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# **Chapter 1**

## ***Native title benefits: Non-assessable non-exempt income***

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### **Outline of chapter**

- 1.1 Part 1 of Schedule # proposes to amend the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Income Tax Assessment Act 1936* (ITAA 1936) to make it clear that native title benefits are not subject to income tax (including capital gains tax).
- 1.2 Part 2 proposes a number of technical changes to the ITAA 1997 and ITAA 1936 to correct terminology.
- 1.3 References throughout this chapter are references to the ITAA 1997 unless otherwise specified.

### **Context of amendments**

- 1.4 The *Native Title Act 1993* (NTA) came into operation on 1 January 1994. The NTA provides for the recognition and protection of pre-existing native title rights over land and waters, and establishes processes for the resolution of native title claims, including through negotiated settlements.
- 1.5 The NTA also allows for actions that impact native title rights and interests. These actions can be validated for native title purposes under an Indigenous Land Use Agreement (Subdivisions B-E, Division 3, Part 2), or in some cases under an agreement reached in accordance with the 'right to negotiate' provisions of the NTA (Subdivision P, Division 3, Part 2).
- 1.6 The NTA provides for payments to native title holders in relation to actions that affect their native title rights and interests. These payments may be determined through a specified negotiation process or by the courts. Section 51 of the NTA allows native title holders to request payments in monetary form, non-monetary form or as a combination of both.

1.7 State and Territory legislation, including, but not limited to, the Victorian *Traditional Owner Settlement Act 2010*, also provides for the making of agreements in relation to native title.

1.8 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. When applying the current rules of the income tax system based on traditional common law concepts, it is unclear whether benefits provided under a native title agreement would be assessable income.

1.9 The High Court has counselled against using traditional common law concept categories in the native title sphere. Instead it indicates native title should be considered on the basis of its uniqueness; formally referred to as *sui generis* (See *Mabo (No 2) v Queensland* (1992) 175 CLR 1 at 89).

1.10 In 2010, the Government released a consultation paper entitled 'Native title, Indigenous Economic Development and Tax'. This paper provided and examined options to reduce the complexity and uncertainty of the income tax treatment of native title claims, including an option to make certain payments under native title agreements exempt from income tax.

1.11 This consultation paper identified that benefits provided in respect of native title do not result in a net gain to the recipient. Therefore, expressly stating that such benefits are not subject to income tax (including capital gains tax) presents a simple and clear path to providing broader clarity to native title groups.

1.12 Submissions to the consultation were supportive of reforms to clarify that native title payments that are for the extinguishment or impairment of native title rights and interests are not subject to income tax.

## **Summary of new law**

1.13 The new law would confirm that certain native title benefits are non-assessable non-exempt (NANE) income, meaning that they are not subject to income tax (including capital gains tax).

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Native title benefits are NANE income and therefore not subject to income tax (including capital gains tax).	The income tax treatment of native title benefits is currently unclear.

## Detailed explanation of new law

1.14 Section 59-50 is inserted to clarify that native title benefits are NANE income when provided to an Indigenous holding entity or to one or more Indigenous persons, or applied for their benefit. *[Schedule #, item 2 and item 3, subsection 59-50(1)].*

1.15 A native title benefit is defined as:

- a payment or non-cash benefit provided under an agreement made under Commonwealth, State or Territory legislation (or an instrument under such legislation) to the extent the payment or benefit relates to an action affecting native title; or
- compensation under Division 5 of Part 2 of the NTA.

*[Schedule #, item 3, subsection 59-50(5) and item 6]*

1.16 The above definition is intended to cover agreements under Australian legislation that provide payments or non-cash benefits for an action affecting native title. An action affecting native title is one that extinguishes native title rights and interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment and exercise.

1.17 Agreements that are captured by this definition include, but are not limited to, Indigenous Land Use Agreements under the NTA and agreements under the *Traditional Owner Settlement Act 2010 (Vic)*.

### 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.

1.18 An Indigenous holding entity means:

- a distributing body (which is a defined term in section 128U of the ITAA 1936); or
- a trust where the beneficiaries can only be Indigenous persons and/or distributing bodies.

*[Schedule #, item 3, subsection 59-50(6) and item 4]*

1.19 A distributing body includes, amongst other things, an Aboriginal Land Council established under the *Aboriginal Land Rights (Northern Territory) Act 1976* or a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Defining an Indigenous holding entity as including a trust is intended to apply to a broad range of circumstances, such as where a native title benefit is held by an ordinary corporation but where that entity is acting in the capacity of trustee in respect of the native title benefit.

1.20 The proposed amendments also clarify that, where an Indigenous holding entity provides a native title benefit to another Indigenous holding entity or to one or more Indigenous persons, the native title benefit retains its NANE income status. This provides Indigenous communities with flexibility as to how they structure their financial affairs and confirms that the benefit remains NANE income where it continues to ultimately be held for the benefit of Indigenous persons. *[Schedule #, item 3, subsection 59-50(2)]*

### **Example 1.2**

Indigenous Holding Entity A is a company acting in the capacity of trustee in respect of a \$10 million native title benefit. Indigenous Holding Entity A then distributes this native title benefit to Indigenous Holding Entity B. Indigenous Holding Entity B is also a company acting in the capacity of trustee in respect of the native title benefit. Indigenous Holding Entity B would not incur an income tax liability because of this payment; and neither would an Indigenous person who is provided a native title benefit from Indigenous Holding Entity B.

1.21 To avoid doubt, the legislation provides that a native title benefit provided between Indigenous holding entities is taken to be a native title benefit for any further transfers to another Indigenous holding entity or Indigenous person. *[Schedule #, item 3, subsection 59-50(4) and item 6]*

1.22 However, a native title benefit provided for any other purpose than the provision to an Indigenous holding entity or an Indigenous person (or applied for their benefit) will not be classified as NANE income. For example, investment income, such as interest income derived from investing a native title benefit, would ordinarily be included in the assessable income of the investor.

**Example 1.3**

Indigenous Holding Entity C receives a \$10 million native title benefit. It invests that money and derives \$500,000 in interest. Indigenous Holding Entity C subsequently distributes the amount of \$10,500,000 to Indigenous Holding Entity D. The interest derived of \$500,000 will not be NANE income for Indigenous Holding Entity C. For Indigenous Holding Entity D, only the \$10 million will be NANE income.

1.23 Any payment or benefit provided out of a native title benefit to meet administration costs or for remuneration or consideration for the provision of goods or services will not be NANE income. This includes situations where the payment or benefit is provided to an Indigenous holding entity or Indigenous person (who would be entitled to receive the native title benefit) and is in respect of administration costs or the provision of goods and services. Administration costs is a broad term and includes, but is not limited to, fees for legal and accounting services and other necessary costs associated with the ongoing administration of the entity. *[Schedule #, item 3, subsection 59-50(3)]*

**Example 1.4**

Indigenous Holding Entity F provides administrative services for Indigenous Holding Entity E. Indigenous Holding Entity F charges Indigenous Holding Entity E \$100,000 in respect of this service. The \$100,000 payment made to Indigenous Holding Entity F from Indigenous Holding Entity E is not NANE income as it is for administration costs.

**Example 1.5**

Indigenous Holding Entity G receives a \$10 million native title benefit. An Indigenous person to whom the native title benefit relates provides accounting services for Indigenous Holding Entity G and receives remuneration for this service of \$75,000. This remuneration of \$75,000 will not be NANE income for the Indigenous person and will be treated under existing income tax provisions as it represents a payment for a service.

## **Application and transitional provisions**

1.24 The amendments made by Part 1 of Schedule # to the exposure draft will apply in relation to native title benefits provided on or after 1 July 2008. Allowing these changes to apply retrospectively clarifies the tax position for cases currently being considered by the Australian Taxation Office. By providing clarity, the changes facilitate a more favourable outcome for affected taxpayers. The retrospectivity does not negatively impact taxpayers. The four year retrospectivity aligns with the four year amendment period for tax returns. *[Schedule #, item 7]*

## **Consequential amendments**

1.25 A consequential change is made to the definition of mining payment in section 128U of the ITAA 1936 to make it clear that a native title benefit is excluded from the definition of a mining payment. The clarification of the tax treatment of native title benefits is not intended to impact on the operation of the mining withholding tax in section 128U of the ITAA 1936. *[Schedule # item 1]*

1.26 A definition of Indigenous person is inserted into the ITAA 1997 as a result of these changes. Indigenous person is defined to mean a person who is a member of the Aboriginal race of Australia or a descendent of an Indigenous inhabitant of the Torres Strait Islands. *[Schedule #, item 5]*

1.27 Part 2 of Schedule # to the exposure draft makes a number of minor and technical changes to the ITAA 1997 and ITAA 1936 to replace references to 'Aboriginal' or 'Aboriginals' with 'Indigenous' or 'Indigenous persons'. *[Schedule #, items 8-22]*