

WPS

LAW

## Tax Considerations for PBCs



# Introduction

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If a native title claim is successful, the native title holders must nominate an Aboriginal corporation to hold their native title. This is formally called a Registered Native Title Body Corporate (or 'RNTBC'). It more commonly referred to as a Prescribed Body Corporate, (or 'PBC').

A PBC is likely to encounter tax issues in a range of matters. This factsheet identifies some possible tax issues in four commonly experienced scenarios.

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# 1. Payments to Heritage Survey Participants

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## Scenario:

Under a heritage protection agreement, the PBC may be required to nominate and manage a heritage team to assess potential heritage impacts associated with activities on the country (for example, for activities being proposed by an exploration company under the terms of an exploration licence).

- The proponent will usually cover the costs associated with the heritage teams which will be paid to the PBC. The PBC will then pay individual heritage participants to undertake the work. PBCs would make payments to the individual heritage survey participants that may include:
  - Travel arrangements (transport or petrol)
  - Accommodation (if required)
  - Meal allowance if food not provided
  - Payment for services

## Considerations:

### Payments for Heritage Survey participants: Taxable or non-taxable?

In the hands of the recipient, it is likely that payments received from a PBC would be considered taxable and included as part of the individual's assessable income in their tax return. The individual may be seen to be 'generating income' for their services as a survey participant.

### Hobby consideration

Whether the individual's participation constitutes a 'hobby' and should be excluded from assessable income will depend on the individual's circumstances. The ATO may consider the following relevant in determining the treatment:

- Whether the payments received are from PBCs that could be seen to be carrying on a business through their actions as administrators of any rights or interests held on trust, and their actions to advocate and negotiate on behalf of (and for the benefit of) their Native Title Holders; and
- Whether these payments are being claimed as deductions in the PBC's income tax returns.

Based on the above, generally we would expect that payments received by Heritage Survey participants would not constitute a 'hobby' and would be considered as taxable by the ATO and included in that participant's income for a given financial year.

## Payments to Heritage Survey Participants

There are several ways through which a PBC could make payments to their Heritage Survey Participants, including:

- treating the participants as employees of the PBC;
- treating the participants as external contractors.

The features and implications for the above options as mentioned on the ATO website [here](#), from the perspective of the Heritage Survey participant, are outlined in Appendix 1. Importantly, the ATO's view is that the treatment of the relationship is based on its substance, and not simply on how it is described in any contractual arrangements.

From the perspective of the PBC, if it does result in an employer/employee relationship, there are further employer obligations that must be considered. These include, but are not limited to, management of payroll functions, management of Pay As You Go (PAYG) liabilities, superannuation payments and state-based payroll taxes (if applicable).

In determining the appropriate arrangement between the PBC and a Heritage Survey participant, consideration should be given to the individual circumstances surrounding each individual and their ability and/or capacity to adequately manage any obligations they may have to the ATO, as a result of their participation in the Heritage Survey and any subsequent consideration received.

Each PBC and individual Heritage Survey participant should seek their own advice when entering into these arrangements.

## Costs of Heritage Surveys

Whether a PBC is able to charge fees for the services they provide is determined by the legislative instruments and regulations that they must adhere to. As such, the PBC may be able to charge a fee for their services depending on who the contracting entity is that requires the work to be completed.

Where a PBC charges a fee, it may be considered a taxable supply and subject to Goods and Services Tax (GST), depending on the specific facts and circumstances. Generally, a supply will be considered to be a taxable supply where it is made for consideration, where it is made in the course or furtherance of an enterprise that the PBC carries on, or where it is connected with the indirect tax zone (i.e. Australia) and the PBC is registered or required to be registered for GST purposes. However, there are exceptions to this and each PBC should seek their own advice when entering into a new arrangement.

## 2. Payments to Directors and Members to attend meetings

### Scenario:

PBC directors and/or members may be paid fees for attending meetings. These payments are necessary as they ensure the directors and members are able to participate in the activities of the corporation including in relation to decision making. Meeting assistance payments may include:

- Fees (for attendance at the meeting) or remuneration
- Travel assistance (petrol or transport)
- Accommodation

Under the CATSI Act, a majority of members must not be employees of the corporation (section 246.5(4)). There is also the issue of related party benefits and associated time limit for approvals (15 months, see section 284.1(a)(ii)). However, note the exceptions in relation to benefits that are available to all members indiscriminately (section 287.10) and in relation to complying with native title obligations (section 287.12).

### Considerations

#### Prescribed Body Corporate Perspective

From the perspective of the PBC, treatment of the payments to directors and/or members for attendance at meetings, travel, accommodation and meal expenses can be summarised as follows (Table 1):

**Table 1**

Payment	Treatment*	Assessable/Deductable?*
<b>Directors and/or Members Fees</b>	Treated as salary and wages for the PBC.	Deductible when paid.
<b>Travel, Accommodation, and Meal Expenses</b>	Treated as work-related expenses necessarily incurred in carrying on the business activities of a PBC.	Deductible when paid.

\* This assumes that workers are being compensated for expenses necessarily incurred to complete their work, and all expenses are 100% business-related.

## Member/Director Perspective

The treatment of the aforementioned expenses from the perspective of Members/Directors of the PBC is broadly summarised below (Table 2):

**Table 2**

<b>Payment</b>	<b>Treatment*</b>	<b>Assessable/Deductible?*</b>
<b>Directors and/or Members Fees</b>	Treated as salary and wages for the individual.	Assessable upon receipt.
<b>Travel, Accommodation, and Meal Expenses</b>	Treated as work-related expenses necessarily incurred in carrying out their business activities or employment obligations.	Deductible when paid.

\* This assumes that workers are being compensated for expenses necessarily incurred to complete their work, and all expenses are 100% business-related.

PBC's and members/directors should seek their own advice when considering how the payments to directors and members are structured as specific circumstances could impact the outcomes.

In either of the above cases, it is likely that superannuation would be payable on the amounts paid to the members and/or directors. Further guidance on when superannuation is payable can be found [here](#).

### 3. Engagement of & payments to PBC members/directors for projects

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#### Scenario:

A PBC member may be paid a fee for their participation in a project, for example, completing an art project or filming project.

#### Considerations:

The methods after which PBC members can derive income from art, film or other specific cultural projects (e.g., Welcome to Country) are generally through the following two employment relationships:

- Independent contracting; and
- Employee remuneration.

It is unlikely that either method would result in a different taxation treatment for payments received from performing these services. However, the responsibilities and obligations of either employment relationship differ significantly.

Contractors are more accountable for management of their employment or taxation obligations than if the entity were an employee of a PBC. This can include (but is not limited to) registration for an Australian Business Number (ABN), payment of tax owed on their income and sole responsibility for any tools or materials they will require to carry out their services. Broadly speaking, employee relationships put the responsibility for the aforementioned points onto the PBC, and remove the requirement for the entity to register for an ABN.

In the scenario provided, the member may not be undertaking sufficient activities to be carrying on an enterprise. In such cases, treating them as a contractor may not require them to be registered for an ABN, and not require the PBC to withhold tax on payments. A comparison of the different treatment is below (Table 3).

In relation to Directors, whilst they may be treated as employees when acting in their capacity as directors, it is possible that they are separately acting as contractors for other activities. However, given they would already be on a payroll system for their directors duties, it would presumably be simpler to provide any other payments for other activities through the same systems.

**Table 3**

	<b>Contractor carrying on an enterprise</b>	<b>Contractor not carrying on an enterprise</b>	<b>Employee</b>
<b>Member's income tax</b>	Taxable	Taxable	Taxable
<b>PAYG withholding</b>	47% required to be deducted by PBC if not registered for ABN.	No withholding required.	PAYG withholding using employee rates.
<b>GST</b>	Can choose to be registered for GST if turnover is less than \$75k. Otherwise required to be registered. If registered, must charge and remit GST, but can claim it back on purchases.	Not eligible for an ABN or to be registered for GST. Cannot claim back GST on purchases.	Not eligible for an ABN or to be registered for GST. Cannot claim back GST on purchases.
<b>Superannuation and other employment taxes</b>	Not required for the PBC.	Not required for the PBC.	PBC will be subject to superannuation and other employment tax obligations.

In determining the appropriate employment relationship, consideration should be given to the individual circumstances surrounding each individual and their ability and/or capacity to adequately manage any obligations they may have to the ATO as a result of carrying out these services and any subsequent consideration received.

It is likely that specific cultural services, such as a Welcome to Country, would not be treated differently for the purposes of taxation.



## 4. Payments received by PBCs for native title compensation

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### Scenario:

PBCs may receive payments for native title compensation. This can include compensation from agreements under the Native Title Act 1993 (Cth), such as Indigenous Land Use Agreements (ILUAs), or payment received as compensation for the loss of their native title rights and interests.

### Comments:

The types of payments received by Native Title Holders that are likely to be non-taxable (with regards to Income Tax and Goods and Services Tax [GST]) are as follows:

- Native Title Benefits received as compensation for a Native Title Claim;
- Any capital gains or losses made from transferring Native Title rights to an Indigenous holding entity or another Indigenous person; and
- Any capital gains or losses made from surrendering or cancelling Native Title rights.

Examples of various scenarios for the receipt of native title benefits and the tax implications are included on the ATO website [here](#).

The question as to whether or not these types of payments would be subject to GST is dependent on whether the amounts are considered to be received by Native Title Holders in the course or furtherance of an enterprise that they carry on. The ATO has expressed its view through various private rulings (for example, PR/1051584821866) that, generally, the activities of Native Title Holders in seeking the status of Native Title Holder and entering into and performing agreements with companies does not constitute an enterprise.

We note any income earned from 'reinvesting' the NT compensation is likely to be treated as taxable in the hands of the PBC or the beneficiary.

Each PBC should seek their own advice when entering into these arrangements.

# Appendix 1 - Features and Implications of Employee vs Contractor Relationships

Employment Relationship	Features	Implications
<p><b>Employee</b></p>	<ul style="list-style-type: none"> <li>• Variety of payment terms available, based on:               <ul style="list-style-type: none"> <li>◦ Time worked;</li> <li>◦ Price per item or activity; or</li> <li>◦ Commission</li> </ul> </li> <li>• Provision of tools and other assets: The PBC will provide all required tools or other assets to complete their work, or will compensate them for the cost of their tools or other assets.</li> <li>• Limited exposure to any commercial risk: The PBC would be legally responsible for their work.</li> <li>• No independence from the PBC: The individual would be considered part of the PBCs business, operating on their behalf, and in accordance with any employment agreement.</li> <li>• Decreased responsibility for Tax &amp;/or Superannuation: The PBC would be responsible for withholding any taxes from their remuneration, calculating and paying their superannuation and reporting and paying any reportable Fringe Benefits provided to them during the course of their employment.</li> <li>• Sick and Annual Leave - Depending on the employment relationship (i.e., casual, part-time, or full-time) the participant could accrue leave in return for their services.</li> </ul>	<ul style="list-style-type: none"> <li>• No subcontracting or delegation: They cannot pay someone else to complete the required services.</li> <li>• Control over the work: The PBC has control over the way in which the participant carries out their work, as determined within their employment contract. This could include such things as working to a set schedule, set times or dates of work and record keeping.</li> </ul>

Employment Relationship	Features	Implications
<p><b>Contractor</b></p>	<ul style="list-style-type: none"> <li>• Subcontracting and delegation: The individual could pay someone else to carry out the services they have been contracted to complete. This would be subject to negotiations with the PBC.</li> <li>• Payment terms: Payment can be determined by the contractor based on a provided quote, calculated using hourly rates or price per service. This may also include compensation for any costs incurred to carry out their duties.</li> <li>• Independence from the PBC: The Heritage Survey participant would be considered separate from the PBCs business, operating on their own behalf, and is free to accept or refuse additional work.</li> </ul>	<ul style="list-style-type: none"> <li>• Required to register for an ABN.</li> <li>• Required to register for GST if turnover exceeds \$75,000 pa.</li> <li>• Provision of tools and other assets: The participant will provide all required tools or other assets to complete their work.</li> <li>• Exposure to commercial risk: The participant would be legally responsible for their work.</li> <li>• Control over the work: Outside of what was contractually agreed, the participant can refuse or accept any additional work that may be required by the PBC.</li> <li>• Responsibility for Tax or Superannuation: Unless the participant does not quote their ABN, or has a voluntary agreement with the PBC to withhold tax from their payments, as a contractor they are responsible for withholding any taxes from their remuneration, calculating and paying their superannuation.</li> <li>• No Fringe Benefits Tax (FBT): Contractors do not have FBT obligations.</li> </ul>