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Native Title Tax Reforms: Bull's Eye or Wide of the Mark?

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NATIVE TITLE TAX REFORMS: BULL'S EYE OR WIDE OF THE MARK?

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ABSTRACT

Twenty years on from *Mabo v Queensland (No 2)* (1992) 175 CLR 1, there is change afoot in the tax treatment of native title. On 25 June 2013, the federal Parliament passed reforms which render certain payments to, or for the benefit of, Indigenous persons exempt from income tax. To qualify, the payments must be made under native title agreements for acts affecting native title, or by way of compensation under the *Native Title Act 1993* (Cth). While drafted in simple language, the reforms apply against a complex factual backdrop of native title agreements, trust structures and social policy issues.

This paper argues that the reforms are likely to cause significant implementation difficulties for energy and resources proponents and Indigenous groups. They also raise potential hurdles for the government's objectives of reducing uncertainty in the tax treatment of native title rights and of improving economic and social outcomes for native title groups. The significance of these problems is highlighted by the scale of benefits under native title agreements over land access. The paper therefore questions whether an earlier option raised by the government, an Indigenous Community Fund model, deserves further consideration. It would more directly link tax exemption to outcomes, would improve the certainty of tax treatment and would also better support the intermediary Indigenous benefits management institutions which will play a critical role in achieving those outcomes.

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INTRODUCTION

Twenty years on from *Mabo v Queensland (No 2)*,¹ there is change afoot in the tax treatment of native title payments. On 25 June 2013, the federal Parliament passed the *Tax Laws Amendment (2012 Measures No 6) Act 2013* (Cth) ('*NT Tax Act*') which renders certain payments to, or for the benefit of, Indigenous persons exempt from income tax.² To qualify, the payments must be made under native title agreements for acts affecting native title, or by way of compensation under the *Native Title Act 1993* (Cth) ('*NT Act*'). While drafted in simple language, the reforms apply against a complex factual backdrop of native title agreements, trust structures and social policy issues.³ The agreements include land access agreements which seek to secure land access and a long term social licence to operate for many key Australian resources projects.⁴

This paper argues that, while an improvement on an earlier Exposure Draft Bill,⁵ the reforms are likely to cause significant implementation difficulties for energy and resources proponents and Indigenous groups. They also raise potential hurdles for the government's objectives of reducing uncertainty in the tax treatment of native title rights and of improving economic and social outcomes for native title groups. The significance of these problems is highlighted by the scale of benefits under land access agreements, likely to be in the hundreds of millions of dollars per year in Western Australia alone.⁶ Moreover, the difficulties are exacerbated by the likelihood that the majority of native title agreements for the current commodities cycle are already in place.

The paper therefore questions whether an earlier option raised by the government deserves further consideration. That option is an Indigenous Community Fund ('Fund') model.⁷ It would more directly link tax exemption to outcomes and improve the certainty of tax treatment for payments received by the Fund. The Fund model would also better support the intermediary Indigenous benefits management institutions which will play a critical role in achieving those outcomes.

The content of the reforms is outlined in Part 1. In addition, this Part also sets out the relevant context, by identifying the reasons for the introduction of the reforms, along with their capacity to effect change given the phase of commodities investment in Australia. It asks, in particular, whether the majority of land access agreements for the current commodities cycle might already have been entered into.

Part 2 explores the consequences of the reforms for energy and resources proponents and Indigenous groups. Part 2.1 suggests that certainty may actually be reduced for all parties, as apportionment between tax exempt payments and payments subject to the normal tax rules is likely to be required under existing and future land

¹ (1992) 175 CLR 1.

² *NT Tax Act* sch 1.

³ See, eg, The Treasury (Cth), 'Native Title, Indigenous Economic Development and Tax' (Consultation Paper, October 2010) 2, 5 ('*2010 Consultation Paper*').

⁴ For further detail on land access agreements, see below Parts 1.2.2 and 2.1.1.

⁵ Exposure Draft Tax Laws Amendment (Tax Treatment of Native Title Benefits) Bill 2012 (Cth) ('*Exposure Draft Bill*').

⁶ See below Part 1.2.2.

⁷ See below Part 3.

access agreements. Allocating payments between acts affecting native title and payments made for other purposes is likely to be a difficult task, which may be rendered even harder in some cases by uncertainty about whether native title exists. Further, the reforms provide an incentive to renegotiate existing agreements to address the apportionment issue.

Initially, renegotiation was also favoured to mitigate the risk that the concessional treatment would not apply to amounts received and distributed by the trustee of a charitable trust. However, since this article was originally written, the government has introduced and the Parliament has passed a further Act which seeks to remedy this concern by amending the definition of 'Indigenous holding entity', introduced by the *NT Tax Act*, to include charitable trusts.⁸ The impact of the additional reforms is therefore considered at the end of Part 2.1.

Part 2.2 questions how reforms focused on the causes and recipients of payments will achieve the government's objective of improving economic and social outcomes. It is suggested that a greater emphasis is required on the institutions which will manage the benefits and implement activities in pursuit of the desired outcomes.

Finally, Part 3 identifies the Fund model which was raised by the government at an earlier stage of consultation and notes the lack of any public reasons for its rejection. This Part then examines the model, suggesting that it deserves further analysis as a potential method to improve certainty and to focus on outcomes and the management of native title benefits.

1 REFORMS IN CONTEXT

On 6 June 2012, 20 years after *Mabo v Queensland (No 2)*,⁹ the federal Attorney-General announced a package of native title reforms, which include significant tax changes for native title holders.¹⁰ The nature of these reforms is outlined in Part 1.1 below. Part 1.2 then seeks to enunciate the context of the changes, by identifying the reasons for their introduction and the land access agreements to which they relate.

1.1 The reforms

Following the release of the Exposure Draft Bill in July, the detailed reforms were tabled in Parliament on 29 November 2012 in the form of the *NT Tax Act*, which is based on, but contains key changes from, the Exposure Draft Bill. The *NT Tax Act* was passed by the federal Parliament on 25 June 2013.¹¹ The *NT Tax Act* will render as non-assessable non-exempt ('NANE') income, benefits to the extent they:¹²

⁸ *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth) sch 11 pt 2.

⁹ (1992) 175 CLR 1.

¹⁰ Nicola Roxon, Attorney-General and Minister for Emergency Management and Jenny Macklin, Minister for Families, Communities and Indigenous Affairs and Minister for Disability Reform, 'The Future of Native Title' (Media Release, 6 June 2012).

¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2013, 2387; Commonwealth, *Parliamentary Debates*, Senate, 25 June 2013, 67.

¹² *NT Tax Act* sch 1 item 3 (proposed *Income Tax Assessment Act 1997* (Cth) (*ITAA97*) ss 59–50(1), 59–50(5), 59–50(6)).

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- are provided to or for the benefit of Indigenous persons, or Indigenous holding entities (broadly, a range of incorporated bodies or trusts, the majority of whose members comprise, or that are for the benefit of, Indigenous persons); and
 - arise under certain native title agreements to the extent that the benefit relates to an act that would extinguish native title or otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title; or are compensation under the *NT Act*.

These benefits are referred to as 'native title benefits'.¹³ Benefits which are remuneration, payments for goods or services or for the purpose of meeting the provider's administrative costs do not qualify.¹⁴ Treating a native title benefit as NANE income means that the amount is not included in assessable income and so income tax (which incorporates capital gains tax ('CGT')) would not be imposed.¹⁵

Certain derivative benefits are also treated as NANE income. That is, amounts or benefits 'aris[ing] directly or indirectly' from a native title benefit (unless they amount to remuneration, payments for goods or services or administrative costs).¹⁶ Although broadly drafted, the provision appears aimed at on-payments by certain entities called 'Indigenous holding entities' to or for the benefit of Indigenous persons or to another Indigenous holding entity (arising directly); and the further on-payment by that Indigenous holding entity, ultimately to Indigenous persons (arising indirectly).¹⁷ However, NANE treatment is not stretched so far as to cover investment returns on invested native title benefits before final distribution to Indigenous persons.¹⁸

The figure below demonstrates the operation of the chief reforms:

Figure 1: Native Title Tax NANE Reforms

¹³ Ibid sch 1 item 3 (proposed *ITAA97* s 59-50(5)).

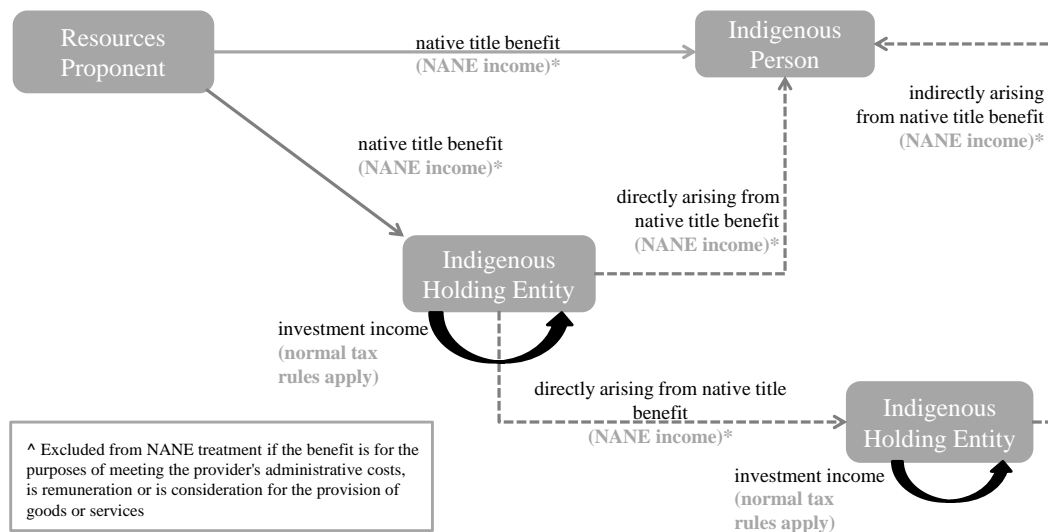
¹⁴ Ibid sch 1 item 3 (proposed *ITAA97* s 59-50(3)).

¹⁵ *ITAA97* s 6-15(3). Income tax law provides for two chief categories of non-assessable income: exempt income and NANE income: *ITAA97* ss 6-15(2), 6-15(3). Key differences include that exempt income may reduce carry forward tax losses or may be counted for the purposes of calculating the tax rates on a taxpayer's assessable income. See, eg, RH Woellner et al, *Australian Taxation Law* (22nd ed, CCH Australia, 2011) 499.

¹⁶ *NT Tax Act* sch 1 item 3 (proposed ss 59-50(2), 59-50(3), 59-50(4) *ITAA97*).

¹⁷ Explanatory Memorandum, Tax Laws Amendment (2012 Measures No 6) Bill 2012 (Cth) 14 [1.20] ('*Explanatory Memorandum*').

¹⁸ *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59-50(4)(b)).



The *NT Tax Act* also contains an additional CGT exemption, not included in the Exposure Draft Bill. The CGT exemption disregards capital gains or losses in respect of native title or rights to be provided with a native title benefit, where a taxpayer transfers them to an Indigenous person or Indigenous holding entity; creates a trust over them in the form of an Indigenous holding entity; or the taxpayer's ownership of those rights ends.¹⁹ The exemption is aimed at situations where a determination of native title includes a determination that an Indigenous holding entity, such as a prescribed body corporate, holds native title on trust for the relevant native title group.²⁰ In addition, a number of consequential changes are included. In particular, the consequential changes clarify that the mining withholding tax provisions under div 11C of the *Income Tax Assessment Act 1936* (Cth) (*ITAA36*) do not apply to native title benefits, so that NANE treatment will apply instead.²¹

The amendments are retrospective, applying to native title benefits provided from 1 July 2008²² so as to permit Indigenous persons and Indigenous holding entities to seek amended assessments over this period. Indeed, the time limits on amended assessments are to be suspended for two years from commencement of the *NT Tax Act* to permit taxpayers access to the full period.²³ Further, there is no 'grandfathering' of existing arrangements for payments under existing agreements. Accordingly, the changes potentially apply to past and future payments under current land access agreements.

¹⁹ Ibid sch 1 item 3 (proposed s 118-77 *ITAA97*).

²⁰ Explanatory Memorandum 19 [1.33].

²¹ *NT Tax Act* sch 1 item 1.

²² Ibid sch 1 item 9.

²³ Ibid cl 4. Taxpayers, particularly individuals, might otherwise be out of time in respect of some years: *ITAA36* s 170.

It is the author's experience that mining proponents typically obtain land access by payment under agreement (in lieu of compensation) rather than being required to pay compensation under div 5 of the *NT Act*.²⁴ Hence the range of agreements covered, along with the scope of acts which would extinguish or be inconsistent with native title, are likely key to the range of benefits which will be treated concessionally as native title benefits. Accordingly, these concepts are explored in greater detail in Parts 1.1.1 and 1.1.2 below.

1.1.1 Acts which would extinguish or be inconsistent with native title

The *NT Tax Act* differs from the Exposure Draft Bill by referring to 'an act that would extinguish native title or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title' rather than 'an act affecting native title'. The Exposure Draft Bill terminology was based on the *NT Act*, which defines the terms 'act' and 'affects', such that a certain act affects native title 'if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise'.²⁵ Accordingly, it is evident that the acts covered by the *NT Tax Act* are intended to correspond to the range of acts contemplated by the *NT Act*. Under land access agreements, this would potentially cover the grant or renewal of most mining or production tenements and associated infrastructure tenure, as well as exploration licences.²⁶ Such acts would often affect at least some components of the relevant bundle of native title rights and interests, unless the native title rights and interests have previously been extinguished.

However, cases such as *Lardil Peoples v Queensland* indicate that an act will not be treated as affecting native title until such time as the existence of native title rights and interests has been determined.²⁷ This can be a very lengthy period indeed, typically many years,²⁸ and in many cases more than a decade.²⁹ It seems that the changed wording in the *NT Tax Act* is intended to address this issue. Proposed s 59-50(5) contains a note which states that the provision 'does not require a determination of

²⁴ See also, National Native Title Tribunal, 'Native Title' (National Report No 8, February 2012) 4 (there have been 35 active and determined compensation applications since 1 January 1994, as compared to 1,616 native title applications and 553 registered ILUAs over the same period); National Native Title Tribunal, *Facts and Figures* (31 May 2012) <<http://www.nntt.gov.au/Information-about-native-title/Pages/Factsandfigures.aspx>> (there have been eight active compensation applications of a total of 473 active native title applications); Miranda Stewart, 'The Income Taxation of Native Title Agreements' (2011) 39 *Federal Law Review* 361, 367-8.

²⁵ Exposure Draft Bill cl 3 (proposed *ITAA97* s 59-50(5)); *NT Act* ss 226, 227.

²⁶ LexisNexis, *Energy and Resources Law in Australia* (at 29 October 2012) [280.010]. As to mining leases under the *Mining Act 1978* (WA) and a general purpose lease under the *Mining Act 1978* (WA) (used for stockpiling and processing ore), see *Western Australia v Ward* (2002) 213 CLR 1, 166 [309], 176 [340]-[341] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

²⁷ (2001) 108 FCR 453, 471 [48], 474 [61] (French J), 476 [70] (Merkel J), 486 [114] (Dowsett J). See also LexisNexis, *Halsbury's Laws of Australia* vol 1(1) (at 11 October 2012) 5 Aboriginals and Torres Strait Islanders, '4 Future Acts' [5.8005].

²⁸ National Native Title Tribunal, 'Native Title', above n 24, 2.

²⁹ LexisNexis, *Energy and Resources Law*, above n 26, [282.630].

native title under the *Native Title Act 1993*³⁰ and the Explanatory Memorandum suggests that the provision could apply both where native title is later determined and even where it is subsequently determined not to exist.³¹

1.1.2 Eligible agreements

To be eligible, an agreement must be 'made under' any of a Commonwealth, state or territory Act (or an instrument made under such an Act), or be an ancillary agreement to such an agreement.³² Focussing on the federal level, why might an energy or resource proponent enter into an agreement under the *NT Act*? Generally, a key reason would be to ensure the validity of the grant or renewal of tenements where that grant or renewal amounts to an act affecting native title which comprises a 'future act'.³³ There are various ways that future acts are made valid by the *NT Act*.³⁴ In the context of land access agreements, two of the most common routes to validity for future acts involving mining tenure are:³⁵

- Acts covered by an Indigenous Land Use Agreement ('ILUA') made under pt 2 div 3 sub-div B-E of the *NT Act*, if the ILUA is entered in the Register of Indigenous Land Use Agreements.³⁶
- Acts which pass the freehold test (this would cover the grant or renewal of most onshore tenements) where the right to negotiate ('RTN') process under pt 2 div 3 sub-div P of the *NT Act* has been followed in relation to certain acts, including the creation of a broadly defined 'right to mine' or variation to extend the area of such a right.³⁷

The *NT Act* expressly contemplates the existence of agreements meeting the requirements of an ILUA³⁸ and provides for the registration of such agreements,³⁹ as well as legislating certain key effects.⁴⁰ Accordingly, it seems reasonable to describe ILUAs as 'made under' the *NT Act*.

The RTN process does not compel parties to reach an agreement. However, it does require them to 'negotiate with a view to reaching an agreement' about future acts,⁴¹

³⁰ *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59-50(5) note 2).

³¹ Explanatory Memorandum 17 [1.28].

³² *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59-50(5)(a)). An ancillary agreement would cover an agreement directly linked to the primary agreement which, for instance, sets out the detail on how and when benefits agreed under the primary agreement will be provided: Explanatory Memorandum 18 [1.29].

³³ In very simplified terms, a future act is an act affecting native title which occurs on or after 1 January 1994 or, in the case of legislation, 1 July 1993, provided it is not a 'past act': *NT Act* s 233.

³⁴ *NT Act* s 24AA(2).

³⁵ National Native Title Tribunal, *ILUA or the Right to Negotiate Process? A Comparison for Mineral Tenement Applications* (2008) 2; LexisNexis, *Energy and Resources Law*, above n 26, [284.210].

³⁶ *NT Act* ss 24EB(2), 24EBA(2), 24EBA(3).

³⁷ *Ibid* ss 24MD(1), 26(1)(c).

³⁸ *Ibid* ss 24BA, 24CA, 24DA.

³⁹ *Ibid* ss 24BI, 24CK, 24CL, 24DL.

⁴⁰ *Ibid* ss 24EB, 24EBA.

⁴¹ *Ibid* ss 25(2), 25(3).

refers to the agreement of the native title group and proponent about the doing of the act,⁴² as well as to certain effects of any agreement;⁴³ and imposes a requirement to provide a copy of any agreement to the relevant arbitral body.⁴⁴ Therefore agreements made as a result of following this process could arguably be described as 'made under' the *NT Act*, although this is less certain than for ILUAs. The *NT Tax Act* deals with this risk by including another note to the new s 59-50(5), stating that 'an agreement of the kind mentioned in paragraph 31(1)(b) of [the *NT Act*]', being an RTN agreement, can be an eligible agreement.⁴⁵ While the note is a 'non-operative' part of the *ITAA97*,⁴⁶ it is relevant to interpretation of the provision⁴⁷ and would permit, but not require, the note to extend the operation of s 59-50(5)(a), even if inconsistent with the provision.⁴⁸ However, this would be a matter of construction for the court,⁴⁹ such that some risk, albeit low, remains. The fact that the note merely says that an RTN agreement 'can' be, not 'is', made under the *NT Act*, reinforces the risk.

Further, the RTN is subject to some significant exceptions which mean that some land access agreements may be made outside this process, and hence not be agreements made under the *NT Act*. One example is the grant of a mining tenement for the 'sole purpose of the construction of an [associated] infrastructure facility'.⁵⁰ Given the breadth of the definition of 'infrastructure facility',⁵¹ this could cover the grant of critical pieces of tenure, such as a miscellaneous licence to construct haul roads and railway lines.⁵² There are also a number of other exceptions, such as for certain renewals, extensions and re-grants of mining tenements.⁵³ Additionally, if the expedited procedure applies,⁵⁴ which is relevant for low interference acts which may include the grant of exploration tenure,⁵⁵ the right to negotiate process may not need to be followed.

Land access agreements might also oblige native title groups to confirm the existence and validity of tenure already granted or to waive the right to challenge the validity of that tenure. To the extent that the tenement grant or renewal occurred before 1 January 1994,⁵⁶ or is otherwise at risk of constituting a 'past act' (which may be

42 Ibid s 31(1)(b).

43 Ibid s 41.

44 Ibid s 41A(1).

45 *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59-50(5)(a) note 1(b)).

46 *ITAA97* ss 2-35, 950-100(1).

47 Ibid s 2-35; *Acts Interpretation Act 1901* (Cth) s 15AD.

48 *Acts Interpretation Act 1901* (Cth) s 15AD.

49 Explanatory Memorandum, *Acts Interpretation Amendment Bill 2011* (Cth) 19 [103].

50 *NT Act* s 26(1)(c)(i).

51 The definition includes such items as roads, railways, ports, electricity generation and transmission facilities, storage and distribution facilities for oil and gas and dams: *NT Act* s 253.

52 *BHP Billiton Pty Ltd v Karriyarra Native Title Claimants* [2004] WAMW 22, 5-6 [3] (Calder SM); LexisNexis, *Native Title* (at 7 December 2012) [2546].

53 *NT Act* s 26D(1).

54 Ibid ss 32, 237.

55 LexisNexis, *Energy and Resources Law*, above n 26, [284.290].

56 1 July 1993 if it occurred by the making of legislation.

invalid),⁵⁷ there may be no requirement under the *NT Act* for an agreement to ensure the validity of tenure. This means there would be no agreement 'made under' the *NT Act*. This is for three chief reasons. First, it may not have affected native title or native title may not exist, such that it is not in fact a past act.⁵⁸ Second, the *NT Act* validates many past acts without the need for an ILUA or the application of the RTN process.⁵⁹ Third, to the extent it breached the *RD Act*, the result may not be invalidity but a right to compensation to be calculated as provided under the *NT Act*.⁶⁰

1.2 Context of the reforms

The *NT Tax Act* reforms follow on from a series of consultations on native title, Indigenous economic development and tax which were conducted by the government between October 2008 and October 2010.⁶¹ Given the timeframes involved, the state of the resources industry and the size and complexity of land access agreements have developed since that time. This part therefore identifies the reasons most recently articulated for reform and also places the *NT Tax Act* in the context of the current stage of agreement making and commodities investment.

1.2.1 Reasons for reform

There are essentially two reasons for pursuing the reforms. First, there is a desire to 'reduce the complexity and uncertainty of the income tax treatment of native title claims'⁶² so as to 'improve agreement-making'.⁶³ As acknowledged by the government

⁵⁷ Broadly, past acts are acts that are invalid from a native title perspective by operation of the *Racial Discrimination Act 1975* (Cth) (*RD Act*), but would not be invalid if native title did not exist or was not affected. The acts must generally have occurred before 1 January 1994 (or 1 July 1993 in the case of legislation) although they also include the exercise of certain options, extensions and renewals relating to earlier acts or arrangements: *NT Act* s 228.

⁵⁸ For instance, if the act occurred before the application of the *RD Act*, which applies from 1 November 1975.

⁵⁹ See, eg, *NT Act* ss 14(1), 19(1). A state or territory law could theoretically impose a requirement for an agreement.

⁶⁰ *Ibid* s 45(1); *Western Australia v Ward* (2002) 213 CLR 1, 100 [108], 170 [321] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶¹ The broader reform process stretches back even further to proposals by Peter Costello and Daryl Williams in 1998: Peter Costello, Treasurer and Daryl Williams, Attorney-General, 'Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters' (Media Release, 13 February 1998) 4; House of Representatives Standing Committee on Economics, Parliament of Australia, *Advisory Report on the Tax Laws Amendment (2012 Measures No 6) Bill 2012* (2013) 4 [1.9].

⁶² Explanatory Memorandum 12 [1.12]-[1.13]; Explanatory Material, Exposure Draft Tax Laws Amendment (Tax Treatment of Native Title Benefits) Bill 2012 (Cth) 2 [1.10]; Nicola Roxon, Attorney-General and Minister for Emergency Management and David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, 'Release of Exposure Draft Materials to Provide Clarity on the Tax Treatment of Native Title Benefits' (Media Release No 79, 27 July 2012). The media release refers also to an earlier consultation paper that identifies the objective of reducing complexity and improving certainty: The Treasury (Cth), *2010 Consultation Paper*, above n 3, v.

⁶³ David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, Nicola Roxon, Attorney-General and Minister for Emergency Management and Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs and Minister for

itself, the current income tax treatment of native title benefits is uncertain.⁶⁴ This is partly due to the unique nature of native title rights and interests, but mainly the general lack of specific income tax provisions or relevant case law dealing with payments under native title agreements.⁶⁵ Presently, there is uncertainty over a range of matters,⁶⁶ including:

- Whether land access payments are capital or revenue and, even if capital to an extent, are payments taxable under the CGT regime, given doubt about whether native title rights are pre-CGT assets?
- If land access payments are received by a body of Indigenous persons, are they treated as a company for tax purposes?
- Whether holding structures established to receive payments for the benefit of native title groups can accumulate investment income for the benefit of future generations.
- Whether benefits distributed by trusts established for the benefit of native title groups are taxable in the hands of recipients.
- Whether mining proponents can recognise outgoings as immediately deductible or as deductible over time.⁶⁷

Second, the reforms are intended to 'improve outcomes for native title stakeholders',⁶⁸ including by 'creat[ing] economic and social opportunities for Indigenous Australians'.⁶⁹ This aim links to the government's broader objective of 'closing the gap' between Indigenous and non-Indigenous Australians,⁷⁰ which is a multi-government and multi-faceted program.⁷¹

Disability Reform, 'Government Clarifies Native Title Tax Treatment' (Media Release No 149, 29 November 2012).

⁶⁴ Explanatory Material, Exposure Draft Tax Laws Amendment (Tax Treatment of Native Title Benefits) Bill 2012 (Cth) 2 [1.8]; The Treasury (Cth), *2010 Consultation Paper*, above n 3, 2-5.

⁶⁵ The Treasury (Cth), *2010 Consultation Paper*, above n 3, 2. Mining withholding tax provisions do exist in *ITAA36* pt III div 11C. However, their scope is relatively limited and the better view is that they do not apply to payments in respect of native title rights or interests. See, eg, 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, 690-2.

⁶⁶ For further discussion of the lack of certainty under the existing law, see especially, Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1/2008, AIATSIS, May 2008); Julie Cassidy, 'Black Fella Land - White Fella Tax: Changing the CGT Implications of Aboriginal/Native Title' (2010) 25 *Australian Tax Forum* 397; Stewart, above n 24, 361; Martin, above n 65; Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments' (1999) 2 *Journal of Australian Taxation* 344.

⁶⁷ There is at least some judicial guidance which accepts immediate deductibility: *Cape Flattery Silica Mines Pty Ltd v Federal Commissioner of Taxation* (1997) 36 ATR 360.

⁶⁸ Roxon and Bradbury, above n 62. See also, Roxon and Macklin, above n 10; Bradbury, Roxon and Macklin, above n 63 ('achieve sustainable outcomes').

⁶⁹ Roxon and Macklin, above n 10. See also, Bradbury, Roxon and Macklin, above n 63; Roxon and Bradbury, above n 62.

⁷⁰ See, eg, Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Beyond Mabo: Native Title and Closing the Gap' (Speech delivered at

1.2.2 *Agreements and commodities investment*

Land access agreements are like emergency protocols on aeroplanes; they frequently have the same overall objective, and yet each agreement is subtly, or not so subtly, different. Typically, however, such agreements involve energy and resource proponents providing benefits in order to obtain the support of Indigenous communities for all aspects of resource exploration and development. A portion of those benefits is likely to reflect compensation for the extinguishment or temporary suspension of native title rights which may be involved in the grant of tenure for access to land for exploration activities, resource development, processing and transportation. However, a further portion of the payments is also often made for matters such as assistance in relation to the grant or renewal of tenements (eg consents) or in relation to mining operations (eg participation in heritage surveys, implementation committees and activities) and (as a form of benefit sharing with the local community) for a social licence to operate.⁷²

In terms of the broader outlook for land access agreements, the extraordinary level of capital investment in new mining projects and the expansion of existing projects over the last decade is expected to peak in 2013/2014,⁷³ if not slightly earlier.⁷⁴ Accordingly, it appears likely that the majority of land access agreements required for the current cycle of projects and expansions are already in place.⁷⁵ Second, the scale of benefits needs to be understood. In Western Australia alone, the existing agreements generate, and are projected to generate, millions to tens of millions of dollars for many affected Indigenous groups every year for a typically decades long mine life.⁷⁶ If added together, this would equate to hundreds of millions of dollars a year.⁷⁷

the 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008) <<http://jennymacklin.fahcsia.gov.au/node/764>> 8, 11.

71 As to the 'closing the gap' initiative, see Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap: The Indigenous Reform Agenda* (15 June 2012) <www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap>.

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

73 Michael Plumb, Christopher Kent and James Bishop, 'Implications for the Australian Economy of Strong Growth in Asia' (Paper presented at the International Monetary Fund, the Australian Treasury and the Reserve Bank of Australia's Structural Change and the Rise of Asia Conference, Canberra, 19 September 2012) 15; The Treasury (Cth), *Mid-year Economic and Fiscal Outlook 2012-13* (2012) 30.

74 Reserve Bank of Australia, *Statement on Monetary Policy* (November 2012) 38.

75 Of course, continued resources investment will necessitate new agreements.

76 See, eg, Debra Jopsen, 'Share in Fortescue Riches a Step Closer for People of the Pilbara', *The Sydney Morning Herald* (Sydney) 25 August 2011, 11; Jeanette Francis, 'Paying the Price: The Battle for James Price Point', *SBS World News* (online) 20 August 2012 <<http://www.sbs.com.au/news/article/1684063/Paying-the-Price-The-battle-for-James-Price-Point>>; Flip Prior, 'Aboriginals Get Jobs Pact at New Mine', *The West Australian* (Perth) 29 June 2011, 40; Andrew Duffy, 'BHP Inks Massive Native Title Deal', *Australian Mining* (online) 20 August 2012 <<http://www.miningaustralia.com.au/news/bhp-inks-massive-native-title-deal>>; Jessica Burke, 'Rio, Pilbara Owners Sign Australia-first Native

2 CONSEQUENCES FOR ENERGY AND RESOURCES PROPONENTS AND INDIGENOUS GROUPS

While the government's objectives are laudable, the way in which they have been implemented is likely to cause a number of difficulties for Indigenous groups and mining proponents. Part 2.1 examines the decrease in certainty that the reforms would generate in their current form. In particular, it explores the need for apportionment between NANE and non-NANE benefits under land access agreements and the troubles that this will cause for the parties involved. There are also significant hurdles that may prevent the reforms from achieving the government's goals and these are appraised in Part 2.2.

2.1 Reduced certainty

While the reforms are drafted in simple language, they apply against a relatively complex factual backdrop of agreements. Moreover, the agreements are themselves sited in a 'complex cultural, institutional and legal environment'.⁷⁸ This Part examines how certainty may be diminished in practice by reference to several factors: the need for apportionment; residual agreement risk; loss of eligibility of charitable trusts; impacts on existing agreements; the exclusion for administrative costs; and matters not addressed by the reforms.

The reduction in certainty is contrary to the government's aim and is likely to make agreement-making more costly and more complicated.

2.1.1 Apportionment

There are two main reasons why apportionment may be necessary. First, concessional tax treatment is provided to the extent that payments are for acts which extinguish or are inconsistent with native title (generally described as '*acts affecting native title*' for brevity). However, as discussed in Part 1.2.2, while a portion of payments under land access agreements will typically reflect compensation for the extinguishment or temporary suspension of native title rights, a further portion will generally relate to other matters, such as the provision of assistance or profit sharing to build a social licence. This means that apportionment between concessional and non-concessionally taxed benefits will be required.

Currently, it is the author's understanding that benefits under land access agreements are generally paid in undifferentiated sums.⁷⁹ Frequently, at least in Western Australia, these comprise smaller upfront payments and larger regular

Title Agreement', *Australian Mining* (online) 3 June 2011 <<http://www.miningaustralia.com.au/news/rio-pilbara-traditional-owners-sign-australian-fir>>; Rio Tinto, 'Rio Tinto Seals Comprehensive Land Use Agreements with Traditional Owners Across the Pilbara Region' (Media Release, 3 June 2011).

⁷⁷ See, eg, Chamber of Minerals and Energy of Western Australia, Submission No 5 to House of Representatives Standing Committee on Economics, Parliament of Australia, *Inquiry into the Tax Laws Amendment (2012 Measures No 6) Bill 2012*, 19 December 2012, 2.

⁷⁸ Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26 *Journal of Energy & Natural Resources Law* 31, 57.

⁷⁹ See, eg, Altman, 'Native Title and Taxation Reform', above n 72, 3.

payments linked to the quantity or value of resource extracted over the life of the mine. Agreements concerning smaller benefits may provide for predetermined fixed payments.⁸⁰ The reforms would require parties to undertake, potentially justify to the Commissioner of Taxation and, preferably, include in their land access agreements, an appropriate apportionment. Not only will this be a new task for most participants, but it is also an exceedingly difficult one. It will not be an esoteric, technical legal challenge, but is likely to be contentious and fraught. This is especially so in light of the significant quantum of payments under some land access agreements.

The *NT Tax Act* calls for a nexus between the benefit and an activity; that is, an act extinguishing or inconsistent with native title. The link is not with the agreement under which the benefit is provided. As discussed in Part 1.1.1, the relevant 'acts' to which land access payments are likely to 'relate' are the grant, variation, extension or renewal of mining tenements.⁸¹ Guidance from the authorities in the main areas where apportionment is relevant for other tax purposes does not seem strictly analogous in this context. The key distinction is that the government carrying out the acts affecting native title may not be a party to the agreement under which benefits are paid (and often would not provide any benefits).⁸² This is so, even if a separate agreement is entered into with a state or territory government acknowledging that land access benefits paid by a mining proponent are in lieu of compensation.⁸³ Accordingly, you cannot simply ask, what benefits are provided for the acts? Instead, a less direct relationship is required; a proposition bolstered by the use of the phrase 'relates to', which is a broad nexus expression.

The relationship could be between the benefit and the effect of the act on native title rights, especially as the Explanatory Memorandum appears to refer to the impact on native title rights as a justification for the reforms.⁸⁴ Compensation apportionment decisions are helpful in this regard as they examine the link between a payment and the impact of an act on rights. The general rule is that a compensation receipt is treated in the same way as the interest for which it is received, so that an amount received in place of a revenue item is treated as income and one received for a capital item is capital.⁸⁵ This suggests that payments which are compensation for extinguishment of native title or for acts which are sufficiently inconsistent with native title are covered, but payments which are received for the provision of assistance, for a social licence or

⁸⁰ As to the range of benefits that may be provided, see, eg, Martin, above n 65, 688.

⁸¹ See, eg, *NT Act* ss 226(2)(b), (d). While the term 'act' is not defined in the *NT Tax Act*, it is expected that it would bear a meaning analogous to the way in which it is defined in the *NT Act*.

⁸² See, eg, National Native Title Tribunal, *ILUA or the Right to Negotiate Process?*, above n 35, 4-5.

⁸³ Despite the reference to an 'ancillary agreement' in the *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59-50(5)(a)(ii)), it would typically be the overarching land access agreement which provides the source of the obligation to pay benefits and, hence, 'under' which benefits are provided, and not the separate agreement with the state or territory: *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd* (2000) 201 CLR 520, 537 [42], 539 [49] (Gleeson CJ, Gaudron, McHugh and Hayne JJ).

⁸⁴ Explanatory Memorandum 12 [1.13].

⁸⁵ *Glenboig Union Fireclay Co Ltd v Inland Revenue Commissioners* (1922) 12 TC 427, 463 (Lord Buckmaster), 465 (Lord Wrenbury); Woellner et al, above n 15, 292.

for 'temporary' impairment of native title,⁸⁶ are not.⁸⁷ Several compensation authorities also suggest that a lump sum received in settlement of several claims for unliquidated damages (as to affairs of capital and of revenue), should be treated in its entirety as a capital compensation payment.⁸⁸

However, there are two reasons why this approach should not be automatically applied. First, the *NT Tax Act* attempts to move away from a capital/income test and questions of whether amounts are received for extinguishment as opposed to temporary suspension of native title.⁸⁹ That is one of the key difficulties with the current regime and a reason for introducing the changes. Second, the *NT Tax Act* employs the words 'to the extent that', which will require an apportionment just as they do for undifferentiated payments under provisions such as the general deduction provision in s 8-1(1) *ITAA97*, which uses the same phrase.⁹⁰

Rather than looking to the effect on native title rights, one could focus on the link between activities and the making of a payment. The nexus test under the general deduction provision provides an example. It renders an amount of expenditure potentially eligible for deduction 'to the extent that' it is 'incurred in gaining or producing' assessable income, or 'necessarily incurred in carrying on a business for the purpose of gaining or producing' assessable income.⁹¹ This link focuses on the connection between expenditure incurred and the activities or operations which are productive of assessable income, or which relate to the business: are those activities the 'occasion of' the outgoing?⁹² While the cases have emphasised the importance of focussing on this link, rather than seeking a substitute,⁹³ it can be helpful when applying the test to look at factors such as whether the expenditure is an incident of the activities in the sense that it is caused by those activities.⁹⁴ Likewise, one can ask

⁸⁶ Which may be numerous given the non-extinguishment principle under the *NT Act* s 238.

⁸⁷ For a discussion of the compensation capital/income analysis to native title payments, see, eg, Strelein, above n 66, 44-8; Cf Black, above n 66, 355-7. As to temporary impairment, see also Woellner et al, above n 15, 297.

⁸⁸ *McLaurin v Federal Commissioner of Taxation* (1961) 104 CLR 381, 390-1 (Dixon CJ, Fullagar and Kitto JJ). For a post-CGT case, see *CSR Ltd v Federal Commissioner of Taxation* (2000) 171 ALR 392, 407 [74], 408 [81] (Gyles J). See also Woellner et al, above n 15, 305-8.

⁸⁹ Explanatory Memorandum 12 [1.11]-[1.13]; The Treasury (Cth), *2010 Consultation Paper*, above n 3, 2-5.

⁹⁰ *Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47, 55, 59 ('*Ronpibon Tin*'); See also Ross Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (Sydney Lawbook, 1985) 482.

⁹¹ *ITAA97* s 8-1(1).

⁹² *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, 179-80 [30]-[33] (Gummow, Hayne, Heydon and Kiefel JJ); *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1, 18-19 [55]-[58] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ); *Ronpibon Tin* (1949) 78 CLR 47, 56-7 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ); *Federal Commissioner of Taxation v Anstis* (2010) 241 CLR 443, 455-6 [27]-[30] (French CJ, Gummow, Kiefel and Bell JJ).

⁹³ *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, 178-9 [29] (Gummow, Hayne, Heydon and Kiefel JJ).

⁹⁴ For instance, the defamation settlement and legal costs which followed on from newspaper publication activities in *Herald & Weekly Times Ltd v Commissioner of Taxation* (1932) 48 CLR 113 or the legal costs in *Federal Commissioner of Taxation v Day* which flowed from Day's

whether any benefits or rights are obtained which assist in carrying out those activities.⁹⁵

On this basis, it is arguable that benefits which represent what would otherwise be ordered to be paid as compensation in accordance with div 5 of the *NT Act* are an incident of the acts affecting native title. Benefits given for assistance with the process of the grant, variation, extension or renewal of mining tenements, such as providing consents to these acts, might also be characterised as linked since they are rights obtained in furtherance of the relevant acts. However, payments in respect of rights or benefits which assist with a proponent's mining or exploration operations, rather than obtaining tenements, would not be sufficiently linked. For instance, social licence payments, benefits for assistance with heritage surveys or, generally, working group payments. Further, such forms of assistance might also amount to the provision of services and so fall within the express exclusion from NANE treatment in any event.⁹⁶

In terms of apportioning a lump sum in this context, the High Court in *Ronpibon Tin* referred to two scenarios under the general deduction provision, the first of which is relevant here.⁹⁷ Where it is possible to show that outgoings are for 'things or services of which distinct and severable parts are devoted to gaining or producing assessable income and distinct and severable parts to some other cause', apportionment should occur based on the differing 'application' of those things or services.⁹⁸ This suggests that an analysis akin to that set out in the paragraph above should be applied for an undifferentiated amount.

It must be acknowledged that the words 'relates to' in the *NT Tax Act* seem literally broader than the reference to 'incurred in' in the general deduction provision. However, given the proposed focus on the practical link between activities and the making of the payment, which is the focus of s 8-1 ITAA97, it is submitted that any difference is illusory. For instance, the High Court in *Ronpibon Tin* referred to outgoings 'incurred in relation to' gaining or producing *exempt* income and outgoings 'incurred in' gaining or producing *assessable* income as forming 'mutually exclusive categories',⁹⁹ suggesting that the words 'relates to' may not add significant breadth.

Applying the above principles, an undifferentiated payment should arguably be apportioned by determining the value of the compensation that would have been ordered under div 5 *NT Act*, plus the market value of tenement assistance rights; and,

obligation not to undertake certain conduct as a public officer: (2008) 236 CLR 163, 182-3 [37] (Gummow, Hayne, Heydon and Kiefel JJ).

⁹⁵ For instance, expenditure on head office administration to support investment operations (*Ronpibon Tin* (1949) 78 CLR 47, 58-60 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ)), or paying a joint managing director to induce him to resign so as to improve the company's efficiency (*W Nevill & Co Ltd v Federal Commissioner of Taxation* (1937) 56 CLR 290).

⁹⁶ The Macquarie Dictionary definition of 'services' is: 'the performance of any duties or work for another; helpful activity' (Susan Butler (ed), *Macquarie Dictionary Online* (Macquarie Dictionary Publishers Pty Ltd, 2012)).

⁹⁷ (1949) 78 CLR 47. The case related to the precursor provision, being ITAA36 s 51(1).

⁹⁸ *Ronpibon Tin* (1949) 78 CLR 47, 59 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ). It is this type of undifferentiated sum which seems most analogous to the benefits provided under land access agreements, rather than the second type of expenditure referred to in the case, being 'a single outlay or charge which serves both objects indifferently': at 59.

⁹⁹ *Ibid* 56 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ).

on the other hand, the value of rights or benefits relating to mining operations. For instance, under the CGT regime, where lump sum expenditure is provided which relates only in part to a CGT asset, the purchaser is entitled to include in the cost base (or reduced cost base) of the asset, the component 'reasonably attributable to the acquisition of the asset'.¹⁰⁰ A market value (of the various assets obtained) basis for apportionment has been accepted in a number of class rulings.¹⁰¹

Nevertheless, even if this is the correct approach, determining compensation is not a straightforward process, as a range of principles must be weighed on the basis of an understanding of the content of each right and the extent of extinguishment or impairment.¹⁰² Valuations of non-traded intangibles, such as assistance rights, are also likely to be variable and valuing a 'social licence to operate' is liable to require greater articulation of what this benefit or right actually is.¹⁰³ Accordingly, the inherent uncertainty in this process will pose risks until the Commissioner provides administrative guidance or an appropriate case is litigated,¹⁰⁴ which is likely to take some time. Further, given the potential for significant diversity between land access agreements, it may be difficult for the Commissioner to provide broadly applicable administrative guidance in the form of a public ruling. To the extent parties seek to agree on an appropriate division in the land access agreement, the valuation and apportionment issues will likely render this a costly and lengthy additional exercise.¹⁰⁵ Further, as an agreed split may deliver tax benefits to the Indigenous counterparties without imposing any tax detriment on the resource proponent,¹⁰⁶ the Commissioner may be less likely to accept the result as reflecting market values.

A second key reason why apportionment may be required is that a number of agreements apply before a determination of native title has been made, and sometimes

¹⁰⁰ ITAA97 s 112-30.

¹⁰¹ See, eg, Australian Taxation Office, *Income Tax: Scheme of Arrangement – Merger of Gloucester Coal Limited and Yancoala Australia Limited*, CR 2012/54, 18 July 2012, 9 [46]; Australian Taxation Office, *Income Tax: Scheme of Arrangement – Centrebet International Limited*, CR 2011/89, 12 October 2011, 5 [31], 5 [33]; Australian Taxation Office, *Income Tax: Scrip for Scrip Roll-over: Acquisition of South Australian Coal Limited by White Energy Mining Pty Limited*, CR 2011/63, 29 June 2011, 12 [74]–[77]. There is also some support for this approach in cases dealing with undivided compensation payments for liquidated claims, or at least claims ascertainable by calculation, such as *Tilley v Wales* [1943] AC 386, 398 (Lord Porter), 393–4 (Cf Viscount Simon LC, Lord Atkin and Lord Russell concurring), (remitted to the Commissioner for 'reasonable apportionment') 396 (Cf Lord Thankerton); Woellner et al, above n 15, 304.

¹⁰² *NT Act* ss 38, 39, 51, 240; LexisNexis, *Native Title*, above n 52, [2199Z]; *Re Koara People* (1996) 132 FLR 73, 87. For instance, the grant of a mining lease may also require regard to be had to the principles in *Mining Act 1978* (WA) s 123: *Re Koara People* (1996) 132 FLR 73, 88.

¹⁰³ Unless, perhaps, assessed as a residual item after subtracting all other items from the value of the benefits provided under the land access agreement.

¹⁰⁴ Of itself, litigation would involve a significant number of risks for the parties: see, eg, Arnold Bloch Leibler and Yamatji Marlpa Aboriginal Corporation, Submission to The Treasury (Cth), *Tax Treatment of Native Title Benefits*, 24 August 2012, 5–6.

¹⁰⁵ Minerals Council of Australia, Submission to The Treasury (Cth), *Tax Treatment of Native Title Benefits*, August 2012, 4.

¹⁰⁶ It is difficult to see how the apportionment could affect deductibility.

even where there has been a determination that native title has been extinguished.¹⁰⁷ As discussed in Part 1.1.1, the *NT Tax Act* expressly seeks to address this risk by referring to acts that would extinguish or be inconsistent with native title, rather than acts which affect native title. It seems appropriate to characterise an act as extinguishing or being inconsistent with native title even if that native title is not formally recognised until a later point in time by way of a determination under the *NT Act*, since the determination recognises existing rights.¹⁰⁸

Where a determination is made that no native title exists, it seems inappropriate to characterise any benefits provided as relating to acts that would extinguish or be inconsistent with native title, as suggested in the Explanatory Memorandum.¹⁰⁹ The approach in the Explanatory Memorandum may be based on a link between payments and the native title rights and interests *claimed* by the relevant native title group, since these must be specified in the claimant application.¹¹⁰ However, this construction is not clearly covered by the note and is a somewhat strained reading of the literal words of the provision.¹¹¹ It also appears inconsistent with the purpose of the amendments, being to confirm that 'benefits are not subject to income tax if they are provided for the extinguishment or impairment of native title',¹¹² as this suggests that the rationale for concessional treatment is the impact on native title rights.¹¹³

Accordingly, a subsequent determination that some claimed native title does not exist, or that it does not exist in respect of part of the land covered by the agreement, is likely to require apportionment. Where payments are to be made even where the agreement is, in part, 'not native title related from the outset' due to an existing determination that native title does not exist,¹¹⁴ an even clearer need for apportionment arises. The first scenario might also result in amended assessments within the time limits available to the Commissioner and therefore an unexpected tax liability for native title groups.

2.1.2 Agreement risk

As discussed in Part 1.1, ILUAs are likely to qualify as eligible agreements, enabling access to concessional treatment of benefits if the other requirements are met. However, not all land access agreements are executed in the form of an ILUA. This paper has already identified that the other chief form of agreement is one reached under the RTN process and that there is a risk, although low, that such an agreement

¹⁰⁷ This is partly due to the lengthy process involved in obtaining a determination of native title and partly due to the possibility in certain circumstances of the restoration of native title (for instance, under *NT Act* s 47B). See, eg, Minerals Council of Australia, above n 105, 3.

¹⁰⁸ *NT Act* ss 51, 223(1).

¹⁰⁹ Explanatory Memorandum 17 [1.28].

¹¹⁰ *NT Act* s 62(2)(d).

¹¹¹ Especially since the words must be applied to the benefits each income year.

¹¹² See, eg, Explanatory Memorandum 13 [1.15].

¹¹³ The compensation calculation provisions of the *NT Act* also provide relevant context in this regard. Note that s 51 states that the entitlement to compensation 'is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'.

¹¹⁴ Minerals Council of Australia, above n 105, 3.

would not qualify. This creates uncertainty both for benefit recipients, since they do not know if benefits received are exempt, and for mining proponents, due to the pay as you go withholding ('PAYG withholding') exposure for failure to obtain an Australian Business Number to the extent the payments are not NANE.¹¹⁵

In addition, due to the significant exceptions to the RTN process identified in Part 1.1, there are likely to be many agreements entered into outside this regime which may therefore not be 'made under' the *NT Act*. For instance, agreements relating to the construction of associated mining infrastructure such as roads or railways. Likewise, land access agreements relating solely to past acts may also not be ILUAs or RTN agreements. Accordingly, there is likely to be uncertainty about whether such agreements can somehow be rendered eligible. For instance, by arguing that they constitute 'ancillary agreements' to other eligible agreements, by including a RTN act within the agreement, or by arguing that the agreement is, in any event, linked closely enough with the *NT Act* to qualify.

2.1.3 Eligibility of charitable trusts

It has been common for land access agreements to require that a significant portion of payments be made to the trustee of a charitable trust.¹¹⁶ However, it is not clear that the *NT Tax Act* definition of an 'Indigenous holding entity' would include a charitable trust, since Indigenous holding entities must (as trusts) have beneficiaries consisting only of Indigenous individuals and/or certain land councils or corporations which are for the benefit of Indigenous persons.¹¹⁷ Indigenous persons, permitted land councils or corporations may benefit from charitable trusts, such that they might be described as the 'ultimate beneficiaries' of the trust, but the ultimate beneficiaries of a charitable trust could not be described as beneficiaries in a 'private trusts law sense'.¹¹⁸

While there is no universal definition of the term 'beneficiary', its ordinary meaning has been held to be a 'person for whose benefit a trust is to be administered and who is entitled to enforce the trustee's obligation to administer the trust according to its terms', such that the trustee owes fiduciary duties to the person in relation to the trust property.¹¹⁹ Charitable trust deeds may provide some self-help remedies to Indigenous persons, land councils or corporations and, despite references to the Attorney-General being the only party capable at general law of enforcing charitable trusts,¹²⁰ statute may provide standing to seek a court order to ensure compliance with the trust terms.¹²¹ There is also some authority which suggests that Indigenous persons, land councils or corporations may be able to demonstrate they are sufficiently 'interested in' the relevant charitable trust to potentially seek enforcement at general

¹¹⁵ As to PAYG withholding, see Part 2.1.6 below.

¹¹⁶ The Treasury (Cth), *2010 Consultation Paper*, above n 3, 5–6.

¹¹⁷ *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59–50(6)).

¹¹⁸ G E Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 65–6 [3.32]–[3.33].

¹¹⁹ *Kafataris v Deputy Commissioner of Taxation* (2008) 172 FCR 242, 249–50 [42]–[43] (Lindgren J). See also, *Colonial First State Investments Ltd v Federal Commissioner of Taxation* (2011) 192 FCR 298, 306 [20] (Stone J); Thomson Reuters, *Law of Trusts*, (at 1 December 2009) [5.050].

¹²⁰ Dal Pont, above n 118, 66 [3.33], 361 [14.25]; J D Heydon, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 202 [1067]; Thomson Reuters, above n 119, [21.170]; *Solicitor-General (NSW) v Wylde* (1945) 46 SR (NSW) 83, 105–10 (Nicholas CJ).

¹²¹ See, eg, *Charitable Trusts Act 1962* (WA) s 21. A number of other statutory bases also exist.

law.¹²² Nevertheless, as charitable trusts exist for certain purposes,¹²³ not persons, those who may benefit are not technically 'beneficiaries'¹²⁴ and so the better view is that a charitable trust could not be an Indigenous holding entity.

This view is bolstered by the context of the *NT Tax Act*, which suggests that a technical meaning was intended.¹²⁵ Further, the potential for statutory or common law cy-près variation of charitable trust purposes,¹²⁶ even if remote, is likely to mean that the trust cannot 'only be' for the required beneficiaries within the words of the *NT Tax Act* since the purposes might be varied to benefit others. The approach in *Latimer v Inland Revenue (New Zealand)*¹²⁷ is also illustrative. The case concerned a trust under which forestry proceeds were received on trust for Maori claimants and, potentially, for the Crown. The trust deed named claimants as 'beneficiaries' who could receive income to assist them in making land claims and also referred to successful claimants as 'confirmed beneficiaries' entitled to receive forestry proceeds in respect of their land. Nevertheless, the Privy Council noted:

It is of the essence of a charitable trust that it is a trust for the promotion or advancement of social purposes rather than a trust for individual beneficiaries. Of course, individuals may benefit from the application of trust moneys, but they are not, as individuals, the beneficiaries of the trust and may not enforce its terms. If the purposes of the trust are charitable, they may be enforced by the Attorney-General ...¹²⁸

However, there is a possibility of redemption for charitable trusts. Since this article was originally written, the government introduced and the federal Parliament has passed the *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth) ('*TLA 2013 Measures No 2 Act*') which seeks to include charitable trusts within the definition of 'Indigenous holding entity'.¹²⁹ It does so by way of an amendment to the definition introduced by the *NT Tax Act*.¹³⁰ *TLA 2013 Measures No 2 Act* contains two key changes to the meaning of Indigenous holding entity. First, a 'registered charity' is expressly included within the term.¹³¹ A registered charity means an entity (including a trust) which is

¹²² *Metropolitan Petar v Mitreski* [2001] NSWSC 976, [4] (Hamilton J).

¹²³ The trust must be for charitable purposes in the manner discussed in *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531, 573 (Lord Herschell, Lord Watson concurring), 583 (Lord Macnaghten, Lords Morris and Watson concurring) in light of the preamble to the *Charitable Uses Act 1601* (43 Eliz I c4). See also *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539, [18] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The need for purposes rather than persons is also clear under the statutory definition of charity contained in *Charities Act 2013* (Cth) s 5 (which will apply from 1 January 2014).

¹²⁴ *A-G (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209, 222-3 (Dixon and Evatt JJ); *BSH Holdings Pty Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 454, 458 [16] (Hansen J); J D Heydon, above n 120, 141-2 [1005].

¹²⁵ In the context of duties legislation, see *BSH Holdings Pty Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 454, 458 [16] (Hansen J).

¹²⁶ See, eg, Thomson Reuters, above n 119, [20.1510]-[20.1890].

¹²⁷ [2004] 3 NZLR 157.

¹²⁸ *Ibid* 168 [29].

¹²⁹ *TLA 2013 Measures No 2 Act* sch 11 pt 2.

¹³⁰ As to commencement, see *ibid* cl 2(1) item 16.

¹³¹ *Ibid* sch 11 item 6.

registered as a charity by the Australian Charities and Not-for-profits Commission,¹³² with the registration requirements being such that a charitable trust should generally be eligible.¹³³ Second, *TLA 2013 Measures No 2 Act* also expands the 'trust' limb of the definition of Indigenous holding entity to include trusts which have *Indigenous holding entities* or Indigenous individuals as the only beneficiaries.¹³⁴ The reference to Indigenous holding entity beneficiaries means that the range of permitted beneficiaries would be expanded to include charitable trusts (and, potentially, non-charitable trusts which are for the benefit of Indigenous holding entities or Indigenous individuals). This is wider than the class of beneficiaries envisaged by the *NT Tax Act*, which is limited to Indigenous individuals and the land councils or corporations for the benefit of Indigenous persons referred to above. For instance, this means that a discretionary trust for the benefit of a native title group could also include a charitable trust within the class of potential objects, and still qualify as an Indigenous holding entity.

2.1.4 Existing agreements

The reforms apply to all eligible payments from 1 July 2008, but as noted in Part 1.2.2, the majority of land access agreements for the current commodities cycle are already in place. This means that mining proponents and native title groups might frequently be required to re-negotiate existing agreements to access the new treatment or improve the certainty of application. That is because many agreements do not apportion benefits payments. Further, the author understands that a number of existing arrangements concern payments to the trustee of a discretionary trust as well as a charitable trust. Despite the broader range of permitted beneficiaries due to the *TLA 2013 Measures No 2 Act*, including the trustee of a charitable trust, a number of discretionary trust deeds may still need to be amended to restrict the class of discretionary objects in order for the discretionary trust to qualify as an Indigenous holding entity.

Many existing agreements, particularly those which provide for significant benefits, have involved extensive and costly negotiation. The further costs and additional risks of re-negotiating such agreements (or amending the relevant trust deeds) would have to be weighed against any certainty that could be obtained from undertaking the process.

2.1.5 Administrative costs

The exception from NANE treatment in the *NT Tax Act* for amounts paid for administrative costs, by way of remuneration or as consideration for goods or services

¹³² *ITAA97* s 995-1(1) (definition of 'registered charity').

¹³³ The additional registration requirements are that the entity be a charity, be a not-for-profit entity, have an Australian Business Number, be in compliance with specified governance and external conduct standards and not be included in a written decision of an Australian government agency under an Australian law relating to the characterisation of entities as engaging in or supporting terrorist or criminal activities: *Australian Charities and Not-for-profits Commission Act* ss 25-5(1), (3), (5). In addition, *TLA 2013 Measures No 2 Act* proposes a transitional measure to ensure that entities endorsed as charities under the pre-Australian Charities and Not-for-profits Commission regime could also qualify: *TLA 2013 Measures No 2 Act* sch 11 item 8.

¹³⁴ *TLA 2013 Measures No 2 Act* sch 11 item 5 (emphasis added).

was carried over from the Exposure Draft Bill. Previously, however, it applied only to on-payments of native title benefits by Indigenous holding entities.¹³⁵ This already generated uncertainty, as the concept of 'administrative costs' was undefined and presumably expected to be broader than administrative assistance provided by an employee (remuneration), administrative services provided by a contractor (services), or equipment required to carry out administration (goods).¹³⁶

Now, the administrative limit also applies to the initial provision of benefits from a resources proponent.¹³⁷ This raises the question whether some payments to assist compliance with land access agreements, such as payments to support joint working group meetings on development issues, might be characterised as outsourcing of resource developer administration and therefore excluded from NANE status. A similar query could be made about grant payments to Indigenous holding entities such as a prescribed body corporate to assist the prescribed body corporate to administer the Indigenous group's obligations under a land access agreement.

2.1.6 Matters not addressed

As detailed in Part 1.2.1, there are a number of existing areas of uncertainty when applying the tax law to benefits provided to Indigenous groups under land access agreements. The amendments only address selected income tax matters, although it is to be welcomed that they do attempt to address the CGT exposure caused by the appointment of a prescribed body corporate. However, they ignore a number of the other issues. For instance:

- Deductibility for mining proponents is not addressed to any extent by the *NT Tax Act*.
- Are benefits provided as consideration for taxable supplies, such that Indigenous groups incur a liability for goods and services tax ('GST'), and energy and resource companies potentially acquire an entitlement to input tax credits? This raises a number of issues. Critically, should Indigenous recipients be treated as individuals or as a single 'unincorporated association or body of persons' for GST purposes; and are Indigenous groups carrying on an enterprise by entry into and performance of their obligations under the land access agreement (or under multiple land access agreements)?
- Is a resources proponent required to make a PAYG withholding from land access payments? Generally, payers are required to do so where the payment to another entity is for a supply that the other entity has made in the course or furtherance of an enterprise carried on by it in Australia (unless a relevant exception applies).¹³⁸ If Indigenous groups are carrying on an enterprise, withholding may be required by resources proponents unless an Australian Business Number is obtained,¹³⁹ or,

¹³⁵ Exposure Draft Bill cl 3 (proposed *ITAA97* s 59-50(3)).

¹³⁶ For an example of concern over the scope of this concept, see, eg, Miranda Stewart, Maureen Tehan and Marcia Langton, Submission to The Treasury (Cth), *Tax Treatment of Native Title Benefits*, 23 August 2012, 10-11.

¹³⁷ *NT Tax Act* sch 1 item 3 (proposed *ITAA97* s 59-50(5)).

¹³⁸ *Taxation Administration Act 1953* (Cth), sch 1 s 12-190(1).

¹³⁹ *Ibid* sch 1 s 12-190(2).

for instance, the payment is NANE income for the Indigenous group.¹⁴⁰ As it may be difficult to obtain an Australian Business Number, it is unfortunate that the NANE exception cannot be accessed unless the entire payment qualifies, which seems unlikely to be the case for most land access payments given the apportionment discussion above.

Failing to address these matters does not itself create uncertainty, but it does represent a missed opportunity to deal with the related issues as a package.

2.2 Economic and social outcomes

Although not the main focus of the reforms, as highlighted in Part 1.2.1, the changes are intended to improve economic and social outcomes for Indigenous groups. However, it should be acknowledged that the extent to which native title benefits can or should achieve this goal is a complex and 'contested' matter.¹⁴¹ Accordingly, this paper seeks only to make several preliminary observations. First, given the complexity of the issue, it is astounding that the Explanatory Memorandum does not explain how the proposals engender such goals, particularly when they do not adequately account for the relevance of the Indigenous organisations which will be needed to manage native title benefits, as this has been recognised as a key issue. Second, given their widespread current use to pursue economic and social improvements for Indigenous groups, it seems undesirable that charitable trusts were initially precluded from qualifying as Indigenous holding entities under the *NT Tax Act*.

2.2.1 *A focus on causes, not the goals themselves or the institutions required to meet them*

The reforms contained in the *NT Tax Act* focus on the identity of the recipient and the structure of the relevant agreement (eg apportionment between compensatory and non-compensatory benefits), rather than the purpose or effect of payments or the management of benefits received by Indigenous groups.

Surprisingly, the Explanatory Memorandum does not elaborate on the manner or extent to which the receipt of native title benefits will achieve improved economic and social outcomes. This is a matter which is not as directly evident as, for instance, the link between an entity which exists for certain purposes (such as a charitable institution) and the achievement of those purposes. There are likely to be social benefits for Indigenous groups from a broader recognition that land access benefits are partly compensation for the diminution of native title rights and that they should be treated accordingly. Further, greater autonomy for benefit recipients by avoiding

¹⁴⁰ Ibid sch 1 s 12-1(1A).

¹⁴¹ See, eg, Ciaran O'Faircheallaigh, 'Use and Management of Revenues from Indigenous-Mining Company Agreements: Theoretical Perspectives' (Agreements, Treaties and Negotiated Settlements Project: Working Paper Series No 1/2011, June 2011) 26; Jon Altman, 'Contestations Over Development' in Jon Altman and David Martin (eds) *Power, Culture, Economy: Indigenous Australians and Mining* (Australian National University E Press, 2009) 1, 6; Jon Altman, Submission to Attorney-General's Department (Cth), *Leading Practice Agreements: Maximizing Outcomes from Native Title Benefits*, 25 November 2010, 8.

mandated benefits management structures may also have advantages.¹⁴² However, the Explanatory Memorandum does not explore these matters.

More significantly, while the *NT Tax Act* contemplates that intermediary Indigenous management entities, in the form of Indigenous holding entities, may be used, it does not provide any regime to support the integrity and efficient operation of the entities. In fact, the reforms are likely to reduce efficiency in some ways. For example, the differentiation between NANE and non-NANE amounts (such as investment returns, or provision for administrative costs) coupled with the ability to retain NANE status for some benefits as they flow through intermediary entities will mean that detailed accounting records will have to be kept. The records will need to contain sufficient specificity to permit tracing through to the amounts which arise directly or indirectly from the original native title benefit,¹⁴³ whilst dealing with the fact that a link based on 'arising directly or indirectly' will involve a degree of ambiguity.

The literature, as noted by O'Faircheallaigh, emphasises the importance of robust 'institutions' (a term which is used in a relatively broad sense, but which would include entities which receive and manage native title benefits) to economic efficiency and social outcomes.¹⁴⁴ Indeed, O'Faircheallaigh suggests that healthy institutions, at the level of each Indigenous group, are 'key in maximising benefits from mining revenues',¹⁴⁵ and that fundamental institutional issues include:

the way in which institutions do or do not mediate the incentives generated by mineral revenues for political leaders; the ability of institutions to support effective planning and priority setting; the degree of transparency associated with their operation; and the extent to which institutions facilitate transmission of demands by indigenous group or community members.¹⁴⁶

Langton and Mazel note that capacity and governance of the Indigenous entities which implement agreements is 'integral to the sustainability of agreements and to the communities they service'.¹⁴⁷

¹⁴² See, eg, The Economist, 'Welfare in India: Money Where Your Mouth Is', *The Economist* (London) 10 November 2012, 27–8.

¹⁴³ See, eg, Explanatory Memorandum 14–15 [1.21]–[1.22]. The ramifications of streaming non-NANE and NANE income to selected recipients, such as, respectively, tax exempt and taxable entities, is not discussed in the Explanatory Memorandum, although arguably, anti-avoidance provisions such as *ITAA36* pt IVA should be considered.

¹⁴⁴ O'Faircheallaigh, above n 141, 10–12.

¹⁴⁵ *Ibid.* 24. See also, Robert Levitus, 'Aboriginal Organisations and Development: The Structural Context' in Jon Altman and David Martin (eds) *Power, Culture, Economy: Indigenous Australians and Mining* (Australian National University E Press, 2009) 73, 93.

¹⁴⁶ O'Faircheallaigh, above n 141, 25.

¹⁴⁷ Langton and Mazel, above n 78, 59–60. See also at 65. The Minerals Council of Australia and the National Native Title Council have also identified the importance of Indigenous organisations to improved outcomes from the management of benefits, with a proposed 'Indigenous Community Development Corporation' incorporating capacity building and integrity measures: Minerals Council of Australia and National Native Title Council, Submission to The Treasury (Cth), *Indigenous Economic Development from Mining Agreements*, 30 November 2010.

For instance, as noted by Langton and Mazel, key economic outcomes include achieving 'a long-term financial base, prospects for ongoing labour participation and skills development, and to establish commercial enterprises whose viability is not entirely dependent on mining activities'.¹⁴⁸ Meeting these targets may involve Indigenous intermediary entities in the form of accumulation vehicles to provide intergenerational support for business development and training; business incubator and training entities; and investors to generate returns from land access benefits and to provide seed funding and meet on-going capital requirements.¹⁴⁹

The lack of certainty of tax treatment discussed in Part 2.1 also has the potential to be multiplied to some extent by each layer of intermediary used by Indigenous groups, particularly if detailed accounting records are required to trace NANE income amounts, so that this impediment should also be considered.

Interestingly, between the time the *NT Tax Act* was introduced and the time that it was passed by the House of Representatives, the government appears to have acknowledged the need for further consideration of how the tax system should support the economic and social goals discussed above, including any adverse implications from the *NT Tax Act* reforms.¹⁵⁰ On 18 March 2013, the Attorney-General, the Assistant Treasurer and the Minister for Families, Community Services and Indigenous Affairs called for the establishment of a native title and tax working group to 'examine the tax treatment of native title payments and how they can better benefit Indigenous communities now and into the future'.¹⁵¹ The working group is intended to consider such matters and to identify how 'governance and sustainability in the management of native title payments' could be improved.¹⁵²

2.2.2 Potential removal of charitable trusts as vehicles for governance support

As discussed in Part 2.1.3, charitable trusts most likely would not have qualified under the concession as originally introduced in the *NT Tax Act*. This would have meant that, to the extent land access agreements provided for payments to the trustee of a charitable trust, there would have been a residual derivation of income risk for the Indigenous group and a risk that some distributions from the charitable trust might be subject to the normal tax rules in the hands of recipients. This would have reduced flexibility and limited what is currently a significant avenue (despite its drawbacks) of seeking improved outcomes, within a relatively robust governance structure. Failure to

¹⁴⁸ Langton and Mazel, above n 78, 65.

¹⁴⁹ For further examples, see, eg, the discussion of entities established under the Yandi Land Use Agreement in Sarah Holcombe, 'Indigenous Entrepreneurialism and Mining Land Use Agreements' in Jon Altman and David Martin (eds), *Power, Culture, Economy: Indigenous Australians and Mining* (Australian National University E Press, 2009) 149; Minerals Council of Australia and National Native Title Council, above n 147, 19–20.

¹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2013, 2380–1 (David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation).

¹⁵¹ Mark Dreyfus, Attorney-General and Minister for Emergency Management, Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform and David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation, 'Native Title Tax Treatment to be Examined' (Media Release, 18 March 2013).

¹⁵² Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2013, 2380 (David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation).

use charitable trusts might also have meant that Indigenous groups would miss out on the tax exemption for investment income which is available,¹⁵³ subject to some potential accumulation limits, to the trustee of a charitable trust.

As noted above, the amendments introduced by the *TLA 2013 Measures No 2 Act* largely eliminate the disincentive to use charitable trusts, by ensuring that they can qualify as Indigenous holding entities. Nevertheless, the reforms may still lead to a reduction in the use of charitable trusts due to the fact that the reforms permit tax free payments directly to individuals.

3. THE INDIGENOUS COMMUNITY FUND ALTERNATIVE

This paper suggests that the Fund model deserves further analysis as a potential method to improve certainty and to focus on outcomes and the management of native title benefits. The need for such analysis is reinforced by the lack of any public reasons provided by the government for its rejection. By implication, though, it seems that rejection probably occurred due to a (misplaced) desire to achieve greater certainty in the short term in as narrow a fashion as possible, with broader reforms to be considered in the longer term.¹⁵⁴ Hopefully the recently established working group will provide an opportunity for such further consideration. This hope is bolstered by the Assistant Treasurer's express reference to the 'Indigenous Community Development Corporation' (discussed in Part 3.2 below) when referring to the working group during the second reading debate on the *NT Tax Act*.¹⁵⁵

3.1 Description of the Fund

The 2010 Consultation Paper suggested three potential reform models, one of which was the Fund.¹⁵⁶ Although set out as a series of suggestions and questions for further comment, the key features of the Fund appear to be:

- The Fund would be an unspecified type of 'entity', potentially including a trust arrangement or a corporation.¹⁵⁷
- The Fund could receive, as exempt income, native title benefits or any other funds, provided those other funds were associated with its purposes.¹⁵⁸
- Investment income would only be exempt from income tax if 'reinvested' in the Fund and used for its purposes (possibly restricted to an unspecified sub-set of purposes).¹⁵⁹

¹⁵³ *ITAA97* s 50-5 item 1.1. See, eg, Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Charities*, TR 2011/4, 12 October 2011, 55 [230].

¹⁵⁴ The Treasury (Cth), 'Tax Treatment of Native Title Benefits: Summary of Consultation Process' (Consultation Process Summary, November 2012) 1. See also House of Representatives Standing Committee on Economics, above n 61, 7 [1.19].

¹⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2013, 2380 (David Bradbury, Assistant Treasurer and Minister Assisting for Deregulation). See also Dreyfus, Macklin and Bradbury, above n 151.

¹⁵⁶ The Treasury (Cth), *2010 Consultation Paper*, above n 3, 10-13.

¹⁵⁷ *Ibid* 10, 12.

¹⁵⁸ *Ibid* 11.

¹⁵⁹ *Ibid*.

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- It would have to be applied for specified purposes, being, for instance, the benefit of Indigenous Australians, or, potentially, of a specific Indigenous group.¹⁶⁰ This general purpose might be articulated more specifically as a range of permitted activities in support of the general purpose.
 - Payments to individuals other than in pursuance of the Fund's purposes would be permitted,¹⁶¹ presumably in the form of a distribution to members made by a corporate Fund. However, such a payment would be subject to the normal tax rules.
 - The Fund would be subject to minimum governance requirements, although not detailed in the 2010 Consultation Paper.¹⁶²

3.2 Can the Fund achieve greater certainty and a better focus on outcomes and management of native title benefits?

An alternative such as the Fund would arguably better meet the policy objectives referred to in Part 1.2.1. Crucially, it could provide certainty of treatment for all payments to the Fund, not just payments made under specific agreements and linked to acts affecting native title. That is because native title benefits *plus* payments to be used for the Fund's purposes would be income tax exempt. For instance, the Minerals Council of Australia ('MCA') and the National Native Title Council ('NNTC'), representing the resources industry and Indigenous native title bodies, respectively, have both endorsed an analogous institution, in the form of an 'Indigenous Community Development Corporation'.¹⁶³ Indeed, the 'most tangible short term benefits' anticipated by the MCA and NNTC resulted from the 'high degree of clarity and certainty for those who choose to adopt this structure'.¹⁶⁴

Of course, the extent of improvement in certainty is likely to depend largely on the width of the Fund purposes since a narrow range of purposes may mean reliance continues to be placed on satisfying the native title benefit test of an eligible agreement plus an act affecting native title. However, regardless of the breadth of purposes, it should be possible to obtain certainty at least for payments made to the Fund to be used for its purposes, without the same apportionment risk associated with the *NT Tax Act*, since the parties could agree on the split between the Fund and other recipients without the fear of having that split challenged.

Using the Fund could also permit certainty to be achieved for several of the outstanding tax issues discussed in Part 2.1.6. For instance, legislating that the Fund is deemed to make supplies for GST and PAYG withholding purposes in return for the income tax exempt payments received would address a number of the questions.

Further, permitting a range of purposes for the benefit of an overall Indigenous group while mandating robust but workable governance standards for an identified entity should better facilitate social and economic outcomes through a greater focus on the management of funds received. As discussed in Part 2.2.1, the role of robust

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid 12.

¹⁶³ Minerals Council of Australia and National Native Title Council, above n 147, 14–22. Despite the title, the institution could comprise a corporation or a trust.

¹⁶⁴ Ibid 22.

institutions to manage the native title benefits received is likely to be critical. However, ensuring appropriate governance standards need not prevent autonomous decision-making by Indigenous groups,¹⁶⁵ or prevent the use of culturally appropriate decision-making processes, so that benefits could best be distributed in support of group needs.¹⁶⁶ It may also enable (although it would not require) the use of one, or one of only a few, management entities, which should entail administrative efficiencies. Additionally, if the Fund must exist for purposes, those purposes could, if appropriate, be more directly aligned with the government's social and economic objectives.

To address concerns that governance arrangements may increase administrative costs and reduce flexibility, a proportional approach could be adopted, with different levels of requirements for small, medium and large Funds. For, instance, a similar approach has been adopted for registered charities subject to the Australian Charities and Not-for-profits Commission.¹⁶⁷ This would reflect the diverse sizes of benefits packages under land access agreements and would enable minimal standards for smaller payments (and smaller Funds), but more extensive regulation for larger Funds. Certainly, the MCA and NNTC anticipate that their Indigenous Community Development Corporation would: create 'capacity to maximise the delivery of economic and social dividends with minimal administrative burden'; and assist by providing a structure which would support sustainability and intergenerational benefit, yet still permit flexibility in approaches by different Indigenous groups.¹⁶⁸

Adopting the Fund would also more effectively promote intergenerational economic and social outcomes by according a tax exemption to accumulated income which is used for Fund purposes. This means that the Fund could be a potential replacement for charitable trusts (the benefits of which were discussed in Part 2.2.2), rather than a reform which removes some of their advantages. Indeed, transitional legislation could permit Indigenous groups to broaden the purposes of existing charitable trusts or to include non-charitable purposes so as to convert existing structures into Funds, or else to transfer assets from an existing charitable trust to a new Fund. While constitutional limits can be an impediment to reforms which relate to trusts (including charitable trusts), if the Fund is directed toward Indigenous communities, the federal Parliament may be able to use s 51(xxvi) of the *Commonwealth Constitution* to pass the necessary legislation. While moving to a Fund may involve transitional costs for existing benefits management structures, they could be mitigated (including by government guidance materials).¹⁶⁹ Moreover, given the widespread use of charitable trusts under existing land access agreements, this process may involve less transitional costs than the significant expense likely to be associated with the income tax exemption contained in the *NT Tax Act*.

¹⁶⁵ Levitus, above n 145, 91.

¹⁶⁶ See, eg, O'Faircheallaigh, above n 141, 18. See also, Langton and Mazel, above n 78, 60.

¹⁶⁷ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 45–10(2A), 50–10(2A), 60–10, 60–20, 60–25, 65–5, 205–25; Australian Charities and Not-for-profits Commission, *Factsheet: Ongoing Obligations of Registered Charities* (2012) <http://www.acnc.gov.au/ACNC/Pblctns/Factsheets/ACNC/FTS/Fact_ongObl_regChar.aspx>.

¹⁶⁸ Minerals Council of Australia and National Native Title Council, above n 147, 14.

¹⁶⁹ The Treasury (Cth), *2010 Consultation Paper*, above n 3, 13.

Accordingly, further consideration of the Fund model seems warranted and could be advanced by debating an existing model, such as the proposed Indigenous Community Development Corporation.

CONCLUSION

The author anticipates that the reforms will significantly reduce certainty for Indigenous groups and energy and resource proponents. First, it seems likely that the majority of land access agreements for the current commodities cycle have already been entered into and involve payments which may well not qualify for concessional treatment (if made to the trustee of a charitable trust, or for other reasons). Seeking to harness the benefits of the reforms would therefore involve re-negotiation of existing agreements, which is likely to be a time consuming and costly process, given the potentially significant payments and complexity of many agreements, as well as the critical importance of the payment recipient's identity.

Further, it is almost inevitable that apportionment will be required under each land access agreement, on the basis that not all benefits are provided for acts which extinguish or are inconsistent with native title. This is likely to be an agreement-specific, difficult and uncertain exercise in that apportionment will probably have to be based on compensation valuations and on valuations of the various intangible rights created under land access agreements. To compound the misery, the parties may not know whether native title actually exists until many years after an agreement has been executed and payments may not be dependent on its existence. All of these issues, of course, only become relevant if the parties have managed to make an agreement under the *NT Act*, which would include ILUAs, likely includes RTN agreements, but certainly would not include a range of other land access agreements entered into outside the RTN regime.

In addition, there is no explanation as to how the changes will achieve the government's second goal of improving economic and social outcomes for Indigenous groups. Surprisingly, there is only limited acknowledgment of the key role that Indigenous organisations will fill in managing native title benefits, along with the integrity and capacity measures that might be required to ensure the success of these organisations. Further, while *TLA 2013 Measures No 2 Act* does address some disincentives that the *NT Tax Act* placed in the way of charitable trusts as benefits recipients, the reforms might also limit the desire of parties to use charitable trusts when negotiating future agreements, despite their current widespread function of pursuing economic and social improvements.

Finally, the reforms focus only on income tax and do not address a number of current uncertainties, such as in relation to PAYG withholding and to the GST treatment of payments under land access agreements. It would have been preferable not to miss the opportunity to clarify the ambiguity in the wider network of tax provisions.

Accordingly, it is hoped that the proposed native title and tax working group provides an opportunity to re-examine the approach adopted in the *NT Tax Act*. In particular, the author suggests that the working group should consider whether an alternative such as the government's proposed Indigenous Community Fund might better achieve certainty whilst facilitating improved economic and social outcomes

through a focus on the Indigenous intermediaries which will manage benefits and their purposes.