
Exposure Draft of the Native Title Amendment Bill 2012 – Tax Treatment of Native Title Benefits

The Treasury

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Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the Exposure Draft of the Native Title Amendment Bill 2012: Tax Treatment of Native Title Benefits (the Draft Bill).
2. As outlined in Attachment A, the Law Council represents the 16 Australian state and territory law societies and bar associations and the Large Law Firm Group (collectively referred to as the “Constituent Bodies” of the Law Council). In this way, the Law Council effectively acts on behalf of some 56,000 lawyers across Australia.
3. The Law Council has previously contributed to the development of Australian Government policy concerning the taxation of native title benefits in the context of previous public consultations. In 2008, the Law Council made submissions to the Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs in response to the 2008 discussion paper entitled “Optimising Benefits from Native Title Agreements”;¹ and to Treasury in response to the 2010 discussion paper entitled “Native Title, Indigenous Economic Development and Tax”.²
4. This submission builds upon the Law Council’s previous submissions and makes some recommendations with respect to the approach under the Draft Bill and its various submissions.
5. The Law Council would be very pleased to expand on any of these submissions or respond to any enquiries. Subject to these comments, the Law Council looks forward to seeing the Bill finalised and enacted.

Income tax exemption

6. Clause 3 of the Draft Bill proposes to amend the *Income Tax Assessment Act 1936* to introduce a new section 59-50, which provides as follows:
 - (1) These are not assessable income and are not *exempt income:
 - (a) a *native title benefit provided to an *Indigenous holding entity;
 - (b) a native title benefit provided to one or more *Indigenous persons, or applied for their benefit.
 - (2) A payment or other benefit:
 - (a) provided to an *Indigenous holding entity; or
 - (b) provided to one or more *Indigenous persons, or applied for their benefit;

¹ See Law Council submission dated 13 February 2009:
http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4CAACA66-1999-B243-6ECB-14B894127CFB&siteName=lca

² See Law Council submission dated 30 November 2010:
http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4CACAEAC-1999-B243-6E38-9D755A0D4518&siteName=lca

is not assessable income and is not *exempt income if the payment or benefit is provided by an Indigenous holding entity out of a *native title benefit it has received.

7. The Law Council notes that these provisions implement two proposals outlined in Treasury's 2010 discussion paper on Native Title, Indigenous Economic Development and Tax.
8. The Law Council supports these proposed amendments and is particularly supportive of the proposal to make native title payments and other benefits non-assessable and non-exempt, regardless of whether the benefits are paid to an Indigenous person or an "Indigenous holding entity".
9. Under the Draft Bill (section 59-50(6)), "Indigenous holding entity" is defined as:
 - (a) a *distributing body; or
 - (b) a trust, if the beneficiaries of the trust can only be:
 - (i) *Indigenous persons; or
 - (ii) distributing bodies; or
 - (iii) Indigenous persons and distributing bodies.
10. Under s 128U of the ITAA, "distributing body" is defined as
 - (a) an Aboriginal Land Council established under the *Aboriginal Land Rights Northern Territory) Act 1976*;
 - (b) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
 - (c) 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.
11. The extension of the income tax exemption of native title monetary and non-monetary benefits to payments received by an Indigenous holding entity appears to address concerns about the existing process, whereby native title holders may seek to use other tax exempt vehicles, such as charitable trusts. Charitable trusts are not ideal as holding entities for native title benefits. As noted in the Law Council's 2010 submission:

"... designation as a charitable trust can create significant limitations on the use of benefits received by the trust, including that funds in the trust may only be applied for a charitable purpose. As noted by the Consultation Paper, this is unlikely to include any commercial enterprise or venture which might assist the economic development or infrastructure of a community. It is considered problematic that native title holders should be forced to fit into the mould of a charitable trust when circumstances clearly require a distinct vehicle or

framework to ensure favourable tax treatment of benefits derived from native title agreements and determinations.”

12. The Law Council considers that the proposed “Indigenous holding entity” is appropriate and defined very broadly, to enable native title holders to structure their affairs in a manner that suits their specific needs.
13. The Draft Bill appears to envisage that the tax exempt vehicle may be a discretionary trust, a corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2001*, an Aboriginal Land Council or an incorporated body under another law of the Commonwealth, States or Territories *that relates to Aborigines*.
14. It is unclear why the limitation on the form of incorporated body is necessary. It appears to exclude, for example, corporations established under the *Corporations Act 2001* (Cth), notwithstanding that such a corporation could be an appropriate vehicle if subjected to the same limitation that applies to trusts in draft section 59-50(6)(b). The limitation also appears to exclude other legal structures unnecessarily. The Law Council suggests that the Draft Bill be amended to remove this limitation.

Investment income

15. It is noted that income derived from investment of a native title benefit will not be income tax exempt. It is understood that this is because the tax exemption to be applied under the Draft Bill is based on the correct notion that native title benefits do not result in a net gain. Native title benefits are paid on the basis that traditional owners’ native title rights have been diminished or extinguished.
16. Notwithstanding this, the Law Council considers that there must be a broader justification for this Bill, including promoting the capacity of native title holders to develop and improve upon an intergenerational asset. 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.
17. The Law Council considers 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 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..

Definition of native title benefit

18. Under sub-section(5) of section Clause 3 of the Draft Bill, a native title benefit is defined as:
 - (a) a payment or non-cash benefit provided under an agreement made under Commonwealth, State or Territory legislation (or an instrument under such legislation) to the extent the payment or benefit relates to an action affecting native title; or

(b) compensation under Division 5 of Part 2 of the NTA.

19. The Law Council supports this definition, including extension of the definition to non-cash benefits, which are increasingly provided for under native title agreements.

Other laws intended to benefit Aboriginal and Torres Strait Islander peoples

20. The Law Council recommends that consideration be given to whether the tax benefits proposed in relation to native title benefits under the Draft Bill could be extended to other enactments designed to benefit Aboriginal and Torres Strait Islander peoples.
21. The Law Council considers it would be appropriate for there to be a common regime in relation to taxation of payments made under State and Federal land rights legislation for the use of, or impact upon, Aboriginal or native title land.
22. Currently, payments contributed to the Aboriginal Benefits Account (ABA) under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) out of royalties from mining activities on Aboriginal land attract a 4% Mining Withholding Tax (MWT). Subsequent distributions to an Aboriginal person or distributing body are non-assessable, non-exempt income and therefore not subject to any tax under s 59-15 of the *Income Tax Assessment Act 1997* (Cth).
23. The Law Council notes that the MWT under Division 11C of the *Income Tax Assessment Act*, while arguably simple to apply and understand, is inequitable in its application.³ For example, median personal income for Indigenous people living in the Northern Territory is \$269 per week, equating to roughly \$14,000 per annum. At this rate, and following other offsets and deductions, it is unlikely that the majority of Aboriginal people living in the Northern Territory would pay any income tax, even if a distribution were made to them from the ABA.⁴
24. In addition, mining royalties from the ABA are paid to income tax exempt entities, (i.e. Land Councils), which indicates a clear policy position that those bodies should not be subject to income tax. Similar tax concessions are offered by State Governments, for example the NSW Aboriginal Land Council is exempt from land tax. These tax concessions are offered because those bodies play a significant role in promoting Indigenous economic development and representing the interests of Aboriginal and Torres Strait Islander communities. Further, it is unclear whether taxing beneficial payments to Aboriginal corporations at the Minister's discretion is consistent with the approach taken in respect of native title benefits. The Law Council submits that royalty payments to Aboriginal people for mining activities on Aboriginal land should attract similar considerations to the matters dealt with under the Draft Bill.
25. The Law Council recommends a review of those provisions in light of the principles underpinning the proposed Draft Bill in respect of native title benefits.

³ See, for example, Martin F, Tran-Nam, B, *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 and the reviews referred to at page 173, Part 9.

⁴ Ibid, note in particular case studies at pages 166-168.

Date of application

26. Clause 7 of the Draft Bill provides that:

“The amendments made by this Part apply in relation to native title benefits provided on or after 1 July 2008.”

27. The draft Explanatory Materials released together with the Draft Bill explains at paragraph 1.24 that:

“Allowing these changes to apply retrospectively clarifies the tax position for cases currently being considered by the Australian Taxation Office. By providing clarity, the changes facilitate a more favourable outcome for affected taxpayers. The retrospectivity does not negatively impact taxpayers. The four year retrospectivity aligns with the four year amendment period for tax returns.”

28. The Law Council welcomes the proposal to apply this tax exemption retrospectively, but queries whether it would be more equitable to apply these proposed changes to all native title agreements reached since the enactment of the *Native Title Act 1993* (Cth). The Law Council acknowledges this may result in some challenges associated with retrospective tax refunds over a significant period of time. However, the Draft Bill and earlier discussion papers on this issue represent 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”. The Law Council therefore considers that the exemption should be applied retrospectively to all native title benefits received by native title holders since the native title system was established.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.