



**Submission in response to
the Native Title, Indigenous
Economic Development
and Tax Consultation Paper
May 2010**

**IBN Corporation (ABN 60 093 140 240) on behalf of
the
Yinhawangka, Banyjima and Nyiyaparli Peoples
November 2010**

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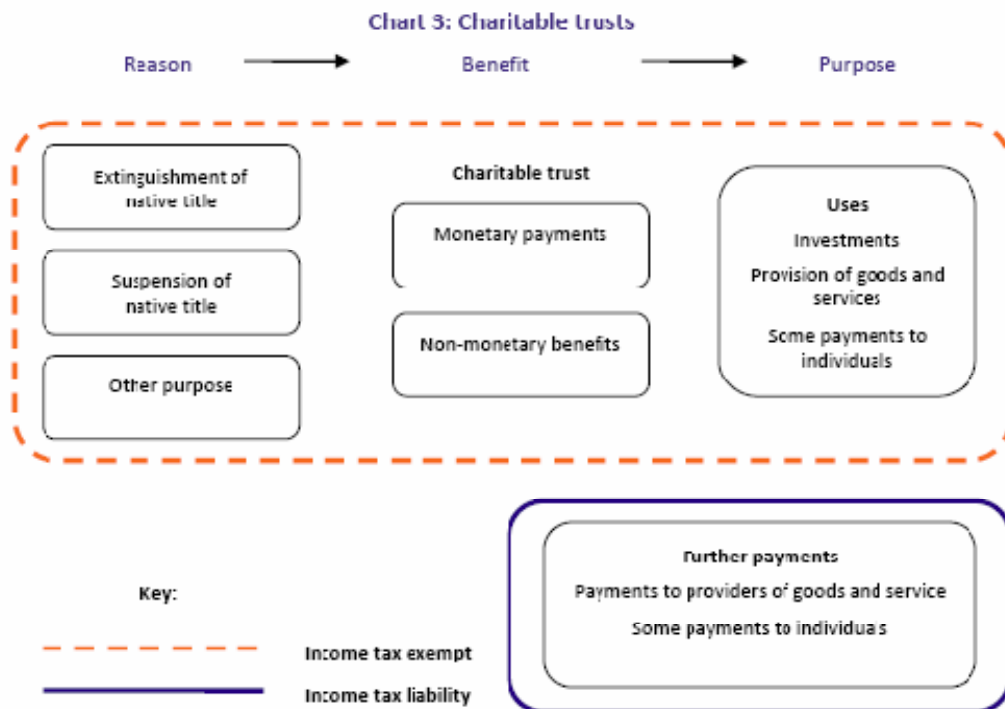
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Executive Summary

1. This submission is made in relation to the Federal Government's May 2010 Consultation Paper in relation to *Native Title, Indigenous Economic Development and Tax*.
2. The submission is made by IBN Corporation (ABN 60 093 140 240) (IBN) in its capacity as Trustee for the IBN Foundation No. 1, the Charitable Foundation and the IBN Foundation No. 2, Financial Assistance Foundation on behalf of the Yinhawangka, Banyjima and Nyiyaparli Peoples, collectively the Traditional Owners of land subject to the Mining Area C Land Use Agreement (MAC Agreement). The owners of IBN are the Minadhu Aboriginal Corporation, Nyiyaparli Aboriginal Corporation, Milyuranpa Banyjima Aboriginal Corporation and Banyjima Aboriginal Corporation.
3. IBN submits that the limitations placed on charitable trusts under the current tax legislation does not result in the most efficient use of resources, nor best serve the needs of Traditional Owners to achieve economic independence and self determination. The uncertainty of what is included within the pool of income, whether it should be distributed or may be accumulated and whether all payments are maintaining charitable purposes is a veritable minefield for trustees of charitable trusts to administer.
4. The path to economic independence is a daunting one. Government should address the effective rate of taxation resulting from both the reduction in welfare payments, combined with loss of income tax offsets and progressive rates of income tax and provide incentives to encourage Traditional Owners to take the first steps towards economic independence and self determination.
5. IBN notes the certainty of taxation deductions afforded to mining companies by virtue of the decision in *Cape Flattery Silica Mines v Federal Commissioner of Taxation* [1997] FCA 706; 97 ATC 4552, but does not accept Treasury's contention that payments received for the suspension of Native Title or other periodic payments of a compensatory nature should be regarded as ordinary income by virtue of the case law precedents in *Nullaga Pastoral Company Pty Ltd v FC of T* 78 ATC 4329; (1978) 8 ATR 757 and *Barrett v Federal Commissioner of Taxation* (1968) 10 ATR 685.
6. IBN supports income tax reforms which enable Indigenous corporations to distribute Native Title payments on a tax exempt basis both in the hands of the payee corporation and the Traditional Owners. Native Title payments are unique and essentially compensatory in nature and the tax exempt character of these payments should be retained through to the ultimate Traditional Owner recipient.

Limitations and restrictions of charitable trusts

7. The consultation paper considers the place of charitable trusts in assisting Native Title groups in limiting exposure to income tax. This is set out in Chart 3, reproduced from the consultation paper, below.



8. Indigenous corporations most commonly use charitable trusts to manage and preserve Native Title payments, due to their income tax exempt status under Australia's current income tax system. However, whilst charitable trusts are commonly used, they do have significant limitations, including:
- payments can only be distributed to Traditional Owners for charitable purposes which are inflexible and at times an inefficient use of resources and will not result in the Traditional Owners ever moving from poverty and welfare dependence to economic independence and self determination;
 - Paragraph 21 of *Taxation Ruling TR 2000/11 Income Tax: Endorsement of income tax exempt entities* demonstrates the tightrope of limitations and uncertainty being walked by trustees when applying the funds of a charitable trust. TR 2000/11 advocates that there should not be an "excessive accumulation of investment income" as this would not be "applying of a fund for its purposes". Further the ATO regard "distribution of a substantial part of the income (but not necessarily capital gains) as essential" but then accept "a charitable fund may use some of its income to acquire assets which, in future, will produce more income for charitable purposes, and may accumulate some of its income for later distribution". There is inherent uncertainty and contradiction in the paragraph. It is also uncertain whether this means that Native Title payments (which should be exempt capital receipts, but may

be within income as defined by a trust) and the taxable income arising from investment should all be distributed.

- c. The chart also includes a class of “Further payments” which are still included within the scope of income tax; although TR 2000/11 states that “Distributions for non-charitable purposes also indicate that a fund is not being applied for its purposes”.

Breaking the welfare dependency cycle

9. Whilst the Government may prefer some form of structure which controls and safeguards capital for future generations and limits the use of income to charitable causes, this paternalistic approach causes much frustration amongst many Traditional Owner members. Many Traditional Owners are of the view that Compensation Funds should be capable of application to a broad range of purposes and this should be reflected in the drafting of any future tax legislation dealing with Native Title payments.
10. Whilst protection of capital for future generations is important, freeing the current generation of Traditional Owners from poverty and financial destitution is more critical and Government needs to work with Traditional Owners to liberate funds and assist them in achieving their own economic independence and thereby bridging the gap with non-indigenous Australians.
11. Many Traditional Owner members (and for that matter, many non-indigenous Australians) are dependent upon welfare payments. The Government should address the real effective rate of taxation when moving from welfare dependency to taxpaying mode, being a cumulation of the reduction in welfare payments, combined with loss of income tax offsets and application of progressive rates of income tax. Government should provide tax incentives to encourage Traditional Owners to take the first steps towards economic independence and self determination.

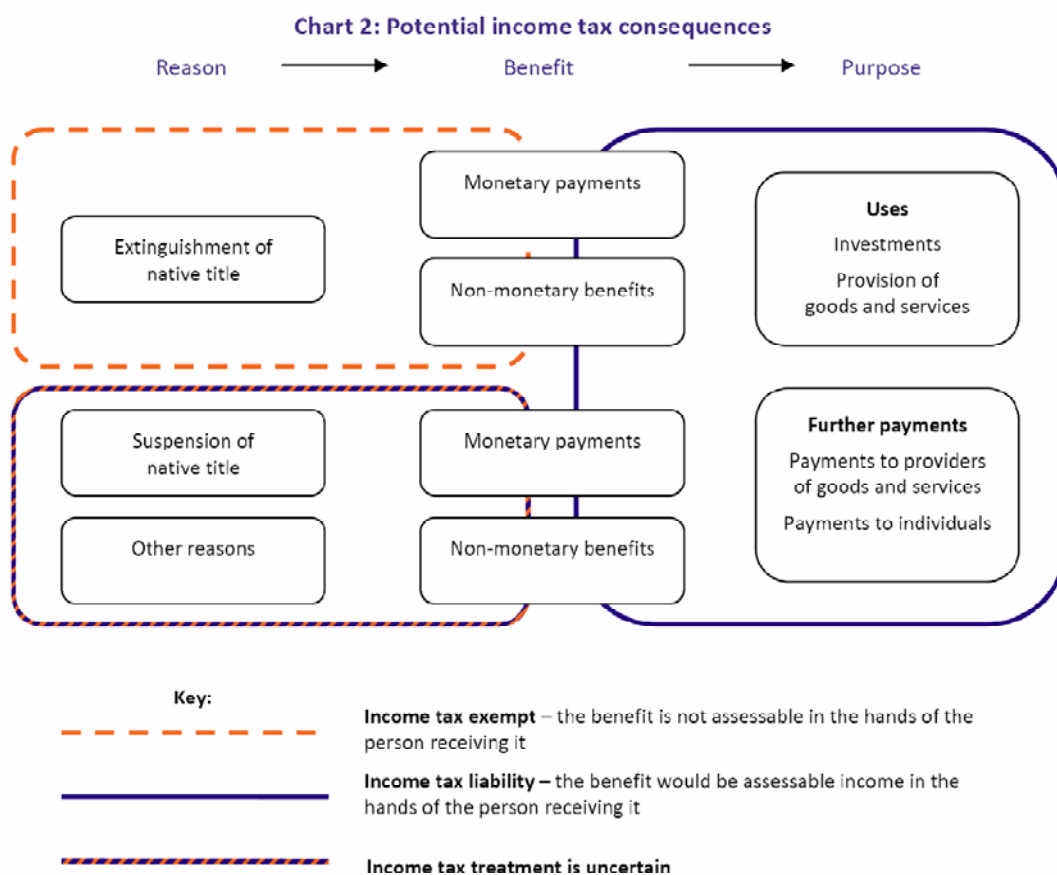
Certainty of taxation treatment

12. Native Title may be recognised, affected or extinguished, but never transferred or rented out beyond the group. Native Title is therefore a unique legal right, which does not strictly accord with traditional property law principles used throughout much of the Australian income tax law. The uniqueness of this right should be afforded an exclusive income tax exempt status.

CURRENT INCOME TAX SYSTEM

13. The Consultation Paper acknowledges that applying the current rules of the income tax system, payments provided under a Native Title agreement may or may not be assessable income when a Native Title group (or members of the group) either

receives them or subsequently use the payments for different purposes. Chart 2, reproduced from the consultation paper, illustrates the uncertainty where there is a suspension of Native Title or other reason for making the payment.



14. The Federal Court in *Cape Flattery Silica Mines v Federal Commissioner of Taxation* [1997] FCA 706; 97 ATC 4552 held that a company making recurrent payments to a Native Title party (calculated as a percentage of gross sales) pursuant to a mining agreement, could be claimed by the company as a tax deduction on the basis that such payments were the subject of the day- to-day operations of the company. Whilst not denying that a deduction should be available to mining companies, as the payments are being made within the course of their trade; the taxation treatment of Native Title payments in the hands of the Traditional Owners should not mirror this revenue nature, simply because a deduction is available to the payer or that the payments made are recurrent or periodic.
15. The consultation paper seeks to distinguish the taxation treatment of Native Title payments according to whether the acts permanently extinguish Native Title rights or where there is only a temporary suspension of Native Title.
16. Treasury acknowledges that extinguishment of Native Title rights would generally be regarded as compensation for the loss of a pre-CGT capital asset and therefore any capital gains would be disregarded.

17. Treasury also state that periodic payments for the suspension of Native Title would normally be regarded as ordinary income and subject to income tax. We do not concur with this interpretation of the current law. In *Nullaga Pastoral Company Pty Ltd v FC of T* 78 ATC 4329; (1978) 8 ATR 757, Wickham J considered that periodic payments of compensation were of a capital nature and not assessable income. Payments were received as compensation for damage to and interference with the company's use of the land. In *Barrett v Federal Commissioner of Taxation* (1968) 10 ATR 685, a licence to win minerals was granted to a third party and the taxpayer received amounts on account of damage, loss and diminution of value of the property. The High Court ruled the payments were made and received for the purpose of making good the estimated diminution in value of the land and the amount of damage to it which might result from carrying on of mining operations and were not payment of royalties or payments received by the company as income in return for the grant of a licence to use the land for the purpose of mining. The relevant case law would indicate that the amounts are not in fact ordinary income. The amounts are in the form of capital receipts in relation to Native Title, which is a traditional entitlement said to have been held since time immemorial. The capital receipt would not be included in statutory income subject to capital gains tax, as the Native Title Rights and interests have been owned by the Traditional Owners since prior to the introduction of the capital gains tax regime.

POSSIBLE REFORMS TO THE INCOME TAX SYSTEM

18. In response to concerns that the potential income tax implications of Native Title claims are complex and uncertain, as they have not been tested extensively through the courts or clarified through other means, the Government plans to consider options for reform in this area. The consultation paper outlines three approaches:

- Income tax exemption
- New tax exempt vehicle
- Native Title Withholding Tax

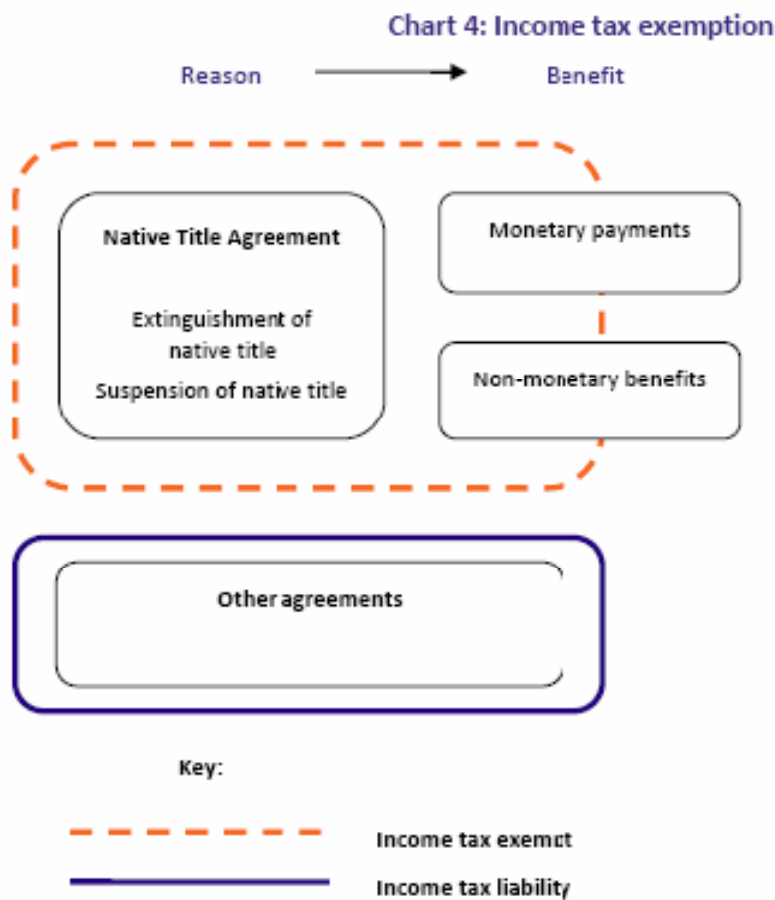
INCOME TAX EXEMPTION FOR NATIVE TITLE AGREEMENTS

19. Under this approach, legislation would provide that payments made under a Native Title agreement are exempt from income tax. Monetary payments made under a Native Title agreement would not be assessable income in the hands of the recipient. Instead, the payment would be either exempt income or non-assessable non-exempt income (i.e. effectively disregarded).

20. As part of this approach, CGT amendments could also be progressed that confirm that there are no CGT consequences from Native Title being vested in a trustee Prescribed Body Corporate "PBC", or where the trustee PBC is dissolved and a new

body takes over its functions (or the common law Native Title holders reassert their rights). Implementing this approach would require the tax law to define the concept of a Native Title agreement.

21. As illustrated in Chart 4, the income tax exemption would only apply to those agreements recognised as Native Title agreements and if this option were selected by Government, it would be necessary to ensure that agreements complied with the tax law definition. Other payments that a Native Title group may receive would be assessable, such as payments under a common law agreement or payments that are otherwise outside the NTA framework.

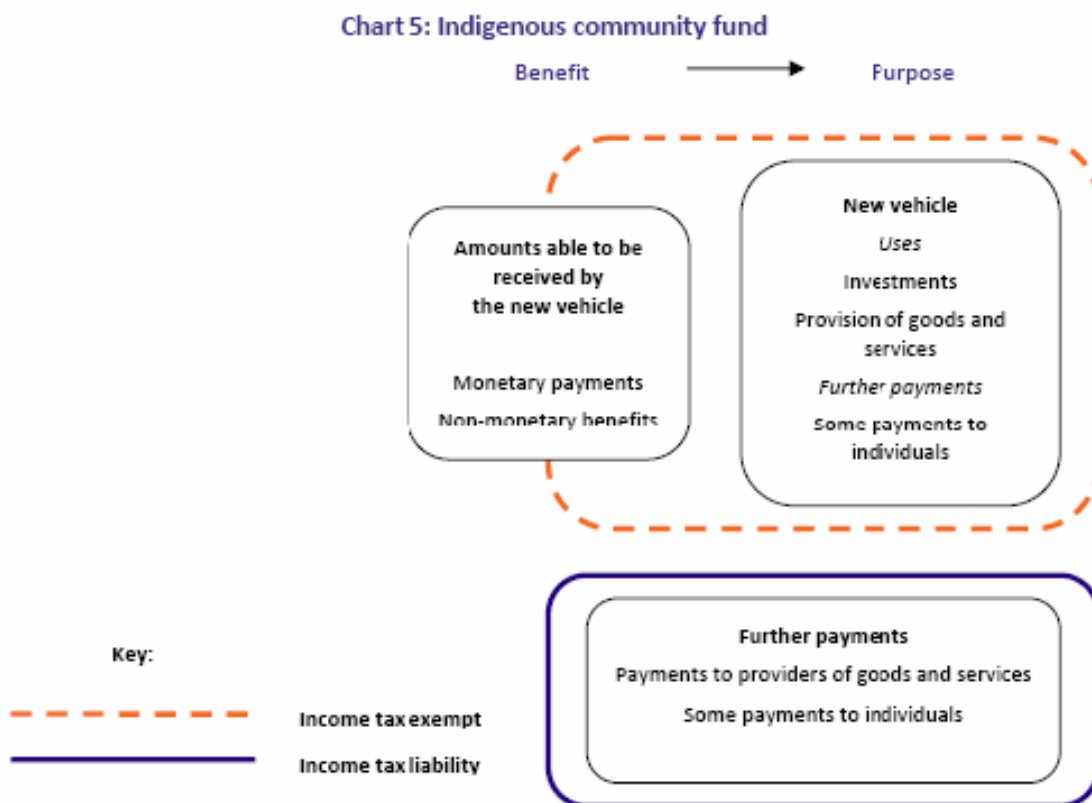


22. As illustrated (and equitably so), an income tax exemption removes the need to distinguish between payments in respect of extinguishment and those in respect of suspension of Native Title.

INDIGENOUS COMMUNITY FUND

23. A new kind of entity could be established under legislation, referred to in the consultation paper as an 'Indigenous Community Fund'. At its most basic, payments received into the fund would remain tax exempt when they are used for certain purposes. The enabling legislation could specify a range of design features including:

- the kinds of payments the fund can receive;
- the purposes (or uses) of the fund; and
- its governance arrangements.

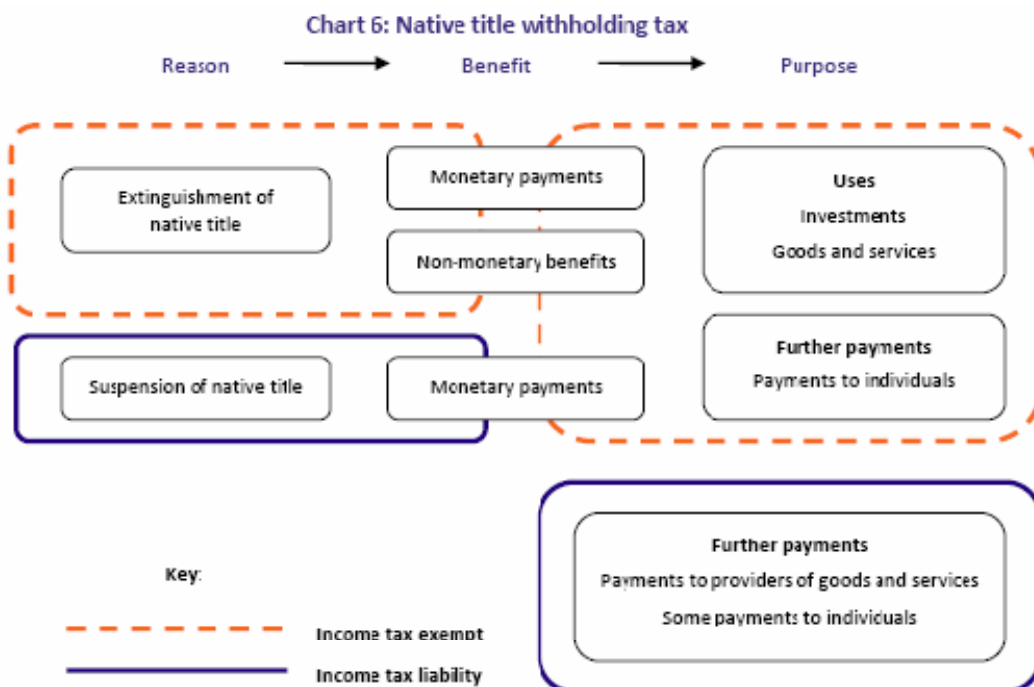


24. If this option were selected by Government, it would be necessary to consider whether / how to convert into the Indigenous Community Fund structure.

25. Whilst this structure would not materially affect the operation of charitable trusts, it would be likely to restrict the distribution of tax exempt payments to individuals from non-charitable structures. These payments may fall into the "further payments" category and be subject to income tax. The limitations applicable to charitable trusts may have the same significance to this structure.

NATIVE TITLE WITHHOLDING TAX

26. In 1998, the previous government announced that it would establish a Native Title withholding tax "NTWT". As announced, the withholding tax would require parties who make payments for the suspension of Native Title rights and interests to withhold an amount of tax (4% was the rate proposed) and pass it to the ATO before the payment goes to the Native Title holders.
27. Although this will result in the imposition of a tax impost (where there should not currently be one), the compliance of the NTWT effectively resides with the mining company making the payment. Assuming no integrity measures are added, once the withholding amount is remitted to the ATO, the remaining 96% can be applied to any use the Native Title group sees fit and no further tax should be levied.



Conclusion

ASSESSMENT OF POSSIBLE REFORMS OF INCOME TAX SYSTEM

28. Taxation reform of Native Title payments is long overdue. Any proposed reform should be measured against the following criteria
- Complexity and ease of administration
 - Flexibility to use the funds efficiently and effectively to meet the current needs and accumulate for future needs of Traditional Owner beneficiaries.
 - Incentives offered to Traditional Owners to move towards economic independence.
 - Recognition that Native Title payments are compensatory in nature and should be afforded a tax-exempt status.
29. The three current proposal are ranked according to each of these criteria, with 1 being the best and 3 the worst selection:

| | Income tax exemption | Tax exempt vehicle | Native Title Withholding Tax |
|-----------------------------|----------------------|--------------------|------------------------------|
| Complexity / Administration | 1 | 3 | 2 |
| Flexibility | 1 | 3 | 2 |
| Incentive | 1 | 3 | 2 |
| Recognition | 1 | 2 | 3 |

TRANSITION TO ABORIGINAL ECONOMIC INDEPENDENCE AND SELF DETERMINATION

30. The transition to Aboriginal economic independence and self determination needs to start as soon as possible and tax reform is an important building block in the process. Government needs to provide a tax system and other support infrastructure to enable the current generation of Traditional Owner members to take responsibility and transition from the entrenched cyclical process of welfare dependency, poverty and ill-health to economic independence, self determination and prosperity, thereby closing the gap with non-indigenous Australians. Every process starts somewhere and if this is managed properly the momentum in the transition of Aboriginal engagement into the real economy and related financial independence will increase exponentially, benefiting the individual, their family, their community and the wider Australian economy!