NATIVE TITLE PAYMENTS AND THEIR TAX CONSEQUENCES: IS THE FEDERAL GOVERNMENT'S RECOMMENDATION OF A WITHHOLDING TAX THE BEST APPROACH?

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I INTRODUCTION

National attention has been focused in recent years on the link between control of Indigenous land and the reduction of Indigenous socioeconomic disadvantage.[1] The federal government has consistently maintained that native title holders should be encouraged to utilise their rights to enable them to derive economic and other benefits.[2] In addition, many native title holders view their role, once a determination is made, as agents for economic change as well as managing the native title.[3] Many Indigenous native title claimants want a financial return from any land over which native title may be determined and many are pro-development.[4]

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1 Jenny Macklin, 'Beyond Mabo: Native Title and Closing the Gap' (Paper presented at the 2008 Mabo Lecture, James Cook University, 21 May 2008) <http://www.nswbar.asn.au/circulars/macklin.pdf>; Robert McClelland, (Speech delivered at the Negotiating Native Title Forum, The Novotel Brisbane, 29 February 2008). <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum>; Graeme Neate, 'Negotiating Comprehensive Settlements of Native Title Claims' (Paper presented at the LexisNexis Native Title Law Summit, Brisbane, 15 July 2009).

2 Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Structures and Processes of Prescribed Bodies Corporate* (2006).

3 Lisa Strelein and Tran Tran, 'Native Title Representative Bodies and Prescribed Bodies Corporate: Native Title in a Post Determination Environment' (Native Title Research Report No 2/2007, AIATSIS, 5–6 December 2006) 8.

4 Jon Altman, 'Reforming Financial Aspects of the *Native Title Act 1993*: An Economics Perspective' (Discussion Paper No 105/1996, Centre for Aboriginal Economic Policy Research (CAEPR), 1996) 1.

Difficulties arise due to the impoverishment of Indigenous peoples, particularly in remote parts of Australia.[5] The areas involved are almost always 'commercially-marginal … land leftover after more than 200 years of settlement, development and extinguishment'.[6] This land, though having low commercial productivity, is extremely important for traditional practices and cultural maintenance which is why Indigenous peoples desire it.[7] In fact most remote communities that run Indigenous businesses have ultimate goals for their businesses which are not centred on the maximisation of profit. These will include employment and training, autonomy, cultural maintenance and development and caring for their land.[8]

There may be little value, in commercial terms, in transferring land to native title holders. It is also probable that native title agreement-making alone cannot support Indigenous economic development, however, it still has a key role to play in terms of injecting funding, investment and infrastructure into remote communities where otherwise there may have been little or no investment.[9] Adding to the difficulties of economic disadvantage is the issue that payments to traditional owners of land and native title holders in respect of their land may also be subject to income tax.

This article looks at several tax issues that arise in respect of native title. First, it introduces some of the range of payments that may be received by Indigenous Australians in respect of native title and mining on land that is subject to native title. Second, it analyses the current withholding tax regime relating to mining payments in respect of 'Aboriginal land' under the *Income Tax Assessment Act 1936* (Cth) ('*ITAA36*') to determine whether or not this regime applies to native title payments under the *Native Title Act 1993* (Cth) ('*NTA*'). The author concludes that it does not. It then looks at the potential application of income and capital gains tax to payments as a result of the *NTA*. Finally, the author considers whether an alternative withholding tax might be an appropriate approach to deal with the tax issues that arise regarding payments in respect of native title. The analysis considers this from the perspective of protecting the native title income stream for current and future generations and providing the

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5 The fact that many Indigenous Australian people are severely economically disadvantaged has been recognised judicially: see, eg, *Re Mathew* (1951) VLR 226; *The Trustees of the Indigenous Barristers' Trust v Commissioner of Taxation* [2002] 127 FCR 63 and by economists; see, eg, Owen Stanley, 'The Potential Use of Tax Incentives for Indigenous Businesses on Indigenous Land' (Working Paper No 17/2002, Centre for Aboriginal Economic Policy Research (CAEPR), October 2002) 2; and by the Australian Government: see, eg, Ken Henry, 'Addressing Extreme Disadvantage Through Investment in Capability Development' (Speech delivered at the Institute of Health and Welfare Conference 'Australia's Welfare 2007', Canberra, 6 December 2007).

6 Jon Altman, Geoff Buchanan and Libby Larsen, 'The Environmental Significance of the Indigenous Estate: Natural Resource Management as Economic Development in Remote Australia' (Discussion Paper No 286/2007, Centre for Aboriginal Economic Policy Research (CAEPR), 2007) 17 <http://caepr.anu.edu.au/Publications/DP/2007DP286.php>.

7 Stanley, above n 5, 2.

8 Ibid, 3.

9 Lisa Strelein, Submission to Australian Institute of Aboriginal and Torres Strait Islander Studies, *Henry Review of Australia's Tax System*, 9 October 2008, 3.

revenue with a stable and appropriate tax base that is easy to administer. In other words, the article will conclude with a consideration of a withholding tax from a 'tax simplicity' perspective.[10]

A withholding tax regime similar to the current mining withholding tax regime was proposed by the federal Coalition government in 1998[11] but never enacted and it is currently being considered by the federal Labor government.[12] In May 2010 Treasury released a consultation paper 'Native Title, Indigenous Economic Development and Tax'[13] that considers three approaches to the potential income tax implications of native title claims. These approaches include a native title withholding tax.

This discussion in this article is also taking place in the context of the Review of Australia's Future Taxation System ('RAFTS'), the Report for which was handed to government on 2 May 2010. This Review, headed by Ken Henry from the Department of Treasury, recommended scrapping the state-based royalty taxes that apply to mining projects and replacing them with a uniform national resource rent tax.[14] Subsequent political events, including the federal election that resulted in a minority Labor government, means that it is not yet clear whether and how this will impact on a proposed native title withholding tax. Furthermore, at the time of writing this article the closing date for submissions regarding the Treasury consultation paper 'Native Title, Indigenous Economic Development and Tax' has been suspended.

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10 The author notes that the current mining withholding tax is subject to much criticism on the basis of the inequitable calculation of the tax base. This tax has been subject to extensive criticism from an equity perspective and it is also widely criticised on the basis that it increases the funding difficulties of Aboriginal Land Councils: see, eg, Jon Altman 'Report on the Review of the Aboriginals Benefit Trust (and related financial matters) in the Northern Territory land rights legislation' (Australian Government Publishing Service, 1984) 229–34; Jon Altman and D P Pollack, 'Reforming the Northern Territory Land Rights Act's Financial Framework into a More Logical and More Workable Model' (Working Paper No 5/1999, Centre for Aboriginal Economic Policy Research (CAEPR), November 1999) states 'Almost all reviewers of the ALRA [*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)] have recommended that the tax be abolished': at 20.

11 Peter Costello and Daryl Williams, 'Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters' (Media Release, 13 February 1998).

12 Wayne Swan and Chris Bowen, 'The Way Forward on Tax Measures Announced but not Enacted, by the Previous Government' (Joint Press Release, 13 May 2008) <http://www.treasurer.gov.au/> .

13 Australian Government, 'Native Title, Indigenous Economic Development and Tax' (Consultation Paper, No 1809, 18 May 2010).

14 Australia's Future Tax System, Parliament of Australia, *Report of Australia's Future Tax System Part One* (2009) recommendations 45, 89. The proposed tax will be modelled on the petroleum resource rent tax levied on products including crude oil and natural gas mined in Commonwealth waters other than the North-West Shelf and the jointly developed area between Australia and East Timor. This resource rent tax has also been suggested earlier by Treasury representatives see, eg, David Parker, 'Tax Reform – Future Direction' (Speech delivered at the Minerals Council of Australia's Biennial Tax Conference, Melbourne, 17 September 2009) <http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/speeches/08.htm>.

II PAYMENTS THAT MAY BE MADE TO INDIGENOUS AUSTRALIANS IN RESPECT OF NATIVE TITLE

This article focuses on payments that arise from agreements between resource developers and Indigenous Australians in respect of native title. In the majority of cases the agreements are confidential which therefore makes it difficult to conclude what these payments actually are. There has, however, been some recent research that indicates that the payments vary from agreement to agreement and in some cases they are financially significant. Payments under these agreements relate to such activities as access to land over which native title exists, exploration of the land and actual mineral extraction. Ciaran O'Faircheallaigh has analysed a number of agreements and points out that whilst some do not contain any financial consideration, others provide for payments that can exceed three per cent of the value of production.[15] Where there is mining output valued at $600 million, a three per cent royalty equals $18 million a year, which is a substantial amount of money. Other agreements provide for specifically determined annual amounts and others involve payments related to the value of minerals.[16] In his 2003 paper O'Faircheallaigh identifies six financial models for agreements between Indigenous peoples and mining companies.[17] These models include the making of single up-front payments, fixed annual payments and royalties based on mining output to the Indigenous owners. Where there is an obligation to make payments under these agreements it is important to be clear about the taxation implications for the traditional owners who receive them. This paper will demonstrate that these implications are currently complex and uncertain.

III MINING PAYMENTS FOR ABORIGINAL LAND AND THE MINING WITHHOLDING TAX UNDER THE *INCOME TAX ASSESSMENT ACT 1936* (CTH)

Division 11C of the *ITAA36* is an example of a specific legislative provision aimed at collecting a percentage of certain payments resulting from mining activities, such as tax, through the mechanism of a withholding tax. It however

15 Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (2004) 2(25) *Land, Rights, Laws: Issues of Native Title* 1, 7.

16 Ciaran O'Faircheallaigh and Tony Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14 *Environmental Politics* 629, 635.

17 Ciaran O'Faircheallaigh, 'Financial Models for Agreements between Indigenous Peoples and Mining Companies' (Research Paper No 12, Parliamentary Library, Parliament of Australia, 2003).

exempts these payments from further tax if payments are made to Indigenous Australian people.[18]

Under division 11C of the *ITAA36* where a 'mining payment' is made to a person, that person is liable to income tax in the form of mining withholding tax. The rate for mining withholding tax is set by Parliament and is currently four per cent.[19] Mining payments are defined in section 128U of the *ITAA36* as certain payments under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*') and any other payments under Commonwealth, state or territory legislation that relate to mining of 'Aboriginal land'. These payments are for permission to enter the land, prospect, explore and or mine the land. 'Aboriginal land' is also defined in section 128U. 'Aboriginal land' is stated to be any estate or interest in land that is held for the use or benefit of 'Aboriginals' under Commonwealth, state or territory legislation.

Mining payments made to either a 'distributing body' or 'Aboriginal person' and which have attracted mining withholding tax are non-assessable and non-exempt income under section 59.15 of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA97*'). The effect of these provisions is that the mining payment is subject to a tax rate of four per cent and is otherwise exempt from ordinary income tax. It is also not taken into account when calculating any tax loss of the individual 'Aboriginal' or 'distributing body' recipient.[20] Although formal liability for the tax rests with the recipient of the mining payment, in order to ensure compliance the actual responsibility for paying the tax lies with the mining company, government or other entity who makes the payment. These bodies are required to withhold an amount from the payment in accordance with the rules established under the pay as you go ('PAYG') withholding rules.[21]

A mining payment is a payment made to either an 'Aboriginal' person or Aboriginal Land Council established under the *ALRA* or a company registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) or any other corporation established under legislation that relates to 'Aboriginals' and which is empowered or required to pay moneys to 'Aboriginals' or for their benefit.[22] An 'Aboriginal' is defined in section 128U of the *ITAA36* as 'a member of the Aboriginal race of Australia' or of the Torres Strait Islands.

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18 Commonwealth, *Parliamentary Debates*, House of Representatives (1979, John Howard MP, Treasurer), <http://law.ato.gov.au/atolaw/view.htm?dbwidetocone=05%3AEXT%3AExplanatory%20Memorandum%20and%20SRS%3A1979%3AIncome%20Tax%20Assessment%20Amendment%20Act%20(No.%202)%201979%3ASecond%20Reading%20Speech%20-%20REPS%3B>. This tax has been subject to extensive criticism from an equity perspective and it is also widely criticised on the basis that it increases the funding difficulties of Aboriginal Land Councils: see, eg, Altman, above n 10; Altman and Pollack, above n 10.

19 *Income Tax (Mining Withholding Tax) Act 1979* (Cth).

20 *ITAA97* s 6.20.

21 *Taxation Administration Act 1953* (Cth) sch 1 s 12-320.

22 *ITAA36* s 128U.

IV DOES THE CURRENT MINING WITHHOLDING TAX APPLY TO NATIVE TITLE?

There are a number of problems with the application of the division 11C mining withholding tax to payments made in respect of native title. It is strongly arguable that the Aboriginal land defined in section 128U of the *ITAA36* is not the same as land that is subject to a determination under the *NTA*. The wording of the section 128U definition is that Aboriginal land is land that '... under provisions of a law of the Commonwealth ... is held for the use or benefit of Aboriginals'. The *NTA* on the other hand defines native title as the 'communal, group or individual rights and interests' in relation to the land or waters that are 'possessed under the traditional laws acknowledged, and traditional customs observed, by Aboriginal peoples or Torres Strait Islanders' and that is 'recognised by the common law of Australia'.[23] Section 253 of the *NTA* specifically defines Aboriginal land as land within specific land rights legislation including the *ALRA*. In *Mabo v Queensland (No 2)*[24] the High Court recognised by a majority of 6:1 that the Meriam people (as represented by Eddie Mabo) had native title to land known as Mer, the Murray Island group in the eastern Torres Strait. This title was considered to be a combination of their local custom, original native ownership and actual possession, use and enjoyment of the land ('usufructuary rights').[25] Justice Brennan provided a summary of his lengthy and complex reasons in the judgment,[26] and the relevant passages are reproduced below:

> it is desirable to state in summary form what I hold to be the common law of Australia with reference to land titles:
>
> 1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
> 2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
> 3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
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> ...
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> 6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by whose laws and customs, have a connexion with the land.
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> ...

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23 *NTA* s 223.

24 (1992) 175 CLR 1.

25 *Mabo v Queensalnd (No 2)* (1992) 175 CLR 1, 69–70 ('*Mabo*').

26 This summary has been referred to as 'influential', see, Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4th ed, 2009) 288.

9. If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.[27]

As a result of this decision the federal government enacted the *NTA*.

Justice Brennan's analysis indicates that native title is not land that is held under provisions of a Commonwealth, state or territory law. It takes its source from the laws and customs of the relevant indigenous peoples. This was subsequently confirmed by the enactment of section 223 of the *NTA*. Lisa Strelein of the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') considers that native title is recognised and protected by the *NTA* but not actually granted by it. She also argues that as native title is a communal right it is not a title 'held for the use or benefit' of Aboriginal and Torres Strait Islanders as the definition in the *ITAA36* of Aboriginal land requires.[28]

It is also arguable that native title, as determined in the *Mabo* decision and subsequent cases, is not an estate or interest 'in land' as required by the section 128U definition, but something less or different to this.[29] The High Court in *Western Australia v Ward* conceptualised native title as closer to a 'bundle of rights' which could be individually severed or extinguished than to the common law concept of title to land.[30] Certainly the inalienable nature of native title would suggest this.[31]

The Australian government does not consider that native title land is covered by division 11C, as in the late 1990s the then federal government expressed the intention of applying a similar regime to the mining withholding tax to native title payments, although this proposal did not proceed.[32] In May 2008 the federal Labor government confirmed the view that division 11C does not apply to payments under the *NTA* by announcing that it was considering establishing a system of withholding tax payments made to native title holders for acts which impair native title. However, at this stage legislation has not been tabled and as stated above there has now been a consultation paper issued by Treasury.[33]

In some cases land subject to native title may also be Aboriginal land under section 128U. In other words, they can co-exist. Native title is not extinguished by the reservation or dedication of land for the benefit of Aboriginal or Torres Strait

27 *Mabo* (1992) 175 CLR 1, 69–70.

28 Lisa Strelein, 'Taxation of Native Title Agreements' (Research Monograph No 1/2008, AIATSIS, May 2008) 55. That native title can be communal title was stated by the Federal Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 and *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 301 (Wilcox, Sackville and Merkel JJ); The *NTA* s 223 also states that native title can be communal.

29 Michael Mansell, 'Mabo Perspectives: The Aboriginal Provisional Government – The Court Gives an Inch but Takes Another Mile' (1992) 1(57) *Aboriginal Law Bulletin* 4, 6; Strelein, 'Taxation of Native Title Agreements', above n 28; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, first published 2003) 111–118.

30 (2002) 213 CLR 1, 91–92.

31 That native title is inalienable was confirmed by the High Court in *Mabo* (1992) 175 CLR 1, 70 (Brennan J).

32 Costello and Willams, above n 11.

33 Swan and Bowen, above n 12.

Islander people[34] and the *NTA* states that native title may be recognised over land that is held by or for the benefit of Aboriginal or Torres Strait Islander peoples.[35] The mining withholding tax will therefore only apply to mining payments in respect of land held under the *ALRA* and various state land rights legislation where the land is an estate or interest in land held for the 'use or benefit of Aboriginal people'. The author has been advised in discussions with representatives of land councils that mining payments in respect of this land rarely occur.

V THE SCOPE OF NATIVE TITLE PAYMENTS

A The Role of the Prescribed Body Corporate

Under the the *NTA*, once a claim is determined by the Federal Court the claimant group is required to establish a body corporate to hold the native title. This body corporate is known as a Prescribed Body Corporate ('PBC').[36] PBCs nominated by the claim group and determined by the court then become Registered Native Title Bodies Corporate ('RNTBC') when they are registered with the Native Title Tribunal on the Register of Native Title Bodies Corporate.[37]

Many researchers are now considering that, with the increase of successful determinations of native title across Australia, PBCs are emerging as a prominent element within the native title arena.[38] It has been said that PBCs 'have the most important long-term responsibility in the entire native title system – the holding and management of the rights themselves'.[39] The federal government estimates that there will be 100–150 PBCs registered once all native title claims are determined. Many Indigenous groups however dispute this number and consider that the total will be higher.[40] It is estimated that it will take approximately 30 years for all current native title claims to be determined if litigated.[41]

34 *Mabo* (1992) 175 CLR 1, 64, 68, 71 (Brennan J).

35 *NTA* s 253. See also Strelein, above n 28, 'Taxation of Native Title Agreements', 56.

36 *NTA* ss 55, 56, 57. Once the details of a PBC are entered on the National Native Title Register, the body then has the status of a 'Registered Native Title Body Corporate' which is recognised under *NTA* s 203AD.

37 The term PBCs will be used throughout this paper to refer to both PBC and RNTBC phases.

38 Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 3, 1 [2]; Toni Bauman and Tran Tran, 'First National Prescribed Bodies Corporate Meeting: Issues and Outcomes' (Research Report No 3, AIATSIS, 11–13 April 2007) xii [33]; David Ritter, *Contesting Native Title* (Allen & Unwin, 2009) 26; McRae et al, above n 26, 378 [7.560].

39 McRae et al, above n 26, 378 [7.560].

40 Bauman and Tran, above n 38, vi [4].

41 Graeme Neate 'Achieving Real Outcomes from Native Title Claims: Meeting the Challenges Head On' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 198, 203; Toni Bauman and Cynthia Ganesharajah, 'Second National Meeting of Registered Native Title Bodies Corporate: Issues and Outcomes' (Native Title Research Report No 2/2009, AIATSIS, 2 June 2009) 3 [2.1] <http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/FINAL_RNTBCMeetingReport.pdf>; Graeme Neate, President of the National Native Title Tribunal, has suggested that all claims will not be finalised until 2035: see Commonwealth Government, Senate Standing Committee on Legal and Constitutional Affairs, Hansard, 16 April 2009, 10–11.

According to the Native Title Research Unit of AIATSIS there were 55 PBCs at 31 December 2007 and currently there are around 70.[42] These PBCs represent more than 75 determinations that native title exists.[43] Other sources indicate that there are over 70 PBCs representing over 50 000 Indigenous Australians.[44]

The primary role of PBCs is to:

- protect and manage native title interests in accordance with the wishes of the broader title holding group; and
- ensure certainty for government and other parties with an interest in accessing or regulating native title lands and waters by providing a legal entity through which to conduct business with the native title holders.[45]

The *NTA* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) ('PBC Regulations') set out the functions to be carried out by a PBC in managing and holding native title.[46]

Under the *NTA*, PBCs are required to hold the native title as either a trustee or agent for the claimant group.[47] Agent is the default category, so that in the event that there is no election by the native title holders that the Federal Court determine that the native title is held on trust, the Court will determine that the title is to be held as an agent.[48] Initially the majority of PBCs elected to choose the trust structure.[49] This is clearly demonstrated in the figures provided by Bauman and Tran in their Report where they state that of the 48 PBCs established by early 2007, 37 were trustees and 11 agents.[50] In more recent years, however, the split has come closer to half trustees and half agents.[51] While it is arguable that an agent PBC holds any income from the native title on constructive statutory trust,[52] it is less clear who has 'legal ownership' under European common law in this situation.[53] The issue of ownership is relevant for

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42 Strelein, 'Taxation of Native Title Agreements', above n 28, 18. By March 2010 this had increased to 56 and by June 2010 to 70: see AIATSIS, *Native Title Research Unit, Major Projects, Registered Native Title Body Corporate Profiles* <http://ntru.aiatsis.gov.au/major_projects/rntbc_profiles.html> .

43 Strelein, 'Taxation of Native Title Agreements', above n 28, 18.

44 Bauman and Ganesharajah, above n 41.

45 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 6, 7; see Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, 'Guidelines for Support of Prescribed Bodies Corporate (PBCs)' (Australian Government, 2009) 3; see also Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 3, 1–2; Bauman and Tran, above n 38; Ritter, above n 38; McRae et al, above n 26.

46 *NTA* ss 55, 56, 57; PBC regs 6, 7.

47 *NTA* ss 55, 56, 57.

48 *NTA* s 57.

49 Strelein, 'Taxation of Native Title Agreements', above n 28, 18.

50 Bauman and Tran, above n 38, 4.

51 AIATSIS, above n 42.

52 Lisa Strelein and Tran Tran, 'Taxation,Trusts and the Distribution of Benefits under Native Title Agreements' (Native Title Research Report No 1/2007, AIATSIS, 19 September 2006) 8.

53 For a general discussion of the implications of the incorporation of a PBC within customary law and its intersection with European law see Marcia Langton and Angus Frith, 'Legal Personality and Native Title Corporations: The Problem of Perpetual Succession' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 170.

the subseqent discussion in this article of native title and income tax, including capital gains tax.

The *NTA* essentially defines the scope of government action that can, since 1 January 1994, validly take place on native title land and waters. Part 2 of division 3 establishes a regime to allow for developments that are undertaken as part of state and territory law, and could otherwise conflict with the protection given to native title by the *NTA* and/or the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). These activities potentially include the renewal of pastoral leases, construction of roads, the passage of state water legislation, the grant of mining leases and the compulsory acquisition of interests in a given land area.[54]

Apart from mining and development agreements, there may be cultural and heritage plans. Some are engaged in social programs and others have little or no activity.[55] Various factors come into play when analysing the level and type of actions that PBCs engage in. These are the level of activity of what are termed 'future acts' under the *NTA*,[56] the type of Indigenous land use agreements ('ILUA')[57] that they have entered into (if they have entered into one at all), their access to joint land management conservation arrangements and other partnerships[58] and very importantly, their access to resources.[59] PBCs may also be expected to fulfil broader cultural roles regarding Indigenous issues such as town-planning, social harmony projects, cultural protocols, welcomes to country and interpretive cultural signage.[60]

B Potential Taxable Income of PBCs once a Determination of Native Title is Made

It is widely acknowledged that the liability for income tax (which includes capital gains tax) under the *ITAA97*, for payments made to a PBC under the *NTA*

54 McRae et al, above n 26, 379 [7.600].
55 Bauman and Tran, above n 38, vii [8].
56 The *NTA* establishes a procedural framework, known as the future act regime, within which future activity impacting on native title may be undertaken. This regime seeks to ensure that native title rights are taken into account by laying down procedures, which must be complied with before acts affecting native title occur: *NTA* pt 2, div 3.
57 A future act will be valid if the parties to what are termed 'Indigenous Land Use Agreements' (ILUAs) consent and the agreement is on the register of Indigenous Land Use Agreements, see *NTA* subs-s 24AA(3), (4). As at 31 December 2009 there were 359 registered ILUAs around Australia: Graeme Neate, 'Improving and Using the Native Title Scheme – Visions and Dreams for the Future' (Paper presented at the Negotiating Native Title Conference, Melbourne, 19 February 2009) 6.
58 McRae et al, above n 26, 384–6; Bauman and Tran, above n 38, 9; For examples of indigenous engagement in natural resource management see Janet Hunt, Jon Altman and Katherine May, 'Social Benefits of Aboriginal Engagement in Natural Resource Management' (Working Paper No 60/2009, Centre for Aboriginal Economic Research, May 2009).
59 Bauman and Tran, above n 38, vii [8].
60 Ibid 17; Jon Altman, 'Alleviating Poverty in Remote Australia: The Role of the Hybrid Economy' (2007) 72 *Development Bulletin* 47.

is highly uncertain, is complex and unsatisfactory.[61] In order to understand the application of a potential withholding tax the following discussion attempts to provide an overview of some of the ways in which PBCs may receive income and/or capital gains that are potentially assessable to income tax.[62]

The *NTA* provides that native title cannot be extinguished contrary to the Act.[63] Extinguishment can occur only in very specific situations as detailed in the *NTA*.[64] The *NTA* also establishes a detailed regime for future acts that may affect native title and provides that validation of acts relating to native title may occur if the parties enter into an ILUA.[65] In addition, the *NTA* provides for the validation of past acts and intermediate period acts that would be invalid by operation of the *RDA*.[66] Native title is considered to arise from the laws and customs of the claimant group[67] and will vary from case to case depending on the proof adduced by the claimants and the impact of settlement and legislative intervention since the British Crown's assertion of sovereignty. It is considered a unique form of title and does not conform to the concept of freehold title under English common law.[68] Where there is no actual extinguishment of native title by the Crown, native title may be recognised as a right of exclusive possession. This often includes the right to control access and determine the use of the land and waters and its resources.[69]

There are various ways in which PBCs may receive amounts that are potentially income and capital gains resulting from the determination of native title and the provisions of the *NTA* that relate to compensation. There is scope for the payment of compensation if native title is extinguished.[70] In addition the *NTA* allows for the validation of past acts and provides for compensation to be payable where this has occurred.[71] It also allows for compensation where future acts that

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61 Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 5, 4; Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments' (1999) 2 *Journal of Australian Taxation* 344; Warren Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?' (2000) *Journal of Australian Taxation* 155; Julie Cassidy, 'Changing Times – Changing the Tax Implications of Native Title' (Paper presented at the Australasian Tax Teachers Association Conference, Sydney, 20–22 January 2010).

62 For a further discussion on the tax implications to native title holders of compensation payments made as a result of determinations of native title by the Federal Court see Black, 'Tax Implications to Native Title Holders of Compensation Payments', above n 61; Tom Middleton, 'Native Title and Taxation Issues' (2000) 28 *Australian Business Law Review* 86.

63 *NTA* s 11.

64 *NTA* s 11, div 2B, 3, pt 2.

65 *NTA* subs-s 24AA(3), (4).

66 *NTA* s 7.

67 *Mabo* (1992) 175 CLR 1, 70 (Brennan J).

68 One important respect in which it does not equate with freehold title is that it is inalienable: see *Mabo* 175 CLR 1, 70 (Brennan J). For a further discussion see Strelein, 'Taxation of Native Title Agreements', above n 28, 6.

69 Strelein, 'Taxation of Native Title Agreements', above n 28, 6. For a summary of the rights and interests recognised in each determination see AIATSIS, *Native Title Research Unit* <http://ntru.aiatsis.gov.au/research/litigated_determinations.pdf>.

70 *NTA* ss 17, 24MD(2), 24MD(4).

71 *NTA* s 17.

will impact on the native title are negotiated.[72] The amount of compensation or payment may or may not be income for taxation purposes and the answer will depend on the facts of each determination as these determinations are unique to the particular community's native title laws and customs.[73] This article focuses on the situations where payments are made by resource developers. Such payments can cover a wide range of agreements and can be for a variety of uses of the land including the granting of access rights, exploration and actual mining.

VI CAN PAYMENTS IN RESPECT OF NATIVE TITLE BE ASSESSABLE INCOME?

The general tax principle is that lump sum damages, or a lump sum out-of-court settlement, representing compensation for losses of an income nature only, will be assessable as income under the income substitution principle.[74] If the compensation is part income and part capital, and can be dissected into these parts, then the income component will be assessable income unless excluded by some specific provision in the *ITAA36* or *ITAA97*.[75] Where lump sum damages are paid in settlement of a claim and it is not possible to determine which component represents loss of income and which is capital then the entire amount is treated as capital.[76]

Applying the income substitution principle to native title compensation, such payments will only be income and therefore liable to tax if what is lost (what is being compensated for) would have been income. This analysis requires a consideration of the relevant facts. It is also important to remember that it is irrelevant that the amount of compensation is calculated by reference to income or profits. For example in the case of *Glenboig Union Fireclay Co Ltd v Inland Revenue Commissioner* the compensation was calculated by referring to lost profits but the amount of compensation was still considered capital.[77] In the *Glenboig Case* a railway company paid compensation to the taxpayer based on the value of unworked minerals. This was because the railway company had exercised its statutory rights to stop the taxpayer mining on its land. The House of Lords held that the payment was capital in nature and therefore not assessable income. Lord Buckmaster summarised the Court's view when he said '[w]hat we must consider is not the measure by which the amount of compensation was

72 *NTA* s 24BB.

73 *Mabo* (1992) 175 CLR 1; Daniel Mah, 'The National Native Title Tribunal: Compensation Issues – A Discussion Paper' (1995) 2 *Murdoch University Electronic Journal of Law* 16.

74 *Commissioner of Taxation (NSW) v Meeks* (1915) 19 CLR 568, 580 (Griffiths CJ); For a detailed discussion see Robin Woellner et al, *Australian Taxation Law* (CCH Australia, 20th ed, 2010) 318.

75 For example, post-judgement interest on compensation for personal injury which is exempt under *ITAA97* (Cth) ss 51–57.

76 *McLaurin v Federal Commissioner of Taxation* (1961) 104 CLR 381; *Allsop v Federal Commissioner of Taxation* (1965) 113 CLR 341; *Federal Commissioner of Taxation v CSR Ltd* (2000) ATC 4710.

77 (1922) 12 TC 427, 456 ('*Glenboig case*').

arrived at, but what it was truly paid for'.[78] The assessability of compensation is determined by what in truth the compensation is paid to fill or replace. On the facts, as the compensation was paid for the sterilisation of a capital asset, it was not assessable income.

If any compensation received under the *NTA* or an ILUA is for the extinguishment of native title land rights then the principle established in the *Glenboig case* indicates that it is not income but capital. This view is supported by Warren Black in his 1999 article, where he states that compensation for extinguishment of native title clearly falls within the situation of the *Glenboig case* and will be for loss of a capital asset and therefore not assessable as ordinary income.[79]

There is no Australian case law relating to the taxation of compensation in respect of payments for native title extinguishment. The Australian Taxation Office ('ATO') has made some public comment but unfortunately this has been in the context of the Goods and Services Tax ('GST') regime, which is a very separate system of tax to income tax. The 2006 ruling[80] clarifies that there is no 'supply' for GST purposes where native title is extinguished. However it does not assist in the issues raised regarding income tax.

VII CAN PAYMENTS IN RESPECT OF NATIVE TITLE BE ASSESSABLE AS CAPITAL GAINS?

With the introduction of capital gains tax ('CGT') in 1985 the distinction between income and capital became less significant from a tax perspective.[81] CGT arises where what is termed in the legislation a 'CGT event' takes place.[82] The crux of the CGT regime is that a CGT liability will happen only where a defined event occurs. The most common CGT event occurs where there is the change of ownership from one person to another of an asset (CGT event A1).[83] However there are many other situations where a CGT event occurs including where rights to assets are extinguished.[84] If an amount is assessable as income then it is not included as a capital gain.[85]

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78 *Glenboig case* (1922) 12 TC 427, 456.

79 Black, 'Tax Implications to Native Title Holders of Compensation Payments', above n 61, 351.

80 Australian Taxation Office, *Goods and Services Tax: Supplies*, GSTR 2006/9, 1 July 2009.

81 The current CGT provisions are found in *ITAA97* pts 3.1, 3.3.

82 *ITAA97* div 104 lists all the CGT events.

83 *ITAA97* s 104-10.

84 Gordon Cooper, Chris Evans and Kirk Andrew Wilson, *Cooper & Evans on CGT* (Thomson Reuters Australia, 2009) 30 [2 030].

85 *ITAA97* s 118-20.

VIII IS NATIVE TITLE AND THE RIGHT TO COMPENSATION UNDER THE *NTA* A CGT ASSET?

The definition of an asset for CGT purposes now includes a legal or equitable right that is not property.[86] This definition is broad enough to include the asset that is native title,[87] even though this title is not freehold property in the sense understood by the English common law as discussed earlier.[88] The extension of the definition of CGT asset to include non-proprietary rights means that the CGT regime now applies to any right that a court of law or equity would uphold.[89] It is therefore clear that rights relating to native title will be an asset for CGT purposes as it is considered a bundle of rights recognised by the common law.[90]

The right to sue is considered a CGT asset.[91] A statutory right to seek compensation would clearly fall within the definition.[92] The CGT provisions may consequently apply to the right to compensation arising from an injury or other event.[93] Certainly the right to compensation granted by the *NTA* is also a CGT asset.[94] Therefore there is at least one asset for CGT purposes, the native title and potentially other CGT assets which arise from the operation of the *NTA*. The latter CGT assets would include the right to compensation for extinguishment, either complete or temporary and other statutory rights arising under the *NTA*.

There are many scenarios relating to native title and payments or compensation in respect of this CGT asset that could potentially give rise to a CGT liability. This will often depend on the individual facts of the situation, however for the purposes of this discussion the author will concentrate on three significant situations. First, the incorporation of a PBC under the *NTA* which holds the native title and any subsequent dealings with this native title under

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86 *ITAA97* s 108-5. It should be pointed out that prior to 26 June 1992 rights such as 'the right to sue under a contract' were not considered property for CGT purposes and therefore did not fall within the CGT regime. This was a result of the High Court decision in *Commissioner of Taxation v Hepples* (1991–1992) 173 CLR 492. The legislation was subsequently amended to specifically include in the definition of an asset legal or equitable rights that are not property see *Income Tax (Transitional Provisions) Act 1997* (Cth).

87 Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?', above n 61, 352.

88 Native Title is a unique interest and does not confer full beneficial interest in the land: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 88–9 (Deane and Gaudron JJ); *Western Australia v Ward* (2002) 213 CLR 1, 91–92.

89 Woellner et al, above n 74, 391 [7-510].

90 *Western Australia v Ward* (2002) 213 CLR 1, 91–2; Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?', above n 61.

91 *Gerard Cassegrain & Co Pty Ltd v Federal Commissioner of Taxation* (2007) 66 ATR 198. See also Australian Taxation Office, *Income Tax: Capital Gains: Treatment of Compensation Receipts*, TR 95/35, 29 November 2006, [69].

92 *Naval, Military and Airforce Club of South Australia v Federal Commissioner of Taxation* (1994) 51 FCR 154.

93 Woellner et al, above n 74, 391 [7–510].

94 Black, 'Tax Implications to Native Title Holders of Compensation Payments', above n 61, 353; Rob O'Connor and JJ Hockley, 'Native Title Payments: Tax Implications Part 2-Assessability' (1997) 24 *Brief* 14.

customary law; second, extinguishment of native title in accordance with the *NTA*; and third, creation of contractual rights under ILUAs.

A Incorporation of a PBC under the *NTA* and Subsequent Transfer of the Native Title under Customary Law

Although native title exists from the time of European settlement of Australia (1788 in most cases),[95] which makes the asset exempt from CGT as having been acquired before 20 September 1985,[96] subsequent actions such as the incorporation of a PBC to hold the native title on trust may result in the asset being 'acquired' on or after 20 September 1985 and therefore falling within the CGT regime.[97] As discussed earlier, the *NTA* requires that once a determination of native title is made a PBC is required to be incorporated. This PBC either holds the native title on trust for the claimant group[98] or acts as their agent regarding the native title.[99] Section 109-5(1) of the *ITAA*97 states that you acquire a CGT asset when you become its owner. Section 109-5(2) of the *ITAA97* sets out specific rules for acquiring a CGT asset depending on which CGT event has taken place.[100] In the case of CGT event A1, which is a change in ownership of a CGT asset, you (in this case the PBC) acquire a CGT asset (the native title) when an entity disposes of the native title to the PBC. It is difficult to see in this case who the entity is that disposes of the CGT asset to the PBC as the claimant group are arguably not an entity at common law.[101] However assuming for the purposes of this discussion that the claimant group is an entity then at this stage CGT event A1 has potentially occurred in that there is a change in ownership of the native title from the claimant group to the PBC because of 'some act or event or by operation of law'.[102] Further problems with this analysis arise because of the application of s 104-10(2)(a) which goes on to state that a change of ownership does not occur if the claimant group stops being the legal owner of the native title but continues to be its beneficial owner. Assuming that the claimant

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95 *Mabo* (1992) 175 CLR 1.

96 CGT does not generally apply to assets acquired before 20 September 1985, for example *ITAA97* s104-10(5) specifically states that a capital gain or loss is disregarded if the taxpayer acquired the asset prior to 20 September 1985. There are two exceptions, first CGT event D1 which creates the asset at the time of disposal. This provision applies where the taxpayers creates a contractual or other legal right in another entity but does not apply if another CGT event would also apply: *ITAA97* s104-35. The other exception is CGT event H2 which applies where an act, transaction or event occurs in relation to a CGT asset that the taxpayer owns. It appears that the asset can be pre-CGT: *ITAA*97 s 104-155.

97 Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?', above n 61.

98 *NTA* s 56(2)(b).

99 *NTA* ss 55, 56, 57.

100 For a general discussion of how the CGT provisions operate refer Cooper, Evans and Wilson, above n 84; Woellner et al, above n 74, ch 7.

101 Black argues that the NT claimant group is an unincorporated association: Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?', above n 61. If this is correct then the group is an entity for income tax purposes. However it is suggested that other researchers in the area do not agree with this argument see Langton and Frith, above n 53.

102 *ITAA97* s 104-10(2).

group is a legal entity then arguably it retains beneficial ownership although the PBC is the trustee of the native title. Against this argument is the stamp duty case of *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW),*[103] which suggests that on the creation of a trust the entire ownership including beneficial ownership is in fact transferred to the trustee even though the property is immediately impressed with a trust in favour of the transferor. Where the PBC is acting as agent it has been suggested that it is still holding the native title on a constructive statutory trust, however the situation is unclear.[104]

If, despite the problems raised above, we come to the conclusion that CGT event A1 has now taken place and there has been a disposal of the native title to the PBC then at this stage there is no CGT liability. This is because the native title was a pre-CGT asset. However, in this scenario, the PBC has now acquired the native title and this acquisition is after September 1985. This makes the native title a post-CGT asset.[105]

Subsequent changes in ownership of the native title under customary law could be a disposal for CGT purposes of a post-CGT asset which was acquired at market value at the date of the determination that the PBC holds the native title on trust.[106] The difference between the market value at the time of incorporation of the PBC and the market value[107] when there is change in the ownership of the native title under customary law is potentially a taxable capital gain or loss. As the PBC holds the native title on trust[108] then changes to the number of beneficiaries (that is, the native title claimant group) are potentially disposals of their beneficial interests in the trust.[109]

There is an argument that, provided that the native title holders are considered an unincorporated association, there will not be CGT either because of rollover relief under section 126-50 of the *ITAA97* or because section 104-60(5) of the *ITTA97* applies where the PBC hold native title on trust.

An unincorporated association is not a legal entity at common law but is treated as a company for tax purposes.[110] An unincorporated association is

103 (1982) 149 CLR 431.

104 Alexandra Richards made the argument at an AIATSIS workshop that 'even PBCs who elect to be agents for native title holders are constructive statutory trusts': Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 52, 8 nn 12. It is also difficult to reconcile the European common law and statutory concepts of acquisition and disposal with the collective right that is native title and *sui generis*. See generally Langton and Frith, above n 53.

105 As a company the PBC is a separate legal entity to the native title holders refer *Saloman v Saloman* [1897] AC 22. The PBC is a separate legal entity established to protect and manage the native title interests see Langton and Frith above n 54, 171.

106 *ITAA97* s 112-20(1).

107 *ITAA97* s 116-25. If a taxpayer receives no capital proceeds for a CGT event they are taken to have received the market value of the CGT asset that is the subject of the event.

108 Alexandra Richards made the argument at an AIATSIS workshop that 'even PBCs who elect to be agents for native title holders are constructive statutory trusts': Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 52, 8 fn 12.

109 CGT event E8 occurs where a beneficiary disposes of their capital interest: *Income ITAA97* s 104-90(1). The capital gain is calculated in accordance with s 104-95(4). Any capital loss is calculated in accordance with s 104-100(4).

110 *ITAA97* s 995-1.

considered to be where 'two or more persons bound together for one or more common purposes … by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules identifying in whom control of it and its funds rests upon what terms and which can be joined or left at will'.[111] There are fundamental differences with this type of organisation and native title holders and their relationship with the native title. The main ones being that the concept of an unincorporated association brings with it the idea of a common purpose, voluntary membership and a situation that can be resigned from at will. Native title is a concept that stems from who you are, in the context of tribe and where you were born.

This argument is discussed in detail by Warren Black,[112] however the author argues that more recent native title research suggests that native title holders are not an unincorporated association.[113]

One final point that should be considered is the argument that CGT event E1 occurs where the PBC holds the native title on trust. This event happens if 'you create a trust over a CGT asset by declaration or settlement'.[114] As discussed above, native title is a CGT asset. In the case of a PBC holding the native title on trust, a trust has been created by declaration or settlement. The problem with the application of this provision lies in the wording of the first part of the section which says 'you create'. Under the *NTA* it is the Federal Court that creates the trust. In a 2009 Interpretative Decision the ATO has said that CGT event E1 has no application where the trust is created by order of a court, rather than by the actions of the owners of the asset. The ATO considers that in such a situation it is not possible to say that the 'you' in s 104-55(1) of the *ITAA97* are the owners of the asset.[115] CGT event E1 therefore does not apply to the incorporation of a PBC and declaration that it holds the native title on trust.

B Application of CGT where There is Extinguishment of Native Title in Accordance with the *NTA*

CGT event C2 happens if a taxpayer's ownership of an intangible CGT asset ends because it is redeemed, cancelled, released, discharged, satisfied, abandoned, surrendered, forfeited or expired.[116] This intangible asset must have been acquired on or after 20 September 1985.[117]

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111 *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 1 WLR 522.

112 Black,'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?', above n 61; see also Black,'Tax Implications to Native Title Holders of Compensation Payments', above n 61 for a detailed discussion of the tax implications for native title holders when compensation is paid.

113 Langton and Frith, above n 53.

114 *ITAA97* s 104-55(1).

115 ATO, *Income Tax: Capital Gains Tax: Land Vested in a Statutory Trustee for Sale – CGT Event A1*, ID 2009/129, 26 October 2009.

116 *ITAA97* s 104-25(1). The common scenarios that this CGT event applies to are the cancellation or redemption of shares.

117 *ITAA97* s 104-25(5)(a).

Where the situation deals with the extinguishment of rights it is crucial to identify the relevant rights (the CGT asset). In the case of native title the *Mabo* decision indicates that there is no right to sue for compensation at common law,[118] so that the right to sue for compensation arises from the *NTA* (enacted after 20 September 1985) and will be post-CGT.

In other words, where the native title is extinguished and compensation is received or receivable under the *NTA* then prima facie CGT will apply. The CGT asset in this situation is the right to sue for compensation which arises under the *NTA* and as this occurred after 20 September 1985 it is therefore potentially subject to CGT.

There may however be a better CGT outcome from the native title group's perspective if the amount received can at least be partly attributed to damage to an underlying asset (eg, extinguishment of native title, compensation for mining activity which reduces the value of the land mined and consequently the native title). This is in contrast to the asset being the right to sue or other right to compensation under the *NTA*. If CGT event C2 applies the ATO states in Taxation Ruling TR 95/35 that where there is an underlying asset the compensation will be treated as a recoupment of the original cost of the asset.[119] In addition there will be no disposal of the asset at that time.[120] The result is that any CGT is deferred and eliminates the problem that a 'right to sue' or a 'right to compensation' is a CGT asset which would otherwise trigger CGT on its disposal.[121] CGT event C2 will apply in priority to an A1 event as the *ITAA97* specifically states that the event to use is the one most specific to the situation.[122]

An example of the application of C2 to a pre-CGT asset is given in TR95/35[123] as follows:

Example 2

264. Avery Landowner owns a large tract of land at Burn Creek, which he acquired in 1962. In July 1991, the Commonwealth compulsorily acquired 32 hectares of the land under the *Lands Acquisition Act 1989*. In accordance with the Act, Avery was entitled to receive compensation for the compulsory acquisition. The Commonwealth valued the land at $600,000, 90% of which was advanced to Avery at the time of the acquisition, pending final determination of the value.

265.

Relevant asset:	The pre-CGT land
Acquired:	1962

118 *Mabo* (1992) 175 CLR 1, 16 (Mason CJ and McHugh J), 58 (Brennan J).

119 Where a taxpayer does not pay anything for the acquisition of a CGT asset they are deemed to have acquired the asset for its market value at the time of acquisition. This amount forms the first element of the asset's cost base for CGT purposes: *ITAA*97 s112-20.

120 ATO, *Income Tax: Capital Gains: Treatment of Compensation Receipts*, TR 95/35, 29 November 2006, [4]–[5].

121 Cooper, Evans and Wilson, above n 85, 310 [11 240].

122 *ITAA97* s 102-25(2).

123 ATO, *Income Tax: Capital Gains: Treatment of Compensation Receipts*, TR 95/35, 29 November 2006, [264]–[265].

Cost base:	Irrelevant
Disposed of:	July 1991
Consideration:	$600,000
CGT consequences:	There is no capital gain or loss. Even though the right to receive compensation for the compulsory acquisition of the land arose post-CGT, the most relevant asset is the underlying land, which is a pre-CGT asset

This situation is analogous to the situation of extinguishment of native title under the *NTA* and compensation payable under the *NTA*. In Avery's example the asset is a pre-CGT asset as it was acquired in 1962 (before 20 September 1985) just as native title is an asset that was acquired by the native title claimant group and their ancestors before 1985. The Commonwealth acquired the asset (Avery's land) under an Act enacted after 1985 (that is the *Lands Acquisition Act 1989* (Cth)). Avery's entitlement to receive compensation was in accordance with the *Lands Acquisition Act 1989* (Cth). In the same way the entitlement to receive compensation of the native title claimant group is in accordance with the *NTA* which is a post-CGT Act being 1993. The most relevant asset in the case of native title is the actual native title, just as in Avery's case the most relevant asset is the land. As the native title is pre-CGT then there should be no CGT consequences.[124]

If, on the other hand Avery's land had been acquired post-CGT then there would have been CGT consequences. In this situation it is not C2 that applies but A1 as there is a disposal of a tangible asset, the part of the land that is compulsorily acquired and not any other right such as the right to sue or seek compensation.[125] If the consideration for acquisition is greater than the 'cost base' of the asset then this difference is assessable as income. The cost base of an asset for CGT purposes includes the purchase price of the asset by the taxpayer.[126] Where no amount has been paid the purchase price is deemed to be the market value at the time of acquisition.[127]

C CGT and Indigenous Land Use Agreements under the *NTA*

As stated earlier a future act in respect of native title will be valid if the parties to ILUAs under the *NTA* consent and the agreement is on the register of ILUAs in accordance with sub-sections 24AA(3) and (4) of the *NTA*. A CGT D1 event occurs where the taxpayer creates 'a contractual right or other legal or equitable right in another entity'.[128] The example given in the legislation is of a

124 This argument is supported by O'Connor and Hockley, above n 95, 14, and Black,'Tax Implications to Native Title Holders of Compensation Payments', above n 61, 352.

125 ATO, *Income Tax: Capital Gains: Treatment of Compensation Receipts*, TR 95/35, 29 November 2006, [4].

126 *ITAA97* s 110-25(2).

127 *ITAA97* s 112-20.

128 *ITAA97* s 104-35(1).

restrictive covenant.[129] The asset in question here is the 'right' which is created at the time of the event, which if the restrictive covenant is entered into now is clearly post-CGT.[130] This event will not however apply if another CGT event will.[131] For example, a taxpayer enters into a contract for the sale of their land. The taxpayer has created a contractual right in the purchaser to enforce completion of the sale. If the sale of the land proceeds then this is CGT event A1 (disposal of an asset) and this means that CGT event D1 does not happen. However, if the contract does not proceed then the rights created in the contract, for example for damages, will fall within a D1 event.

Although it is arguable that the right to compensation under a statute is not covered by CGT event D1 as it is not a right 'created' in another person,[132] it is possible that native title holders either as the communal nation or PBCs who enter into ILUAs, for example, to allow access for mining, or enter into an agreement to negotiate quickly regarding a future act, trigger a D1 event. It is not relevant for the operation of D1 that the native title is pre-CGT as D1 applies to create the right at the time that the taxpayer enters into the contract or otherwise creates the right.[133] Another example of a D1 event is where there is an agreement for the supply of mining information in the possession of the taxpayer. Although the information is not an asset as it is neither property nor a right, the right to supply the information or knowledge is a CGT asset. Where this right is created, CGT event D1 may happen.[134]

CGT event D1 usually happens if there is a grant of an easement.[135] It also happens if there is a grant of a right to take something off another person's lands (what is termed a profit a prendre).[136] The usual situation is where the landowner grants, for a fee, the right to someone else to cut down the timber on their land. This would be a CGT event D1.[137]

Taxation Determination TD 1999/80 states that CGT event D1 will also apply if a taxpayer receives money to withdraw an objection against a proposed land development and the money is not for the permanent damage or reduction in value of the taxpayer's land due to the proposed development. On receiving the money (or property) for withdrawing the objection, the taxpayer creates a legal or

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129 See also *Tuite v Exelby* 93 ATC 4293, 4300 where the Court considered that the asset in question could be the benefit of a restraint of trade covenant (Shepherdson J).

130 *ITAA97* s 104-35(2).

131 *ITAA97* s 104-35(5)(b), s 102-25(3).

132 Black, 'Transferring Native Title to a Body Corporate under the *Native Title Act 1993* (Cth) – Can CGT Arise?', above n 61, 358.

133 *ITAA97* s 104-35(2).

134 *Australian Master Tax Guide* (CCH Australia, 45th ed, 2009) 570–1.

135 ATO, *Income Tax: Capital Gains: Grants of Easements, Profits a Prendre and Licences*, IT 2561, 21 September 1989; ATO, *Income Tax: Capital Gains: How are Grants of Easements Treated for the Purposes of the Capital Gains Tax (CGT) Provisions of the Income Tax Assessment Act 1936?*, TD 93/235, 16 December 1993.

136 ATO, *Primary Production and Forestry*, TR 95/6, 25 May 1995.

137 ATO, *Income Tax: Capital Gains: When does a Person, Who on or after 21 September 1989 Grants to Another a Right to Cut and Remove Timber from the Grantor's Land, Dispose of the Right? Is it When the Right is Granted or When the Trees are Felled?*, TD 96/35, 21 August 1996.

equitable right in the developer to stop the taxpayer from exercising its right to object.[138] If on the other hand, what has happened is the reduction in value of the underlying asset then event C2 will apply and the reasoning in TR95/35 will mean that there is no disposal. The example provided in TD 1999/80 to illustrate the interaction between D1 and C2 is where the money is paid to the land owner to withdraw their objection to the building of a wall between their property and another property. If the building of this wall causes permanent reduction in the value of the landowner's property and the amount is payment for this then it is a CGT event C2 and the compensation amount reduces the landowner's cost base for their asset.[139]

CGT event H2 occurs where an act, transaction or event occurs in relation to a CGT asset owned by the taxpayer. It is possible that CGT event H2 could apply to agreements such as one to negotiate quickly or to cease negotiations. The width of the application of this provision is shown by the example in the legislation which states that this event will apply where the taxpayer owns land that it intends to develop. Another entity pays the taxpayer a sum of money to commence development early and no contractual rights or obligations are created by the arrangement. The payment is made because of the event (the inducement to start construction early) in relation to the taxpayer's land (the CGT asset owned by the taxpayer). At this stage there are no cases relating to H2 events.

CGT event H2 applies as a last resort, so will not apply if another CGT event will.[140] The legislation is also silent on whether or not the underlying asset must also be post-CGT so therefore it does not have to be.

IX INCLUSION IN ASSESSABLE INCOME OF TAXABLE AMOUNTS RECEIVED BY PBCS AND INDIVIDUAL INDIGENOUS PEOPLE

Amounts received by the PBC may be assessable as income, as discussed earlier, if they are considered compensation for loss of income. In this case the same amount is not also assessable under the CGT provisions due to anti-overlap provisions in *ITAA97*.[141] Payments for services such as welcome to country, traditional dances and provision of guides by the PBC will be income under ordinary concepts.[142] As a PBC is a legal entity it will fall within the tax regime just as individual taxpayers do.[143]

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138 ATO, *Income Tax: Capital Gains: Does CGT Event D1 in Section 104-35 of the Income Tax Assessment Act 1997 Happen if you Receive Money or Property for Withdrawing an Objection against a Proposed Land Development?*, TD 1999/80, 15 December 1999, [1].

139 Ibid [6].

140 *ITAA97* s 1020-25(3).

141 *ITAA97* s 118-20.

142 Income tax is assessed on the taxable income of a taxpayer. Taxable income is stated to equal assessable income less deductions, *ITAA* s 4-15. Assessable income includes payment for services: *Brent v Federal Commissioner of Taxation* 71 ATC 4195 which dealt with providing information.

143 Trusts are treated as taxpayers under *ITAA36* pt III div 6 with the liabilty to tax falling on either the beneficiary or the trustee.

It is important to point out that, in many cases, even if a native title payment was ultimately included in an Indigenous person's taxable income, they may not have any personal tax liability.[144] Low income individuals are not liable to taxation until their assessable income reaches $14 000[145] for the 2008–09 income year. If the taxpayer is an older person then the senior taxpayer offset means they can earn a total of $28 867 before triggering a tax liability for 2008–09.[146] As already pointed out Indigenous peoples are recognised as being economically disadvantaged,[147] particularly those in remote communities, it is therefore important not to add to their disadvantage by imposing a tax liability that they may not have otherwise had to pay.

There are two potential tax scenarios under the current tax system if the native title payments are considered assessable income and the income is derived for tax purposes by a PBC or trustee company. If the PBC is a non-profit company,[148] for tax purposes its taxable income over $416 will be taxable at the rate of 30 per cent.[149] As a non-profit company it cannot make distributions to individuals in the native title claimant group for their individual use however it would be able to make distributions to the community in accordance with its obligations under the *NTA*. In other words, no distributions that it makes in accordance with its objects will be income, however any income that it receives is taxable unless it is exempt from tax either because the payment is exempt or the PBC is an endorsed charitable institution.[150]

If, on the other hand, the native title payments are considered assessable income and are paid to a company that acts as a trustee that then distributes to the individual native title holders, then this amount is included in the individual's assessable income. This is because the *ITAA36* provides that the ultimate beneficiary who receives or has paid on their behalf a distribution from the net

144 A taxpayer's assessable income includes net capital gains: *ITAA36* s 102-5. The calculation of a net capital gain may also be subject to a 50per cent discount if the taxpayer is an individual or a trust: *ITAA97* s 115-5.

145 A combination of the application of the tax free threshold of $6 000 and the low income rebate under *ITAA36* ss 159H, 159N.

146 *ITAA36* s 160AAAA provides for the Senior Australians Tax Offset ('SATO'). The most common scenario for eligibilty is that the taxpayer was eligible at some point in the income year to an age pension under the *Social Security Act 1991* (Cth) and is not in gaol. The threshold amount is slightly less if the person is part of a couple.

147 *Re Mathew* (1951) VLR 226; *The Trustees of the Indigenous Barristers Trust v Commissioner of Taxation* [2002] 127 FCR 63; Ken Henry, 'Addressing Extreme Disadvantage Through Investment in Capability Development' (Speech delivered at the Institute of Health and Welfare Conference, 'Australia's Welfare 2007', Canberra, 6 December 2007) 2.

148 A non-profit company is defined in s 3 of the *Income Tax Act 1986* (Cth) as a company that is not carried on for the purposes of profit or gain to its individual members and is, by the terms of the company's constituent document, prohibited from making any distribution, whether in money, property or otherwise, to its members. In order to gain charitable status an entity must first be non-profit or not-for-profit.

149 See *Income Tax Act 1986* (Cth). The first $416 of income is not taxed.

150 *ITAA*97 s 50-5 exempts the income of charitable institutions. For a further discussion of this issue see Fiona Martin, 'Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth); Can they be Exempt from Income Tax as Charitable Trusts?' (2007) 30 *University of New South Wales Law Journal* 713.

income of the trust estate is the taxpayer.[151] Tax is assessed at their personal marginal tax rate so that if they have taxable income of less than $14 000 (including the assessable trust distribution) then they will not be liable for tax unless they are a minor.[152] If the trustee company that receives the assessable payment wishes to retain any funds then as a trustee it will be taxable at the highest marginal tax rate.[153]

X GOVERNMENT RECOMMENDATION OF A WITHHOLDING TAX FOR PAYMENTS UNDER THE *NATIVE TITLE ACT 1993* (CTH)

In May 2008 the federal Labor government announced that it was reviewing the taxation of native title payments with a view to introducing a similar scheme to the withholding tax regime under division 11C of the *ITAA36*.

The previous federal Coalition government had announced in 1998 that it would introduce a native title withholding tax, however this was never enacted. When announcing the policy the previous Treasurer and Attorney-General stated:

> ...the existing tax law should apply to native title related transactions wherever possible. Departures from this approach would occur only where the administrative and compliance costs involved in applying the existing tax law to some native title related transactions outweigh any potential benefit, or where departures from existing tax law will provide a more equitable treatment for certain transactions.[154]

The following is a table explaining the Government's position as at March 2010:[155]

Category 5: Measures for which final decisions have not yet been reached

	Measure	Description	Background
46	Native title withholding tax	Establish a system of withholding tax from payments made to native title holders for acts which impair, but do not extinguish, their native title rights.	This was announced in February 1998. The proposed approach has met with legal and practical problems which are currently being examined.
47	Native title and capital gains tax issues	Allow: native title to retain its pre-CGT status when acquired by a	This was announced by the previous government in February 1998 and

151 *ITAA36* pt III, div 6.

152 If the trust beneficiary is under 18 years anti-avoidance provisions apply to tax their trust distributions at a higher rate and they can only receive trust distributions up to $2 667 before tax is payable. See *ITAA36* pt III, div 6A.

153 *ITAA97* s 99A. Currently the rate is 45 per cent.

154 Costello and Williams, above n 11.

155 Swan and Bowen, above n 12.

	registered body corporate upon obtaining a native title determination; a transfer of native title within a group of native title holders and succession from one group of native title holders to another to be CGT exempt; and compensation payments received for the extinguishment or voluntary surrender of native title rights to be exempt from CGT and income tax; and expenses for extinguishment of native title to form part of the cost base of a CGT asset.	was to be implemented with the native title withholding tax measure (see item 46).

The Government therefore recognises that there are tax consequences from both income tax and CGT perspectives of incorporation of PBCs and transfer of native title including succession, extinguishment and voluntary surrender.

The report of RAFTs did not refer to native title payments however, as stated earlier in this article, in May 2010 Treasury released a consultation paper, 'Native Title, Indigenous Economic Development and Tax' which calls for submissions regarding the operation of the income tax system to payments under the *NTA*.[156] Amongst other things, the paper asks for submissions regarding a potential withholding tax relating to these payments. As discussed earlier, at the time of writing this paper the closing date for submissions had been suspended.

XI THE RATIONAL FOR AND AGAINST A WITHHOLDING TAX INSTEAD OF THE CURRENT UNCERTAIN SITUATION

A Advantages and Disadvantages from a Tax Simplicity Perspective

This section of the paper looks at the advantages and disadvantages of a withholding tax from the perspective of tax simplicity. The author has already noted that there is a high level of criticism of the current mining withholding tax under division 11C as this system is based on a calculation of the tax base, which is argued by many to be inequitable. However, in view of the announcement of two successive federal governments that they were considering this type of tax and the recent consultation paper written by Treasury, the author submits that it is important to discuss the issue of imposing tax on what would otherwise be taxable amounts using a withholding tax approach.

156 Australian Government, above n 13.

This type of tax has a number of advantages particularly from the tax compliance and administration perspective.[157] A tax that is low in compliance costs would be a significant improvement on the current situation from a tax collection and imposition perspective. In 2008 it was recognised by the Native Title Working Party established by the Commonwealth Attorney-General's Department that the multiple tax burdens that arise through the life of native title agreements are placing a high compliance burden on Indigenous communities.[158]

The withholding tax regime under division 11C has been in existence since 1979 and the current rate is four per cent.[159] The issue of collection and recovery is handled through the imposition of the tax as a withholding tax which puts the actual responsibility for payment (although not the legal liability) on the paying entity. As this will usually be either the Commonwealth, state or territory government or a mining company that the ATO will have a record of through lodgement of tax returns this ensures ease of collection and recovery from the ATO perspective. As it is the payer that is responsible for the payment of tax there is less risk that the moneys will be dissipated before the tax is collected by the ATO. This advantage is increased by the fact that government agencies would not place the revenue at risk due to potential non-payment. Corporate payers may not always be in a stable financial position however as the number of paying entities is likely to be smaller than the number of Indigenous individuals or representative bodies that receive the payments this contributes to the ease of collection of the tax. In his second reading speech, on the introduction of division 11C, the then Treasurer, John Howard, referred to a 'clear need for certainty and simplicity in the rules governing tax on payments flowing to aboriginals from mining operations'.[160] He also made it clear that it was important for Aboriginal Land Councils to be able to easily determine the after-tax benefits of these payments. He concluded with the point that this system follows closely the dividend and interest withholding tax systems.[161]

Withholding tax is a flat rate tax which means that it is relatively easy to calculate. This factor assists towards compliance by the taxpaying entity as it does not place a high administrative burden on this entity and ensures that from a tax policy perspective it is a relatively simple tax to administer.[162] One way of defining simplicity from a tax perspective is the ease with which the correct tax liability can be determined. A more formal definition along this line, offered by Surrey and Brannon, is that '[s]implicity is the characteristic of a tax which

157 See generally, Harvey Dale, 'Withholding Tax on Payments to Foreign Persons' (1980–1981) 36 *Tax Law Review* 49.

158 Commonwealth Attorney-General's Department, 'Optimising Benefits from Native Title Agreements' (Discussion Paper, Native Title Unit, 2 December 2008) 15.

159 First introduced in the *Income Tax (Mining Withholding Tax) 1979* (Cth).

160 Howard, above n 18.

161 Ibid.

162 John A Greig, 'Aspects of Interest Withholding Tax' (1993) 3 *Revenue Law Journal* 27, 29. For a general discussion regarding tax policy and the relevance and importance of simplicity (expressed as certainty and convenience) see Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (first published 1776) book five, ch 2.

makes the tax determinable for each taxpayer from a few readily ascertainable facts'.[163] Thus, effective or economic simplicity can be measured in terms of the effort (that is, value of resources) expended by the society in raising some amount of tax revenue. A tax is considered to be effectively simpler than another tax if the operating costs of the first tax are lower than those incurred in raising the same amount of revenue by the second tax.[164]

Subject to the difficulties of defining the scope of a payment under the *NTA*, the withholding tax allows for simplicity[165] and certainty from the perspectives of the paying entity, the ATO and the Indigenous recipients. A flat-rate withholding tax is reputed to be the simplest tax to calculate and pay.[166] This is due to the fact that it is collected by the paying entity prior to payment which means that it is ascertained without reference to any factors other than the amount of the payment. Other factors such as tax deductions, number of dependents or offsets that may vary from recipient taxpayer to taxpayer are not relevant. This also ensures that the ATO is able to easily calculate the amount of tax that it is entitled to receive. The withholding tax for mining payments under division 11C also provides certainty and causes less stress to the Indigenous taxpayer in that the mining payment is not included in their assessable income for tax purposes.[167] The result is that they do not have to be concerned about the amount to include in any tax return or delay lodging a return due to the late notification by the payer. It also means that it does not lead to an Indigenous recipient being required to lodge a tax return when they would not otherwise have this responsibility.

Difficulties that may arise with this type of tax in the context of payments under the *NTA* are first, definitional. The withholding tax regime under division 11C clearly defines the mining payments that it applies to. This is essential for the smooth operation of this type of tax as the definition of the fund out of which the tax is payable is key to a withholding tax regime. Other examples in the tax arena are withholding taxes that apply to dividends, interest and royalties paid to non-residents.[168] In each of these legislative provisions the scope of the relevant

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163 Stanley S Surrey and Gerrard N Brannon, 'Simplification and Equity as Goals of Tax Policy' (1968) 9 *William & Mary Law Review* 915, 915.

164 Binh Tran-Nam, 'Tax Reform, Tax Simplification: Some Conceptual Issues and a Preliminary Assesment' (1999) 21 *Sydney Law Review* 500.

165 For a definitive discussion of the issues surrounding the concept of tax simplicity see Graeme Cooper, 'Themes and Issues in Tax Simplification' (1993) 10 *Australian Tax Forum* 417; see also Richard Krever, 'Taming Complexity in Australian Income Tax' (2003) 25 *Sydney Law Review* 467.

166 Kim Brooks, 'Tax Treaty Treatment of Royalty Payments from Low-Income Countries: A Comparison of Canada and Australia's Policies' (2007) 5 *eJournal of Tax Research* 169, 185.

167 Mining payments made to either a distributing body or Aboriginal person and which have attracted mining withholding tax are non-assessable non-exempt income under *ITAA97* s 59-15. The result is that the mining payment is subject to a current tax rate of 4 per cent and is otherwise exempt from ordinary income tax.

168 For example, dividends paid by a resident Australian company to a non-resident taxpayer are subject to withholding tax under *ITAA36* s 128B. The withholding tax is imposed regardless of whether or not the dividends are otherwise assessable as ordinary income and is imposed on the gross amount of the dividend, so no deductions are made from the dividend.

fund is clearly defined in the legislation and by case law.[169] It may be extremely difficult for legislation to be drafted that can cover all the different ramifications and variations that arise when native title is determined much less capture all types of payments that may be made in respect of this determination.[170] Although it is difficult to determine the specific types of payments that are made under ILUAs as the majority are confidential, analysis by O'Faircheallaigh demonstrates that they vary and include one-off payments and payments that are linked to mineral extraction and mining profits.[171]

An important further consideration is to ensure that the native title payment (however defined) is not included in the ultimate taxpayer's assessable income (even with a credit for the tax paid). This is to ensure ease of compliance and administration by Indigenous taxpayers as discussed above.

B Arguments for a Low or Zero Rated Withholding Tax

As explained above a withholding tax greater than zeo per cent[172] will often have the effect of unfairly adding to Australian Indigenous people's current economic disadvantage by imposing tax which would not have otherwise been payable.

If the entity that receives the assessable payment is a trustee and it wishes to retain any funds then as a trustee it will be taxable at the highest marginal tax rate unless it is exempt from tax.[173] This is a serious concern as a trust may wish to accumulate income for many valid reasons such as future capital works, to fund scholarships and pay anticipated future liabilities. A withholding tax at a low or zero rate would alleviate this tax burden as well as reducing compliance and administrative costs and allow for certainty for all stakeholders.

The introduction of a withholding tax system for native title payments would recognise that these payments and their recipients are part of the Australian tax system and clarify the extent of the tax liability in a relatively easily administered manner. By making the rate very low or even zero rated the tax burden on native title holders would be appropriate given their general economic circumstances. The fact is that many payments under the *NTA* may not be taxable in any event as they are for extinguishment of a pre-CGT asset. Furthermore, the majority of payments to PBCs are used for managing native title that is part of economic and community development and which if undertaken by a charity would be income tax exempt. The main problem will be attempting to define the scope of

169 Dividends, see *ITAA36* s 128B(1); Interest, see *ITAA36* s 128B(2)(b); royalties, refer *ITAA36* s 128B(2B). In each of these situations a body of case law has been developed over many years that assists in the determination of these concepts.

170 See Strelein, 'Taxation of Native Title Agreements', above n 28; Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 53.

171 Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (2004) 2(25) *Land, Rights, Laws: Issues of Native Title* 1.

172 For a discussion of some reasons why it may be preferrable to have a zero rated withholding tax, rather than leaving the situation to the current taxation law see Strelein, 'Taxation of Native Title Agreements', above n 28, 57–61.

173 *ITAA36* s 99A. Currently the rate is 45 per cent.

payments that this tax applies to given the inherent complexity of the *NTA* and range of payments that are possible in respect of native title. A further problem is the interaction between distributions due to native title and social security payments paid to individual Indigenous people, however this discussion is outside the scope of this paper.

XII CONCLUSION

The above analysis has explained how the withholding tax regime in the *ITAA36* relating to mining payments currently applies to Aboriginal land. The discussion has also analysed why this withholding tax regime does not apply to native title and how income tax law (including CGT) may apply to payments to either individual native title holders or PBCs incorporated once a claim is determined. It has demonstrated the uncertainty and complexity that the application of income tax law brings to the making of these payments, together with the uncertainty (from a tax perspective) that native title holders are faced with when receiving payments. Such difficulties may have significant consequences for payments under the *NTA*, and it has already been reported that tax obligations and the complexity of this area is placing onerous burdens on PBCs and Native Title Representative Bodies.[174]

There are serious risks for industry if PBCs are not appropriately resourced, including increased costs and substantial delays in industry agreement-making.[175] The complex and uncertain tax situation adds to the drain on resources from several angles including the high cost of tax advice as well as the failure to enter into agreements due to the high tax burden[176] or lack of knowledge about what this burden might be and apprehension regarding the risks that follow.

In view of the inherent complexity, from a legal perspective, of understanding and applying taxation law to the already legally complex area of native title law it is essential that the federal government clarifies the tax position. This is important so that native title holders, either as individuals, or, more commonly through PBCs can then concentrate on the essential business of managing native title. The above discussion has also highlighted that native title is clearly a pre-CGT asset and that the incorporation of a PBC to hold the native title in accordance with the *NTA* should not jeopardise this status. A loss of pre-CGT exemption for this asset due to the imposition of a procedural requirement by the federal government is inappropriate from a public policy and equity perspective.

A further approach, where there are payments that would otherwise be assessable, is to impose a withholding tax at a very low or zero rate, and the discussion above has highlighted the advantages and disadvantages of such a tax

174 Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 52, 4 [1.5].
175 Bauman and Tran, above n 38, 39.
176 Strelein and Tran, 'Taxation, Trusts and the Distribution of Benefits', above n 52, 4 [1.5].

system. A withholding tax is considered, from a tax policy perspective to be certain and simple. This is the significant advantage of a withholding tax as opposed to an income tax that is complex from a collection perspective due to progressive tax rates for individuals and which is further uncertain due to determinations of income, tax deductions and tax rebates or off-sets that are specific to each individual recipient.[177] Imposing this tax at a low or zero rate would be a recognition that in the vast majority of situations there would otherwise be little tax liability due to the low income of the majority of Indigenous Australians. It would also be a strong public policy stance attempting to overcome past injustices and the lack of compensation given to Indigenous Australians.

177 For example, *ITAA97* s 4-15 states that a taxpayer's taxable income equals assessable income minus deductions. This formula requires a detailed knowledge of the case law to determine what is assessable income and what are allowable deductions. A decision on taxable income is required before the actual calculation of the tax payable can take place.