applying the tax policy concept of 'income' to native title. Native title simultaneously comprises property and personal rights and responsibilities of individuals and community groups. Native title payments perform both a compensatory and an economic development role to benefit indigenous communities as a whole. Thus, there is a clash between the individualistic, market economy concept of personal income or economic gain, and the collective, inalienable and 'non-economic' features of native title in both traditional and settler law. The analysis also identified that, while a principled conclusion can probably be reached that some native title payments are not 'income', others are likely to be treated as personal economic gain, in particular where native title is not made out, or where agreements have a significant commercial flavour. It is therefore necessary to decide, as a matter of broad public policy, how to treat these kinds of payments under the diverse range of native title agreements.

Native title agreement-making is a key element in the ongoing struggle for a settlement of land, economic justice and development issues in Australia's particular historical context of indigenous dispossession. This article supports a legislative tax exemption for all payments under native title agreements (not just payments that would qualify as 'compensation'), so as to provide certainty and to support traditional owners, business and governmental participants in native title agreement-making. Agreement-making has enabled traditional owners, governments and other stakeholders to move forward under processes set out in the NTA, without having to resolve all of the complexities of native title, or to finally resolve compensation claims through the courts. It is important to resolve the tax treatment of native title so as to provide certainty to participants, through legislative reform that confirms that all such payments sit outside the tax system. The definition or class of native title agreements to

137 Langton, above n 44, 10.

be treated as non-taxable should be broad enough to cover the diversity of agreements and innovative approaches to agreement-making that have been and continue to be developed in the States and territories.

Finally, this article considered the option of a specifically designed tax-exempt Indigenous Community Fund which would provide for the long term governance of native title and other payments for the benefit of indigenous communities. This option is supported in addition to the exemption of native title payments from taxation. The inadequacies of charitable trusts, in particular for long term economic development goals, and the fact that native title is not available for all Australian indigenous people are both good arguments for the enactment of such a tax-exempt Fund. The fundamental goal of such a Fund should be to enable indigenous communities to convert a communal benefit made under a collective agreement into economic and capabilities development and relief of economic disadvantage of indigenous individuals and families. It should be designed by communities in consultation with government, enabling accumulation and good management of funds for future generations as well as to benefit the current generation of indigenous Australians.