



27 August 2012

Manager
Corporate Tax Unit
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: nativetitle@treasury.gov.au

Dear Sir/Madam

Tax Treatment of Native Title Benefits

The Chamber of Minerals and Energy (CME) is the peak resources sector representative body in Western Australia funded by its member companies who generate 95 % of all mineral and energy production and employ 80 % of the resources sector workforce in the State.

The Western Australian resources sector is diverse and complex covering exploration, processing, downstream value adding and refining of over 50 different types of mineral and energy resources.

In 2011, the value of Western Australia's mineral and petroleum production reached \$107 billion, accounting for 92% of Western Australia's total merchandise exports and thus representing the majority of Western Australia's 46% contribution to Australian merchandise exports. Furthermore, royalty payments to the State Government totalled \$4.9 billion in 2011.

The prospects for future growth are strong, with \$1.82 billion invested in minerals exploration in Western Australia in 2011, accounting for 51% of total national investment. This exploration is translating into significant further development, with the value of resource projects either committed or under construction at \$166 billion.

CME member companies play a significant role in the negotiation and implementation of agreements with native title parties and are committed to ensuring such agreements are sustainable and contribute in a meaningful way to the future social and economic independence of Aboriginal people.

CME thanks the Commonwealth Treasury for the opportunity to provide comment on the Exposure Draft and Explanatory Memorandum on the proposed changes to the tax treatment of Native Title Benefits.

Executive Summary

The Exposure Draft does not in its present form deliver the Commonwealth Government's stated policy and social objectives, which were to ensure a more flexible, less legalistic approach to native title delivering practical outcomes for indigenous Australians. If implemented, the Exposure Draft will work against those objectives.

CME submits that tax reform should be directed towards:

1. covering the wide range of agreements being made and delivered which provide the social dividend sought by the Government;
2. linking preferable taxation treatment to vehicles that deliver the policy aims of community and economic development for current and future generations; and
3. embedding good governance.

Unless the taxation regime is directed in this manner, the Commonwealth Government's stated policy objectives will not be met.

CME considers payments to individuals should receive normal taxation treatment and be subject to income tax at existing rates. Beneficial taxation treatment should instead be given to vehicles that deliver specific community and economic development outcomes for current and future generations of indigenous Australians.

Providing a blanket tax exemption will:

1. not sustainably enrich the indigenous communities affected by mining or properly return to the wider Australian community through the taxation regime, an appropriate share of the benefit gained;
2. remove incentives to establish adequate governance regimes; and
3. not result in material social benefit for disadvantaged indigenous people or deliver benefits for future generations.

Discussion

In commencing public consultation for these amendments in 2010, the Government's stated aim was to clarify the taxation treatment of payments delivered under native title agreements. In two discussion papers released that year,¹ the overall stated objectives of the Commonwealth Government were to ensure:

- a more flexible, less legalistic approach to native title that delivers practical outcomes for indigenous Australians; and
- benefits received under agreements were adequately preserved and deployed for the benefit of both current and future generations.

The narrow focus of these current proposals means they will not apply to a range of agreements currently in place. CME is concerned the proposed amendments do not meet the Commonwealth Government's objectives and, in particular:

1. do not address the types of agreements currently being made with native title parties;
2. proceed on the basis benefits under native title agreements are exclusively compensatory in nature and solely address the effect of acts on native title; and
3. do not provide incentives for good governance, community benefit and intergenerational benefit regarding management and distribution of benefits.

Types of agreements

While the Exposure Draft applies to agreements made under the *Native Title Act 1993* (Cth) and the *Victorian Traditional Owner Settlement Act 2010*, it does not apply to benefits under a wide range of other agreements being negotiated with indigenous groups for the purposes of securing access to land. While these agreements are usually negotiated on the basis of a native title claim, they often make provision for recognition of traditional connection and the continuation of the agreement and benefits even where:

- no native title may ultimately be found to exist; or
- where native title is extinguished.²

¹ "Native Title, Indigenous Development and Tax" and "Leading practice agreements: maximising outcomes from Native Title"

² In relation to this point, existing provisions for statutory revival of native title extinguished by dealings in land especially in s47B of the NTA which enables native title to be recognised even long years after a determination declaring its extinguishment, if the land reverts to Unallocated Crown Land. There is a driver under the NTA itself for a business with a long term presence in an area to include in its agreement any land a group asserts a traditional connection to, even if native title is currently extinguished, because of the possibility of a subsequent revival of those rights and interests. CME notes that the Commonwealth Government is seeking to extend this statutory revival regime in its current proposals to amend the NTA.

Characterisation of payments as compensatory

The Government's proposed amendments proceed on the basis payments under agreements are made only to address extinguishment, impairment or suspension of native title and thus are fundamentally compensatory in nature. In fact mining proponents negotiate agreements to address a range of issues relevant to their relationship with groups, not just the legal effect of their titles and activities on native title.

Incentives for good governance, community and intergenerational benefit

In the 2010 discussion paper *Leading practice agreements: maximising outcomes from native title* the Commonwealth Government stated its own objectives as being, *inter alia*, benefits received under agreements be adequately preserved and deployed for the benefit of both current and future generations.

General points

CME and its members are concerned to ensure:

- benefits provided under native title agreements are managed and distributed for the benefit of the group;
- the capacity for individual benefits unrelated to payments such as relief of poverty, health and education should be limited; and
- intergenerational benefit is secured through accumulation of an adequate portion of the benefits in properly managed tax effective funds.

In providing a blanket taxation exemption to particular kinds of payments and, in particular applying such exemptions to benefits in the hands of individuals, the Commonwealth Government subverts its own policy objectives. There is no incentive to good governance when the tax advantages attach to the character of the payment itself. CME's view is beneficial taxation treatment should, instead, be linked to vehicles delivering specific community and economic development outcomes, for current and future generations, through good governance and accountability.

The Commonwealth Government's stated policy objectives are achieved if taxation exemptions proposed by the Government apply to a vehicle or fund into which the benefits are transferred, if certain standards are met in relation to the management, distribution and accumulation of funds.

A more sound policy approach is to provide favourable taxation treatment based on whether the funds are to be applied to the policy objective of sustainable intergenerational indigenous community benefit.

CME supports the policy objective of generational equity and the delivery of sustainable community outcomes for indigenous people. CME believes it is essential taxation reform is targeted at delivering favourable taxation treatment to a suitable vehicle or fund with strong governance, for the purpose of encouraging economic development, accumulation and intergenerational benefit sharing.

These vehicles are currently trusts however CME is supportive of a vehicle such as the proposed Indigenous Community Development Corporation (ICDC), following further refinement, which would offer native title groups greater flexibility in economic and business development. Instead of making native title payments to individuals' non-assessable non-exempt income, it is these proposed vehicles which should receive beneficial taxation treatments to deliver practical outcomes for current and future generations. CME stresses, however, the use of any such model should remain voluntary.

Where money is applied for certain purposes, the taxation treatment of those payments is driven by the purposes for which benefits are applied. The same approach should be applied to native title payments.

CME's advocates individual benefits unrelated to the relief of poverty or measures to improve health and education should be limited and any payments made to individuals should be treated as income for taxation purposes and not attract tax exemption.

CME does not support the proposal to exclude investment income derived from native title benefits from tax exemption status. This position is contrary to the stated Government position of encouraging sustainable benefits which endure for future generations. To exclude investment income from taxation benefits limits the economic independence for current and future generations.

The Commonwealth Government has the opportunity to encourage best practice agreements, linked to good governance arrangements which support the management and investment of benefits gained under these agreements for the current and future generations.

While the Exposure Draft seeks to provide certainty in relation to the recipients of native title payments it does not address the potential uncertainty for resource or other companies who make such payments. While case law generally supports the deductibility of native title payments, CME recommends the introduction of legislation confirming the deductibility of such payments in the year incurred. In addition, clarity should be provided in relation to the GST and PAYG withholding treatment of native title payments.

Conclusion

CME does not support the proposed amendments in their current form and requests the Commonwealth Government undertake further consultation with industry members before proceeding with legislative amendments.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Reg Howard-Smith', written in a cursive style.

Reg Howard-Smith
Chief Executive