Income tax treatment of native title benefits.

There are a number of principles which should guide how payments received by native title holders should be treated.

1. Native title is a property right. Although a communal title it is private property and should be dealt with consistently with other property interests since to do otherwise would be racially discriminatory.

2. Native title is a perpetual title subject only to legal extinguishment. Current native title holders are effectively life tenants and generations yet unborn are entitled to have native title preserved for their benefit. Like any life tenants current native title holders should be responsible for the maintenance of the property and entitled to the income from the property and are not entitled to lay waste to the property to the detriment of future generations.

3. Mining inevitably reduces the native title value of land. The degree of interference will vary from mine to mine but native title is based on how land forms were created and their continuing meaning for the native title holders. Any physical interference is an interference with the living land and is a form of sacrilege. The Argyle Diamond Mine for example mines a very important women's site, the Barramundi dreaming and has severely damaged Devil Devil Springs, a men's site. In the Pilbara the developments on which our prosperity depends are destructive of many sites of importance. We demand this occur and it means native title land is handed on top future beneficiaries (owners) in a much diminished state.

4. In legal terms there has been a permanent loss of value of a capital asset. This is forced on native title holders as they have no real legal capacity to resist. The Native Title Act offers no more than a right to negotiate the terms of the despoiling of the land and State and Commonwealth Heritage legislation always provides sites can be damaged (ruined or destroyed) in the public interest, which in practice means the economic interest of the whole community in seeing developments proceed.

5. Income derived from use of native title land for the limited commercial uses permitted such as cultural and environmental tourism is income in the hands of the current native title holders and would in normal course be taxable in their hands.

6. Native title holders can have access to charitable trusts consistent with the access of all Australians. To provide otherwise would be racially discriminatory. Such trusts are widely used to remove income tax liabilities and to enable funds to be accumulated and protected for future generations. The use of charitable trusts has negative aspects. It infers that Aboriginal people will always be indigent and in need of charity and encourages small payments for the relief of hardship which leave no permanent benefit. In addition the accumulation rules are technical and not geared to ensuring intergenerational justice.

7. There are legitimate policy concerns in governments that native title benefits are not leading to an increase in the material circumstances of Aboriginal beneficiaries leading to assertions that such moneys should be used for some wider benefit as directed by government. To require this would be racially discriminatory unless all

private recipients of royalty and other mining related income (such as the Hancock and Wright partnership) were similarly required to hand over their huge receipts for public purposes.

8. How native title payments are utilized and organised is already affected by the taxation framework. The tax status of charitable trusts results in widespread use of the trusts for the relief of poverty rather than using the money for the production of wealth. A tax framework which, consistent with the nature of native title as an entailed estate, recognised the capital compensation nature of the payments, preserved the capital sum in a tax free environment, permitted the use of all income by the current native title holders on the basis that the income was taxable in their hands, allowed access to the capital only for specific categories of expenditure deemed to be of value to the future native title holders, would no doubt have a similar shaping effect on agreement making and subsequent outcomes.

9. All governments want to see Aboriginal people educated, healthy, and engaged in the economy. They do not want to see results such as Narbalek in the 1970s and 1980s where substantial payments left little or no benefits to the relevant community. But as the expenditure of governments themselves over the last 30 years shows getting long term beneficial outcomes from $s spent is not easy. Aboriginal involvement in decision making is a condition precedent for good outcomes and more suitable tax treatment would be a tool for the community development which is essential to better outcomes.

10. As far as possible taxation laws should enable and encourage Aboriginal people to be subject to the normal taxation laws applicable to other Australians not least the payment of income tax.

Referring to the discussion paper:

Page 8 Para 2.3.1 acknowledges that extinguishment or voluntary surrender of native title would not be subject to Capital Gains Tax but in my view all payments including periodic payments are for the diminution of capital value and should be treated as capital receipts and preserved. If current native title holders take the cash as a current entitlement it should be taxable as income

Any suggestion that transactions relating to the transfer of nt rights to a PBC should give rise to a CGT event is absurd as such transactions are imposed on nt holders by law.

The final paragraph of that section on page 5 refers to some of the concerns I have raised above. Whatever form benefits take they are part of the consideration for having to agree, repeat, having to agree, to the diminution of value of the native title.

Possible reforms.

3.1 First para. This proposal is consistent with the view that the receipts are essentially a capital transfer but in my view the exemption should be available only where the recipients treat the consideration as a capital preserved asset. To simply

provide an upfront exemption to any payment however used and by current nt holders would be a mistake.
Second para is an essential provision

Third para raises problems. I think a definition of a relevant agreement should be possible along the lines of any agreement made to provide any benefit or consideration in return for agreement by native title holders to licence or permit physical interference with native title land. Relating the status of the agreement to whether an ILUA is involved would be an error as whether or not an ILUA is needed may be irrelevant to the nature of the transaction and simply a matter of whether you ned to go outside the future act provisions of the Act.

3.2 Indigenous Community Fund.

This proposal is broadly consistent with my views above. The intergenerational issues need to be expressly included in the framing of the fund.

3.3 I have no comment to make on this other than to see it as an alternative but one which might facilitate squandering benefits by current nt holders.