Australian National University

Tuesday 18 December 2012

Jon Altman BA MA (Hons) (Auckland) PhD (ANU), FASSA, HFRSNZ
Research Professor

Centre for Aboriginal Economic Policy Research

David Monk
Inquiry Secretary
House Standing Committee on Economics
Parliament House
Parkes ACT 2601
By email to economics.reps@aph.gov.au

RE: Inquiry into Tax Laws Amendment (2012 Measures No. 6) Bill 2012

Thank you for your email alert dated 6 December 2012 about the Inquiry into Tax Laws Amendment (2012 Measures No. 6) Bill 2012. While I am not in position to make a fresh submission to this Inquiry, I do want to draw your attention to an early submission made in August this year (attached) on the Tax Treatment of Native Title Benefits that is attached.

To summarise, it is unfortunate that the beneficial treatment being proposed in relation to native title compensation payments is not extended to compensation payments made under the far earlier *Aboriginal land Rights (Northern Territory Act 1976* (Comm) where a mining withholding tax (MWT) has been levied since John Howard as Treasurer introduced it in 1978. The MWT represents double taxation in many situations (e.g. payments made out of the Aboriginals Benefit Account to land councils attract the MWT, the only statutory authorities to have their incomes taxed at source, while their employees also pay income tax); taxation without representation (there was no consultation on this tax when introduced); and now a potential social injustice owing to the proposed inconsistency in the treatment of compensation payments made under land rights and native title laws.

My understanding is that MWT has not been abolished because the Australian Government is too concerned that such abolition will not be revenue neutral so a tax inequity is to be prolonged in the name of an aspirational balanced budget for 2012–13. The impost of the MWT has cost Aboriginal interests in the NT about $50 million since 1978, but with time this amount will likely escalate and its inequity could become a source of enhanced resentment at the different treatment of different interests in Australian society. Indeed it is possible that more MWT we be paid in 2012–13 on behalf of Aboriginal people in the NT than paid nationally under the new Minerals Resource Rent Tax.

Friday 24 August 2012

Jon Altman BA MA (Hons) (Auckland) PhD (ANU), FASSA
Research Professor

Centre for Aboriginal Economic Policy Research

+61 2 6125 2858
+61 2 6125 5568
Jon.altman@anu.edu.au

Canberra ACT 0200 Australia
www.anu.edu.au

David Bradbury MP
Assistant Treasurer
Nicola Roxon, MP
Attorney-General
via The Treasury
Australian Government

By email to nativetitle@treasury.gov.au

RE: Tax Treatment of Native Title Benefits

I have made a number of submissions in relation to the tax treatment of native title and land rights benefits since 2009 including on the consultation paper 'Native Title, Indigenous Economic Development and Tax' on 25 November 2010. I would like yet again to make an unsolicited brief submission.

I am in general agreement with the proposal that the Income Tax Assessment Acts be amended to clarify that native title benefits are not subject to income tax. Your summary of the new law, that confirms that native title benefits are non-assessable non-exempt (NANE) income that is not subject to income tax and capital gains tax, has cogency and recognizes that native title benefits are compensatory. This will be welcome news to native title groups. You note that this decision will apply retrospectively back to 1 July 2008 to provide clarity to the Australian Tax Office and native title groups whose tax liabilities have been uncertain to date. No mention is made of the number of such cases. Your detailed explanation of the new law indicates that compensatory payments are NANE but that investment income is not NANE income. This makes sense, although arguably this distinction might provide some incentive to spend rather than save and invest NTA-linked compensation payments.

I am surprised that the exposure draft package makes no mention of land rights benefits nor tries to clarify why they have been subject to a mining withholding tax (MWT) in the Northern Territory since 1979. This oversight might suit the budgetary imperatives of the government of the day but if the new tax laws proposed in the native titles benefits exposure draft are passed this existing tax inequity will be highlighted. It strikes me as very poor policy making to clarify that native title payments are exempt from tax in response to submissions from consultations, but to leave another area where there is complexity, uncertainty and now possible legal inequity unattended, swept under the policy debate carpet. With time the legality of the MWT will be challenged; indeed it is surprising that this impost has not been legally contested on at least three grounds since its passage and application 33 years ago. Let me explain.

In 1982, some 30 years ago, while undertaking research on the payment of mining royalties under land rights law in the Northern Territory, I identified three issues that were poorly understood at that time and still are. (See JC Altman *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra, 1983, especially Chapter 5, pp 51–60.)

First, prior to the passage of land rights law, mining royalties raised by the Commonwealth on Aboriginal reserves were paid into the Aborigines Benefits Trust Fund. After passage of land rights law in 1976 and of the NT Self Government Act in 1978, statutory mining royalty equivalents (SMREs) were paid into the new Aboriginals Benefit Trust Account (ABTA) operationalised on 1 July 1978.

Second, in June 1979 the *Income Tax Assessment Amendment Act* (No.27 of 1979) and the *Income Tax (Mining Withholding Tax) Act* (No.28 of 1979) were passed. At that time this imposed a tax of 6.4% on any payment of SMREs out of the ABTA (now the Aboriginals Benefit Account or ABA). This tax is set at 20% of the lowest tax rate and so is currently at 4%. It is not payable on the ABA's investment income, paradoxically applying the inverse of what is currently proposed with respect to native title benefits.

Third, this tax was applied retrospectively—by June 1979 four major mining agreements had been completed without any reference to the MWT; again counter to the current proposals a tax was levied retrospectively rather than an exemption being provided as now proposed for native title benefits.

Because SMREs are paid from consolidated revenue there has been some debate over the years whether these moneys are private or public. Importantly, the *Aboriginal land Rights (Northern Territory) Act*, *1976* also allows for the negotiation of additional beneficial payments above the minimum set by statutory royalties and in all agreements additional payments have been made. It remains far from clear if the MWT is levied on these payments that are indisputably of a private nature.

There are currently four main forms of payments made from the ABA: s.64(1) payments to Land Councils for their administrative expenses; s.64(3) payments to so-called royalty associations as compensation payable to traditional owners of land in recognition of land rights impairment; s.64(4) grants made to or for the benefit of Aboriginal people in the Northern Territory almost without exception via incorporated organizations; and s.64(4A) payments made with respect of township leasing and to meet the operational costs of the Office of the Executive Director of Township Leasing.

In each of these situations it is far from clear why the MWT is levied:

- s.64(1) payments are made to statutory authorities (Aboriginal land councils) whose employees pay income tax so the MWT might operate as a form of double taxation.
- s.64(3) payments are made to incorporated associations that may make some cash payments to members. But historically such payments (that become NANE after the MWT is applied at source) have made relatively small payments of cash to members and in any case members should have the option of having such income assessed like other Australians for taxation if

their compensation payments are deemed non-NANE which would seem quite inconsistent with what is being proposed in relation to taxation of native title benefits.

- s.64(4) grants are not made to individuals but are instead applied to group or community benefit and are generally made in kind rather than in cash.
- s.64(4A) payments may be made to individuals but again are compensatory for the surrender of land to the Office of the Executive Director of Township Leasing for a period of between 80 and 99 years. In so far as they support the operations of the Office, established as a Howard government initiative, like s.64(1) payments they are applied to a statutory office.

The ambiguity of this taxation regime generates administrative difficulty for the ABA that needs to differentiate payments of SMREs from investment income (in other words retain two accounts). Historically the ABA has sought to make s.64(4) grants from investment income and all other payments from SMREs that attract MWT. This exacerbated the budgetary challenges faced by land councils and reduced compensation payments to traditional owners in areas affected. This tax regime is also very obviously inequitable and represents an unnecessary tax impost on Aboriginal interests in the NT that while relatively small annually would still now total in the region of $50–$60 million. It is unclear how the MWT operates in relation to negotiated payments made under ss.35(3) and 35(4) of the Land Rights Act.

There have been numerous calls since 1983 for the MWT to be abolished and I will not rehearse the full list here except to note that they have been made by a diversity of stakeholders including bipartisan parliamentary inquiries like *Unlocking the Future: The Report of the Inquiry into the reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1999) that recommended the equity and efficiency of the MWT be reexamined with a view to its abolition (p.69).

But to date the issue has been largely ignored mainly it seems because MWT abolition will not be revenue neutral to the Commonwealth's budgetary bottom line. Even without retrospectivity, the abolition of the MWT will marginally increase the net cost of MREs. Conversely, in the future a successful challenge of the legality of the MWT sees a risky expansion of the contingent liability in this area for the Commonwealth.

In my view it is extremely disappointing that as the Commonwealth seeks to clarify the tax exempt status of native title benefits it ignores the equally valid claim of land rights benefits for tax exemption. While the clarification that native title benefits are NANE is welcome, it highlights the need for land rights benefits to enjoy similar NANE status. Urgent policy attention should focus on this inequity and anomaly with its attend inefficiencies that hamper, rather than assist, the Australian government overarching goal to Close the Gap.

Yours sincerely