The Parliament of the Commonwealth of Australia

Advisory Report on the Tax Laws Amendment (2012 Measures No. 6) Bill 2012

House of Representatives
Standing Committee on Economics

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Canberra

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Chair's foreword

The Bill makes a range of amendments to the tax law. Three of the schedules, Schedules 2, 3 and 4, did not attract submissions from stakeholders and the committee accepts this as support or acceptance of them.

Schedule 2 updates the list of deductible gift recipients. The organisations that have been listed, or had their listing extended, include AE1 Incorporated, which seeks to locate and honour the crew of Australia's first submarine; Teach for Australia, which seeks to attract top graduates to teach in disadvantaged communities; and Australia for UNHCR, which raises funds to support the humanitarian programs of the United Nations High Commissioner for Refugees. These are important causes and the committee is pleased that they have been included in the Bill.

Schedule 3 extends the immediate deductibility of exploration expenditure, already provided to mining and petroleum explorers, to geothermal energy explorers. This will restore competitive neutrality in the sector and support a clean energy source.

Schedule 4 extends the interim streaming provisions for managed investment trusts from 2012 to 2014, in line with the Government's announcement to defer until 2014 the commencement of the new overall regime for managed investment trusts and the new general trust income rules. The committee expects that coordinating the commencement of these different systems will reduce compliance costs for taxpayers.

The committee received submissions in relation to the other four major schedules in the Bill. Schedule 1 clarifies the tax law so that payments under native title agreements will be subject to neither income tax nor capital gains tax. These reforms have been on the policy agenda since 1998 and the committee is of the view that this tax treatment is fully consistent with the unique nature of native title.

At the hearing, there was considerable support for the view that the Schedule should also provide preferential tax treatment for Indigenous community development corporations. This is outside the scope of the Bill and the committee does not believe that a recommendation along these lines would be appropriate.

However, the committee would like to stress that native title is only 20 years old. Indigenous people have spent much of that time proving native title and are still learning how to release the economic potential of that title for the benefit of present and future traditional owners. The evidence given indicates that there is work to be done in finding consensus on what is an appropriate legal framework that recognises native title once transferred through a compensation payment to a monetary form. Finding that consensus will become more important as Indigenous communities explore new mechanisms to unlock the economic potential of native title for the benefit of their community now and in the future.

However, as the purpose of Schedule 1 is to amend the tax law so that it largely reflects the way that the ATO has been applying the law in relation to native title, it should proceed. The committee expects that further legislative innovations will be introduced in the coming years.

Schedule 5 applies an income-based means test to the rebate for medical expenses. The AMA argued that a means test should not apply to a medical care safety net because illness does not discriminate on the basis of income. The committee nonetheless supports the Schedule because it will result in better targeted health expenditure and a more sustainable health system.

Schedule 6 amends the definition of limited recourse debt, following a High Court case in 2011 where BHP Billiton secured double deductions for its iron briquette plant in Western Australia. Although there was general support for the provisions, there were also concerns about retrospectivity and whether the Schedule should be limited to related party transactions, similar to the facts in the BHP Billiton case.

The committee was not unduly concerned about retrospectivity because the new law will apply from the date of announcement and the policy intent of the provisions is unchanged. Further, there has been only a short delay between the announcement and the introduction of the Bill. Although limiting the Schedule to related party transactions may be attractive, it overlooks the fact that the limited recourse debt rules play an important role in the wider integrity of the tax system.

Schedule 7 removes the concessional fringe benefit tax treatment for in-house fringe benefits accessed through salary sacrificing. In-house fringe benefits are those where the employer provides the same or similar goods or services as part of their business. The in-house provisions were initially included in the fringe benefits tax because the tax is imposed on employers and in-house benefits cost less to employers to provide them.

However, since then the in-house rules have evolved into a key element of employee remuneration in some industries, contrary to the original goal.

Overall, the Bill makes a range of amendments that protect the integrity of the tax system, closer aligns it to underlying policy, and achieves important social goals. The Bill should pass.

On behalf of the committee, I thank the organisations that assisted the committee during the inquiry through submissions or participating in the hearing in Canberra. I also thank my colleagues on the committee for their contribution to the report.

Julie Owens MP
Chair

Contents

Chair's foreword iii
Membership of the Committee x
Terms of reference xi
List of abbreviations xii
Recommendation xiv

THE REPORT

1 Introduction 1
Referral of the Bill 1
Schedule 1 – Native title benefits 2
Introduction 2
Policy development and consultations 4
Proposals in the Bill 8
Schedule 2 – Deductible gift recipients 11
Schedule 3 – Geothermal energy explorers 12
Schedule 4 – Managed investment trusts 13
Schedule 5 – Rebate for medical expenses 14
Schedule 6 – Limited recourse debt 16
Preventing double deductions 16
Current definition of a limited recourse loan 17
The BHP Billiton case 17
Developing the new provisions 19
Schedule 7 – In-house fringe benefits 20
Why in-house benefits are treated differently 20

Incidence of salary sacrificing 21
The proposal in the Bill 23
Objectives and scope of the inquiry 25
Conduct of the inquiry 25

2 Issues in the Bill 27
Schedule 1 – Native title benefits 27
Should the Schedule proceed? 28
Definition of native title benefits 34
Definition of an Indigenous holding entity 39
Retrospectivity 42
Schedule 5 – Rebate for medical expenses 44
Schedule 6 – Limited recourse debt 46
Breadth of the provisions 46
The meaning of 'predominantly' 48
Safe harbour 48
Retrospectivity 50
Schedule 7 – In-house fringe benefits 52
Reasons for the reforms 52
Transitional rules 55
Effect on independent schools 59
Overall conclusion 61

DISSENTING REPORT

Coalition Members' Dissenting Report 65
Issues in the Bill 65
Schedule 1 – Native title benefits 65
Schedule 3 – Geothermal energy explorers 68

APPENDICES

Appendix A –Submissions and exhibits 69

Appendix B – Hearing and witnesses 71

Wednesday, 30 January 2013 in Canberra 71

Appendix C – List of reports 75

Membership of the Committee

Chair	Ms Julie Owens MP
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Terms of reference

On 29 November 2012 the Selection Committee referred the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 to the committee for inquiry and report.

Under Standing Order 222(e), the House is taken to have adopted the Selection Committee's reports when they are presented.

List of abbreviations

ABL	Arnold Bloch Leibler
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AMA	Australian Medical Association
ATO	Australian Taxation Office
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006*
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CGT	Capital gains tax
CME	Chamber of Minerals and Energy of Western Australia
DGR	Deductible gift recipient
ICAA	Institute of Chartered Accountants in Australia
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILUA	Indigenous land use agreement
ISCA	Independent Schools Council of Australia
MBS	Medicare Benefits Schedule
MCA	Minerals Council of Australia
MIT	Managed investment trusts

MRRT	Minerals Resource Rent Tax
NANE	Non-assessable non-exempt
NMETO	Net Medical Expenses Tax Offset
NNTC	National Native Title Council
NTSV	Native Title Services Victoria
PBS	Pharmaceutical Benefits Scheme
PCA	Property Council of Australia
TLAB No.6	Tax Laws Amendment (2012 Measures No. 6) Bill 2012
UNHCR	United Nations High Commissioner for Refugees
UNSW	University of New South Wales
YMAC	Yamatji Marlpa Aboriginal Corporation

Recommendation

2 Issues in the Bill

Recommendation 1

The House of Representatives pass the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 as proposed.

1

Introduction

Referral of the Bill

1.1 On 29 November 2012 the Selection Committee referred the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 to the committee for inquiry and report.

1.2 The Bill has eight schedules. Broadly, they:

- clarify that native title benefits are not subject to income tax, including capital gains tax (Schedule 1);
- update the list of deductible gift recipients (Schedule 2);
- extend the immediate deductibility of exploration expenditure, already provided to mining and petroleum explorers, to geothermal energy explorers (Schedule 3);
- extend the interim streaming provisions for managed investment trusts (MITs), in line with the Government's announcement to defer the commencement of the new regime for MITs (Schedule 4);
- apply an income-based means test to the rebate for medical expenses (Schedule 5);
- reverse capital allowance deductions that, at the time the debt is terminated, are excessive having regard to the amount of the debt repaid. This is to ensure that the relevant tax laws operate as intended responds to the High Court case in 2011 between the Tax Office and BHP[1] (Schedule 6);

1 *Federal Commissioner of Taxation v BHP Billiton* [2011] HCA 17.

- remove concessional fringe benefit tax treatment for in-house fringe benefits accessed through salary sacrificing. In-house fringe benefits are those where the employer provides the same or similar goods or services as part of their business (Schedule 7); and
- make miscellaneous amendments (Schedule 8).

Schedule 1 – Native title benefits

Introduction

1.3 The native title system, initiated with the *Mabo* decision in 1992, has given Indigenous communities significant opportunities and increased security in enjoying the cultural and economic benefits of their relationship with the land. However, the focus in resolving native title uncertainties to date has been on issues such as rights of access and decision-making about land use.[2]

1.4 An important issue from the perspective of Indigenous people is the relationship between the native title system and the tax system. After all, one of the aims of native title is that Indigenous people should be able to obtain some financial benefit from it, if they wish to do so. At the hearing, Native Title Services Victoria spoke positively about the fact that these issues are now being addressed. For them it represents an indication that the native title legislation has been successful:

> In this 20 years, in fact, since the parliament passed the Native Title Act, we have now moved to the stage where the big issue in native title is how it can best deliver economic development for Indigenous Australians. The fact that we are having this discussion is an indication of the very positive results that have been achieved by the Native Title Act over that time.[3]

1.5 The *Native Title Act 1993* and the tax legislation are silent on the tax treatment of native title and there is very little case law. Current estimates are that mining companies are paying $200 million annually to Indigenous

2 Dr Lisa Strelein, *Taxation of Native Title Agreements,* May 2008, Native Title Research Monograph, No. 1/2008, AIATSIS, p. 4.

3 Mr Matthew Storey, NTSV, *Committee Hansard,* Canberra, 30 January 2013, p. 33.

communities in the Pilbara alone, and that these sums will continue for decades.[4] An AIATSIS research paper states:

> Some of the agreements being reached involve payments and benefit packages that are complex and in almost all circumstances raise significant conceptual and practical questions as to their treatment for taxation purposes. Little analysis has been done to determine how native title fits with the tax system and resolution of this issue has eluded a generation of policy makers.[5]

1.6 Native title sits separately to the legal traditions that Australia inherited from the United Kingdom. The AIATSIS research paper describes native title and its impact as:

> 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 Australian law. Its recognition required an immediate rethinking of Australia property law and the way in which governments, in particular, dealt with land.[6]

1.7 This rethinking process is continuing, as reflected by the proposals in the Bill to clarify the tax treatment of native title benefits.

1.8 Prior to *Mabo*, the Commonwealth Government introduced land reforms in the Northern Territory for Indigenous people through the *Aboriginal Land Rights (Northern Territory) Act 1976*. This created a system equivalent to mining royalties, paid to land councils and Indigenous communities through the Aboriginals Benefit Account. In 1979, a Mining Withholding Tax was established on distributions made by the Account. The current tax rate is 4 per cent and total receipts to date are estimated at up to $60 million. The Mining Withholding Tax is outside the scope of this report, although the Committee notes there have been calls for its abolition.[7]

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4 CME, *Submission 5,* p. 2.

5 Dr Lisa Strelein, *Taxation of Native Title Agreements,* May 2008, Native Title Research Monograph, No. 1/2008, AIATSIS, p. 5.

6 Dr Lisa Strelein, *Taxation of Native Title Agreements,* May 2008, Native Title Research Monograph, No. 1/2008, AIATSIS, p. 4.

7 Professor Jon Altman, *Submission 2,* pp. 1-4; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976,* August 1999, p. 69.

Policy development and consultations

Initial attempts in 1998

1.9 The previous Government announced reforms to clarify the tax implications of native title as part of its native title reforms, the latter culminating in the *Native Title Amendment Act 1998*. The then Treasurer stated that he wished to apply existing tax law wherever possible, and make amendments where this would significantly reduce administrative and compliance costs or 'provide a more equitable treatment for certain transactions.'[8] The Government's views of the existing tax treatment at that time and its proposals are in the table below.

Table 1.1 Tax treatment and reform proposals for native title transactions in 1998

Transaction	Existing tax treatment	Proposed tax treatment
Obtaining a native title determination and vesting native title in a registered body corporate as agent or trust.	The vesting in the body corporate may represent an asset transfer for capital gains tax (CGT).	Native title will not lose its pre-CGT status upon acquisition by the body corporate.
Transferring native title with-in a group of native title hol-ders and succession from one group of holders to another.	Would trigger a CGT liability, but would be difficult and costly to administer due to it being a communal asset.	Exempt from CGT.
Compensation payments received for the extinguishment or voluntary surrender of native title rights, including pastoral leases.	Generally regarded as compensation for the loss of a capital asset and exempt from tax. But the form of the payment may attract income tax.	Exempt from CGT and income tax, irrespective of the form of the payment.
Payments for the temporary impairment or suspension of native title, i.e. all receipts where it is not extinguished.	Individual taxpayers would pay tax at their marginal rate. Identifying the taxpayers would be difficult.	All receipts taxable through a withholding tax of 4 per cent.
Payments by non-native title holders, e.g. for: (i) extinguishment (ii) temporary impairment (iii) other expenses.	Expenses for ongoing operations deductible. Payments to protect assets not deductible, but may increase an asset's cost base (CGT).	(i) not deductible but may increase an asset's cost base (ii) deductible (iii) existing tax law will apply.

Source *The Hon. Peter Costello MP, Treasurer, and the Hon. Daryl Williams AM QC MP, Attorney-General, 'Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters,' Media Release, 13 February 1998, p. 4.*

1.10 The proposals were to exempt dealings in native title from Capital Gains Tax for Indigenous people, recognising its 'pre-1985' status. Payments where native title was not extinguished, but applied over time for a productive purpose, would be taxed at 4 per cent, which would be

8 The Hon. Peter Costello MP, Treasurer, and the Hon. Daryl Williams AM QC MP, Attorney-General, 'Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters,' *Media Release,* 13 February 1998, p. 1.

consistent with the approach under the Mining Withholding Tax. The Government also made proposals to clarify the tax treatment of native title dealings for the mining, tourism and other industries that seek access to land, but this is not attempted in the Bill.

1.11 The then Government did not proceed with its proposals. The committee is not aware of any formal explanation for this, although one commentator has suggested that the proposals lost priority when the then Government announced its program of tax reform, including the goods and services tax.[9]

The AIATSIS research paper

1.12 From 2007, researchers started publishing conference papers on the interaction between native title and the tax system.[10] AIATSIS published a major paper in 2008, which put forward four policy proposals, each of which would provide some tax benefit contingent on a 'social security means testing exemption:'

- sovereign immunity from taxation, which implies Indigenous people form a separate sovereign nation alongside or within Australia;
- a zero per cent withholding tax for a class of native title agreements, including any agreement relating to a process under the *Native Title Act 1993;*
- payments for loss or impairment of native title and the exercise of those interests and rights, as well as interest income from those funds, could be excluded from various tax regimes; and
- a new tax vehicle could be created, which supports Indigenous economic development and financial accumulation and distribution.[11]

The Government's consultation paper

1.13 In October 2010, the Government released a consultation paper where it canvassed views on proposals similar to the last three of those in the AIATSIS paper (that is, excluding the sovereign immunity proposal). The Government's proposals were different in some respects. For example,

9 Mr Warren Black, 'Tax Implications to Native Title Holders of Compensation Payments,' 1999, *Journal of Australian Taxation,* vol. 2(5), p. 344.

10 Ms Miranda Stewart, 'Native Title and Tax: Understanding the Issues,' 2010, *Indigenous Law Bulletin,* vol. 7(21), pp. 7-11, fn. 1.

11 Dr Lisa Strelein, *Taxation of Native Title Agreements,* May 2008, Native Title Research Monograph, No. 1/2008, AIATSIS, p. 64.

they did not envisage that interest income from investing native title payments should be tax exempt. There was also no mention of a social security means testing exemption.[12]

1.14 The paper gave an overview of some of the issues. For example, it noted that native title agreements can provide for both monetary and non-monetary benefits, which can then be used for investment, the use of goods and services, payments to providers of goods and services, and payments to individuals. Benefits can be provided through the extinguishment or suspension of native title, or they can be provided for other reasons. Often, native title agreements do not explain why a benefit is being provided, such as whether it relates to a change in native title status or some other reason.

1.15 In some cases, the tax treatment is relatively clear. A direct link between extinguishment of native title and a benefit would mean that the benefit would not be subject to income tax because it was obtained through disposing of an asset. As a pre-CGT capital asset, no capital gains tax would be involved, either. However, the treatment becomes less certain where the benefit is linked to the suspension of native title or other reasons. Uncertainty increases where the benefit and its reason cannot be linked. Treasury summarised the difficulties as follows:

> The current income tax system treats native title as a capital asset capable of being exploited to generate income, rather than as an inalienable, intergenerational and communal right with particular cultural significance. Further, the tax system assumes that benefits under a native title agreement can be clearly apportioned between extinguishment of native title, suspension of native title and any other matters dealt with in the agreement, which may not accord with the agreement making process as experienced by native title groups.[13]

1.16 Under current tax law, the returns from funds invested to generate a profit are taxable. The main vehicle through which this tax outcome is avoided in pursuit of a community purpose is the charitable trust. The requirements for a trust to obtain this status from the ATO are:

- it exists for the public benefit or relief of poverty;
- its purposes meet the legal definition of 'charitable';

12 Discussion overall drawn from: Australian Government, *Native Title, Indigenous Economic Development and Tax,* Consultation Paper, October 2010.

13 Australian Government, *Native Title, Indigenous Economic Development and Tax,* Consultation Paper, October 2010, p. 5.

- it is not for profit; and
- its sole purpose is charitable.

1.17 Charitable trusts have several limitations that affect their suitability in supporting Indigenous communities. Firstly, they must be for the public benefit, which may not be consistent with focussing on Indigenous people. Secondly, they cannot support profitable projects, which would be inconsistent with supporting Indigenous businesses. Finally, they are subject to the rule against perpetuities, which prevents the accumulation of wealth across generations. The accumulation of wealth by future generations could well be an important requirement for native title holders who agree to extinguish their native title rights.

Refinement and announcement

1.18 In June 2012, the Attorney General and the Minister for Families, Community Services and Indigenous Affairs announced that the Government's approach would be to 'clarify that income tax and capital gains tax will not apply to payments from a native title agreement.' They also foreshadowed consultation on the legislation.[14]

1.19 In July 2012, the Government released exposure draft legislation for comment. Treasury noted there was support for the proposals, but that many submissions sought to widen the scope of the legislation. Treasury's response was that this 'would be contrary to the intent of the measure, which is to clarify the tax treatment of certain native title benefits by confirming that they are not subject to income tax, and as such were not adopted.'[15]

1.20 However, two detailed changes were still made to the Bill. Firstly, where native title is yet to be determined or may not be determined, the benefits provided under an agreement will still be tax exempt. Secondly, Treasury confirmed there are no capital gains tax implications from creating a trust that is an Indigenous holding entity over native title rights, or for related transactions.[16] This is similar to one of the 1998 proposals.[17]

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14 The Hon. Nicola Roxon MP, Attorney-General, and the Hon. Jenny Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'The Future of Native Title,' *Media Release,* 6 June 2012.

15 The Treasury, *Tax Treatment of Native Title Benefits - Summary of consultation process,* November 2012, p. 1.

16 The Treasury, *Tax Treatment of Native Title Benefits - Summary of consultation process,* November 2012, p. 2.

17 See row 1 of table 1.1.

Proposals in the Bill

Income tax

1.21 Simply put, the Bill states that an amount or benefit is non-assessable non-exempt (NANE) income (that is, exempt from income tax) where it arises from a native title benefit. For the exemption to apply, an Indigenous person or Indigenous holding entity must receive the benefit. The amount or benefit can arise indirectly from a native title benefit, that is, through a chain of transfers. However, the benefit must maintain its NANE status at each individual transfer. If it loses this status at one point, such as passing through a company that is not an Indigenous holding entity, then this status cannot be re-acquired.[18]

1.22 A key element in the regime is the definition of a native title benefit. This is an amount or non-cash benefit:

- that arises under an agreement (such as an Indigenous Land Use Agreement) made under Commonwealth, State or Territory legislation, to the extent that the amount or benefit relates to an act that would extinguish native title or would be inconsistent with the continuation of native title to some extent; or
- compensation for acts affecting native title under Division 5 of Part 2 of the *Native Title Act 1993*.[19]

1.23 An amount or benefit will still have tax exempt status if it is later found that native title does not exist or if no formal determination of native title is ever made.[20]

1.24 An Indigenous holding entity is defined as:

- a distributing body; or
- a trust whose beneficiaries can only be Indigenous persons or distributing bodies.[21]

1.25 A distributing body is defined in section 128U of the *Income Tax Assessment Act 1936,* within the Division that covers the Mining Withholding Tax. It includes Aboriginal Land Councils and corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006.* A distributing body is a body established under Australian law that

18 *Explanatory Memorandum,* pp. 14-15.
19 *Explanatory Memorandum,* p. 16.
20 *Explanatory Memorandum,* p. 17.
21 *Explanatory Memorandum,* p. 18.

distributes the money it receives to, or for the benefit of, Indigenous persons.[22]

1.26 When an amount or benefit starts to be applied to more commercial applications, then it loses its NANE status. For example, the income earned from investing an amount or benefit with NANE status will be subject to income tax. Further, using an amount or benefit to pay for administrative costs or goods and services will not be NANE income for the recipient. Conversely, an expense will not be deductible where it was used to gain NANE income because those revenues are tax free. Expenses can be apportioned where they were used to generate both NANE and taxable income.[23]

Capital Gains Tax

1.27 The Bill confirms that there are no Capital Gains Tax implications resulting from native title rights, or rights to a native title benefit, being transferred to an Indigenous holding entity or to an Indigenous person. This also applies where a trust is created that is an Indigenous holding entity over such rights. Further, no Capital Gains Tax implications arise from a native title right being ended.[24]

Transitional and consequential provisions

1.28 The amendments apply from 1 July 2008. This retrospectivity is to the benefit of taxpayers. Transitional provisions apply so that taxpayers can seek amended assessments back to this date.[25] Consequential amendments are made to the tax law so that mining withholding tax does not apply to NANE amounts or benefits under the Bill.

Human rights

1.29 The Bill promotes the right to self-determination under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Explanatory Memorandum also discusses whether the Schedule contravenes the rights of equality and non-discrimination of the ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This is because the Schedule gives Indigenous people a tax

22 *Explanatory Memorandum,* p. 19.
23 *Explanatory Memorandum,* pp. 15-16.
24 *Explanatory Memorandum,* p. 19.
25 *Explanatory Memorandum,* p. 20.

exemption in relation to amounts and benefits they receive through their native title rights, which is not available to the wider community.[26]

1.30 The Explanatory Memorandum concludes that differences in treatment will be legitimate if there are reasonable causes for this and if there is a proper purpose behind the differences. These requirements apply here because the Schedule seeks to clarify the tax position relating to unique rights that only Indigenous people can hold. Further, NANE status only applies to income relating to the impairment or extinguishment of native title.

1.31 Another argument in favour of the Schedule is the special measure provisions in the CERD. This states that measures taken to solely secure the advancement of certain groups shall not be racial discrimination where this gives these groups equal enjoyment or exercise of human rights and fundamental freedoms (demonstrated in this instance by the *Closing the Gap* agenda). There are also a number of conditions that must be met for special measures. The Explanatory Memorandum states that these are met because:

- only Indigenous people can hold native title;
- the amendments are proportional because NANE income status only applies to native title benefits to the extent that they are for the impairment or extinguishment of native title;
- the Schedule clarifies the treatment of native title rights, which are accepted and recognised by the international community as securing the existence and identity of Indigenous people in Australia; and
- the Schedule is functional and goal related because it is linked to the existence of native title, rather than instituting a permanent advantage for Indigenous people.[27]

Financial impact and compliance cost

1.32 The financial impact of the measure on the Government is close to zero from 2012-13 to 2015-16. The Explanatory Memorandum states that expected compliance costs are nil.[28]

26 Discussion drawn from *Explanatory Memorandum,* pp. 23-26.

27 If all Native Title is extinguished, then the amendments are non-permanent in that they will no longer effectively operate.

28 *Explanatory Memorandum,* p. 3.

Schedule 2 – Deductible gift recipients

1.33 A deductible gift recipient (DGR) is an entity or fund that can receive tax deductible gifts. A DGR can either be endorsed by the ATO or be listed in the tax law. The Schedule will change the DGR status of five entities:

- AE1 Incorporated, which seeks to locate and honour the crew of Australia's first submarine, will be a DGR between September 2011 and September 2014;
- Australia for UNHCR, which raises funds to support the humanitarian programs of the United Nations High Commissioner for Refugees, will have its listing extended;
- One Laptop per Child Australia, which seeks to enhance learning opportunities for over 500,000 primary school aged children by providing each one with a connected laptop, will have its listing extended to June 2016;
- Teach for Australia, which seeks to attract top graduates to teach in disadvantaged communities, will be listed in respect of gifts received from January 2013; and
- Yachad Accelerated Learning Project, which seeks to close educational gaps in remote, regional and rural locations of Australia through practices developed in Israel, will have its listing extended to June 2015.[29]

1.34 The Government's revenue projections from the measure are given in the table below:

Table 1.2 Financial impact of changing the DGR status of five entities ($m)

Organisation	2012-13	2013-14	2014-15	2015-16
AE1 Incorporated	-0.8	-0.8	-0.8	0
Australia for UNHCR	0	-6.3	-7.0	-7.8
One Laptop per Child Australia	0	-0.1	-0.1	-0.1
Teach for Australia	0	-0.2	-0.2	-0.3
Yachad Accelerated Learning Project	0	-0.1	-0.1	-0.1
Total	**-0.8**	**-7.5**	**-8.2**	**-8.3**

Source *Explanatory Memorandum, p. 4.*

29 *Explanatory Memorandum,* p. 4.

1.35 In the Explanatory Memorandum, the Government states that compliance costs from the provisions are nil and that no human rights issues are involved.[30]

Schedule 3 – Geothermal energy explorers

1.36 Geothermal energy is heat contained within rock or any other naturally occurring substance in the earth. It has the potential to be used to generate electricity with minimal emissions. Geothermal energy has been identified in every Australian State and the Northern Territory.[31]

1.37 The definition of 'exploration or prospecting' in the *Income Tax Assessment Act 1997* does not extend to geothermal energy. This, and other features of the tax law, means that explorers for geothermal energy cannot immediately deduct prospecting expenditure, a benefit which is available to explorers of minerals or petroleum.

1.38 This issue was raised by the Policy Transition Group, which consulted on the design of the Minerals Resource Rent Tax. Although outside its terms of reference, stakeholders raised the tax anomaly with the Group during its inquiries. The Group provided advice to Government that the tax law should be amended so that geothermal exploration is incorporated into the wider definition of exploration. This advice was consistent with the Government's policy of encouraging the development of geothermal energy.[32]

1.39 The Government accepted the Group's advice in March 2011, and stated that the new deductibility arrangements would commence from 1 July 2012.[33]

1.40 The Government's revenue projections from the measure are given in the table on the next page.

30 *Explanatory Memorandum,* p. 5.

31 Discussion drawn from *Explanatory Memorandum,* pp. 31-34.

32 Policy Transition Group, *Report to the Australian Government: Minerals and Petroleum Exploration,* December 2010, pp. 7, 29.

33 The Hon. Martin Ferguson MP, 'Tax Deduction a Major Boost for Geothermal Energy in Australia,' *Media Release,* 24 March 2011.

Table 1.3 Revenue impacts of the geothermal energy exploration measure ($m)

2012-13	2013-14	2014-15	2015-16
0	0	-5	-5

Source *Explanatory Memorandum, p. 6.*

1.41 In the Explanatory Memorandum, the Government states that compliance costs from the provisions will be low and that no human rights issues are involved.[34]

Schedule 4 – Managed investment trusts

1.42 The amendments have been made in the context of major reforms of the taxation of managed investment trusts, as well as re-writing Division 6 of Part III of the *Income Tax Assessment Act 1936,* which deals with trust income. The former reforms were scheduled to commence on 1 July 2012, but were deferred by 12 months to permit further consultation. They were then deferred by another 12 months, to coincide with the trust income changes.[35]

1.43 In 2011, the tax law was amended to enable the 'streaming' of capital gains and franked dividends to beneficiaries. Managed investment trusts were exempt from these provisions for 2010-11 and 2011-12, recognising that these trusts generally do not 'stream' income to their beneficiaries. However, the trustee of a managed investment trust could elect to apply these rules on an irrevocable basis. The new regime for managed investment trusts was then expected to commence from 2012-13. Because the new regime has been deferred by two years, the irrevocable election arrangement has been extended by the same period.

1.44 The general effect of the Schedule is that, if a trustee elected or elects to apply the interim streaming provisions for any of the years between 2010-11 and 2013-14, then those rules will be applied for that and all later years until 2013-14. Elections must be made within two months after the end of the relevant income year.

1.45 The Explanatory Memorandum states that the measure is, 'expected to have an unquantifiable but not significant impact on revenue.' The

34 *Explanatory Memorandum,* p. 7.

35 Discussion drawn from *Explanatory Memorandum,* pp. 51-52.

Government states that compliance costs from the provisions will be low and that they do not raise any human rights issues.[36]

Schedule 5 – Rebate for medical expenses

1.46 Under section 159P of the *Income Tax Assessment Act 1936,* taxpayers can claim a rebate for medical expenses, which is often referred to as the net medical expenses tax offset. This section was first introduced in 1975, which was the same year as the Medicare reforms. Parliament has regularly amended the offset since then. The offset for 2012-13 is 20 per cent of out-of pocket expenses above a threshold of $2,120. Legislation in 2010 increased the threshold from $1,500 to $2,000, which was also then indexed to the CPI.[37]

1.47 The offset has a major effect on revenue at about $500 million annually. The *Tax Expenditures Statement 2011* was released in January 2012 and provides estimates for the offset's effect between 2007-08 and 2014-15, presented in the table below. The dip in 2011-12 is presumably due to the $500 increase in the threshold.

Table 1.4 Estimated revenue effect of the medical expenses offset ($m)

2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
-390	-435	-465	-525	-475	-510	-520	-555

Source Tax Expenditures Statement 2011.[38] Figures for 2010-11 are preliminary. Estimate reliability is 'medium'.

1.48 The Schedule imposes an income test on the offset that will have two effects: it will increase the threshold for that individual or family, and it will decrease the offset they receive if the offset applies to them. The new system is summarised in the table on the next page.

36 *Explanatory Memorandum,* p. 7.

37 Discussion drawn from *Explanatory Memorandum,* pp. 57-59.

38 <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Tax-Expenditures-Statement-2011/TES> viewed 25 January 2013.

Table 1.5 Operation of the proposed medical expenses offset

Taxpayer status	Adjusted taxable income for rebates	Out-of-pocket medical expenses	Rate of offset available (%)
Single	$84,000 or less	$2,120 or less	0
		Greater than $2,120	20
	Greater than $84,000	$5,000 or less	0
		Greater than $5,000	10
Family	$168,000 or less	$2,120 or less	0
		Greater than $2,120	20
	Greater than $168,000	$5,000 or less	0
		Greater than $5,000	10

Source *Explanatory Memorandum, p. 59. The family threshold is increased by $1,500 for each dependent child after the first. The family threshold applies if a taxpayer is married on the last day of the year or has dependants on any day of the year.*

1.49 The income thresholds are broadly in line with those for the Medicare levy surcharge. They are indexed annually by average weekly ordinary time earnings.

1.50 The revenue savings from the measure are expected to exceed $100 million annually:

Table 1.6 Revenue impacts of the medical expense rebate measure ($m)

2012-13	2013-14	2014-15	2015-16
0	115	125	130

Source *Explanatory Memorandum, p. 8.*

1.51 In the Explanatory Memorandum, the Government states that compliance costs from the provisions will be nil.[39]

1.52 The International Covenant on Economic Social and Cultural Rights recognises the right to the enjoyment of the highest attainable standard of physical and mental health. The Government argues that the Schedule is consistent with this agreement because it is not reducing the availability or access to medical services. Rather, it is reducing a Government rebate for higher income earners who have a greater capacity to pay and thus the Schedule promotes the health system's sustainability. Therefore, any limitations for certain individuals in accessing the health system are, 'reasonable, necessary and proportionate.'[40]

39 *Explanatory Memorandum,* p. 7.

40 *Explanatory Memorandum,* p. 69.

Schedule 6 – Limited recourse debt

Preventing double deductions

1.53 Limited recourse debt arises where a lender can only seek recourse against a borrower for a limited range of assets or interests. This can occur through the terms of a contract, where the lender expressly limits themselves to what action they can take to seek repayment of a loan. It can also happen as a matter of practicality. An example is where a company is established as a special purpose entity for a project and it is lent money for this purpose. If the project fails before the loan is repaid, the lenders only have recourse to the project's assets, which by then may have little or no value. Either way, limited recourse debt will have higher risk and lenders can charge higher interest rates.

1.54 The limited recourse debt provisions have a number of roles, one of which is to prevent taxpayers obtaining double deductions for projects in certain circumstances. Currently, major companies can create special purpose entities within their group, which receive loans from another wholly owned subsidiary, the 'internal banker'. This company enters international capital markets and borrows funds for it to lend to special purpose entities within the group.[41]

1.55 But if the project fails, then the internal loan is written off because the special purpose entity's only major asset was the project, which by now has little value. Because the practical effect of the arrangement is that the internal banker has limited recourse on the loan, the failure of the project means that the internal banker can now claim the loss as a deduction for a bad debt. However, the special purpose entity has also received deductions for depreciating the project asset.

1.56 The end result is that the parent company can write off the asset twice. Normally, the consolidation provisions in the tax law would mean that transactions between wholly owned subsidiaries would be cancelled out, and the above arrangements would not lead to any particular tax advantage. However, 600 corporate groups in Australia are not fully consolidated and double deductions could be available to them. Further, there is $6 billion to $7 billion of bad debts available annually to the large business market. One of the intentions of the limited recourse debt

41 Internal bankers can be established for legitimate business purposes; Mr Peter Chochula, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 7.

provisions is to prevent the creation of a bad debt deduction when an asset is already being depreciated.[42]

Current definition of a limited recourse loan

1.57 The issue that the Bill addresses is the definition of limited recourse debt. Section 243-20 defines a limited recourse debt in three main ways:

- where an obligation to pay an amount by law is limited to certain legal rights;
- where an obligation to pay an amount by law is 'capable of being limited' to certain legal rights;
- where there is no debt property, but the obligation to pay an amount is nevertheless 'capable of being limited' to certain legal rights.

The BHP Billiton case

1.58 The case covered BHP Billiton's iron briquette plant in Western Australia. A wholly owned subsidiary, BHP Billiton Direct Reduced Iron, was created for the project and it was funded by two wholly owned subsidiaries within the BHP Billiton Group: a loan from BHP Billiton Finance and equity from BHP Minerals Holdings. The BHP Billiton board approved the project in 1995, but it was subject to cost overruns and received additional equity and loans from Holdings and Finance. In 2000, the directors of Finance wrote off the balance of the loan, some $1.8 billion, out of original loan amounts of $2.7 billion on the basis of a report by Ernst & Young. The project continued until 2004 with share capital only.[43] It was then terminated after an explosion at the plant.

1.59 BHP Billiton sought both bad debt and capital allowance deductions in relation to the project. The ATO applied Division 243 to reduce the capital allowance deductions between 2001 and 2006 by over $1 billion. The ATO also sought to use the provisions to increase the assessable income of Reduced Iron for 2000 by $381 million.[44]

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42 Mr Peter Chochula, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 3.

43 French CJ, Heydon, Crennan and Bell JJ, *Federal Commissioner of Taxation v BHP Billiton,* [2011] HCA 17, pars 3-15.

44 Gummow J, *Federal Commissioner of Taxation v BHP Billiton,* [2011] HCA 17, par. 78; ATO, 'Decision Impact Statement: Commissioner of Taxation v BHP Billiton Finance Limited; Commissioner of Taxation v BHP Billiton Limited,' <http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/M117-M125of2010/00001> viewed 10 December 2012.

1.60 The role of Finance was crucial in that it created the deduction for a bad debt. Edmonds J in the Federal Court found that it operated as a lending business and was not a sham. This was because the loans were made in the ordinary course of Finance's business. Comparisons with how a major bank would operate were not relevant. This was despite the fact that:

- Finance did not have its own staff, but paid management fees for the services of BHP Billiton;
- In July 1999, BHP Billiton provided a guarantee to Reduced Iron to pay its debts, excluding those owed to Finance;
- Finance decided to write off the bad debt on the basis of the Ernst & Young report without issuing a demand for payment to Reduced Iron.[45]

1.61 When the case reached the High Court, the main issue was the meaning of subsection 243-20(2) of the *Income Tax Assessment Act 1997*, in particular that the rights of the creditor 'are capable of being limited in the way mentioned in subsection (1).' The ATO argued that subsection (2) focussed on whether there is 'a practical capacity or ability to bring about legal limitations on legal rights irrespective of whether there is any arrangement to which the debtor is a party.' In other words, the words 'capable of' had the same meaning as 'susceptible to'. Although any contract could be varied in theory, the ATO argued that it was applying the stricter test of whether an arrangement was 'practically or commercially susceptible' to being varied.

1.62 In its decision in June 2011, the High Court did not accept this argument and placed a higher standard again for arrangements to be 'capable of being limited.' It stated that there must exist at the start of the loan some power by which the debtor could limit their liability, although that power need not exist in an enforceable arrangement. Although Finance and Reduced Iron were part of a corporate group, the High Court accepted that Finance was not a sham and it operated at arm's length from the other BHP Billiton companies to which it lent. Therefore, by the High Court's interpretation of Division 243-20, the amounts were not a limited recourse debt.[46]

1.63 The facts in this case occurred before the introduction of the current consolidation provisions, which would limit the scope to which creating a

45 ATO, 'Decision Impact Statement: Commissioner of Taxation v BHP Billiton Finance Limited; Commissioner of Taxation v BHP Billiton Limited,' <http://law.ato.gov.au/atolaw/view.htm?DocID=LIT/ICD/M117-M125of2010/00001> viewed 10 December 2012.

46 French CJ, Heydon, Crennan and Bell JJ, *Federal Commissioner of Taxation v BHP Billiton,* [2011] HCA 17, pars 41-65.

wholly owned, special purpose entity can be used to create additional deductions. However, where a corporate group has wholly owned subsidiaries overseas, then the consolidation rules may not apply and the device may be available. The decision has significant revenue implications, given the sums involved in this one case and the fact that this is a routine method for large companies to finance projects.

1.64 In its listing of decision impacts statements, the ATO categorised this decision as 'current,' rather than ,'resolved,' indicating that it was considering further action on the matter. A prominent law firm recognised this may be the case:

> The decision clearly places a significant limitation of the scope of the limited recourse debt rules and other taxation provisions that utilise this concept. It remains to be seen whether the ATO will seek to have the provision re-drafted to express the ATO's view of the scope of the provision.[47]

Developing the new provisions

1.65 In the 2012 Budget on 8 May, the Government announced that it would amend the definition of limited recourse debt and that the changes would apply from the date of announcement. The key points in the proposal were that deductions would not be available where, 'the taxpayer is not effectively at risk for the expenditure and does not make an economic loss.'[48]

1.66 Treasury issued a discussion paper in July 2012 and an exposure draft in October 2012. Treasury stated that it received two main sets of comments about the proposals, which were not accepted.[49] The first comment was that the provisions are retrospective because they apply to debt already in place on 8 May 2012. Treasury's response was that the announcement reflected the ongoing policy intent of the provisions.

1.67 The second set of comments about the proposals was that they were too broad and could unintentionally capture other situations. Treasury's response was that the Explanatory Memorandum has been amended to clarify that existing carve-outs continue to operate. The Explanatory Memorandum refers to subsection 243-20(6), which states that an

47 Greenwoods & Freehills, *Tax Brief: Limited Recourse Debt,* 7 July 2011, p. 3.

48 The Hon. Wayne Swan MP, Deputy Prime Minister and Treasurer, *Budget Measures: Budget Paper No. 2, 2012-13,* May 2012, p. 32.

49 The Treasury, *Limited recourse debt – Amended definition: Summary of consultation process,* November 2012, pp. 1-2.

arrangement is not a limited recourse debt under subsection (1), (2) or (3) if, 'having regard to all relevant circumstances, it would be unreasonable for the obligation to be treated as limited recourse debt.' The Explanatory Memorandum notes that, where a debtor is fully at risk with respect to the loan, subsection (6) will override any liability that might technically arise under subsections (1), (2) or (3).[50]

1.68 The new operative provision in paragraph 243-20(2) retains the reference to rights that 'are capable of being limited.' However, it also includes a reference to debts that, 'are in substance or effect limited wholly or predominantly,' to certain rights.

1.69 In the Explanatory Memorandum, the Government states that the amendments protect a 'significant amount of revenue.' Compliance costs and human rights implications are negligible.[51]

Schedule 7 – In-house fringe benefits

Why in-house benefits are treated differently

1.70 The *Fringe Benefits Tax Assessment Act 1986* includes a number of provisions that refer specifically to in-house fringe benefits. These benefits are valued at reduced rates, typically 75 per cent of their retail value. The argument for the concessional treatment is that the value of in-house fringe benefits to the employer is less because it is part of their everyday business. In other words, they are more likely to access these products and services at wholesale rates, rather than retail, and the FBT system recognises this.[52]

1.71 The types of fringe benefits that are valued at reduced rates when they are provided in-house include non-remote housing, property (goods, animals, gas and electricity, land and buildings, and shares or bonds), expense payments (generally reimbursing an employee for an expense they incur), or residual benefits (not included in specific categories in the Act, but includes public transport from home to work).[53] These types of benefits

50 The Hon. Wayne Swan MP, Deputy Prime Minister and Treasurer, *Explanatory Memorandum to the Tax Laws Amendment (2012 Measures No. 6) Bill 2012,* November 2012, p. 76.

51 *Explanatory Memorandum,* pp. 8-9.

52 F. Gilders, J. Taylor, M. Walpole, M. Burton, T. Ciro, *Understanding Taxation Law 2012,* December 2011, LexisNexis, p. 367.

53 F. Gilders, J. Taylor, M. Walpole, M. Burton, T. Ciro, *Understanding Taxation Law 2012,* December 2011, LexisNexis, p. 367.

generally also attract a further $1,000 exemption on the taxable value, regardless of whether they are provided in-house. Therefore, there is usually a two-stage process in calculating the taxable value of these fringe benefits when they are provided in-house: multiplying the retail amount by 75 per cent, and then subtracting $1,000 from this product. Further calculations are then required to determine an individual's fringe benefits tax and these depend on other circumstances, for example whether the individual works in a non-profit organisation.

Incidence of salary sacrificing

1.72 The Explanatory Memorandum states that these exemptions are now subject to large-scale use through salary packaging, or salary sacrificing. This was not the original intent of the provisions:

> The concessions were not intended to allow employees to access goods and services by agreeing to reduce their salary and wages (through salary packaging arrangements) in order to buy goods and services out of pre-tax income.
>
> Since the in-house fringe benefits concessions were included in the FBT law, changes in technology have increased access to salary sacrifice arrangements.
>
> As a result of expansion in the availability of salary sacrifice arrangements, employees are increasingly accessing concessionally taxed fringe benefits under these arrangements and receiving tax-free non-cash remuneration benefits for goods and services.[54]

1.73 The use of salary sacrificing varies greatly across the economy. For November 2011, the ABS reported the following weekly figures for full time adults:

- salary sacrificing is higher in the public sector than the private sector ($105.90 compared with $36.30);
- across the public and private sectors, salary sacrificing is highest in the Australian Capital Territory at $96.90; and

54 *Explanatory Memorandum,* pp. 79-80.

- salary sacrificing is highest in the health care and social assistance industries at $183.[55]

1.74 Salary sacrificing is also concentrated in upper income ranges, in particular amongst managers, administrators, professionals, and associate professionals. ABS data from 2004 are in the table below.

Table 1.7 Salary sacrificing, by occupation group, May 2004

Occupation	Employees with salary sacrifice (%)	Amount salary sacrificed as a % of average weekly earnings	
		Employees with salary sacrifice	*All employees*
Managers and administrators	26.2	16.8	5.1
Professionals	23.2	18.1	4.6
Associate professionals	14.7	17.8	3.1
Tradespersons and related workers	8.5	9.6	1.0
Advanced clerical and service workers	12.4	13.8	1.9
Intermediate clerical, sales and service workers	8.1	16.8	1.7
Intermediate production and transport workers	7.5	9.4	1.1
Elementary clerical, sales and service workers.	1.8	14.7	0.4
Labourers and related workers	4.9	8.9	0.7
All occupations	**11.9**	**16.2**	**2.7**

Source *ABS, Australian Labour Market Statistics, January 2007, Cat. No. 6105, p. 28.*

1.75 In 2004, people in these upper income groups salary sacrificed on average over 3 per cent of their average weekly earnings. The statistic for all other employees was less than 2 per cent. The proportion of employees from the elementary clerical, sales and service workers who salary sacrificed was less than 2 per cent, indicating that they have limited access to this tax minimisation strategy.

1.76 There is a number of reasons for this disparity:

- it requires the taxpayer either having knowledge about salary sacrificing or being well-advised about it;

55 ABS, '6302.0.55.002 – Information Paper: Changes to Average Weekly Earnings, Australia, April 2012, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/DD23CEA658FF10D1CA2579DF0014A104?OpenDocument> viewed 13 December 2012.

- employers are not under any obligation to provide salary sacrificing;
- the saving per dollar sacrificed varies with the employee's marginal tax rate (and therefore income); and
- the employee must have discretionary income available to pursue the relevant purchases.[56]

The proposal in the Bill

1.77 Broadly, the Bill removes the concessional tax treatment of in-house fringe benefits accessed through salary packaging. A key provision is the definition of a 'salary packaging arrangement,' which is based on the food and drink provisions in section 41(2) of the *Fringe Benefits Tax Assessment Act 1986.* A salary packaging arrangement exists where the employee receives a benefit:

- in return for a reduction in salary or wages that would not have happened apart from the arrangement; or
- as part of an employee's remuneration package, and it is reasonable to conclude that the employee's salary or wages would be greater if the benefit were not provided.[57]

1.78 The Bill uses the concept of 'notional value' in determining the taxable value of in-house fringe benefits. This is already defined in subsection 136(1) of the Act and means 'the amount that the person could reasonably be expected to have been required to pay to obtain the property or other benefit from the provider under an arm's length transaction.' Amendments along these lines will be made to both in-house property fringe benefits and in-house residual fringe benefits. Expense payment fringe benefits are also covered by implication because they fit within either of the two previous categories.[58]

1.79 The Bill also removes the $1,000 reduction in aggregate taxable value of in-house benefits where they are obtained through a salary packaging arrangement.[59]

1.80 The new provisions apply to all salary packaging arrangements made on or after 22 October 2012. The treatment of pre-existing arrangements will

56 R. Gittins, 'Whopping tax break escapes taxman,' *Sydney Morning Herald,* 5 February 2007, p. 17.

57 *Explanatory Memorandum,* p. 82.

58 *Explanatory Memorandum,* pp. 83-86.

59 *Explanatory Memorandum,* p. 86.

continue as before, until 1 April 2014, unless they are materially altered or varied. All benefits provided on or after 1 April 2014 will be subject to the measure.[60] The FBT year commences on 1 April.

1.81 There are two key definitions for the transitional provisions. An existing salary packaging arrangement means those that were agreed and entered into before 22 October 2012. It is not necessary for the salary to have been reduced or for the benefit to have been provided to meet this criterion. A material alteration or variation of an existing salary packaging arrangement is not defined in the legislation, but will depend on the facts of the arrangement. Changes that are likely to be considered material include those relating to:

- the employer;
- the end date of the arrangement, when fixed; and
- the types of benefits covered.[61]

1.82 The Government's revenue projections from the measure are given in the table below:

Table 1.8 Revenue impacts of fringe benefits measure ($m)

2012-13	2013-14	2014-15	2015-16
15	45	145	155

Source *Explanatory Memorandum, p. 9.*

1.83 In the Explanatory Memorandum, the Government states that compliance costs from the provisions are low. The provisions raise a human rights issue in that they apply from the date of the policy announcement on 22 October 2012, rather than from the date they become law. However, this is not regarded as material because:

- no criminal offences are involved;
- this is a revenue measure and a gap between announcement and commencement of the measure would allow taxpayers to change their arrangements and affect the integrity of the tax system; and
- the legislation is being introduced within a reasonable time after the announcement.[62]

60 *Explanatory Memorandum,* pp. 87, 89.
61 *Explanatory Memorandum,* pp. 87, 89.
62 *Explanatory Memorandum,* pp. 9, 90.

Objectives and scope of the inquiry

1.84 The objective of the inquiry is to investigate the adequacy of the Bills in achieving their policy objectives and, where possible, identify any unintended consequences.

1.85 In its report, the Selection Committee gave the following reasons for referral and principal issues for consideration:

> Implication of policy decisions, in particular: interim streaming rules for managed investment trusts until the commencement of the new tax system for managed investment trusts; income test to the rebate for medical expenses from 1 July 2012; definition of 'limited recourse debt' includes arrangements where, in substance or effect, the debtor is not fully at risk in relation to the debt; removal of the concessional fringe benefits tax treatment for in-house fringe benefits accessed by way of salary packaging arrangements.[63]

Conduct of the inquiry

1.86 Details of the inquiry were placed on the committee's website. On 6 December 2012 the Chair issued a media release announcing the inquiry and seeking submissions.

1.87 17 submissions and a supplementary submission were received, which are listed in Appendix A.

1.88 A public hearing was held in Canberra on Wednesday, 30 January 2013. A list of the witnesses who appeared at the hearing is in Appendix B. The submission and transcript of evidence are available on the committee's website at www.aph.gov.au/economics.htm.

63 House of Representatives Selection Committee, *Report No. 73: Private Members' business and referral of bills to committees,* 29 November 2012, p. 4.

2

Issues in the Bill

Schedule 1 – Native title benefits

2.1 This Schedule has a clearly defined, narrow purpose. It seeks to clarify that payments and other benefits made under native title agreements are not subject to income tax, and that certain transfers of native title to trusts do not attract capital gains tax. This is broadly how the Australian Taxation Office (ATO) has implemented the tax law to date, but the position has been unclear and in a small number of cases Indigenous communities have paid tax because of their particular circumstances. The Schedule is intended to do no more than clarify this uncertainty and facilitate a small number of refunds.

2.2 However, the overwhelming response of witnesses at the hearing was to expand the debate and make wider policy changes to native title. As Native Title Services Victoria observed at the hearing, the policy debate around native title has progressed over the last 20 years.[1] It is only natural that groups involved with and affected by native title would want to improve the way it operates and to help Indigenous communities further benefit from it.

2.3 But these are big questions. A Schedule that clarifies the tax treatment of some native title transactions is not the place in which to consider major policy. These matters can only be addressed through broader consultation, both in terms of who is involved, and the issues that are on the table. Therefore, this report focusses on the Bill.

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1 Mr Matthew Storey, NTSV, *Committee Hansard,* Canberra, 30 January 2013, p. 33.

Should the Schedule proceed?

Background

2.4 The main issue debated at the hearing was whether the Schedule should proceed in its current form. Opinions during the inquiry fell into three categories.[2] Indigenous organisations generally supported the Schedule because it would clarify the relevant income tax and capital gains tax issues. However, they wanted to increase its scope in a range of ways including through the addition of a tax-exempt vehicle, such as an Indigenous Community Development Corporation, broadening scope by amending some definitions, or making investment income generated from native title payments tax exempt.

2.5 The second category was mining groups. These also wanted the inclusion of a tax-exempt vehicle, but thought that the Schedule should not proceed if was not amended. They were especially concerned that the Bill could encourage substantial up front payments to individuals at the expense of longer term, inter-generational goals.

2.6 The final group comprised the Government of Western Australia. It stated that a tax exemption specific to native title was not warranted, outside the normal provisions for charitable trusts. In its view, the Bill should not proceed in any form. The committee does not regard this view as tenable and discusses it further below.

2.7 The idea that investment income using money that has attracted the tax exemption should also be tax exempt was commonly made in submissions.[3] The argument is that, if native title is meant to assist Indigenous communities over generations, then the tax exemption should also apply over this time period:

> Following extinguishment and settlement, the 'asset' is a pool of funds and other non-monetary benefits which are notionally expected to be enjoyed by many future generations of native title holders. It is arguable that the value of native title rights and interests may increase over time. Moreover, the opportunity to invest native title payments will benefit future generations whose native title rights have been lost.
>
> … there are strong policy arguments in favour of extending the income tax exemption to income derived from investing native title benefits. This will encourage native title holders to invest and build upon their asset. It also goes to the original intent of the

2 Various witnesses and organisations, *Committee Hansard,* Canberra, 30 January 2013, pp. 24-25.

3 For example, Ms Fiona Martin, *Submission 1,* p. 5; NNTC, *Submission 12,* pp. 4-5.

> native title system which was to recognise native title as an intergenerational asset to be enjoyed by present and future generations of native title holders.[4]

2.8 Native Title Services Victoria (NTSV) suggested a variation on this. Its proposal was that investment income should be tax exempt up to the point that it has covered the effects of inflation and population growth among Indigenous people. For example, say the typical range of inflation is up to 3.5 per cent annually and Indigenous population growth is approximately 2.5 per cent annually. Then the first 6 per cent of investment income each year would also be NANE income, with the base being reduced if a distribution is made. NTSV argue that this approach is used in related areas, such as:

- fringe benefits tax, where some thresholds are adjusted for inflation;
- the mineral resources rent tax has an uplift factor to take inflation into account; and
- personal injury settlements, where an annuity will be tax exempt, even if it increases in line with inflation.[5]

2.9 The Minerals Council of Australia and the Chamber of Minerals and Energy of Western Australia argued in favour of establishing Indigenous community development corporations as the vehicle through which Indigenous communities receive a tax benefit for their agreements with mining companies and other project proponents.[6] These corporations were included in the Government's 2010 consultation paper, but are not included in the Schedule. The key points of the corporations would be:

- only the corporations would receive the tax exemption, and only when they applied the funds for community and economic development;
- payments to individuals would not be tax exempt, in line with native title's unique, communal nature;
- the corporations would overcome the weaknesses of charitable trusts, which cannot focus on Indigenous development and do not allow for the accumulation of wealth over generations; and
- the formal structure of the corporations would be an opportunity to apply good governance requirements.[7]

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4 Law Council of Australia, *Submission 13,* pp. 5-6.

5 NTSV, *Submission 7,* pp. 3-5.

6 CME, *Submission 5,* p. 4; MCA, *Submission 9,* p. 7.

7 MCA, *Submission 9,* pp. 5-8.

2.10 The Council was especially concerned that individual payments can have a divisive effect on Indigenous communities and saw the corporations as a way of avoiding this. It stated:

> One of the lessons learnt over the last 20 years has been the divisive effect in Indigenous communities of native title benefits being paid directly to individuals. The best known example is the practice of mining companies operating in the Goldfields region of Western Australia during the 1990s of making substantial payments to registered applicants in order to secure grants of tenure, which resulted in multiple overlapping native title claims being made. Where a few individuals can secure control over benefits by virtue of a privileged position in the group, it has a divisive effect on the whole community.[8]

Analysis

2.11 The committee believes that a tax exemption for income and capital gains generated from native title is necessary and appropriate. Native title is derived from Indigenous peoples' cultural and religious relationship with the land that they have enjoyed since before European settlement. Although these rights are external in character to Australia's legal system, legislators none the less have a duty to reconcile the two sets of legal principles, if only because they interact from time to time. Providing a tax exemption under Australian law for income and capital gains closely connected with native title recognises its separate legal character. The committee is in no doubt that the proposals are consistent with native title.

2.12 Another important preliminary matter is whether the provisions will in fact clarify the income tax and capital gains tax implications of native title payments. The ATO commented that this was a complicated area and its experience to date had been in private binding rulings. However, it confirmed that the provisions would have the desired effect:

> My experience to date is that there have been circumstances where, because of the peculiar nature of the arrangement … some of these payments have been treated as being assessable income or generating a CGT liability. Based on the number of private rulings we have given, they are certainly the minority, but they certainly do arise. Those issues would almost certainly be clarified by this legislation such that they would not arise in the future.[9]

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8 MCA, *Submission 9,* pp. 7-8.

9 Mr Robert Puckridge, ATO, *Committee Hansard,* Canberra, 30 January 2013, pp. 20-21.

2.13 Arnold Block Leibler agreed, but from a different perspective. In their view, the ATO has occasionally taken an inconsistent approach to these matters, which would be rectified by the Bill:

> It is absolutely essential that there be new legislation. At present, confusion abounds on the ground. There is inconsistency in tax treatment of payments and of entities. We have some instances where entities are treated as being tax exempt but others that are, for all intents and purposes, exactly the same are treated as not tax exempt … So in fairness to the ATO as much as in fairness to all participating bodies, there needs to be consistency of treatment. That is what is behind the policy intent, as we understand it, of these laws.[10]

2.14 The committee therefore concludes that the Bill will at least achieve its stated goal of clarifying that native title payments will be exempt from income tax and capital gains tax.

2.15 The mining sector was strongly of the view that the Schedule should not proceed because it would have the unintended consequence of encouraging large payments to individuals, which would be contrary to long term development goals:

> I think that the question comes back to the behaviour that you are trying to drive by these tax amendments … If you enacted the legislation or the bill as it is currently, there is no incentive … to have today and tomorrow money. There is a positive incentive to distribute everything immediately. Rio Tinto publicly stated in 2011 that the value of these native title benefits paid out under our agreements in the Pilbara alone was $100 million. That is distributed among five, six or seven agreements, but that is a lot of money to be distributed every year as a straight distribution.[11]

2.16 In order to prevent this outcome, the mining sector has changed the structure of its agreements with Indigenous communities. These days they tend to allow for a small amount of money to be distributed up front, with the majority set aside for longer term goals. BHP Billiton stated in evidence:

> We started off with very simple agreements that created some problems, and one of those problems resulted in the immediate distribution of all of the benefits that were paid. As result of that, the industry in the Pilbara moved to a different regime whereby structures were set up to guarantee the intergenerational

10 Mr Peter Seidel, ABL, *Committee Hansard,* Canberra, 30 January 2013, p. 24.

11 Miss Catherine Crompton, Rio Tinto, *Committee Hansard,* Canberra, 30 January 2013, p. 21.

> improvement that is the government policy and is something that industry is supporting. But we are now in the third era, because there is a recognition within industry that Aboriginal people want the ability to make decisions, and those decisions include the ability to set aside a proportion of funds for the intergenerational benefits but also to set aside a proportion of funds for immediate needs, and the tax regime at the moment is set up in such a way that there is full tax exemption for charitable trusts but you do not always get the full tax exemption where there is a discretionary trust.[12]

2.17 The Yamatji Marlpa Aboriginal Corporation gave the perspective of the other side of negotiating table and confirmed that mining companies have been driving these outcomes in native title negotiations:

> … mining companies have a lot to say in the Pilbara about how they want benefits to be spent and preserved and looked after. Part of the negotiation process is for those things to be reflected in agreements, which the traditional owners have accepted and taken on board. So those sorts of arrangements already exist to ensure that benefits will last into the future.[13]

2.18 Other witnesses confirmed that the general approach in agreements is that payments to individuals are small and usually only made when the recipient needs them.[14]

2.19 On the basis of this evidence, the committee is of the view that the negative outcome from the Bill envisaged by the mining sector is unlikely to eventuate. This is because native title agreements are now structured to prevent it occurring, and this feature of the contracts has been largely driven by the mining companies themselves, and because the schedule seeks to broadly put into law the current tax treatment of native title, not change it.

2.20 Since the Schedule is dealing with the income tax and capital gains tax implications of native title payments, the committee believed it would be appropriate to raise the associated issue of whether investment income derived from them should also receive concessional tax treatment. Treasury stated in evidence that this would not be appropriate because the concessional tax treatment would continue in perpetuity. What is proposed does not apply in other areas of the tax law:

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12 Mr Mark Donovan, BHP Billiton, *Committee Hansard,* Canberra, 30 January 2013, p. 22.

13 Mr Michael Meegan, YMAC, *Committee Hansard,* Canberra, 30 January 2013, p. 24.

14 Ms Fiona Martin, UNSW, *Committee Hansard,* Canberra, 30 January 2013, p. 27; Ms Melanie Stutsel, MCA, *Committee Hansard,* Canberra, 30 January 2013, p. 27.

> I think the issue here is that if anybody receives a payment and it is tax free, when they go and invest that payment they earn income from that payment. So the fact that the lump sum you got to begin with was tax free is pretty well irrelevant to the income that is actually earned from the investment of that payment because there is further income earned there … Otherwise you could keep extending that on and say that no-one ever pays tax in relation to income that has been earned from a native title payment that originally was non-assessable, exempt income …
>
> … it is similar to when you get a compensation payment and go away. If the reason you got that compensation payment was, say, for personal injury and you invest it then that earns income. The fact that it was a compensation payment for personal injury does not keep tagging along on the income that is earned from the actual payment.[15]

2.21 The committee acknowledges that the proposal for an Indigenous Community Development Corporation had support at the hearing. However, this proposal is outside the scope of the Bill and the committee leaves it for future debate.

2.22 The Committee's brief is to enquire into the legislation before it. Native title is relatively new – just 20 years old – and much of the last twenty years has been spent in proving title. Communities are moving to a phase of trying to unlock its economic potential and many of the issues raised relate to larger policy issues. These include the nature of native title once transferred to another economic form, and the mechanisms that should be available to indigenous communities to unlock the economic potential for the benefit of future generations. The larger issues of native title including the pathways for indigenous communities to grow in strength, confidence and skill in the management of their native title rights are complex ones. They are a matter of policy and should be the subject of extensive consultation with indigenous communities.

2.23 Therefore the committee declines to comment extensively on the submissions requesting an expansion of the Bill's range. However, the committee will say that the evidence given indicates that there is work to be done in finding agreement on what is an appropriate legal framework that recognises native title once transferred through a compensation payment to a monetary form. There is also work to be done on the range of mechanisms that indigenous communities seek to use to unlock its

15 Mr Paul McMahon, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 26.

economic potential for the benefit of their community now and in the future.

Conclusion

2.24 The purpose of Schedule 1 is to amend the tax law so that it largely reflects the way that the ATO has been applying the law in relation to native title. It brings certainty to a group of native title holders who would most likely have been assessed as tax exempt by the ATO. Others will have to continue to negotiatate with the ATO on a case by case basis as they do now.

2.25 The Schedule should proceed because the provisions will give Indigenous communities the clarity they need over the tax treatment of payments under native title agreements. The beneficial tax treatment is an appropriate recognition of native title and the committee does not support the position of the Government of Western Australia to 'normalise' taxes in this area.

2.26 The mining sector did express concerns that the Schedule will result in short term payments to individuals to the detriment of long term goals. However, this is unlikely to occur because the mining companies themselves have been driving longer term results in the agreements and the negotiations. Extending the proposal in the Schedule, through making investment income tax exempt, is not warranted. This is because it would create an open ended tax concession that would soon lose connection with the native title interests that initially generated it.

Definition of native title benefits

Background

2.27 Another theme in submissions, particularly from Indigenous groups, was a recommendation that the definition of native title benefits should be broadened. Arnold Bloch Leibler and Yamatji Marlpa Aboriginal Corporation gave the most in-depth coverage of this. They argued that the definition should be broadened to apply to all payments under a native title agreement because:

- the Schedule applies conditions to the definition of a native title benefit, such as requiring the amount or benefit to be connected to extinguishment or impairment of native title, but the Government's press release in June 2012 simply states that the tax exemption applies to 'payments from a native title agreement';

- example 1.8 in the Explanatory Memorandum, which covers the definition of native title benefits, makes no reference to the requirement of an extinguishment or impairment of native title;
- current practice is that native title agreements do not state that payments are being made in return for their effect on native title;
- there is a risk that the ATO will query payments made under ILUAs, well after they are made, as to whether they related to an act affecting native title: 'At best, confusion will abound, and at worst the ATO may assess the payments or amounts as subject to tax (and potentially penalties and interest), with litigation the likely result;'[16] and
- when a court has determined there is no native title, the ATO will investigate in some cases whether an agreement affects native title, which is effectively a 'Kafkaesque inquiry.'[17]

2.28 Fiona Martin from the University of New South Wales made a similar argument, which in essence was that there can be a great deal of uncertainty over native title. ILUAs are typically made so that parties can avoid the protracted process of determining whether native title exists. The Schedule may require Indigenous communities and corporations to obtain additional, costly legal advice on the native title status of a piece of land.[18]

2.29 The hearing discussed the related question of what happens if native title is found not to exist on a piece of land, and whether the legislation should be broadened to cater for this possibility.[19] Ms Martin noted that situations do arise where native title is found to be extinguished after an agreement.[20]

2.30 Ms Martin also commented that many agreements have a commercial dimension and are not necessarily made under the *Native Title Act 1993* or other legislation. This means they would not meet the definition of a native title benefit. Ms Martin recommended that the tax exemption 'should apply to ordinary commercial arrangements.'[21]

2.31 The Minerals Council of Australia and the Chamber of Minerals and Energy of Western Australia also recommended that commercial agreements should be eligible for the tax exemption. Although they did so in the context of other changes to the Schedule, they noted that there is

16 ABL and YMAC, *Submission 4,* pp. 2-5.
17 Mr Peter Seidel, ABL, *Committee Hansard,* Canberra, 30 January 2013, p. 20.
18 Ms Fiona Martin, *Submission 1,* pp. 3-4.
19 Mr Matthew Storey, NTSV, *Committee Hansard,* Canberra, 30 January 2013, p. 31.
20 Ms Fiona Martin, UNSW, *Committee Hansard,* Canberra, 30 January 2013, p. 16.
21 Ms Fiona Martin, *Submission 1,* p. 4.

often ongoing uncertainty around native title in some locations, which means that some agreements would be unnecessarily excluded.[22] Agreements with Indigenous people in regional Australia often take native title into account, even when it is apparently extinguished.[23]

2.32 Connected to this is the position of the Chamber and the Council that the tax exemption should not be compensation for an effect on native title, a view which is shared by the Government of Western Australia.[24] They argue that negotiated benefits cover a range of issues in addition to native title, including land access, community and business development, and employment. Having a tax exemption linked to native title effects could also adversely affect mining access negotiations:

> Importantly, negotiations are greatly assisted by avoiding disputation over the percentage of benefits that are to be attributable as compensation, given the complexity of the issues in assessing how native title has been affected or will be affected and the lack of case law as a guide on quantifying compensation …
>
> … the Government's proposals potentially encourage a narrow legalistic focus on native title compensation in agreement negotiations rather than an approach that prioritises addressing the long term relationship between proponents and Indigenous groups.[25]

Analysis

2.33 At the hearing, Treasury responded to the suggestion that the definition of a native title benefit should be expanded by stating that this would affect the integrity of the measure. Potentially, any agreement where an Indigenous community receives payments from an external party could be tax free:

> … if you start trying to expand beyond payments that are, strictly speaking, for native title to include other sorts of payments, there are integrity concerns around that when you consider: what if there is a payment for services provided which is more like remuneration or contracting or something like that so that the payment goes to the Indigenous community for services provided?

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22 CME, *Submission 5,* p. 3.

23 MCA, *Submission 9,* p. 4.

24 CME, *Submission 5,* p. 3; MCA, *Submission 9,* pp. 4-5; Government of Western Australia, *Submission 15,* pp. 4-5.

25 MCA, *Submission 9,* p. 5.

> The treatment should not apply to those types of payments. So you cannot sort of just broadly switch off the notion and say, 'Everything that falls underneath the heads of this agreement is treated as a native title payment.'[26]

2.34 The committee agrees that any commercial payment to an Indigenous community, without a clear link to native title, does not necessarily warrant becoming non-assessable, non-exempt income, particularly without reference to the larger debate on native title. The potential for abusing such a provision is too broad and if it were enacted, the committee would expect that amending legislation would soon be introduced to narrow its scope.

2.35 Government witnesses also responded to the concerns expressed that the tax benefits would not flow to Indigenous communities where it had been found that native title did not exist, contrary to the policy intent. The Department of Families, Housing, Community Services and Indigenous Affairs stated that the provisions were drafted on the basis that an inquiry into the precise effect on native title would not be required for the tax benefit to apply. The Department expressed this as, 'there is a nexus to an act that affects native title, but … there is no requirement for inquiry as to the essential nature of the payments.'[27]

2.36 Treasury made similar comments. It stated that the Office of Parliamentary Counsel has given its formal advice that the provisions will implement the policy intent of allowing the tax benefit to apply, even if native title is subsequently found not to exist. This policy intent is expressed in the Explanatory Memorandum and Treasury expects that the ATO will adopt this approach as well:

> Our clear intention was, as the explanatory memorandum said, to give effect to the government's decision that it should apply in such cases. That would be consistent with the way we understand Indigenous land use agreements are treated under the Native Title Act. We gave those instructions to Parliamentary Counsel. These are the words they came up with. Their advice is that it does give effect to that intention. I accept that it is possible to interpret it in a different way, but where you are confronted with two interpretations that are potentially at odds, the Acts Interpretation Act would require you to prefer the interpretation that gives effect to the legislative intent. I would expect the Taxation Office to take

26 Mr Paul McMahon, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 32.

27 Ms Libby Bunyan, FAHCSIA, *Committee Hansard,* Canberra, 30 January 2013, p. 31.

> that view. The legislative intent is clearly stated in the explanatory memorandum.[28]

2.37 The committee is satisfied by this explanation. The Office of Parliametary Counsel are the technical experts in this matter and it is ATO practice to implement the policy intent of the law, which is clearly expressed in the Explanatory Memorandum.

2.38 In relation to the comments of Arnold Bloch Leibler, the committee understands that it may be artificial to determine whether there is a native title effect in an agreement where native title is later found not to exist. However, the committee notes that this broadly correlates with current practice by mining companies. They are prepared to negotiate with Indigenous communities as long as they assume traditional responsibilities, even if native title is later found not to exist:

> What we see right across the Pilbara and the Murchison is native title parties that get a seat at the table by virtue of their status as registered native title claimants—or in some cases even if they are not registered—and mining companies are prepared to negotiate an agreement with them … In many case mining companies are content for those payments to continue even if at some stage in the future—whether it is five or ten years—that a registered native title claimant is unable, because of the vagaries of proof in the Federal Court, to secure its native title, so long as it maintains a claim on traditional responsibilities. Mining companies well understand that, so long as there is a group that claims responsibility for that country, it is sufficient.[29]

2.39 The alternative under a high integrity system is more problematic. If a greater connection to native title was required, then the risk is that, in order for the ATO to assess whether income should be tax free, it will need to formally determine the native title status of land. In other words, the tax system would drive native title litigation. This is clearly undesirable, and hence the approach in the Bill will make the system more workable.

Conclusion

2.40 The proposals to broaden the definition of native title benefit are too broad and would serious affect the integrity of the measure. If the tax exemption applied to any commercial arrangement, the integrity problems would be readily apparent and the provisions would be soon amended. The committee would prefer that the Schedule proceed as proposed. The ATO

28 Mr Gregory Pinder, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 32.

29 Mr Michael Meegan, YMAC, *Committee Hansard,* Canberra, 30 January 2013, p. 32.

has stated that the Schedule will give the required clarification in cases where Indigenous communities have paid tax. Future agreements can be structured to take into account the new law.

2.41 Stakeholders were concerned about how the law would operate if native title was found not to exist in particular communities. The Office of Parliamentary Counsel has confirmed that the tax exemption will still apply in these cases, and the ATO will implement this policy intent because it is expressed in the Explanatory Memorandum. Although the legislation has some artificiality in that there must be a native title connection when it may not formally exist, this is useful because it prevents the tax law driving native title litigation.

Definition of an Indigenous holding entity

Background

2.42 Another issue raised in submissions was that the definition of an Indigenous holding entity should be broadened, as should the definition of a distributing body, which comprises part of the definition of an Indigenous holding entity. Unpacking these definitions gives this composite definition of an Indigenous holding entity:

- a trust where the beneficiaries are either distributing bodies or Indigenous persons;
- an Aboriginal Land Council established under the land rights legislation;
- a corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI);
- any other incorporated body that:
  - ⇒ is established by or under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals; and
  - ⇒ is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Aboriginals or to apply such moneys for the benefit of Aboriginals, either directly or indirectly.

2.43 The policy intent behind the Schedule appears to be to confine the tax benefits to Indigenous persons. However, the comments in submissions are to the effect that it is unnecessary and would lead to impractical results.[30] Specific comments were:

30 LCA, *Submission 13,* p. 5.

- CATSI bodies have members, rather than shareholders, so cannot raise capital and are not well suited to business enterprises, compared with bodies created under the corporations law;[31]
- long standing Indigenous corporations incorporated under prior legislation will not be included, such as companies limited by guarantee, or trusts with a charitable unincorporated association or trust as a beneficiary;[32]
- many Indigenous organisations do not want to incorporate under laws that specifically relate to Indigenous persons, such as the CATSI Act;[33]
- a trust that has a general power to appoint additional beneficiaries will not be included, so all trusts would need to review and possibly amend their trust deeds, or new entities might be required;[34] and
- some Indigenous bodies provide community infrastructure that also services a small proportion of non-Indigenous clients, such as remote area health services, and these would be excluded under the Schedule.[35]

2.44 The committee received two specific suggestions. The Law Council of Australia recommended that bodies established under the corporations law could be included if they were subject to the same limitation as applies to trusts in paragraph 59-50(6)(b), that is 'if the beneficiaries of the trust can only be Indigenous persons or distributing bodies.'[36]

2.45 Ms Fiona Martin from the University of New South Wales recommended that the definition of a distributing body be expanded to include:

- an association, society or body incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976;* and
- any other incorporated body that is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Aboriginals or to apply such moneys for the benefit of Aboriginals, either directly or indirectly.[37]

Analysis

2.46 The committee put these arguments to the Government witnesses at the hearing. The ATO commented that the provisions were drafted so as to protect the integrity of the exemption, or in other words, to ensure that

31 Ms Fiona Martin, *Submission 1,* p. 4.

32 Ms Fiona Martin, *Submission 1,* p. 4; ABL and YMAC, *Submission 4,* p. 6; NNTC, *Submission 12,* p. 4.

33 ABL and YMAC, *Submission 4,* p. 6

34 ABL and YMAC, *Submission 4,* pp. 5-6.

35 NNTC, *Submission 12,* p. 3.

36 LCA, *Submission 13,* p. 5.

37 Ms Fiona Martin, *Submission 1,* p. 5.

only Indigenous people could claim NANE status from native title payments. The broader the definition of Indigenous holding entity, the greater the risk that non-Indigenous people could enjoy the concessional tax treatment:

> … as a general statement, the broader it is and the more difficult it is to relate it back to a particular native title claim or, in some cases, simply to an application or an agreement, the more difficult it will be for us to ensure that there is any integrity in the system. This happens all the time. Just to make a general comment: when you have an exempt system, the broader the definition of the exemption the more likely it is to lead to unforeseen consequences … We would say that our preference is to have a targeted exemption …[38]

2.47 The committee supports this approach. It would generally prefer that a tight regime be introduced, rather than a regime that is too loose that then needs to be tightened. The exception to this approach is where any specific unintended consequences are apparent.

2.48 One such possible adverse consequence was the comment by the National Native Title Council relating to community infrastructure, such as regional health services. These facilities also service a small proportion of non-Indigenous people and the Council queried whether this meant that they would be excluded under the Bill. The committee put this to Treasury, who responded that incidental benefits to non-Indigenous people would not be caught by the provisions:

> … I do not think it would stop the payment that was being spent in this way from being a native title benefit. It would be impractical to try and eliminate all cases where there was some incidental benefit to non-Indigenous people. If a sporting facility, a park or anything of that nature were built out of those funds, I do not think the legislation would exclude that from being a native title payment; and, therefore, it should still get the non-assessable non-exempt treatment. It might be different if someone started paying somebody's bills directly.[39]

2.49 Treasury also responded to the concern that trusts that have a power to appoint additional beneficiaries would have to amend their trust deeds to ensure that they are within the definition of an Indigenous holding entity. Treasury acknowledged that the deeds may have to be amended, but suggested the best way of doing this would be to remove the power of

38 Mr Robert Puckridge, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 26.

39 Mr Paul McMahon, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 27.

appointment. Instead, trusts could provide for future generations to automatically become beneficiaries of the trust from the day they are born.[40]

Conclusion

2.50 The committee is satisfied with the approach of having a targeted exemption through the proposed definition of an Indigenous holding entity. This will protect the integrity of exemption and ensure it is confined to Indigenous people. Some Indigenous organisations may have to change the formalities of their arrangements, but these compliance costs are reasonable, given the long run benefits these groups will receive from having their native title income classified as NANE.

2.51 The committee was able to obtain clarification at the hearing about Indigenous organisations that provide community infrastructure, such as health services, and where non-Indigenous people are able to gain an incidental benefit from them. The Schedule will not exclude those organisations from being an Indigenous holding entity, as long as the benefit to non-Indigenous persons remains incidental.

Retrospectivity

Background

2.52 The Bill backdates the exemption to 1 July 2008 and makes consequential amendments to allow taxpayers to have their assessments amended for this purpose. The Law Council of Australia recommended that the exemption instead be backdated to the commencement of the *Native Title Act 1993*. Its argument is as follows:

> The Law Council acknowledges that this may result in some challenges associated with retrospective tax refunds over a significant period of time. However, the Bill represents a clear acknowledgment that taxing native title benefits may be inimical to the purpose for which the payments have been made. It is also acknowledged in the draft Explanatory Materials that 'benefits provided in respect of native title do not result in a net gain to the recipient'.[41]

2.53 The opposite view was put by the Government of Western Australia, in that it would now have to incur additional costs because of

40 Mr Paul McMahon, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 33.

41 LCA, *Submission 13,* p. 7.

retrospectivity.[42] However, it did not elaborate why these costs would be incurred, or how much they were.

2.54 The Minerals Council of Australia provided a different perspective again on retrospectivity. It thought that this would impose additional obligations on the Government, including:

- substantial tax refunds to individuals and organisations that received native title payments;
- establishing a clear and transparent process for making claims and calculating refunds; and
- allocating resources to the ATO and the courts to resolve any disputes that may arise.[43]

Analysis

2.55 At the hearing the committee asked Treasury why 1 July 2008 was chosen as the date for retrospectivity. Treasury responded that it was unlikely that anyone had paid tax relevant to the Schedule before that date.[44] Therefore, although a retrospectivity date back to 1993 may be attractive in theory, in practice a retrospectivity date of 2008 is all that is required.

2.56 The committee also questioned whether the ATO would be involved in additional compliance activity following the legislation. The ATO stated that it was 'very unlikely' that it would revisit previous agreements with a view to obtaining more revenue, unless important new information came to light.[45]

2.57 On the basis of this evidence, the committee does not believe that the retrospectivity provisions will lead to the ATO incurring substantial implementation costs, as suggested by the Minerals Council of Australia. The committee's sense of the issue is that the ATO and Treasury have a reasonable idea who is entitled to a refund, commencing with those taxpayers that sought private binding rulings. The ATO also stated that the provisions will greatly clarify the tax liabilities in these matters, and so the committee expects any disputes to be at a minimum.[46]

Conclusion

2.58 The committee supports the retrospectivity of the provisions because it is to the benefit of taxpayers. It has also been calculated with reference to the

42 Government of Western Australia, *Submission 15,* p. 4.

43 MCA, *Submission 9,* p. 9.

44 Mr Paul McMahon, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 30.

45 Mr Robert Puckridge, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 30.

46 Mr Robert Puckridge, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 21.

most likely point when income tax or capital gains tax has been paid in relation to a native title payment. Given that the ATO already has some knowledge about the taxpayers whom the provisions are likely to benefit, the committee expects that implementation should not be problematic.

Schedule 5 – Rebate for medical expenses

Background[47]

2.59 The committee received one submission on the Schedule. The Australian Medical Association (AMA) expressed concern about the provisions and recommended that the Schedule be removed from the Bill. The AMA's reasoning was that the incidence of illness does not depend on income, and therefore neither should government safety nets:

> Illness does not discriminate between the rich, the poor, the young, the aged or the frail. Previous Governments have designed safety nets to ensure that every Australian who experiences high out-of-pocket medical expenses because of high, and often unexpected, medical needs in a given period, is supported financially through these difficult periods. Safety nets ensure that patients can continue to have affordable access to the care they need to recover and restore their normal, productive lives.
>
> All Australians, regardless of their income, are eligible for the Medicare Benefits Schedule (MBS) and Pharmaceutical Benefits Scheme (PBS) safety nets. The net medical expenses tax offset (NMETO) provides the final safety net for patients, after the MBS and PBS safety nets have been applied. In the policy context, it is incongruous to apply an income test to the NMETO.[48]

2.60 The AMA also sought to differentiate means testing for health insurance and means testing of safety nets for medical expenses. It noted that high income earners already 'make a higher contribution to health care' through the tax system. It also argued that the financial savings to the Government would be modest, and hence not worth pursuing.[49]

47 Submission evidence only; representatives of the AMA were unavailable to attend the hearing.

48 AMA, *Submission 11,* p. 1.

49 AMA, *Submission 11,* pp. 1-2.

Analysis

2.61 The Government's position is that the Bill is part of an overall drive to improve the sustainability of the health system. Better targeting health expenditure, such as an income test on the offset, is part of this strategy.[50]

2.62 The Government has also argued that the Bill does not infringe any human rights in relation to health in the International Covenant on Economic Social and Cultural Rights. This is because the Bill does not reduce the availability of health care. Instead, it requires those who have a greater capacity to pay to take more responsibility in supporting the health system.[51]

2.63 The committee agrees that the sustainability of the health system should be a high priority and the Schedule should be viewed from that perspective. Reducing government support for medical services for high income earners, who have a greater capacity to pay, is consistent with that goal. There are many instances in Australia where means tests are applied to government benefits and they enjoy broad support.

2.64 The AMA argued that there is a difference between means testing for health insurance and means testing of safety nets for medical expenses incurred. However, the AMA did not elaborate why this was the case and the committee is not aware of any compelling arguments to support this claim.

2.65 Finally, the AMA's argument that the improvement to revenue of the measure is too small to be worth pursuing ignores the practicalities of managing a government budget. Budgets comprise a large number of small programs, as well as a small number of large programs. Budget savings and budget responsibility require the proper management of both the smaller and larger programs. If all smaller programs escape review, then the total cost to the budget can be substantial. A saving of $100 million in one program, potentially replicated across the large number of programs the Government supports, can make a real difference to the budget outcome.

Conclusion

2.66 In the Schedule, the Government is taking a proportionate approach to deliver a budget saving and support the sustainability of the health system. The measure will not affect the availability of health care in Australia, but better target government assistance through means testing, which is widely used across many policy areas. The AMA made a number

50 *Explanatory Memorandum,* p. 58.

51 *Explanatory Memorandum,* p. 69.

of arguments against the Schedule, but they either were not substantiated, or did not withstand scrutiny.

Schedule 6 – Limited recourse debt

2.67 At the hearing, Ashurst Australia supported the Schedule in the sense that it was appropriate to respond to the BHP Billiton case.[52] In other words, Ashurst supported the policy intent. However, it raised a number of other issues, and these are dealt with below.

Breadth of the provisions

Background[53]

2.68 The Property Council of Australia, Ashurst Australia, and the Institute of Chartered Accountants in Australia were all concerned that the provisions potentially had a wider scope than the policy intent. For example, they were concerned that the Bill does not specifically refer to special purpose vehicles and can cover other entities.[54] Ashurst stated in evidence:

> … the tax office's concern is with related party situations. The situation … just outlined is not a related party situation, and it seems to us that a sensible way of resolving this is to confine the scope of these proposed changes to related party situations, which would protect the revenue without introducing this level of uncertainty into the general business community.[55]

2.69 The Institute argued that including an exemption for small business would be consistent with the Government's policy of simplifying the tax system for this sector. It recommended that 'a debt arrangement of $1 million or less be excluded from the definition of "limited recourse debt".'[56]

Analysis

2.70 In the light of the facts in the BHP Billiton case, the stakeholders' proposed that the amendments should be limited to related party transactions. The committee put this proposal to the ATO and Treasury. However, these

52 Mr Paul O'Donnell, Ashurst Australia, *Committee Hansard,* Canberra, 30 January 2013, p. 1.

53 Neither the ICAA nor the PCA attended the hearing. Both organisations stated that their submissions fully represented their views.

54 ICAA, *Submission 8,* p. 3; PCA, *Submission 10,* p. 2.

55 Mr Ian Fullerton, Ashurst Australia, *Committee Hansard,* Canberra, 30 January 2013, p. 6.

56 ICAA, *Submission 8,* p. 3.

witnesses responded that the limited recourse debt provisions in Division 243 have an important role within the tax framework. Further, the definition of 'related party' is complex and inserting such a term in the tax law would not necessarily provide certainty to taxpayers:

> In finance tax there is a great deal of argument about what is or what is not a related party, and there is a lot of detail that you have to go into sometimes in order to see what the real nature of a relationship is. In that particular vein, and particularly because it is a minor clarifying change, we do not really think that it is appropriate to further confine it. All taxpayers should be treated the same, shouldn't they?[57]
>
> From a policy perspective I want to clarify that Division 243 is not designed to deal with related parties. It is designed for when the equity risk is being shifted through a financing arrangement from the borrower to the lender so that the borrower cannot get the capital allowance deduction, but the lender can get a deduction for credit risk assumed.[58]

2.71 The committee finds these arguments compelling. Although the amendments have been triggered by the BHP Billiton case, the provisions' role in the tax system is more fundamental than dealing with complicated transactions between subsidiaries in a corporate group. Further, the concept of related parties is difficult to legally define and using this term would, of itself, increase uncertainty for taxpayers.

2.72 These arguments also respond to the proposal by the Institute that there should be a small business exemption from the provisions. The evidence from Treasury and the ATO is to the effect that Division 243 has an important role to play in preserving the integrity of the tax system with smaller enterprises as well, and so a small business exemption would not be appropriate.

Conclusion

2.73 The argument that the provisions should be limited to related party transactions appears attractive in the first instance, as did the idea that there should be a small business exemption. However, such limitations would increase complexity and are inappropriate given the role Division 243 has in protecting the integrity of the tax system.

57 Mr Michael Pols, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 7.

58 Ms Nan Wang, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 7.

The meaning of 'predominantly'

Background

2.74 Ashurst Australia suggested that the word 'predominantly' in the new provisions was uncertain. In the examples in the Explanatory Memorandum, the borrowings to purchase the project asset are equal to or greater than 80 per cent of the asset's value. Ashurst queried whether the provision would still be satisfied at lower proportions of borrowing. It recommended that 'predominantly' be more clearly defined in the Bill and the Explanatory Memorandum.[59]

Analysis

2.75 At the hearing, the committee put this to the ATO. Its response was that the use of the word was 'a well-trodden path' and it was a known term.[60] Broadly, 'predominantly' could be described as any proportion above a half:

> The court's interpretation of the word 'predominantly' is largely—and probably more of a rule-of-thumb aspect—51 per cent or more. That is the sense we have within the ATO of the word 'predominantly'. It is not the sole purpose—it does not have to be to that extent—but it is something that is perhaps overwhelming or largely a majority …[61]
>
> The High Court has dealt with this at great length in relation to the general anti-avoidance provision: predominant and dominant being the same kinds of expressions and having the same kind of context.[62]

Conclusion

2.76 The committee is satisfied that 'predominantly' is well known and represents any proportion above a half.

Safe harbour

Background

2.77 Safe harbour was an issue for stakeholders. In the consultations for the Bill, and in the Explanatory Memorandum, the Government states that any risk of unintended consequences through more broadly defining

59 Ashurst Australia, *Submission 3,* p. 2.

60 Mr Peter Chocula, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 6.

61 Mr Peter Chocula, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 6.

62 Mr Michael Pols, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 6.

limited recourse debt will be covered by subsection 243-20(6).[63] This provides that an arrangement will not be considered as limited recourse debt if, 'having regard to all the relevant circumstances, it would be unreasonable for the obligation to be treated as limited recourse debt.'

2.78 The Property Council of Australia made a specific suggestion for a safe harbour. It recommended that a safe harbour apply where:

- the assets (of the entity) that lead to the creation of the capital allowance deductions represent less than 50 per cent of the entity's total assets; or
- loans are not limited recourse debt by the terms of the contract (and therefore escape subsection 230-20(1); and
  - ⇒ the entity's liabilities are less than 75 per cent of assets; or
  - ⇒ gearing is more than 75 per cent, but the lender has recourse to all the entity's assets and the loan is on arms' length terms.[64]

2.79 If this proposal is not accepted, then the Council recommended that the Bill be redrafted 'to clarify that the provisions will have no operation where the relevant debt is fully repaid.' The Council is concerned that the provisions may be triggered when the relevant debt has been repaid.[65]

2.80 If the above are not implemented, then the Council recommended that the Explanatory Memorandum be amended to provide further clarity about the operation of subsection 230-20(6). The Institute also took this view and it provided three specific examples in its submission that it believed would not be captured by the Bill. It recommended that these scenarios should be included in the Explanatory Memorandum, along with Treasury's analysis of them, to provide certainty to taxpayers.[66]

Analysis

2.81 The clearest indication for amending the existing protective provision in subsection 230-20(6) would be if it was not operating as intended or had been demonstrated to be problematic. However, the committee received no evidence to this effect. Therefore, the committee does not believe that amendments are necessary.

2.82 The committee is also of the view that it is not necessary to include the Institute's scenarios in the Explanatory Memorandum. This document is not meant to provide detailed advice about tax Bills. Rather, it is designed

63 *Explanatory Memorandum,* p. 76; The Treasury, *Limited recourse debt – Amended definition: Summary of consultation process,* November 2012, p. 2.

64 PCA, *Submission 10,* p. 2.

65 PCA, *Submission 10,* p. 2.

66 ICAA, *Submission 8,* p. 3; PCA, *Submission 10,* p. 2.

to demonstrate the policy intent and give Parliament and the wider community an explanation of the proposals at a more general level.

2.83 If an individual taxpayer wants certainty about interpreting a tax law, then they have the option of applying for a private binding ruling from the ATO. The committee understands that the transactions in this area are very complicated and that the tax outcome can depend on a range of factors. In these circumstances, a private binding ruling is the forum for this detailed analysis. The more general approach in Explanatory Memorandums is designed to explain how a Bill implements the policy intent.

Conclusion

2.84 The committee appreciates that taxpayers may wish to increase certainty in relation to new tax measures. However, the proponents of safe harbour provisions did not explain how the current protections for taxpayers are deficient. The proposal that the Explanatory Memorandum should have specific, detailed examples of how the provisions would work confused the role of the Explanatory Memorandum with private binding rulings. The latter are the proper process for considering the detailed operation of the tax law as it relates to specific and often complex fact scenarios.

Retrospectivity

Background

2.85 The legislation will apply to debts that terminate on or after 7.30 pm on 8 May 2012. Ashurst and the Council expressed the concern that debts that were created before this time, on the basis that they were not limited recourse debts, may now become so. This creates uncertainty for business.[67] Ashurst stated in evidence:

> … I think that the courts have suggested that you actually have to go back to the time when the loan is made in order to characterise whether or not it is limited recourse debt … So it is probably not technically true to suggest, at least in our view, that, if a termination occurs after the announcement last year, it only has effect—basically you are asking the taxpayer to effectively recharacterise something that he had no knowledge of at the time the loan was made, which admittedly gives rise to tax consequences after the announcement but which involves a recharacterisation of legal relationships that were in place before

67 Ashurst Australia, *Submission 3*, p. 3; PCA, *Submission 10*, p. 7.

> the announcement was made. That was the sense in which we thought it was retrospective.[68]

2.86 Ashurst also noted that taxpayers with similar circumstances could have very different tax outcomes. For example, assume two different companies that borrow in 2005 and their arrangements meet the new definition of limited recourse debt, but not the old definition. One loan goes bad on 7 May 2012 and the other goes bad on 9 May 2012. The company with the second loan may have its assessable income increased under the legislation, without the opportunity to restructure its affairs, whereas the other company does not face the same risk.[69]

2.87 The Council recommended that the new definition of limited recourse debt should not apply to arrangements that commenced before 8 May 2012. If this is not implemented, then the Council recommends that entities with arrangements that will now be classified as limited recourse debt be given the opportunity to restructure their affairs in a tax effective manner.[70]

Analysis

2.88 The committee received two opposing views on retrospectivity at the hearing and what effect this had on taxpayers. The ATO stated that the policy intent and the expectation among taxpayers was always that Division 243 applied to special purpose entities:

> … it was discussed when the provision was enacted whether it did apply to single purpose entities. There was a general expectation that it did apply to single purpose entities, and that is evidenced by some of the statements that were made by externals on their own websites. There are examples that the ATO retains in relation to an explanation by one law firm that they expected that the provision when enacted would apply to single purpose entities. There were some submissions provided and there was no change made to the legislation to carve out single purpose entities. On that basis, we had a sense always and until the High Court provided its decision that it did apply to single purpose entities.[71]

2.89 However, Ashurst Australia argued that the courts' interpretation has technically applied since Division 243 was first enacted. Therefore, the Schedule is changing the law:

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68 Mr Ian Fullerton, Ashurst Australia, *Committee Hansard,* Canberra, 30 January 2013, p. 3.

69 Ashurst Australia, *Submission 3,* p. 3.

70 PCA, *Submission 10,* p. 7.

71 Mr Peter Chocula, ATO, *Committee Hansard,* Canberra, 30 January 2013, p. 8.

> … I agree that we can actually have our own views, but it is really what the High Court thought and, to put it mildly, opened, when you read the legislation. With all due respect to the High Court, it is obvious that they make the law. Regardless of what people other than parliament might have said at the time the legislation was enacted, it looks as though this is a change of law, and it does seem to have consequences if you are making a lending decision in a project finance context.[72]

2.90 The committee appreciates Ashurst's argument, but it does not reflect the practicalities of administering the tax system. If the Government of the day announces that a law will have a particular effect and there is some level of consensus that it will do so, then the committee would expect the ATO to administer the law on this basis. Individual taxpayers can interpret tax law differently and pursue this in the courts, but if the consensus is in line with the policy intent, then the great majority of investment decisions will be consistent with this and legislative correction will have a minimal effect.

2.91 The committee does not find persuasive Ashurst's example about taxpayers being treated differently, depending on the date when a debt went bad. The taxpayer whose debt goes bad between the decision of the High Court in the BHP Billiton case and the Budget announcement is in fact receiving a windfall gain. In other words, the inconsistency in treatment is beneficial for a small group of taxpayers.

Conclusion

2.92 The committee considers that the Bill is prospective from the date of announcement. It is true that it applies from before the Royal Assent, however this is common for integrity changes.

Schedule 7 – In-house fringe benefits

Reasons for the reforms

Background

2.93 Ernst & Young recommended that Schedule 7 should not proceed because it does not have sound underlying reasons. In particular, it stated that the ultimate revenue gain of $190 million annually is small in terms of total tax receipts. It also suggested that the policy objectives of the reform are

72 Mr Paul O'Donnell, Ashurst Australia, *Committee Hansard*, Canberra, 30 January 2013, p. 8.

not clear.[73] Ernst & Young argued that there is nothing in the original legislation that suggests that there is meant to be a limit to salary sacrificing. They also argued that there are other options available in limiting salary sacrificing that would protect more revenue:

> … in reviewing the [Act] and the supporting Explanatory Memorandum ('EM'), there is nothing to indicate that the intention of the legislation is anything other than how it is worded, which is to allow employers to provide the same products or services to their employees that they ordinarily provide to the public, at a concessional valuation …
>
> There is nothing in the Act or the EM that indicates the intent of the legislation is not to allow employees to access these benefits by way of a salary sacrifice arrangement. Additionally it is noted that the proposed measures in the Bill are not intended to stop salary sacrifice benefits generally, nor does there appear to be any public policy to do so, as salary sacrifice arrangements are still widely available for a range of other benefits where the potential revenue gain would be significantly greater than that which is proposed under these measures.[74]

2.94 Ernst & Young also raised equity concerns about the Schedule, in that the effects of the Schedule would be felt more by lower income workers:

> I think it is fair to say that the group of people that this is likely to impact is significantly different from recent budget changes. If we go back to the budgets last year and in recent history, there have been a number of changes designed to isolate what are considered to be executive perks, if you like … But this measure will have a very different impact because it will largely impact a blue-collar work base. Even though it might only be $1,000 worth of tax concessions, it is a concession that is considered a very important one to those people who will be affected.[75]

2.95 Ernst & Young extended this argument to low income employees in other industries, such as retail.[76]

2.96 If the provisions nevertheless proceed, Ernst & Young recommended that limits be placed on salary sacrificing in-house fringe benefits that will not affect low to middle income earners. Examples are a cap on the amount of in-house fringe benefits that are concessionally taxed, and an income limit

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73 Ernst & Young, *Submission 14,* pp. 3-4.

74 Ernst & Young, *Submission 14,* p. 3.

75 Mr Paul Ellis, Ernst & Young, *Committee Hansard,* Canberra, 30 January 2013, p. 10.

76 Mr Paul Ellis, Ernst & Young, *Committee Hansard,* Canberra, 30 January 2013, p. 11.

so that the concession is only available to individuals whose annual earnings are below a certain amount. Ernst & Young state that both approaches are used for employee share schemes:

- there is a $5,000 limit on salary sacrificing shares offered under a tax deferral scheme; and
- a $1,000 reduction is available for taxed up front schemes for individuals who earn less than $180,000 annually.[77]

Analysis

2.97 At the hearing, Treasury responded to these claims by stating that the reduced rates of tax for in-house fringe benefits was initially designed to benefit employers, on whom fringe benefits tax is levied, rather than employees. However, as time has progressed, the tax advantages of in-house benefits has meant that more employees are taking advantage of them, and they are now seen as a benefit for employees, contrary to their original purpose:

> The policy behind this change was to ensure that the tax concession that is provided in the fringe benefits tax law actually benefits the employer. It just so happens over time employees have moved into more and more salary sacrifice arrangements and through the interaction between the income tax system and the fringe benefits tax system employees are now getting an income tax advantage by salary sacrificing which is different to what the intention of the original provisions was, that the concessional treatment there was for the benefit of the employer in terms of recognising what the costs of providing those benefits were. So it becomes a matter of should the concessional treatment be available for the employer or should the tax system be subsidising some employees who have the ability to salary sacrifice in-house benefits?[78]

2.98 In this comment, Treasury has also touched on one of the less attractive features of salary sacrificing, namely that the ability to take advantage of it varies widely across employees. Higher income earners have higher marginal rates of tax and so make greater savings for each dollar they can salary sacrifice. Further, an employee is only able to salary sacrifice if their employer offers it. At the hearing, Ernst & Young suggested that salary sacrificing had become an important feature of remuneration packages in

77 Ernst & Young, *Submission 14,* p. 4.

78 Ms Raylee O'Neill, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 14.

the electricity sector.[79] However, there is no reason why employees in particular parts of the private sector, such as retail, electricity, or private education, should have the additional advantage of concessionally taxed in-house fringe benefits, while other sectors do not.

2.99 Ernst & Young's argument that the amounts involved are small compared with the total Budget were dealt with in relation to Schedule 5, the medical expenses rebate. In short, the argument ignores the reality of public sector budgeting, where all programs must withstand scrutiny. If budget savings are not made because an individual program is small, then this argument could be applied to other small programs, which would mean that a substantial proportion of public expenditure would be exempt from review.

Conclusion

2.100 Concessionally taxing in-house fringe benefits was a theoretically-based refinement to the tax, introduced at its inception. It was designed to benefit employers, on whom the tax is levied, in recognition of the fact that it costs them less to provide in-house fringe benefits. Over time, the in-house provisions have had unintended consequences because they have evolved into a benefit for employees that has no policy basis. Therefore, there are good policy reasons for the amendments.

2.101 Although the argument was made that amending the in-house provisions would be inequitable because they adversely affect lower income earners in some specific sectors, overall, the beneficiaries of salary sacrificing tend to be higher income earners. Whether of benefit to higher or lower income earners, the in-house provisions are of themselves already inequitable because they are only available in certain industries and with certain employers, without a policy basis.

Transitional rules

Background

2.102 The Schedule introduces some transitional rules so that employees with a salary sacrificing arrangement in place on the announcement date will continue to receive the concessional tax treatment until 1 April 2014. An employee who commences salary sacrificing from the date of announcement, 22 October 2012, will be subject to the new rules. Material variations to an existing arrangement will trigger the new provisions. These include changing employer, the types of benefits covered, and changing the end date of an arrangement, when it is fixed.

79 Mr Paul Ellis, Ernst & Young, *Committee Hansard,* Canberra, 30 January 2013, p. 9.

2.103 In its submission, Ernst & Young recommended that, if the provisions become law, they should commence on 1 April 2014 with no transitional rules. Their reasons were:

- commencing the provisions on 22 October 2012 for new agreements has not given employers sufficient time to consider the impact of the changes on their business;
- the 22 October 2012 start date is part of the way through the FBT year, which may result in inequitable outcomes for some employees, in particular where they salary sacrifice from time to time ('deduct and pay'), rather than through an ongoing arrangement ('accrual');
- the loss in revenue will be marginal ($20 million in 2011-12 and $55 million in 2012-13); and
- compliance costs for business and the ATO will be reduced if they do not have to manage two systems simultaneously.[80]

2.104 Ernst & Young made some further recommendations if these are not adopted. The most important of these was that employee movements within a group of companies will be regarded as a material change of employer and thus trigger the new provisions, when there is no change of employer in substance. They recommended that an exemption apply to material changes when an employee remains within a corporate group.[81]

Analysis

2.105 In discussing the transitional rules, the committee recognises that their role is to facilitate the fair and orderly introduction of the new system, while balancing competing demands. Although stakeholders sought various changes to provisions to their advantage, the rules should be judged on their overall purpose of introducing the new arrangements. Treasury explained the role of transitional arrangements at the hearing:

> It is a trade-off between the certainty of one specific start date and allowing people time to change and to adapt to the new law by having a transitional period. The changes that have been made to the fringe benefits tax over the last few years have generally allowed transitional periods because people are locked into particular contracts and a hard-and-fast state can be quite draconian for a lot of employees if the law changes from a specific date without a transitional period. So by doing this there has been an attempt at a balance between the integrity of the reforms and allowing existing employees time to rearrange their affairs. It is a

80 Ernst & Young, *Submission 14,* pp. 5-6.

81 Ernst & Young, *Submission 14,* p. 7.

> balancing act, basically. The date that has been chosen is seen as sufficient time for existing employees to deal with the changing circumstances.[82]

2.106 Starting the new arrangements for all taxpayers from 1 April 2014 would have two negative effects. Firstly, implementation of the new rules would be delayed. Secondly, taxpayers would start adjusting their behaviour from now until that date to maximise the tax benefits they could generate, such as bringing forward as much salary sacrificing as possible under the current rules. Treasury confirmed the importance of integrity measures in tax law changes at the hearing:

> … if you allowed all employees to start from 1 April 2014, there would be a shift in behaviour from some employees knowing full well that the law would be changing. So it is an integrity measure, which is often a feature of the tax law, that these types of things are implemented from a specific date so that taxpayers know what the law is as of that date rather than allowing a shift in behaviour.[83]

2.107 Participants at the hearing also discussed whether the new laws would unfairly affect taxpayers who salary sacrifice on a 'deduct and pay' basis (ad hoc) compared with those who used an 'accrual' basis (an ongoing contract). For the former group, the new rules will commence when they next attempt to salary sacrifice, whereas for the latter group, the new rules will commence on 1 April 2014, or whenever a taxpayer makes a material variation, whichever occurs earlier. Treasury stated at the hearing that it consulted confidentially on the transitional rules and that it took into account industry concerns:

> There was a comment made about the different types of salary-sacrifice arrangements that are provided by employers, whether on a deduction in pay or an accruals basis, and the complexity that the transitional rules would add to that. We consulted confidentially on this measure specifically around the transitional rules and what the salary-sacrifice arrangements are that are undertaken in relation to in-house benefits. We have tried to reflect the concerns of the sector in what we have put into the legislation.[84]

2.108 The two electricity companies who presented at the hearing, Essential Energy and Endeavour Energy, noted that the former had moved to

82 Ms Raylee O'Neill, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 13.

83 Ms Raylee O'Neill, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 12.

84 Ms Raylee O'Neill, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 13.

deduct and pay and would be implementing the new rules now. However, the latter was still on an accrual basis and its employees would be salary sacrificing their electricity at the concessional rate until 1 April 2014. At first glance, this result is inconsistent. But the purpose of the transitional rules is not to treat substantially similar taxpayers in the same way. The rules are designed to bring taxpayers into the new regime in an orderly manner. If a taxpayer is receiving a concessional benefit that has lost its policy basis, and they are about to enter into an new deduct and pay arrangement, then this is a suitable time for the new rules to commence.

2.109 A similar argument applies to the question where an individual transfers employer within a corporate group. In evidence, Treasury stated that this would be a material variation, including where a public servant transfers between agencies.[85] The purpose of the transitional rules is not to maximise the number of people who can use the current arrangements. Their purpose is to bring over taxpayers to the new system efficiently. If a taxpayer changes employer within a corporate group, then they will make new FBT arrangements, and this will be an appropriate time for the new rules to apply.

2.110 Taxpayers often use the corporate veil to reduce their tax liabilities. In this context, the committee sees no inherent unfairness in the corporate veil triggering the new in-house provisions for fringe benefits tax.

Conclusion

2.111 There were two main concerns expressed about the transitional provisions. The first was that running two systems until 1 April 2014 would impose significant compliance costs and that a single start date of 1 April 2014 would be simpler for all parties. However, taxpayers could accelerate salary sacrificing between the announcement and 1 April 2014, which would affect the integrity of the measure.

2.112 The second sought to show that the provisions would be unfair on some taxpayers. However, this argument was premised on the idea that the current rules should apply to as many taxpayers for as long as possible. The transitional rules are not designed for this purpose. Rather, they are designed to move taxpayers away from the current system, which has lost its policy basis, towards the new system in an orderly manner. If a taxpayer has a convenient opportunity to move to the new system, such as purchasing a new service under a deduct and pay arrangement, then it is appropriate for this to occur.

85 Ms Raylee O'Neill, Treasury, *Committee Hansard,* Canberra, 30 January 2013, p. 11.

Effect on independent schools

Background[86]

2.113 The fringe benefits tax regime provides significant benefits to independent schools in Australia. They are treated as non-profit organisations and so they can reduce their fringe benefits tax liability through a rebate equal to 48 per cent of gross fringe benefits tax payable, subject to a $30,000 cap per employee. This provides a significant tax concession where schools provide tuition for the children of staff. Further, they have up until now received a 25 per cent discount on the taxable value of this tuition through the in-house rules.

2.114 The Independent Schools Council of Australia (ISCA) stated during the inquiry that the Bill would significantly increase cost pressures in independent schools. It analysed the effect of the Bill on a teacher salary sacrificing $15,000 a year in school fees. This analysis is reproduced in the table below:

Table 2.1 Effect on FBT liability for a teacher salary sacrificing $15,000 in school fees ($)

Scenario	Current FBT rules	Proposed FBT rules	FBT difference
No rebate	8,908	13,038	4,130
Rebate applied	4,633	6,708	2,147

Source *ISCA, Submission 6, p. 7.*

2.115 The effect of the rebate for non-profit organisations is shown in the 'proposed FBT rules' column. If the rebate is not applied, or if a staff member has already fully utilised the $30,000 threshold, then the FBT payable is $13,038. Applying the rebate reduces this to $6,708. The current rules on in-house benefits further reduce these liabilities to $8,908 and $4,633 respectively. Exactly how these calculations would work out for individual staff would depend on their particular circumstances, such as how many children they have at the school and the fees involved.

2.116 The Association stated that increased cost pressures would 'greatly impact' the sector. It summarised these effects as follows:

> The independent schooling sector appreciates this capacity to access FBT concessions for its employees as a means of 'value adding' to their contribution to the NFP sector. Staff of non-government schools broadly access benefits across the areas of in-house benefits (school fees in particular), remote area housing benefits (extremely important for schools in rural and remote

86 ISCA declined to attend the hearing. It stated that its views were fully represented in its submission.

> areas) and salary packaging (a means of attracting, rewarding, and keeping highly competent staff in the sector). A phasing out of FBT concessions would lead to significant increased pressure on wage rates in the sector and to a substantially reduced capacity to attract good staff, particularly to more rural or remote areas.
>
> The impact of any change to the in-house fringe benefits rules will either see a real reduction in school revenue or a similar reduction in the value of employee remuneration in schools …
>
> Schools not only need to attract suitably qualified teaching staff, but also compete in an open market for staff in educational support areas such as finance, IT, maintenance, nursing, administration, catering etc. The provision of limited fringe benefits assists greatly in being able to attract and retain such staff.[87]

Analysis

2.117 The committee notes that the new in-house provisions will adversely affect independent schools, depending on the fees involved. The effect will be greater with higher school fees and higher teachers' salaries.

2.118 However, the Association did not demonstrate to the committee why the in-house provisions should apply to independent schools in the first place. As discussed above, the in-house provisions were designed to support employers, who are the taxing point for fringe benefits tax. In-house benefits would cost less for employers to provide their staff, and therefore a concessional rate was deemed appropriate. However, the in-house concessional rate has changed into being primarily for the benefit of employees at a significant cost to the budget. There is no underlying policy reason for this. Nor is there any underlying policy reason that the in-house concessional tax benefit should be more favourable to high income teachers or high fee schools. These are an unforeseen product of the interaction between income tax and fringe benefits tax.

2.119 The committee notes that independent schools already receive substantial concessional treatment for fringe benefits tax from the not-for-profit provisions. These have a sound policy basis and the Bill will leave them untouched.

Conclusion

2.120 Although independent schools gain a significant tax advantage when their staff send their children to the same school as students, the Association

87 ISCA, *Submission 6*, p. 7.

did not demonstrate why these schools should enjoy this in-house tax advantage, which is not available in many other sectors. As noted earlier, the in-house concessional tax treatment has evolved into a key aspect of employee remuneration, instead of recognising that in-house benefits cost less for employers to provide their employees.

2.121 Independent schools already enjoy substantial concessional treatment of fringe benefits tax through their not-for-profit status. The Schedule will not affect this.

Overall conclusion

2.122 The Bill makes a range of amendments to the tax law. Some of the Schedules did not attract submissions from stakeholders and the committee accepts this as support for them.

2.123 Schedule 2 updates the list of deductible gift recipients. The organisations that have been listed, or had their listing extended, include AE1 Incorporated, which seeks to locate and honour the crew of Australia's first submarine; Teach for Australia, which seeks to attract top graduates to teach in disadvantaged communities; and Australia for UNHCR, which raises funds to support the humanitarian programs of the United Nations High Commissioner for Refugees. These are important causes and the committee is pleased that they have been included in the Bill.

2.124 Schedule 3 extends the immediate deductibility of exploration expenditure, already provided to mining and petroleum explorers, to geothermal energy explorers. This will restore competitive neutrality in the sector and support a clean energy source.

2.125 Schedule 4 extends the interim streaming provisions for managed investment trusts from 2012 to 2014, in line with the Government's announcement to defer until 2014 the commencement of the new overall regime for managed investment trusts and the new general trust income rules. The committee expects that coordinating the commencement of these different systems will reduce compliance costs for taxpayers.

2.126 The committee received submissions in relation to the other four major Schedules in the Bill. Schedule 1 clarifies the tax law so that payments under native title agreements will be subject to neither income tax nor capital gains tax. These reforms have been on the policy agenda since 1998 and the committee is of the view that this tax treatment is fully consistent with the unique nature of native title.

2.127 At the hearing, there was considerable support for the view that the Schedule should also provide preferential tax treatment for Indigenous

community development corporations. This is outside the scope of the Bill and the committee does not believe that a recommendation along these lines would be appropriate. However, the committee would like to stress that native title is only 20 years old. Parliament, Indigenous people and other stakeholders are still learning about what native title is, what it means, and how Indigenous people can benefit from it. The committee expects that further legislative innovations will be introduced in the coming years and so the Schedule should proceed in its current form.

2.128 Schedule 5 applies an income-based means test to the rebate for medical expenses. The AMA argued that a means test should not apply to a medical care safety net when illness does not discriminate on the basis of income. The committee nonetheless supports the Schedule because it will result in better targeted health expenditure and a more sustainable health system.

2.129 Schedule 6 amends the definition of limited recourse debt, following a High Court case in 2011 where BHP Billiton secured double deductions for its iron briquette plant in Western Australia. Although there was general support for the provisions, there were also concerns about retrospectivity and whether the Schedule should be limited to related party transactions, similar to the facts in the BHP Billiton case.

2.130 The committee was not unduly concerned about retrospectivity because the new law applied from the date of announcement and the policy intent of the provisions was unchanged. Further, there was only a short delay between the announcement and the introduction of the Bill. Although limiting the Schedule to related party transactions may be attractive, it overlooks the fact that the limited recourse debt rules play an important role in the integrity of the tax system.

2.131 Schedule 7 removes the concessional fringe benefit tax treatment for in-house fringe benefits accessed through salary sacrificing. In-house fringe benefits are those where the employer provides the same or similar goods or services as part of their business. The in-house provisions were initially included in the fringe benefits tax because the tax is imposed on employers and in-house benefits cost less to employers to provide them.

2.132 However, since then the in-house rules have evolved into a key element of employee remuneration in some industries, contrary to the original goal. For example, the independent schools sector expressed concern that it would be affected because many teachers send their children to the same school. However, the independent schools did not establish why they should receive this concessional tax treatment in the first place, especially one that varies with the teacher's salary and the tuition fee. It should also

be noted that independent schools already receive an FBT advantage through being not for profit organisations.

2.133 Overall, the Bill makes a range of amendments that protect the integrity of the tax system, closer aligns it to underlying policy, and achieves important social goals. The Bill should pass.

Recommendation 1

2.134 **The House of Representatives pass the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 as proposed.**

Julie Owens MP
Chair
8 February 2013

Coalition Members' Dissenting Report

Liberal Members of the House of Representatives Standing Committee on Economics outline herewith dissenting remarks from the majority committee advisory report on the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 (TLAB No. 6).

Liberal Members do not support the majority report recommendation that the House of Representatives pass the TLAB No. 6 as proposed.

Rather, it is our considered view that the TLAB No. 6 Bill be amended such that Schedule 1 – Native title benefits be excised from the Bill.

Additionally, Liberal Members reinforce our opposition to the Government's Minerals Resource Rent Tax (MRRT) and its associated expenditure and our intention to repeal the MRRT should the Coalition form Government following the next general election.

Issues in the Bill

Schedule 1 – Native title benefits

Liberal Members of the Committee note and agree with paragraphs 2.4, 2.5, and 2.6 insofar as the majority advisory report highlights that opinions provided to the Committee fell into three broad categories.

Paragraphs 2.5 through 2.10 reasonably outline the evidence provided to the Committee.

The concerns raised in paragraph 2.15 encapsulate legitimate concerns that Liberal Members found compelling and overwhelming such that excision of Schedule 1 from the Bill is warranted.

The legitimate concerns raised by the Minerals Council of Australia and others, and supported by Liberal Members, are not borne from nefarious intent. Rather, the concerns are a consequence of uncertainty driven by the TLAB No. 6 Bill as highlighted by the Minerals Council of Australia and supported by BHP Billiton and the Chamber of Minerals and Energy of Western Australia:

> The Minerals Council of Australia supports the government's policy objective to deliver a more flexible and less legalistic approach to native title and to deliver practical outcomes for Indigenous Australians. We are committed to working with the government to ensure that agreement monies constructively contribute to socio economic outcomes for Indigenous Australians in line with the government's *Closing the Gap* policy objectives. While we support reforms to the taxation system to maximise the economic value of the native title compensation and benefits packages, we are concerned that the proposed native title payment tax treatment may have a range of unintended consequences. Specifically, we consider that those amendments disincentivise investment in intergenerational wealth creation, as tax will be payable on any transfer of monies to future generations or on income earned. It disincentivises the provision of benefits under agreements to Aboriginal people who are resident in an area but who are unrelated to native title determination and it limits the main tax treatment to the defined beneficiaries.[1]

The majority advisory report in paragraph 2.19 outlines that the concerns raised by many witnesses were not compelling and "unlikely to eventuate … because native title agreements are now structured to prevent it occurring, and this feature of the contracts has been largely driven by the mining companies themselves …".

Liberal Members find the conclusion reached in paragraph 2.19 counterintuitive. It is compelling that the authors of the agreements to which the majority members refer and rely are the very parties highlighting the problems arising from the TLAB No. 6 Schedule 1.

> **Ms O'Dwyer:** I want a pretty simply short answer to the question as to whether, in the view of the people who are sitting around the table today, it would be better not to proceed with this aspect of the legislation, assuming that no changes were made to it, because

1 Ms Melanie Stutsel, Minerals Council of Australia, *Committee Hansard,* Canberra, 30 January 2013, p. 15 and Mr Mark Donovan, BHP Billiton, & Dr Debra Fletcher, The Chamber of Minerals and Energy of Western Australia, *Committee Hansard,* Canberra, 30 January 2013, p. 18.

> it would do more harm than good. I just want to understand where people sit on this question.
>
> **Mr Murphy:** The position of the State of Western Australia is that it would do more harm than good. Clearly, there are many issues that have been raised just in this short session today which indicate that there are differences of opinion about what is the best way to deal with the matter. I think the only point of agreement that you actually have is that there is much disagreement about what should be done. So until such time as there is further investigation and data about what is the likely consequence of change and the best way to proceed, the state of WA's position would be to do nothing – do no harm at this point in time.
>
> **Chair:** So far we have got 'don't proceed' from BHP and Rio –
>
> **Dr Fletcher:** And CME members overall support that position as well.[2]

This position was also promulgated by the Minerals Council of Australia:

> **Ms Stutsel:** The position of the Minerals Council would be that, no, we do not think the legislation should proceed. Our preferred position would be to stay with the status quo, and that is largely because the differences that will be formalised by these arrangements will lead to a diminution in the sustainable outcomes being achieved from agreements.[3]

Further, the sentiment of paragraph 2.23 of the majority advisory report demonstrates the breadth of concern raised.

As highlighted above, the principle adopted by the majority advisory report that is contained in paragraph 2.26 again is counterintuitive and betrays the compelling weight of concern expressed by the authors of the very agreements Government Members rely upon.

It is also noted by Liberal Members of the Committee that there are matters of principle that are potentially offended by Schedule 1.

Making compensatory (or any other) income exempt from tax violates the key tax principle of horizontal equity (ie a dollar earned by one person, regardless of how it is earned or from what activity, is given the same tax treatment as if it were earned by another person).

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2 *Committee Hansard,* Canberra, 30 January 2013, p. 24.

3 Ms Melanie Stutsel, Minerals Council of Australia, *Committee Hansard,* Canberra, 30 January 2013, p. 25.

However, if this income was to be taxable in the hands of the indigenous recipient(s), it would likely increase the compensation sought by the amount of tax expected to be paid. As such, the incidence of any tax paid would likely be borne by the compensator (likely to be a mining or agri-business), increasing their costs as a consequence.

Schedule 3 – Geothermal energy explorers

Schedule 3, which provides a deduction for certain costs associated with exploration for sources of geothermal energy, was announced by the Government as part of the final design of the Minerals Resource Rent Tax (MRRT) and is an expenditure associated with the MRRT.

The Coalition will repeal the MRRT.

The MRRT has proved to be a public policy farce from its inception as the Resource Super Profits Tax. It is a tax that has not raised any meaningful revenue.

Mr Steven Ciobo MP
Deputy Chair

Ms Kelly O'Dwyer MP

Mr Scott Buchholz MP

A

Appendix A –Submissions and exhibits

Submissions

1 Ms Fiona Martin, University of New South Wales (independent capacity)

2 Professor Jon Altman, Australian National University (independent capacity)

3 Ashurst Australia

4 Arnold Bloch Leibler & Yamatji Marlpa Aboriginal Corporation

5 The Chamber of Minerals and Energy of Western Australia

6 Independent Schools Council of Australia

7 Native Title Services Victoria Ltd

7.1 Supplementary submission

8 Institute of Chartered Accountants Australia

9 Minerals Council of Australia

10 Property Council of Australia

11 Australian Medical Association Ltd

12 National Native Title Council

13 Law Council of Australia

14 Ernst & Young

14.1 Supplementary submission

15 Government of Western Australia

16 Essential Energy, Endeavour Energy and Ausgrid

17 Independent Schools Victoria

Exhibits

1 Assorted news articles on native title agreements (presented by Rio Tinto)

2 Minerals Council of Australia and the National Native Title Council, *Proposal for an Indigenous Community Development Corporation* (presented by the Minerals Council of Australia)

B

Appendix B – Hearing and witnesses

Wednesday, 30 January 2013 in Canberra

Schedule 6 – Limited recourse debt

Ashurst Australia (teleconference)

Mr Ian Fullerton, Consultant

Paul O'Donnell, Partner

The Department of the Treasury

Ms Nan Wang, Manager, Finance Taxation Unit

Australian Taxation Office

Mr Peter Chochula, Senior Assistant Commissioner

Mr Richard Pols, Technical Adviser

Schedule 7 – In-house fringe benefits

Ernst & Young

Mr Paul Ellis, Partner Human Capital, Employment Taxes

Essential Energy

Mr Barry Cohen, Group Taxation Manager

Endeavour Energy

Mr Rodney Clark, Taxation Manager

The Department of the Treasury

Ms Raylee O'Neill, Senior Adviser, Personal and Retirement Income Division

Australian Taxation Office

Mrs Caroline Bath, Director, New Measures

Mr Rod Walker, Director, Risk and Intelligence for Fringe Benefits Tax

Mr Glenn Smith, Assistant Director, Risk and Intelligence for Fringe Benefits Tax

Schedule 1 – Native title benefits

The Chamber of Minerals and Energy of Western Australia

Dr Debbie Fletcher, Manager-Land Access

BHP Billiton Iron ore

Mr Mark Donovan, Head of External Affairs

Rio Tinto

Miss Catherine Crompton, Manager, Agreements Implementation

University of New South Wales

Ms Fiona Martin, Senior Lecturer (private capacity)

Native Title Services Victoria

Mr Matthew Storey, Chief Executive

Mr Ben Gordon, Economic Development Adviser

Minerals Council of Australia

Ms Melanie Stutsel, Director Health, Safety, Environment & Community Policy

Ms Therese Postma, Assistant Director - Social Policy

Government of Western Australia

Mr John Catlin, Executive Director, Native Title Unit

Mr Adrian Murphy, Director, Native Title Unit

Arnold Bloch Leibler (teleconference)

Mr Neil Brydges, Senior Associate

Mr Peter Seidel, Partner

Yamatji Marlpa Aboriginal Corporation (teleconference)

Mr Michael Meegan, Principal Legal Officer

Attorney-General's Department

Dr Sean Sexton-Moss, Principal Legal Officer, Native Title Unit

Department of Families, Housing, Community Services and Indigenous Affairs

Ms Libby Bunyan, Director, Native Title Policy

The Department of the Treasury

Mr Paul McMahon, A/g General Manager, Small Business Tax Division

Mr Greg Pinder, Senior Advisor

Ms Jessica Mohr, Policy Analyst

Australian Taxation Office

Mr Robert Puckridge, Assistant Commissioner

C

Appendix C – List of reports

Below is a list of reports tabled by the House of Representatives Standing Committee on Economics in the 43rd Parliament.

No.

1. Inquiry into the Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011, and the Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011
2. Inquiry into Indigenous economic development in Queensland and advisory report on the Wild Rivers (Environmental Management) Bill 2010
3. Advisory report on the Taxation of Alternative Fuels Bills 2011
4. Advisory report on the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011
5. Advisory report on the Competition and Consumer (Price Signalling) Amendment Bill 2010, and the Competition and Consumer Amendment Bill (No. 1) 2011
6. Advisory report on the Food Standards Amendment (Truth in Labelling - Palm Oil) Bill 2011
7. Advisory report on the Corporations (Fees) Amendment Bill 2011
8. Advisory report on the Tax Laws Amendment (2011 Measures No. 8) Bill 2011, and the Pay As You Go Withholding Non-compliance Tax Bill 2011
9. Advisory report on the Minerals Resource Rent Tax Bill 2011 and related bills
10. Review of the Tax Laws Amendment (2011 No. 9 Measures) Bill 2011
11. Review of the Insurance Contracts Amendment Bill 2011

12. Advisory report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012

13. Advisory report on the Clean Energy Finance Corporation, Clean Energy Legislation Amendment Bill 2012, Clean Energy (Customs Tariff Amendment) Bill 2012, and Clean Energy (Excise Tariff Legislation Amendment) Bill 2012

14. Advisory Report on the Tax Laws Amendment (2012 Measures No. 2) Bill 2012, Pay As You Go Withholding Non-compliance Tax Bill 2012, Income Tax (Managed Investment Trust Withholding Tax) Amendment Bill 2012, and Passenger Movement Charge Amendment Bill 2012

15. Advisory Report on the Tax Laws Amendment (Managed Investment Trust Withholding Tax) Bill 2012

16. Advisory Report on the Tax Laws Amendment (2012 Measures No. 4) Bill 2012

17. Report on the Exposure Draft of the Australian Charities and Not-for-profits Commission Bills 2012

18. Advisory Report on the Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012, Clean Energy (Charges—Excise) Amendment Bill 2012, Clean Energy (Charges—Customs) Amendment Bill 2012, Excise Tariff Amendment (Per-Tonne Carbon Price Equivalent) Bill 2012, Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Per-Tonne Carbon Price Equivalent) Bill 2012, Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Per-Tonne Carbon Price Equivalent) Bill 2012, and Clean Energy (Unit Issue Charge—Auctions) Amendment Bill 2012

19. Report on Australia's Oil Refinery Industry