



ATNS SUBMISSION

TAX LAWS AMENDMENT BILL 2012: TAX TREATMENT OF NATIVE TITLE BENEFITS

23 August 2012

EXECUTIVE SUMMARY

This submission is made by Professor Miranda Stewart in collaboration with Associate Professor Maureen Tehan and Professor Marcia Langton, on behalf of the Chief Investigators for the Agreements, Treaties and Negotiated Settlements (ATNS) Project.

Thank you for the opportunity to respond to the Exposure Draft Tax Laws Amendment Bill: Tax Treatment of Native Title Benefits (closing date 24 August 2012) (the **Exposure Draft**), which will implement some of the proposals put forward in the Treasury Consultation Paper *Native Title, Indigenous Economic Development and Tax* (May 2010) (the **Treasury Paper**).

The ATNS project would like to commend the Government for taking steps towards reforming Australia's income tax law to be consistent with the policy and legal framework of the native title regime established under auspices of the *Native Title Act 1993 (NTA)*. We support the Government's decision to provide for an income tax exemption for native title payments. We also support the Government's decision to ensure that native title payments are generally excluded from the existing mining withholding tax regime.

We support the general approach in the Exposure Draft, including treating eligible payments as "non-assessable non-exempt income". We welcome the primary link to "agreements" and "compensation" and the recognition of various State native title settlement processes in the Exposure Draft.

However, we remain concerned that some aspects of the provisions in the Exposure Draft may continue to generate uncertainty and difficulty in negotiations. The provisions as drafted fail to provide clear guidelines for native title claim groups, private parties or governments in some respects. We submit that the primary policy and goal of the native title payments exemption (both for compensation payments and payments under NTA agreements) is to improve and support native title agreement making and outcomes. Certainty up front during native title negotiations is very important. We also make submissions about the scope and meaning of some of the draft provisions.

Finally, we note that we continue to support, in addition, a dedicated tax-exempt entity to perform the function of an Indigenous Community Development Corporation (ICDC) to manage funds. We propose that this entity would be complementary to the native title tax exemption and has potential to make a significant contribution to economic development in Indigenous communities in remote and regional areas around Australia.

This submission is made by the Chief Investigators on the ATNS Project and does not necessarily represent the views of the industry research partners on the project.

Contact Details for the submission:

Miranda Stewart, Melbourne Law School m.stewart@unimelb.edu.au

Maureen Tehan, Melbourne Law School m.tehan@unimelb.edu.au

ABOUT THE ATNS

The Agreements, Treaties and Negotiated Settlements (ATNS) project is a University of Melbourne based research project consisting of a series of ARC Linkage grants and a team of inter-disciplinary researchers from Melbourne, Griffith and the Australian National Universities. The ATNS database (www.atns.net.au) is an integral part of the project. The project began in 2002 with an ARC Linkage grant examining treaty and agreement-making with indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. In 2005 the research team secured a second grant to build on the project. The second phase examined the process of implementation and the wider factors that promote long term sustainability of agreement outcomes.

The current project, 'Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities', started in 2010. It aims to study the institutional, legal and policy reforms required to reduce indigenous people's poverty and to promote economic development for sustainable indigenous communities. The interdisciplinary research draws on anthropology, geography, demography, law and public policy and uses comparative case studies. The project analyses the impacts of large-scale resources projects, and government policy and services, on local communities. The object is to identify solutions for realising sustainable social and economic development for indigenous people based on social, policy, fiscal, procedural and legal models.

Chief Investigators

- Professor Marcia Langton (School of Population Health, University of Melbourne)
- Associate Professor Maureen Tehan (Melbourne Law School, University of Melbourne)
- Professor Miranda Stewart (Melbourne Law School, University of Melbourne)
- Professor Lee Godden (Melbourne Law School, University of Melbourne)
- Professor Ciaran O'Faircheallaigh (School of Politics & Public Policy, Griffith University)
- Professor John Taylor (Centre for Aboriginal Economic Policy Research, ANU)

Partner Investigator

- Dr Lisa Strelein (Australian Institute for Aboriginal and Torres Strait Islander Studies)

Research Fellows

- Ms Frances Morphy (Centre for Aboriginal Economic Policy Research, ANU)
- Ms Judy Longbottom (School of Population Health, University of Melbourne)
- Ms Jessica Cotton (School of Population Health, University of Melbourne)

Research Partners

- The Department of Families, Housing, Community Services and Indigenous Affairs
- Rio Tinto Ltd
- Woodside Energy Ltd
- Santos Ltd

ATNS Project Contact: www.atns.net.au; atns-team@unimelb.edu.au or 03 8344 9161

SUBMISSION

Thank you for the opportunity to respond to the *Exposure Draft Tax Laws Amendment Bill: Tax Treatment of Native Title Benefits* (closing date 24 August 2012) (the **Exposure Draft**), which will implement some of the proposals put forward in the Treasury Consultation Paper *Native Title, Indigenous Economic Development and Tax* (May 2010) (the **Treasury Paper**).

The ATNS project would like to commend the Government for taking steps to reform Australia's income tax law to be consistent with the policy and legal framework of the native title regime established under auspices of the *Native Title Act 1993 (NTA)*. We support the Government's decision to treat eligible native title payments as "non-assessable non-exempt income". We also support the Government's decision to ensure that native title payments are generally excluded from the existing mining withholding tax regime.

We support the general approach in the Exposure Draft, including treating eligible native title benefits as "non-assessable non-exempt income" (**NANE**) so that they are completely outside the operation of the income tax law. We welcome the primary link to "agreements" and "compensation" in the definition of eligible native title benefits and the recognition of State native title settlement processes in the Exposure Draft. However, we remain concerned that some aspects of the provisions in the Exposure Draft will continue to generate uncertainty and difficulty in negotiations. Certainty up front during native title negotiations is very important. As a result, there is a risk that the provision will fail to provide clear outcomes for native title claim groups, private parties or governments.

The legal and moral basis for a legislative exemption for payments made under "native title" agreements is that they are, in essence, compensation payments. For native title claimants, these agreements provide a basis for future economic development and independence and contribute significantly to sharing the benefits of resource development and "closing the gap". We continue to emphasise that it is the *agreement-making process* that should be supported as it enhances economic opportunity and engagement of indigenous communities. Research has demonstrated that agreements constitute a major form of engagement and collaboration between indigenous people, governments and industry, enabling relationship building and improved future economic participation and governance.¹

1. Native title benefits under draft section 59-50

Proposed new s 59-50 of the *Income Tax Assessment Act 1997 (ITAA97)* which provides that a ***native title benefit** as defined is not assessable income or exempt income, subject to certain conditions and exclusions.

¹ See an analysis of the impacts of extractive resource development on local communities in Langton, M. and Longbottom, J. (eds) *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (2012) Routledge, Oxford and New York. For detailed comparative research on agreement making see Langton, M., Tehan, M., Palmer, L., and Shain, K. (eds) *Honour among Nations? Treaties and Agreements with Indigenous People* (2004), Melbourne University Press, Carlton; also Langton, M., Mazel, O., Palmer, L., Shain, K. and Tehan, M. (eds) *Settling with Indigenous People: Modern Treaty and Agreement Making* (2006), The Federation Press, Sydney.

1.1 Definition of native title benefit in s 59-50(5)

Proposed s 59-50(5) states:

- (5) A **native title benefit** is a payment or *non-cash benefit provided:
- (a) under an agreement made under:
 - (i) an Act of the Commonwealth, a State or a Territory; or
 - (ii) an instrument made under such an Act;to the extent that the payment or benefit relates to an act affecting native title; or
 - (b) as compensation determined in accordance with Division 5 of Part 2 of the Native Title Act 1993.

In paragraph (a), **act, affecting and native title** have the same meaning in that paragraph as they have in the Native Title Act 1993.

Note: Examples of agreements that can be covered by paragraph (a) include:

- (a) indigenous land use agreements (within the meaning of the Native Title Act 1993); and
- (b) recognition and settlement agreements (within the meaning of the Traditional Owner Settlement Act 2010 of Victoria).

It is appropriate that the tax law provision cross-reference the definition of *act, affecting* and *native title* in the NTA. We submit that it may be helpful if the relevant definition provisions in the NTA could be specifically cross-referenced in the Explanatory Material, to assist in interpreting the tax law provision. The relevant provisions in the NTA that we have identified are set out in Appendix 1 to this Submission.

1.2 “a payment or non-cash benefit provided ... under an agreement ... to the extent that the payment or benefit relates to an act affecting native title”

We welcome the approach reflected in the ED that defines an eligible native title benefit with reference to a native title agreement (proposed s 59-50(5)(a)).

However, we are concerned that the provision as drafted requires that **each specific** payment or non-cash benefit under an agreement “relates to an act affecting native title” in order to be eligible. In the ED, the phrase “to the extent ... relates to an act affecting native title” qualifies the “payment or benefit” rather than the “agreement”. The provision as drafted will require the Australian Tax Office (ATO), and the Indigenous person or body that receives the payment and seeks to comply with the tax law, to carry out an impossible characterisation and apportionment exercise. It will be necessary to identify each separate payment or non-cash benefit and then characterise it as “relating to an act affecting native title”. If it cannot be so characterised, or can only be partly so characterised, it will not be eligible for exemption under the provision.

Given the diversity of payments and non-cash benefits and of the negotiating practices under native title agreements, this requirement renders the provision difficult, if not impossible either to comply with or to administer. The ATO is not an expert in native title law and is not privy to the negotiations generating the agreement. Frequently, the agreement will be confidential and its terms are not disclosed even if it is registered under the NTA. Even if it is provided to the ATO, it is not clear how the ATO will be able to identify the relationship or extent of that relationship between each separate payment or benefit and an “act affecting native title”.

The Explanatory Material (EM) contains Example 1.1 illustrating s 59-50(5):

Example 1.1: A native title group enters into an Indigenous Land Use Agreement with a mining company. Under the agreement, the native title group sets up a holding entity in the form of a trust to receive cash payments in the form of profit-sharing payments and milestone lump-sum payments. The agreement also provides for non-cash benefits in the form of training and employment opportunities for the beneficiaries of the trust. As the agreement is an Indigenous Land Use Agreement entered into under the NTA and the trust satisfies the definition of an Indigenous holding entity, the benefits received by the trust and its Indigenous beneficiaries are native title benefits and thus NANE.

This example, in our view, illustrates what should be the correct policy outcome of the proposed reform. That is, the Indigenous Land Use Agreement (ILUA) entered into by the native title group and the mining company is clearly a *native title agreement* that “relates to an act affecting native title”. Consequently, the payments and benefits provided under it, whether they are profit share or lump sum payments, or non-cash benefits such as training services, are appropriately exempt. However, we are concerned that the actual terms of s 59-50(5)(a) as currently drafted may not necessarily generate this outcome. They would instead require the ATO to carry out an exercise in characterising each of the separate payments or benefits under the agreement, adding significant complexity and uncertainty to the administration of the provision.

A consequence is that it may be impossible for the parties to rely on the provision as determining the outcome for the agreement as a whole. Instead, native title claim groups, private parties and governments will seek to enlist private solutions – such as the use of a charitable trust – to ensure a certain tax exempt outcome. This will defeat the primary purpose of the reform. In our original submission, we observed that dissecting the types of payments or benefits made under native title agreements is extremely difficult and will generate uncertainty. Instead, a holistic approach is required. Overall, native title agreements are made under the framework of the NTA so that the package of payments incorporates all of these aspects of land access, social licence and compensation for use of land.

Furthermore, we note that one agreement may relate to more than one area of land subject to native title, or there might be different impacts for different areas of land. However, the agreement as a whole, or in relation to the package of benefits provided under it, may not separately refer to these separate lands or explain payments relate to each area or impact of an act affecting native title.

We submit that it is clear, as indicated by wording elsewhere in the EM, that it is the Government’s policy intent that eligibility for this exemption should depend on the *agreement* being related to native title, rather than any specific payment or benefit itself. In paragraph 1.8 of the EM, it is stated that “A question arises in this context as to the tax treatment of any payments or non-cash benefits *provided under an agreement relating to native title*” (emphasis added).

More generally, it is our submission that any apportionment principle (“to the extent”), while commonly used in tax law, is inappropriate in this context and will tend to reduce the positive impact of the reform. It is our submission that for certainty, it is the entire native title agreement (and all benefits under it) that should be eligible for the exemption.

We suggest that one possible way that this provision could be redrafted to achieve the policy objective is as follows:

- (5) A **native title benefit** is a payment or *non-cash benefit provided:
- (a) under **an agreement that relates to an act affecting native title** made under:
 - (i) an Act of the Commonwealth, a State or a Territory; or
 - (ii) an instrument made under such an Act; ...

1.3 Types of native title agreements

The ED does not set out in the provision the specific types of agreement entered into under relevant Commonwealth or State native title that would be eligible for the provision.

We welcome the inclusion in the note to s 59-50(5) of two examples, which should clearly be eligible: ILUAs entered into under the NTA, and recognition and settlement agreements under the *Traditional Owner Settlement Act 2010* of Victoria.

Strictly speaking, we observe that this Note is classified as “non-operative material” (according to s 2-35 of ITAA97) although it is still “part of the Act” (s 2-45 of ITAA97). Usually, non-operative material is intended “to help you identify accurately and quickly the provisions that are relevant to you and to help you understand them”.

Payments or benefits may also be provided under agreements that initiate in a native title process “as if” there is native title but where, in the result, no native title determination is ever made, including payments made under the “right to negotiate” under the NTA. The background to most such agreements is the ILUA and non-extinguishment process. The State delegates its responsibility to negotiate compensation. It is submitted that these are still “native title” agreements as they are generally made under a “future act” or ILUA process or under other processes initiated or concluded under the NTA, for example in relation to a registered or lodged claim.

For clarity about the effect of this provision, we suggest that some key types of eligible native title agreements that would definitely be within the provision should be listed in the section itself. This would certainly include ILUAs registered under the NTA and should also include “future act” agreements under s 31 of the NTA. In addition, it would include agreements made under the Victorian native title settlement law and other similar native title State settlement regimes would also be eligible.

Such a listing would render this provision much easier to comply with and administer. While the ATO may still need in the course of administration to make further inquiry in some cases, the inquiry would be within the scope of its expertise if qualifying agreements were clearly defined and listed.

Alternatively, reference could be made to a listing in a regulation of eligible agreements under the NTA or relevant statutory provisions. In addition, a regulation-making power could be legislated, to add particular kinds of legislation or regimes in future. The power could be in the hands of the Attorney-General and the Treasurer. This could be particularly helpful, as the process of

establishing State native title settlement regimes is still ongoing around Australia and it is crucial to ensure that future settlement regimes will be eligible for s 59-50 treatment.

In our previous submission, we discussed in detail the different types of “native title agreement”. The explanation of these different types of agreement is included again in Appendix C to this submission, together with relevant provisions of the NTA.

1.4 “Compensation”: s 59-50(5)(b)

Native title is a *sui generis* property right recognised at common law.² Under section 51 of the NTA, native title holders have an entitlement to compensation “on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests”. The right to compensation for native title arises as a result of the operation of various provisions of the NTA, the *Racial Discrimination Act 1975* (Cth) or, at least potentially, under section 51(xxxi) of the Constitution. These latter provisions ensure that any right to compensation for the loss of property under the Constitution or any compulsory acquisition legislation extends to native title holders. The NTA recognises this right and introduces mechanisms for determining compensation.

In many instances, compensation for extinguishment or an act affecting native title is paid under an agreement. Consequently, these payments will presumably qualify for the provision under s 59-50(5)(a). However, we support inclusion of this separate criterion of “compensation” to encompass payments made following a court order for compensation or, perhaps, in other circumstances where no specific agreement is entered into (for example, following compulsory acquisition of land and an assessment of compensation).

1.5 Non-extinguishment principle

It was noted in the Treasury Paper³, that certain acts which may generate compensation for native title groups may not extinguish native title as a result of the non-extinguishment principle. Thus, acts may affect native title under the NTA even if extinguishment does not occur. These are still the result of native title negotiations under the NTA whether or not native title is extinguished and whether or not there is an agreement. Further, Under the NTA, extinguishment may be disregarded in certain circumstances and the impact of these savings provisions should be included.⁴

Some types of payments of “compensation” where there is no extinguishment may be eligible for the provision under proposed s 59-50(5)(b). However, for clarity, we recommend that payments or benefits made under agreements, that may be covered by the non-extinguishment rule in the NTA, should still be eligible under s 59-50(5)(a).

² *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1.

³ Treasury Consultation Paper, Native Title, Indigenous Economic Development and Tax (May 2010) 2.

⁴ The Treasury Paper refers to s47A of the NTA, which disregards historical extinguishment for the purposes of determining if native title exists.

For certainty, we recommend a specific statement in the provision that eligibility is not prevented “merely because of the operation of the non-extinguishment principle in the NTA or other saving provisions” (or similar wording).

Examples of other saving provisions include s 47A or s 47B of the NTA, which allow disregarding of prior extinguishment in some cases (there are quite extensive definitions in those provisions).

1.6 Land rights legislation

We welcome the breadth of the reference to an “agreement” made under an Act of the Commonwealth, a State or a Territory. This would on its face encompass agreements made under land rights legislation in various States and the Northern Territory. However, our reading of the provision as drafted is that it requires a nexus to an act affecting native title.

Under land rights legislation, we expect that mining payments would probably be covered by the mining withholding tax rules. However, there may be other kinds of payments made under land rights legislation agreements, such as payments in respect of a tourism operation or other land use agreements. We query whether such payments or agreements ought to be given the same treatment as payments in respect of native title, for consistency or equity reasons.

2. Benefits provided to an Indigenous holding entity or Indigenous persons

We welcome the ED provision that will extend eligibility to the exemption to a native title benefit as defined, that is provided either to an Indigenous holding entity or to an Indigenous person directly.

2.1 “Indigenous holding entity”

This is defined as a *distributing body or a trust for the benefit of Indigenous persons, and/or distributing bodies. As noted in the EM, *distributing body is defined in s128U of Division 11C, Part III of the *Income Tax Assessment Act 1936* (ITAA36) concerning mining withholding tax. The definition states:

“distributing body means:

(a) an Aboriginal Land Council established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976*;

(b) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*;
or

(c) (Repealed by No 125 of 2006)

(d) any other incorporated body that:

(i) is established by or under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals; and

(ii) is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Aboriginals or to apply such moneys for the benefit of Aboriginals, either directly or indirectly;”

One issue here is whether this definition will cover a regular corporation or a company limited by guarantee that is established under the federal *Corporations Act 2001* (Cth) or the State incorporated association acts. We would accept that the corporation should be limited by (d)(ii), but we query whether a distributing body should include entities incorporated otherwise than under a law that specifically relates to Aboriginals.

In view of the fact that the proposed s59-50 of ITAA97 regarding native title benefits can be expected to become the main applicable provision for native title for communities across the whole of Australia once enacted, we recommend for ease of comprehension that the definition of *distributing body be specifically inserted into a new s 59-50(6).

This is particularly pertinent given that amendments are being made, in any event, to the rules in Div 11C to bring the language up to date by replacing the term “Aboriginals” with “Indigenous persons” and that ITAA97 is today the central income tax law, with the ITAA36 being gradually replaced with the ITAA97 as reforms take place over time. Such a change would also simplify the cross-referencing of definitions from the Dictionary in s 995-1(1) of ITAA97.

2.2 Indigenous person

A new definition to be inserted into the Dictionary in s 995-1(1) of ITAA97 that is relevant to both proposed s 59-50 and the mining withholding tax and is adapted and updated from the definition currently in s 128U(1) of ITAA36 of “Aboriginal”, defined as:

“s 128U(1) **Aboriginal** means a person who is:

- (a) a member of the Aboriginal race of Australia; or
- (b) a member of the race to which Torres Strait Islanders belong.”

This definition should be adequate for the proposed purpose.

2.3 Tracing of native title benefit through an Indigenous holding entity

We support the proposal to extend exempt treatment to eligible native title benefits that are passed through an Indigenous holding entity to another Indigenous holding entity or indigenous person(s), to provide flexibility for the ultimate benefit of indigenous communities.

We note that the ability to pass through the native title benefit and retain its eligibility for exemption will require careful account keeping and tracing of native title benefit status by the Indigenous holding entity.

Example 1.3 illustrates that investment income derived from investing a native title benefit is not eligible for NANE treatment. We note that the decision not to extend the exemption to investment earnings on native title benefits will generate an incentive for immediate distribution of benefits,

rather than their investment for the longer term. This is one reason why we support the additional complementary reform of an Indigenous Community Development Corporation (or fund), which would be eligible to accumulate native title and other payments free of tax for the long term economic development of Indigenous people.

We recommend that Example 1.2 in the EM be expanded to illustrate the kind of evidence required to be provided by Indigenous Holding Entity B (and presumably received by it from Entity A) in order to satisfy the ATO.

We also recommend that guidance be issued by the ATO that sets out the kind of tracing and evidence that would be required to satisfy the ATO of eligibility for a flow through native title benefit.

We are not sure whether the ability to flow through the native title benefit will apply only where it is money or property. It is difficult to see how an Indigenous holding entity could pass on other non-cash benefits, such as services, to other Indigenous holding entities or persons. Some clarification of whether this is intended could be provided in the EM or included in an example.

Proposed section 59-50(4) appears to be intended to avoid the need to trace back through a series of Indigenous holding entities in order to establish status of a payment as an eligible “native title benefit”, essentially by deeming it to be a native title benefit once s 59-50(2) applies. However, it is still unclear what evidence will be needed, in the first place, to ensure that s 59-50(2) is satisfied.

More generally, we note that from the perspective of encouraging entity and administrative structures for Indigenous and native title communities that are as simple as possible, it may not be necessary to allow the benefit of s 59-50 to apply to an indefinite number of Indigenous holding entities.

3. EXCLUSIONS

Under s 59-50(3), where a native title benefit is passed through an Indigenous holding entity, certain types of payment or benefit are excluded from NANE treatment. These are payments or benefits:

“to the extent that the payment or benefit:

- (a) is for the purposes of meeting the administrative costs of the provider of the payment or benefit; or
- (b) is remuneration or consideration for goods or services provided by another entity.”

We accept that a payment made by an Indigenous holding entity as remuneration or consideration for goods or services provided by another entity should be excluded from eligibility under proposed s 59-50. This is illustrated in Example 1.5 in the EM. The recipient of such a payment should be taxable in the normal way.

However, we are unsure of the purpose or scope of the exclusion for “administrative costs” of an Indigenous holding entity under s 59-50(3)(a). There also appears to be duplication between s59-50(3)(a) and (b). Example 1.4 in the EM purports to illustrate the application of para (a), referring

to an Indigenous Holding Entity F which is providing administrative services to Indigenous Holding Entity E for a fee. However, this example would appear to be caught by s 59-50(3)(b) in any event. Even in-house administration, such as office supplies or rent, or salaries of an on-staff accountant, would appear to be covered by para (b).

A key concern in the native title arena is the cost of negotiation, management and administration of native title agreements. It is clear that native title PBCs are very significantly under-resourced to do this work. We suggest that it is consistent with government policy that a proportion of payments under native title agreements be able to be utilised for the ongoing administration of native title organisations, without losing the benefit of tax exemption.

We therefore request clarification as to the intent and purpose of s 59-50(3)(a).

APPENDIX 1: RELEVANT EXTRACTS FROM THE NTA

Native title is recognised in Part 2 Division 1 of the NTA. Division 2, 2A and 2B validates certain past and intermediate period acts by State and Federal governments in relation to native title and confirms extinguishment in certain circumstances. Division 3 deals with future acts and Indigenous Land Use Agreements (ILUAs), while Division 5 relates to the determination of compensation for acts that offend or have offended native title. Part 15 includes definitions.

Native title is defined in s 223 of the NTA as follows:

223 Native title

Common law rights and interests

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

Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests.

Statutory rights and interests

- (3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression **native title** or **native title rights and interests**.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

...

Native title rights then persist where they have not been abrogated in the meantime. To claim a native title right, a continuing observance of a practice or tradition in relation to that right must be demonstrated. Future act agreements, ILUAs and compensation will hence all relate to these rights.

Right to compensation

The NTA recognises a right to compensation in a variety of sections and introduces mechanisms for determining compensation.

51 Criteria for determining compensation

Just compensation

- (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 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.

Acquisition under compulsory acquisition law

- (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

Compensation where similar compensable interest test satisfied

- (3) If:
 - (a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
 - (b) the similar compensable interest test is satisfied in relation to the act;

the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines similar compensable interest test).

Compensation not covered by subsection (2) or (3)

- (4) If:
 - (a) neither subsection (2) nor (3) applies; and
 - (b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable;

the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

Monetary compensation

- (5) Subject to subsection (6), the compensation may only consist of the payment of money.

Requests for non-monetary compensation

- (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
 - (a) must consider the request; and

(b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

Where recommendation not complied with

- (7) If the person does not transfer the property or provide the goods or services in accordance with the recommendation, the person claiming to be entitled to the compensation may request the court, person or body to determine instead that the whole or the part of the compensation concerned is to consist of the payment of money.

Where recommendation complied with

- (8) If the person does transfer the property or provide the goods or services in accordance with the recommendation, the transfer of the property or provision of the goods or services constitutes full compensation for the act, and the entitlement to it is taken to have been determined in accordance with this Division.

The NTA also includes some specific provisions about compensation, for example sections 17 and 19 of the NTA provide that for past acts of extinguishment, the Commonwealth (or State as applicable) will be liable for compensation. In another example, Part 2, Division 3, Subdivision G provides that the Commonwealth (or State as applicable) is liable for compensation in relation to non-exclusive agricultural leases granted on or before the application of native title (23 December 1996) (s 24GA). On-going activities and activities that could have been done under any legislation in force before 31 March 1998 are excluded from the compensation framework (s 24GC). There are many other examples. Mining is treated under separate provisions in Part 2 Division 3.

Section 22L of the NTA may authorise structured agreements or other settlements. These provisions provide authority for some State based settlements.

22L Entitlement to compensation

Compensation where validation

- (1) If a law of New South Wales validates the acts, the native title holders concerned are entitled to compensation.

Recovery of compensation

- (2) The native title holders may recover the compensation from New South Wales.

Compensation to take into account rights etc. conferred by transferee

- (3) The compensation is to take into account all rights, interests and other benefits conferred, in relation to the lands, on the native title holders by, or by virtue of membership of, the Aboriginal Land Council (within the meaning of the *Aboriginal Land Rights Act 1983* of New South Wales) to which the lands are transferred or by which the lands are held.

NSW may create compensation entitlement

- (4) This section does not prevent a law of New South Wales from creating an entitlement to compensation for the acts or for their validation.

Note: Paragraph 49(b) deals with the situation where there are multiple rights to compensation under Commonwealth and State legislation.

The definition of 'future act' is found in section 233 of the NTA.

233 Future act

Definition

- (1) Subject to this section, an act is a **future act** in relation to land or waters if:
- (a) either:
 - (i) it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or
 - (ii) it is any other act that takes place on or after 1 January 1994; and
 - (b) it is not a past act; and (c) apart from this Act, either:
 - (i) it validly affects native title in relation to the land or waters to any extent; or
 - (ii) the following apply:
 - (A) it is to any extent invalid; and
 - (B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and
 - (C) if it were valid to that extent, it would affect the native title.

Validation and extinguishment legislation excluded

- (2) If:
- (a) the act consists of the making, amendment or repeal of legislation; and
 - (b) the act purports to:
 - (i) validate any past act or intermediate period act; or
 - (ii) extinguish native title, or extinguish native title rights and interests to an extent; and
 - (c) the act is done or permitted to be done by Division 2, 2A or 2B of Part 2; subsection (1) does not apply to the extent that the act purports to validate the act, or to extinguish the native title or the native title rights and interests.

Acts creating or affecting Aboriginal/Torres Strait Islander land or waters excluded

- (3) Subsection (1) does not apply to any of the following acts:
- (a) an act that causes land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under a law mentioned in the definition of **Aboriginal/Torres Strait Islander land or waters** in section 253;
 - (b) any act affecting Aboriginal/Torres Strait Islander land or waters.

226 Act

Section affects meaning of **act** in references relating to native title

- (1) This section affects the meaning of act in references to an act affecting native title and

in other references in relation to native title.

Certain acts included

(2) An act includes any of the following acts:

- (a) the making, amendment or repeal of any legislation;
- (b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;
- (c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;
- (d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;
- (e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;
- (f) an act having any effect at common law or in equity.

Acts by any person

(3) An act may be done by the **Crown** in any of its capacities **or by any other person.**

227 Act affecting native title

An 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.

APPENDIX 2: AGREEMENTS

Indigenous Land Use Agreements (ILUAs)

ILUAs are the central large scale agreement making process under the NTA. ILUAs have the advantage that they must be registered under the NTA and that a range of steps must be taken that assist in ensuring due process in negotiation of the ILUA. An ILUA may be negotiated “as if” there is native title, or on the assumption that native title may be established in due course (and may stand even if native title is not, ultimately, made out).

A range of payments and benefits may be agreed under an ILUA. Some payments may have a form which for income tax analysis might be considered “capital” in nature, for example, a payment is made as a lump sum, once and for all, and is expressed to be for compensation or for access to or acquisition of an asset. Other payments may be periodical, or tied to use of an asset and so may be treated as “income” for tax purposes and hence assessable under the general tax rules. Some benefits, such as heritage protocols or employment targets, are more difficult to categorise.

NTA Division 3, Subdivisions B, C and D provide for ILUAs made with bodies corporate; those made in relation to an area where there is not a body corporate; as well as those made under ‘alternative procedures’. These subdivisions provide for the technicalities of registering an agreement. Each subdivision provides a list of requirements for an agreement to satisfy the definition of an ILUA. The specification and division of these requirements may point to divisibility in assessment being possible in relation to a final payment under any such ILUA.

Some of the requirements of an ILUA with a body corporate include consideration of compensation for past acts and future acts, payment for future acts, extinguishment of native title rights, frameworks for interaction between native title rights and other parallel rights, and the manner of exercise of those various rights (s 24BB).

Future Acts

A “future act” agreement (that is not an ILUA) deals with any act that affects native title in the future (excluding some specific matters). This refers to any act that extinguishes or is inconsistent with native title. The main purpose of a future act agreement is to compensate for future impairment of title, even though the agreement itself may not extinguish or suspend title. A future act negotiation, like an ILUA, may apply to lands where title is determined, or may be negotiated “as if” there is native title, or on the assumption that it may be established in due course. Where property interests are at stake (such as the issue of a licence by the State), the future act provisions are triggered by the State government notifying all relevant native title holders or potential holders in the relevant region.

A “future act” agreement, like an ILUA, may apply to lands where title is determined, or may be negotiated “as if” there is native title, or on the assumption that native title may be established in due course. Payments under future act agreements, like those under ILUAs, may be in a range of different forms. A future act agreement may compensate, in a loose sense, for future impairment of title, even though the agreement itself may not extinguish or suspend title. It is possible that native title may not ultimately be made out, or impaired. However, the payment may have already been made, sometimes some years previously.



A future act in relation to native title is defined at s 233 NTA. Section 24AA(2) provides that a future act is valid if covered by the provisions of the NTA, while s 24AA(3) provides that a future act is valid if dealt with by a registered ILUA.

APPENDIX 3: STATE GOVERNMENT NATIVE TITLE SETTLEMENT FRAMEWORKS

I. South Australian Government Settlement process

See: <http://www.aiatsis.gov.au/ntru/docs/researchthemes/agreement/broadsettlements/SouthAustralianSettlementFramework.pdf>

See: <http://www.iluasa.com/>

a. Outline

The South Australian Settlement process focuses on two alternative paths to litigation under the Native Title Act (NTA) for resolving native title disputes – use of Indigenous Land Use Agreements (ILUA) or through consent determinations.

b. Rights received

Under both approaches, a continued right to practice traditional laws and customs on the native title land is recognised. When an agreement is registered as an ILUA, there is by default a consideration of the right to negotiate land use with people wanting to exploit the resources in the native title land. Consent orders may have details like this stripped away, but other rights will usually be evidenced as part of the native title claim. There will also be a continuing right to compensation from the Crown against acquisition of land or water rights.

c. Approaches to agreement-making

ILUAs are registered with the National Native Title Tribunal (NNTT) and so have some level of consistency and oversight. There is a South Australian Native Title Resolution (SANTR) process operating in parallel to the ILUA process, bringing together the Congress of Native Title Management Committees, the South Australian Native Title Services (SANTS), the SA Farmers Federation (SAFF), the SA Chambers of Mines and Energy (SACOME), Wildcatch Fisheries SA, the Local Government Association (LGA) and the South Australian Government. The SANTR process can result in a court determination, a consent determination, or an agreement not to pursue.

Consent determinations, following negotiations and compulsory mediation, take legal effect when confirmed by a Federal Court. Claimants have to provide evidence as to a continued connection to the land under the requirements of the NTA for consent determinations, but this is significantly cheaper and simpler than preparation for a full trial. Prior to confirmation of the determination, applicants may seek to fulfill the Registration Test, effectively lodging a caveat against further land use while the application is pending.

d. Compensation

Compensation is determined either under a consent determination or an ILUA in South Australia. A consent determination can leave a claimant exposed to exploitation or not aware of their rights, and so may undervalue the native title claim. The ILUA negotiating framework and consultation process makes a full consideration of the economic, social and cultural needs of the native title claimants and so may provide for more holistic compensation. The Resolution process does not

specify particular heads of compensation. Compensation beyond recognition and acknowledgement of a continued right may simply be unnecessary in many cases.

II. Victorian Government Settlement Process

<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/>

a. Outline

Agreement-making may occur under the Victorian Native Title Settlement Framework as set out in the [Traditional Owner Settlement Act 2010](#) (Vic) and arising out of applications for determinations of native title in the Federal Court. Both of these pathways are open to applicants, and failure in one avenue does not necessitate failure in the other (for example, the Yorta Yorta people came to an arrangement under the Settlement Framework with the Victoria Government (prior to the Act passing), despite failing in their appeal to the High Court).

b. Rights received

The key components to a Framework Agreement are:

Access to land

- Transfers of land to Traditional Owner groups (with or without conditions).
- Hand back of Crown land in perpetuity through joint management.
- Joint management where the State retains control of the land.

The Land Use Activity Regime

- Much like agreements in relation to future acts in the NTA, coordinating native title holders, Crown use and third-party use, but simplified to four areas from ten: routine, advisory, negotiation or agreement activities.

Access to and use of natural resources

- Rights in relation to management, rights in relation to non-commercial Traditional Owner use, and participation rights in relation to commercial use.

Measures for recognition and strengthening culture

- Including suggestions such as protocols for public events, a recognition statement, cultural centres and keeping places, indigenous place naming, signage on roads, development of interpretive and educational information and cultural awareness projects.

Alignment with cultural heritage processes

Claims resolution

- Compensation
- Funding
- Certainty and finality

c. Approaches to agreement-making

Native title applications to the Federal Court can result in declarations of native title, but the Settlement Framework seeks to pre-empt Court decisions by conducting direct negotiations with Traditional Owner groups. Agreements under this framework are called 'non native title agreements'. They generally include a declaration that the group will cease native title applications in relation to the agreed land and promises not to commence any such action in the future. The intention is to minimise costs for applicants and increase the number of groups exercising native title-like rights in Victoria without increasing the burden on the Court system.

d. Compensation

The 'claims resolution' aspect of the Settlement Framework accounts for the majority of compensation. Other rights such as participation in use of natural resources could have a profound economic development effect, however.

The entirety of the Framework Agreement is designed to be equivalent to a native title settlement under the NTA. The Land Use Activity Regime accounts for future acts such as mining and large-impact land-use, providing for community benefits in that case. The 'benefits' will be targeted to assist economic, social and cultural development goals. Sustainable and on-going funding may be provided to Traditional Owner corporations as part of the Agreement so as to allow them to continue to deliver their obligations under the Agreement.