

Taxation of Native Title Benefits

Native title is a unique legal concept that seeks to bridge the rights held by Indigenous peoples under their own law and an accommodation and protection of those rights within Australia law. Its recognition required an immediate rethinking of Australia property law and the way in which governments, in particular, dealt with land.

An agreement making framework was developed to facilitate access to land where native title has been found to exist or is under native title claim. However, the common law and legislative framework have constrained native title as an economically valuable right.

These legal constraints are strangely at odds with the tendency to presume that native title will be an economic boon for Indigenous peoples. This is teamed with the rhetoric of respondents and interest groups, particularly in the years surrounding the 1996 Wik decision and subsequent amendments to the Native Title Act 1993 (NTA), that native title is a significant cost to industries and the economy more broadly.

Despite the restrictive framework of native title law, Indigenous groups are active in negotiating agreements over land and water matters, both inside and outside the framework of the NTA.

Some of the agreements being reached involve payments and benefit packages that are complex and in almost all circumstances raise significant questions, both conceptually and practically, as to their treatment for taxation purposes. But little analysis has been done to determine how native title fits with the tax system and resolution of the question has eluded a generation of policy makers.

It is interesting to contrast other jurisdictions where Aboriginal rights have a much longer history of recognition. For example, the leading text book on Aboriginal legal issues in Canada contains a whole chapter on Taxation.

This resource provides a summary of the current legislation, case law and taxation law related to the taxation of native title benefits. It also contains links to comparative materials in other jurisdictions.

Extract from: Strelein, L, 2008, 'Taxation of Native Title Benefits' *Research Monograph 1/2008*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Legislation

Key provisions

[Income Tax Assessment Act 1997 \(Cth\)](#)

Section 6-15 definition of 'taxable income'

Part 3-1 – capital gains & losses

Section 116-20 calculating a capital gain/loss

Part 3, Division 11C – Mining Withholding Tax

Division 50 – income tax exempt entities

Division 30 deductible Gift Recipient status

[*A New Tax System \(Goods and Services Tax\) Act 1999 \(Cth\)*](#)

Section 9-5 definition of 'taxable supply'

Section 9-10 definition of 'supply'

Section 9-20 definition of 'enterprise'

Section 195-1 nexus between 'consideration' and 'supply'

Other Commonwealth legislation

[*Fringe Benefits Tax Assessment Act 1986 \(Cth\)*](#)

[*Income Tax Act 1986 \(Cth\)*](#)

[*Income Tax Assessment Act 1936 \(Cth\)*](#)

[*Taxation Administration Act 1953 \(Cth\)*](#)

Declarations

[*Social Security \(Means Test Treatment of Private Trusts — Excluded Trusts\) Declaration 2005*](#)

ATO Rulings

Income tax and fringe benefits tax: charities [*TR 2005/21*](#)

Income tax: Companies controlled by exempt companies [*TR 2005/22*](#)

Income tax: Endorsement of income tax exempt entities [*TR 2000/11*](#)

Income tax: capital gains: treatment of compensation receipts [*TR 95/35*](#)

Goods and Services Tax: GST consequences of court orders and out-of-court settlements [*GSTR 2001/4*](#)

Goods and Services Tax: Non-monetary compensation [*GSTR 2001/6*](#)

Goods and services tax: supplies [*GSTR 2006/9*](#)

[*Register of Binding Private Rulings, Authorisation no. 43869 \(2008\)*](#)

[*Register of Binding Private Rulings, Authorisation no. 77829 \(2004\)*](#)

Taxation Cases

GST

Ferguson v FCT (1979) 26 ALR 307

London Australian Investment co Ltd v FCT (1977) HCA 50 138 CLR 106

Shaw v Director of Housing & Anor (No 2) [\[2001\] TASSC 2](#)

Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd [\[2006\] FCAFC 115](#)

Capital/income distinction

Associated Newspapers Ltd v Federal Commissioner for Taxation [\(1938\) 61 CLR 337](#)

Barrett v Federal Commissioner of Taxation [\(1968\) 118 CLR 666](#)

Cape Flattery Silica Mines Pty Ltd v Federal commissioner of Taxation [97 ATC 4556](#)

Cliffs International Inc. v. Federal Commissioner of Taxation [79 ATC 4059](#)

Federal Commissioner of Taxation v Guy [96 ATC 4520](#)

Glenboig Union Fireclay Co. Ltd v IRC (1922) 12 TC 427

Hallstrom Pty Ltd v Federal Commissioner for Taxation (1946) 72 CLR 634

Scott v Commissioner of Taxation (NSW) 1935 3 ATD 182

Charitable Trusts/Tax concessions

Commissioner of Taxation v Word Investments Ltd [\[2007\] FCAFC 171](#)

Commissioner of Taxation v Word Investments Ltd [\[2006\] FCA 1414](#)

Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council [\[2006\] NSWSC 1008](#)

Re: Matthew (1951)VLR 226

Nullaga Pastoral Co. Pty Ltd v Federal Commissioner of Taxation [78 ATC 4329](#)

Royal Australasian College of Surgeons v The Federal Commissioner of Taxation [\(1943\) 68 CLR 436](#)

Salvation Army (Victoria) Property Trust v Shire of Fern Tree Gully [\(1952\) 85 CLR 159](#)

Shire of Ashburton v Bindi Bindi Community Aboriginal Corporation [\[1999\] WASC 108](#)

Shire of Derby-West Kimberley v Yungngora Association Inc [\[2007\] WASCA 233](#)

Trustees of the Indigenous Barristers Trust v Commissioner of Taxation [\[2002\] FCA 1474](#)

Dingle v Turner [1972] AC 601

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Black, W 'Transferring native title to a body corporate under the Native Title Act 1993 (Cth) – Can CGT arise?' *Journal of Australian Taxation* , mar/Apr 2000 155.

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- 'Taxation Implications Of The Native Title Act And Legal Aid For Native Title Matters', Media release, The Treasurer, the Hon. Peter Costello MP Attorney-General The Hon. Daryl Williams AM QC MP, 13 February 1998.

International and Comparative Resources

- Commissioner of Inland Revenue v New Zealand Refining Co Ltd* (1997) 18 NZTC 13187
- Chatham Islands Enterprise Trust v. Commissioner of Inland Revenue* (1999) 19 NZTC 15 075
- Landboden-Agrardienste GmbH & Co. KG v Finanzamt Calau* [1998] BVC 70
- Mohr v Finanzamt Bad Segeberg* [1996] BVC 293

Indian taxation

- Indian Act (Canada), ss [87](#), [89](#), [90](#).
- R v Nowegijick* [\[1983\] 1 SCR 29](#)

Mitchell v Peguis Indian Band [\[1990\] 2 SCR 85](#)

Bryan v Itasca County, [426 US 373 \(1976\)](#)

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Borrows, John, and Leonard Rotman, *Aboriginal Legal Issues: Cases, materials and commentary*, (2 edn) Butterworths, 2003, pp.745-828

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