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Managing native title benefits

Peter Seidel and Bridgid Cowling examine the structures used to receive, manage and distribute native title benefits in Australia

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Abstract

- *This article examines the evolution and tax treatment of native title benefits in Australia, focusing on the statutory framework of the Native Title Act 1993 and s.59-50 of the Income Tax Assessment Act 1997.*
- *Key legal structures for managing native title benefits, including Indigenous holding entities, charitable and discretionary trusts and the two-trust model are analysed.*
- *There are challenges in balancing tax efficiency, asset protection, administrative sustainability and cultural legitimacy. This highlights the importance of early alignment of tax and governance strategies in native title negotiations and agreement-making.*
- *An exploration of future reform prospects to empower Indigenous economic development and self-determination.*

The High Court of Australia's decision in *Mabo v Queensland (Mabo)* [\[1\]](#) shattered the myth of *terra nullius* and affirmed that the common law could and did recognise the pre-existing traditional laws acknowledged, and customs observed by, Indigenous peoples.

The ensuing *Native Title Act 1993* (the Act) established a statutory framework for the recognition and protection of native title rights, compensation for impact on those rights and agreement-making between native title holders and proponents of activities that impact on native title.^[2]

Over the past three decades, native title agreements in Australia have evolved into comprehensive and sophisticated settlements incorporating social, economic and governance objectives. Landmark examples such as the *South West Native Title Settlement*,^[3] the *Yamatji Nation ILUA*^[4] and the *Dja Dja Wurrung Recognition and Settlement Agreement*^[5] powerfully illustrate the shift from recognition to empowerment, through mechanisms such as land return, joint management and perpetual funding.

As the State of Victoria advances toward a treaty,^[6] the policy focus has expanded from validating native title rights to embedding principles of self-determination and sustainable governance. Yet within this maturing framework, income tax treatment of native title benefits often still remains somewhat of an afterthought, despite its critical implications for intergenerational wealth and autonomy.

Relevant to practitioners in private wealth management and trusts, this article examines the evolution of structures used to receive, manage and distribute financial benefits under native title agreements. It outlines key tax considerations, analyses benefits-management frameworks and considers prospects for future reform.

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Tax treatment of native title payments

For the first two decades after the introduction of the Act, the tax status of native title payments was opaque.^[7] Representatives in native title agreement negotiations often defaulted to housing native title payments in charitable trusts to secure income tax exemption, even when charitable constraints misaligned with economic aspirations. The 2013 amendment to the *Income Tax Assessment Act 1997* (ITAA 1997), introducing s.59-50, remedied much of the uncertainty by deeming qualifying native title benefits received by an 'Indigenous person' or an 'Indigenous holding entity' to be non-assessable non-exempt income (NANE).

Under the amended legislation, a native title benefit is broadly defined as cash or non-cash amounts arising under agreements made pursuant to Australian federal, state or territory legislation, or under ancillary agreements, where the amount relates to acts that would extinguish or impair native title rights. It also includes compensation determined under the Act.^[8]

Relevant agreements include Indigenous Land Use Agreements (ILUAs), s.31 agreements under the Act and agreements under the *Traditional Owner Settlement Act 2010* (Vic). For commercial agreements, it is important to ensure these are ancillary to the qualifying agreement for s.59-50 to apply.^[9]

The Australian Commissioner of Taxation has adopted a broad approach to whether a benefit relates to an act that would extinguish or impair native title rights.^[10] This is consistent with the explanatory memorandum to the Bill introducing s.59-50.^[11] Notwithstanding the Commissioner's broad nexus approach, it is vitally important that the language used to identify payments under native title agreements is chosen with care.

NANE treatment applies only if the benefit is paid to an Indigenous person^[12] or an Indigenous holding entity.

Indigenous holding entities include Aboriginal land councils, corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act), trusts whose beneficiaries can only be Indigenous persons or Indigenous holding entities and registered charities.^[13] Examples include registered native title bodies corporate (RNTBCs), charitable trusts or corporations and Native Title Representative Bodies (NTRBs).

Entities that do not meet these requirements, such as non-charitable companies or trusts with non-Indigenous beneficiaries or broad powers of variation,^[14] fall outside this definition and jeopardise NANE treatment.

There are four exceptions to NANE treatment of native title benefits under s.59-50. These are:

- where a payment is to meet the provider's administrative costs;^[15]
- where the payment is for the provision of goods or services;^[16]
- where the payment has ceased to be NANE (i.e., has been paid to a non-Indigenous holding entity);^[17] and
- where the money arises from investment of the native title benefit.^[18]

From this, it is self-evident that to ensure payments under native title agreements can be treated as NANE, native title groups and their advisors must draft agreements to ensure that:

- payments are clearly for an act that would extinguish or otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title;
- all recipient entities fit the statutory definition of an Indigenous person or Indigenous holding entity;
- unnecessary reference to 'administrative' payments is avoided; and
- taxation of investment income is planned for, unless an income-tax-exempt vehicle, such as a registered charity, will hold the corpus and investment income.

Elements of benefit management structures

From the mid-1990s, trust structures became the dominant model for the receipt and management of native title benefits, offering fiduciary oversight and tax efficiency. At the same time, native title agreements have grown in scale and complexity; advisors have deepened their understanding of the law and Indigenous expectations have evolved.

Groups increasingly seek flexible benefits management structures with culturally grounded governance that preserve autonomy and economic opportunity while ensuring compliance with tax and corporate law.

To ensure payments to an NTRB are treated appropriately for tax purposes, careful drafting is essential.

Effective benefits management structures balance four imperatives:

- tax efficiency: maximising NANE treatment and, where desired, charitable exemptions;
- asset protection: shielding intergenerational capital from commercial risk;
- administrative sustainability: ensuring costs and governance requirements are proportionate to the scale of benefits; and
- cultural legitimacy: reflecting kinship, decision-making customs and free, prior and informed consent.

This section outlines options for benefits management structures to achieve these imperatives.

Payments straight to an Indigenous corporation

For reasonably small native title agreements, it is usually most cost-effective for benefits to be paid to the existing registered native title body corporate (RNTBC) or native title representative body (NTRB) without the need to establish new entities. This option is administratively sustainable and can also achieve cultural legitimacy. Such corporations will typically be Indigenous holding entities and registered charities, making this a tax-effective approach.

However, a key risk with paying native title benefits to an RNTBC is asset exposure. RNTBCs engaged in land management, commercial ventures or employment can incur liabilities that threaten the native title benefit corpus. Before housing all the assets of a native title group in an RNTBC, advisors should carefully assess the entity's capacity to receive and manage large sums while also managing its cultural responsibilities and ensure it is adequately resourced.

Where the NTRB is chosen to receive native title payments, it can then make payments to a functioning RNTBC, another representative Indigenous corporation established by and for the native title claim group or holders or, in some cases, directly to the group members. This option is useful when the native title agreement is finalised before the RNTBC or an appropriate representative Indigenous corporation has been formally established.

To ensure payments to an NTRB are treated appropriately for tax purposes, careful drafting is essential. If the drafting provides for the NTRB to receive payments on trust for native title holders, a separate trust may be created that does not share the income tax exemption available to the NTRB.^[19] This outcome should be identified and addressed during the drafting process.

The use of charities in a benefits management structure

Charitable corporations or trusts remain common in benefits management structures because:

- they guarantee income tax exemption for investment returns;
- charitable status overcomes the perpetuity period that restricts non-charitable trusts, making them well suited to intergenerational benefits management; and
- oversight by the Australian Charities and Not-for-profits Commission (ACNC) offers regulatory benefits.

In addition to providing tax certainty, corporate proponents have often been a key driver of the use of charitable trusts to receive payments under native title agreements. Arguably, this reflects a continuing perception that the payment of native title benefits is linked to a social license to operate.^[20] This perception persists in certain quarters, despite the fact that native title benefits are payments for impact on private rights and any question of a social licence to operate or broader community impact ought to be a separate consideration.^[21] It is also perhaps reflective of the vestiges of a complex historical paternalism.

Proponents must remember that native title payments are not charity. If a charitable trust or charitable company is used within a benefits management structure, this must be at the discretion of, and with the free, prior and informed consent of, the native title group.

Disadvantages of using a charity in a benefits management structure

First, it can impose the language of disadvantage and deficit, as well as the perception that the benefits themselves are charitable contributions by the proponent. This misalignment of language and purpose is one of the driving forces behind the creation of a new model of income tax exemption, discussed below.

Second, charities must be not-for-profit and for public benefit,^[22] which means they must not operate for the private profit or gain of members. In addition, charities must have only charitable purposes^[23] and, to maintain income tax exemption, all distributions or payments must be in pursuit of those purposes.^[24]

This requirement means that direct distribution of untied cash to native title claimants may be impermissible where payments are not in furtherance of charitable aims, such as the relief of poverty.^[25] Many native title holders now generally consider this to be unacceptable, given that native title benefits are payments for impact on private rights, not acts of charity.

The prohibition on operating for private gain also prevents many charitable structures from supporting enterprise development and private business. While charities can engage in commercial activity in furtherance of their charitable purpose,^[26] the perception of risk can create challenges, as economic development and wealth creation are often key goals for native title parties.^[27]

The public benefit requirement also requires attention. Where the beneficiaries of a charitable trust all have a family relationship, the public benefit requirement is generally not met under Australian common law.^[28] In the context of native title, this has been resolved by the *Charities Act 2013*, which provides that for charities that receive, hold or manage benefits relating to native title, relationships between the persons for whose benefit the charity operates is no bar to the satisfaction of the public benefit criterion.^[29]

This is a solution for registration as a charity pursuant to Commonwealth law, but it does not assist at individual state and territory levels. For a charitable trust to be valid under relevant state legislation, for example, the trust must meet the common-law definition of being for public benefit. In addition to familial links between beneficiaries, reference to apical ancestors, reference to traditional law and custom, several other factors are relevant to whether the public benefit test is met. Advisors must therefore consider this requirement and the relevant state law when drafting charitable trusts.

Finally, charitable vehicles used in benefits management structures will usually want to accumulate a portion of native title benefits in a future fund for intergenerational benefit. While concerns have been raised over the years about whether a charitable trust can accumulate money in a future fund beyond about ten years, it appears well settled in Australia that where the accumulation of funds furthers a charitable purpose, it will be acceptable.^[30]

Overall, charities are useful in benefits management structures for ensuring income tax exemption and facilitating intergenerational management of money. The ACNC is an effective regulator with a focus on minimising red tape, meaning charities are not typically administratively burdensome. However, challenges can arise when, as is rightly the case nowadays, a native title holding group has economic development imperatives and expectations of receiving untied payments of private native title benefits.

Discretionary (non-charitable) trusts

Where native title groups seek flexibility to make private benefit distributions or business investments unconstrained by charity law, discretionary (family) trusts can be used. Provided beneficiaries are limited to

Indigenous persons or Indigenous holding entities, incoming payments remain NANE. However, any investment income is taxable in the hands of beneficiaries or the trustee and the trust must vest within the perpetuity period.

The two-trust structure

At the core of many sizeable benefits management structures are two benefit-receiving trusts: a charitable trust and a discretionary trust for the direct benefit of the native title claim group.

Typically, the two-trust model includes:

- a professional corporate trustee acting for both trusts, often with mandated transition to Indigenous control over time;
- a discretionary trust listing the charitable trust as a beneficiary, allowing pre-tax streaming of surplus income; and
- advisory committees to inform trustee decisions and align investments and distributions with cultural priorities.

This structure is tax effective and provides for asset protection. The inclusion of a discretionary trust overcomes constraints inherent in a structure that relies solely on charities. These structures are, however, complex and costly to maintain. Further, while advisory and Indigenous elders' committees can be used, the heavy involvement of a non-Indigenous professional trustee risks reducing cultural legitimacy. They can also be disempowering if governance is not carefully co-designed and transparent. While there are successful, accountable and diligent trustee companies, there have also been reports of failure of native title trusts and limited accountability within such structures.^[31]

Overall, the success of these trusts depends on their accountability, culturally appropriate communication, effective governance and prudent financial management.

Choosing or recommending a benefits management structure

Each benefits management structure must be tailored, with the free, prior and informed consent of the native title party, to that party's circumstances, the size of the agreement and the location and impact of the development.^[32]

Advisors should recommend structures that are sustainable, streamlined and not administratively burdensome, while also considering taxation implications during structuring and drafting. Structures must be consistent with traditional decision-making practices, be culturally appropriate and meet the aspirations of the native title party. Fundamentally, the advisor's obligation is to provide information to the native title holders, facilitating their decision-making based on the principles of free, prior and informed consent.

There is no doubt that charities can both engage in economic development activities and build future funds.

What lies ahead?

In 2013, a working group was established to examine arrangements for holding, managing and distributing land-related payments then in existence recommended the creation of the Indigenous Community Development Corporation (ICDC). The ICDC would be a not-for-profit, income tax-exempt entity with deductible gift recipient status, established by an Indigenous community for the purpose of promoting sustainable community and socio-economic development. Its purposes would be wider than those permissible for a charity.^[33]

More recently, the National Native Title Council, in conjunction with the Minerals Council of Australia, has developed the ICDC concept into the related concept of Prescribed Body Corporate Economic Vehicle Status (PBC EVS). The broad concept is for an optional status for prescribed bodies corporate (PBCs) that would allow them to undertake a broader range of economic development activities, such as providing finance for private businesses, while accessing broad charitable tax concessions.^[34]

The proposal also includes the ability for existing native title charitable trusts to roll their corpus into a PBC EVS structure, although the complexities of achieving this, and the amendments to state-based trust laws required are still under consideration.

The Final Report into the 2020 CATSI Act Review did not consider the PBC EVS in detail but recommended a review of current benefits management structures to identify and address impediments to engaging in economic development activities and accumulating funds for future generations.^[35]

There is no doubt that charities can both engage in economic development activities and build future funds. Nevertheless, the charities framework is not preferred by many native title groups and the nuances in the law outlined above can make it difficult for understandably risk-averse groups to feel comfortable adopting a charitable structure when their focus is economic development.

The details of the proposed PBC EVS do not yet satisfactorily clarify whether direct and specific funding for individual for-profit businesses will be permissible and on what basis. Further, neither the PBC EVS nor the original ICDC model clarifies the treatment of direct distributions of untied cash addressed above. And finally, they do not address state duties laws, including land tax, payroll tax and stamp duty, etc., which are also relevant to the management of native title benefits.

The serious and sustained academic, practitioner and community effort devoted to reform in this area cannot be overstated. From taxation, governance, charity law and trusts law perspectives, there are solid ideas for reform.

As this work continues, the following suggestions are offered for further development:

- many of the building blocks for streamlined and effective benefits management structures already exist;
- much of the uncertainty and caution in relation to charities supporting economic development and making individual payments in accordance with traditional law and custom could be addressed through clearer guidance from the ACNC;
- as recommended by the Productivity Commission, giving the ACNC the power and capacity to make private binding rulings on eligibility for charity registration is worthy of further consideration;^[36] and
- work on older charitable trusts, to remove antiquated and paternalistic concepts of charity that impede their use in economic development, will likely proceed most efficiently on a case-by-case basis and require application to the relevant supreme court.

Concluding observations

The recognition of native title has matured over the past three decades, from the belated common-law recognition in *Mabo* of pre-existing Indigenous rights to complex and increasingly sophisticated systems of governance, wealth management and intergenerational planning. Yet, as this article illustrates, the tax treatment of native title benefits, which remains central to how those systems perform in practice, remains somewhat stuck in the past.

For advisors in this area, early alignment of tax and governance strategies is strongly recommended. Tax, charity and trust specialists should be engaged during negotiations, not after signing, so that s.59-50 considerations can be integrated into the drafting of native title agreements and an appropriately tailored benefits management structure can be developed from the outset, rather than as an afterthought.

Sound drafting and careful entity design as early as possible during negotiations can lead to modern, tax effective, creative and empowering outcomes that reflect the native title group's cultural authority, economic ambitions and capacity.

To further consolidate Indigenous economic empowerment, the next phase of reform needs to focus less on creating entirely new vehicles and more on refining existing ones through clearer guidance, modernised charity law and practical flexibility. Effective benefits management structures must protect Indigenous capital, catalyse Indigenous enterprise and respect the principle of free, prior and informed consent.

Ultimately, the test of any reform will be whether it effectively and efficiently supports Indigenous peoples in exercising genuine control over their economic futures, transforming native title from a legal recognition of rights into a living framework for self-determination and real and sustainable economic prosperity.

For more on indigenous wealth management

In [Weaving old into new](#), Isaac Hikaka TEP reviews developments in New Zealand regarding recognition of tikanga Māori, including its potential impact on trusts and succession, and in [First nation trusts](#), Peter Glowacki and Paul Taylor outline the treatment and key characteristics of Indigenous trusts in Canada.

Footnotes

[1] [Mabo v Queensland \(No 2\)](#)(1992) 175 CLR 1

[2] While statutory land rights regimes such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provide title through legislation, native title arises from common-law recognition of traditional laws acknowledged and customs observed. The distinction is critical: statutory grants are conferred, while pre-existing native title is recognised by the common law.

[3] [South West Native Title Settlement](#) (accessed October 2023), Government of Western Australia

[4] [Yamatji Nation Indigenous Land Use Agreement](#) (accessed October 2023) Government of Western Australia

[5] [Dja Dja Wurrung Recognition and Settlement Agreement](#) (accessed October 2023) Victoria State Government

[6] [Treaty Victoria](#) (accessed October 2023)

[7] For discussion, see Lisa Strelein 'Taxation of Native title Agreements' (2008) *AIATSIS Native Title Research Monograph* No 1, 5; Fiona Martin 'Native Title Payments and Their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach?' (2010) 33(3) *UNSW Law Journal* 685; M Stewart 'The Income Taxation of Native Title Agreements' (2011) 39 *Federal Law Review* 361; and [Native Title, Indigenous Economic Development and Tax](#) (Accessed, October 2025), The Australian Government Treasury

[8] ITAA 1997, s.59-650(5)

[9] Private Binding Ruling (PBR) 1051396944054, 20 July 2018. The agreement between a mining company and an Aboriginal corporation was determined to be a private commercial agreement, not one meeting the requirements of s.59-50. The commercial agreement was entered into before a subsequent ILUA and neither

the agreement nor the ILUA made reference to the other. NANE treatment was therefore not possible for the payments under this agreement.

- [10] See, for example, PBR 1012579850256; PBR 1012608952223; PBR 1051222037993
- [11] Explanatory Memorandum to the *Taxation Laws Amendment (2012 Measures No. 6) Bill 2012*, para. 1.27
- [12] Indigenous person is defined in ITAA 1997, s.995-1
- [13] ITAA 1997, s.50-50(6); *Income Tax Assessment Act 1936* (Cth), s.128U
- [14] See for example PBR 1012579850256
- [15] ITAA 1997, s.59-50(3)
- [16] ITAA 1997, s.59-50(3)
- [17] ITAA 1997, s.59-50(4)
- [18] ITAA 1997, s.59-50(4)
- [19] See, for example, PBR 1012749481534
- [20] See also Lisa Strelein 'Taxation of Native title Agreements'(2008), *AIATSIS Native Title Research Monograph* No 1, 27-28; Adam Levin 'Observations on the development of native title trusts in Australia' (2016) *Trusts & Trustees* 22(2), 251-252
- [21] See J Altman and K Jordan, 'A Brief Commentary in Response to the Australian Government Discussion Paper 'Optimising Benefits from Native Title Agreements' and the Report of the Native Title Payments Working Group', *CAEPR Topical Issues* No. 03/2009; Ian Murray, Joe Fardin and James O'Hara '[Co-Designing Benefits Management Structures](#)' (17 July 2019) *UWA Centre for Mining, Energy and Natural Resources Law*
- [22] ACNC Act, s.25-5 together with *Charities Act*, s.5
- [23] ACNC Act, s.25-5 together with *Charities Act*, s.5
- [24] *ACNC Governance Standard 1*; ITA 1997, s.50-50(2)

- [25] See *Flynn v Mamarika* [1996] NTSC 16. All four Northern Territory Land Councils established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) are registered PBIs. They are empowered by their governing statute to make payments to traditional Aboriginal owners, which was expressly determined to be consistent with the requirements for PBI in *Northern Land Council v CMR of Taxes* [2002] NTCA 11.
- [26] *Commissioner of Taxation (Cth) v Word Investments Ltd* (2008) CLR 204; *Grain Growers Limited v Chief Commissioner of State Revenue* [2015] NSWSC 925
- [27] *Resources Sector Regulation: Productivity Commission Study Report* (November 2020), Productivity Commission, Commonwealth of Australia, 317; see also Ian Murray, 'Public Benevolent Institutions for Native Title Groups: An Underappreciated model?' (2015) 43 *Federal Law Review* 423, 445
- [28] *Davies v Perpetual Trustee Company Ltd* (1959) 59 SR (NSW) 112
- [29] Charities Act, s.9
- [30] See for general guidance *Tax Ruling TR 2011/4*, paras. [39]-[40]
- [31] See, for example, then [Registrar of Indigenous Corporations Selwyn Button's call for a Parliamentary enquiry into trust handling of native title benefits](#) in November 2021; see also '[Where did the money go? How native title failed a community](#)' (accessed October 2025) *The Sydney Morning Herald*
- [32] See Ian Murray, Joe Fardin and James O'Hara 'Co-designing Benefits Management Structures (2019) *Centre for Mining, Energy and National Resources Law*, UWA Law School for a detailed analysis of benefits management structure and design principles.
- [33] *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report to Government*, Commonwealth of Australia, 1 July 2013, 25-32
- [34] See *Realising the Promise of Native Title: A National Native Title Council Position Paper*, National Native Title Council (2019)
- [35] *CATSI Act Review Final Report* (February 2021), National Indigenous Australians Agency, Commonwealth of Australia, Recommendation 55
- [36] *Resources Sector Regulation: Productivity Commission Study Report* (November 2020), Productivity Commission, Commonwealth of Australia, 343, Recommendation 11.1