Tax Laws Amendment Bill – Tax Treatment of Native Title Benefits

House of Representatives Committee on Economics

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Introduction

I am an academic with the University of New South Wales. My qualifications are in law and I have researched and published in the field of taxation law for over 20 years. For the past several years I have been researching and writing in the field of taxation, native title payments and charities.

The following are examples of my work in this area:

Chapter in Book

'The income tax exempt charitable structure as a vehicle for holding Australian native title interests: some lessons from New Zealand' in Marcia Langton and Judy Longbottom, (eds) *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (2012, Routledge).

Journal Publications

'Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth); Can they be Exempt from Income Tax as Charitable Trusts?' (2007) 30(3) *University of New South Wales Law Journal* 713-730.

'Native Title Payments and their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach (2010) 33(3) *University of New South Wales Law Journal* 685-713.

'The Mining Withholding Tax under Division 11C of the Income Tax Assessment Act 1936: It may be Simple but is it Equitable? (2012) 27 *Australian Tax Forum* 149-174.

'Recent Federal Court Decision Highlights the Use of an Income Tax Exempt Structure to Facilitate Face-to-Face Banking and other Services in Remote Communities' (2011) *Indigenous Law Bulletin* 20 – 23.

'The Taxation Exemption of Canadian Indians as Governments and Individuals: How does this Compare to Australia and New Zealand' (2011) *Common Law World Review* 119-143 (with Brad Morse and Barbara Hocking).

'Charitable Purpose and the Need for a Public Benefit: A comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples' (2009) 24 *Australian Tax Forum* 207-233 (With A. Sharp).

I have also made submissions to the Federal Government regarding the previous Treasury Consultation Paper on Native Title and Tax (2010) and the draft of the Bill currently under consideration.

I welcome the Government's initiative to introduce provisions to make native title benefits non-assessable and non-exempt (NANE) from income tax. The lack of certainty in this area has led to significant compliance costs when Native Title Groups enter into mining agreements. It has also led to the use of charitable trusts, a structure which has legal limitations and barriers when used by Indigenous Australians particularly where they wish to engage in community development and business activities.

I raise the following issues regarding Schedule 1 of the Bill, 'The Tax Treatment of Native Title Benefits':

1. Definition of Native Title Benefits

It is accepted that agreements are usually negotiated with Native Title Groups on the basis of their native title claim or determined native title. However it is common that agreements make provision to provide benefits where native title:

- may ultimately be found not to exist because a Group has not been able to establish connection sufficient to establish native title; and
- has been determined to be extinguished by dealings in land prior to the agreement.

Clause 59-50 (5)(a) of the amendments indicates that in order for a benefit to be a 'native title benefit' it must be an amount relating to an act that would either extinguish native title or be inconsistent with the continued existence, enjoyment or exercise of native title. The use of the word 'would' includes a hypothetical situation, so it covers situations where an agreement is entered into, payment is made and mining is about to occur once everything is agreed upon. The payment is NANE as long as the agreement is of the type set out in sub-clause (a)(i) or (ii).

The situation in the first dot point above, native title found not to exist, may be covered by Note 2 to cl 59-50(5) but it is not clear from the face of the clause.

The second situation does not appear to be covered by the new provisions. Agreements may not be related to native title from the beginning if there is no native title claim. There may also be situations where the native title was extinguished many years ago, an ILUA has now been entered into under the Native Title Act with a payment as part of the agreement. The payment may not 'relate' to native title as this was extinguished in the past.

These agreements are still with Indigenous groups and often arise from the fact that there may have been or may still be native title but the parties do not wish to go through the protracted process of proving this.

The lack of clarity of the definition of native title benefit will only lead to complexity and the need for sophisticated and costly legal advice on how to ensure that the agreement satisfies the provisions. It would be better for the definition of native title benefits to be broad

enough to take into account a range of payments and circumstances, so that it fits within the subject of commonly occurring mining agreements.

2. Types of Agreements

Agreements that are often entered into are commercial and cover a range of situations so not all agreements will be in accordance with the Native Title Act or any other legislation that is referred to in s 59-50(a)(i) and (ii). The NANE provisions should apply to ordinary commercial arrangements not just agreements that are in accordance with particular legislation otherwise many commercial arrangements may be diminished or lost altogether.

3. Definition of Indigenous Holding Entity

Clause 59-50(6)(a) defines an Indigenous Holding Entity. This definition incorporates the definition of 'distributing body' under s 128U of the *Income Tax Assessment Act 1936*. This definition is exhaustive and states that:

A 'distributing body' is:

(a) an Aboriginal Land Council established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976* ;

(b) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act); or

(d) any other incorporated body that:

(i) is established by or under provisions of a law of the Commonwealth or of a State or Territory that relate to Aboriginals; and

(ii) 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.

This means that the NANE provisions will not apply to a situation where the native title payments are made to ordinary private companies unless they are acting as a trust (s 59-50(6)(b)).

There are many situations, in particular, where the company is intended to carry on business for the Native Title Group, where the Group may wish to establish a company incorporated under Corporations Law rather than one under the CATSI Act. Corporations incorporated under the CATSI Act have legal limitations such as the fact that they are required to have members rather than shareholders. This means that finance cannot be raised through the issue of shares which is a common method of raising business finance for mainstream corporations.

There are also long standing Aboriginal corporations incorporated under prior legislation that will not comply with the proposed definition.

The intention to carry on business is consistent with the rationale of economic independence that the Federal Government states is an important part of its policy of 'Closing the Gap'. The provision should therefore be broadened to include companies incorporated under the Corporations Law.

I submit that the definition of 'distributing body' should be broadened to include:

(i) an association, society or body incorporated under Part IV of the *Aboriginal Councils and Associations Act 1976*; and

(ii) 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.

I agree with the submission of the Law Council of Australia [15] that the definition as currently proposed appears to exclude other legal structures unnecessarily.

4. Capital Gains Tax

I am concerned that the result of the proposed provisions relating to CGT and native title is that the native title asset will be acquired after 19 September 1985 and therefore any subsequent dealings will be subject to CGT.

I propose that rather than disregard the CGT consequences of dealing with the native title that a rollover provision is inserted into the legislation so that on the acquisition of native title by a corporation as a result of a determination this acquisition retains pre-CGT status.

5. Investment Income

I agree with the statements of the Law Council of Australia that income derived from native title benefits should also be NANE.