

Our Ref: AK

24 August 2012

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

Dear Sir

**SUBMISSION: TAX TREATMENT OF NATIVE TITLE BENEFITS**

In response to the Treasury's invitation, this letter contains the submission of Ngaanyatjarra Council (Aboriginal Corporation) (ICN: 101), Ngaanyatjarra Land Council (Aboriginal Corporation) (ICN: 715) and Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation) RNTBC (ICN: 4527) (the **Ngaanyatjarra Corporations**) regarding the Exposure Draft of the *Tax Laws Amendment Bill 2012: tax treatment of native title benefits*.

**1. Background to the Ngaanyatjarra Corporations**

- 1.1 Each of the Ngaanyatjarra Corporations is incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
- 1.2 The Ngaanyatjarra Council (Aboriginal Corporation) (the **Council**) represents the interests of around 2000 Ngaanyatjarra, Pintupi and Pitjantjatjara Traditional Owners (Yarnangu) who reside in the twelve member communities in the central desert region of Western Australia.
- 1.3 Ngaanyatjarra Land Council (Aboriginal Corporation) (the **Land Council**) is the lessee of 99 year leases of land reserved for the use and benefit of Aboriginal inhabitants under the *Land Administration Act 1997* (WA) and proclaimed under Part III of the *Aboriginal Affairs Planning Authority Act 1972* (WA). The Land Council is also sublessee of 50 year leases granted to the Aboriginal Lands Trust under the *Land Act 1933* (WA) for the use and benefit of Aboriginal inhabitants.
- 1.4 Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation) RNTBC (the **PBC**) is the registered native title body corporate which holds native title on trust for the native title holders under the Ngaanyatjarra Lands native title determination (*Stanley Mervyn and Others v the State of Western Australia and Others* [2005] FCA 831). That determination covers parts of the 99 and 50 year leases referred to above, as well as covering some unallocated Crown land and other tenures. The determination recognises that the native title rights and interests confer possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others.

- 1.5 The Ngaanyatjarra Corporations have entered into a number of agreements with mining and petroleum companies, and are likely to continue to do so into the future. Under those agreements, the companies agree to pay sums of money and in return obtain consent to the grant of mining tenements and access to land both for the purposes of the *Native Title Act 1993* (Cth) (NTA) and in accordance with the rights of the Land Council under the leases and for the purposes of the *Aboriginal Affairs Planning Authority Act 1972* (WA) and regulations made under that Act (AAPA Act).

## 2. The Ngaanyatjarra Corporations' concerns

- 2.1 Proposed subsection 59-50(5) of the *Income Tax Assessment Act 1997* (ITAA1997) defines a "native title benefit". A payment made under an agreement will only satisfy that definition:
- (a) if the agreement is made under a State or Commonwealth Act or under an instrument made under such an Act; and
  - (b) to the extent that the payment relates to an act affecting native title (i.e. an act which extinguishes native title or which is wholly or partly inconsistent with its continued existence, enjoyment or exercise).
- 2.2 The Exposure Draft also proposes an amendment to the definition of a "mining payment" under section 128U of the *Income Tax Assessment Act 1936* (ITAA1936) to exclude a native title benefit from that definition. No other substantive amendments are proposed to the Mining Withholding Tax regime in Division 11C of Part III of the ITAA1936.

### First concern

- 2.3 The Ngaanyatjarra Corporations' first concern is that it is unclear whether agreements of the kind referred to in paragraph 1.5 above are made "under" the NTA and/or the AAPA Act. Most of the agreements are not indigenous land use agreements. In some cases the agreements require the PBC to execute, upon request, a separate agreement for the purposes of section 31 of the NTA (commonly referred to in Western Australia as a 'State Deed'). While the main agreement may provide that the PBC consents to the grant of particular mining or petroleum tenements, only the 'State Deed' will be provided to the National Native Title Tribunal and notified to the Minister under section 41A of the NTA.
- 2.4 Accordingly it could be argued that while the State Deed is made "under" the NTA, the main agreement (being the agreement under which payments are made) is not made "under" the NTA nor under the AAPA Act. See for example *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Limited* (2000) 201 CLR 520 especially at [49].
- 2.5 Such an outcome would not be consistent with the Attorney-General Nicola Roxon's Media release in which she stated that "*we will clarify that income tax and capital gains tax will not apply to payments from a native title agreement*".<sup>1</sup> Agreements of the kind referred to in paragraphs 1.5 and 2.3 above are commonly considered to be 'native title agreements', yet rather than clarifying the law, the proposed drafting in the Exposure Draft introduces further uncertainty.

### Second concern

- 2.6 The Ngaanyatjarra Corporations' second concern (assuming the first concern is resolved) is that in the case of agreements of the kind referred to in paragraph 1.5 above, an issue may arise as to whether, and if so to what extent, payments made under the agreement constitute a

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<sup>1</sup> The Honourable Nicola Roxon MP, Attorney-General and Minister for Emergency Management, Media Release, "The Future of Native Title" 6 June 2012.

*native title benefit* (and are therefore non-assessable non-exempt income), and to what extent the payments are a *mining payment* in respect of which Mining Withholding Tax is payable. This is because the agreements themselves do not expressly identify to what extent the benefits relate to native title and to what extent they relate to the 99 or 50 year leases.

- 2.7 The Ngaanyatjarra Corporations submit that it is not good public policy for such uncertainty to exist, as it is likely to lead to confusion and an additional administrative burden on the Ngaanyatjarra Corporations, mining and petroleum companies operating in the central desert region, and the Australian Taxation Office. There is also no good policy reason why native title payments should be tax free, while mining payments in respect of Indigenous land remain taxable. A better overall policy is to encourage and facilitate the delivery of resources to counteract the disadvantage experienced by Indigenous Australians living in the Ngaanyatjarra Lands.

Third concern

- 2.8 The Ngaanyatjarra Corporations' third concern is that it could be argued a payment or benefit under an agreement of the kind referred to in paragraph 1.5 above does not relate to "an act affecting native title" because the act does not extinguish the native title nor is it wholly or partly inconsistent with its continued existence, enjoyment or exercise. This is because, under the Ngaanyatjarra Lands native title determination, the 99 and 50 year leases prevail over the native title and the non-extinguishment principle applies. It would be preferable for the drafting of section 59-50 to put this beyond doubt.

**3. Proposed amendment to the Exposure Draft**

- 3.1 The Ngaanyatjarra Corporations' principal submission is that:

- (a) Mining payments should be given the same status as native title benefits; that is, mining payments should be non-assessable non-exempt income; or the rate of Mining Withholding Tax under section 128V(1) ITAA1936 should be set at zero percent; and
- (b) The definition of a *native title benefit* under proposed subsection 59-50(5) ITAA1997 should be amended to read as follows:

(5) A *native title benefit* is a payment or non-cash benefit provided:

- (a) under an agreement concerning an act in relation to native title, to the extent that the payment or benefit relates to that act; or
- (b) as compensation determined in accordance with Division 5 of Part 2 of the *Native Title Act 1993*.

In paragraph (a), *act* and *native title* have the same meaning in that paragraph as they have in the *Native Title Act 1993*.

This will:

- ensure that payments under native title agreements of the kind commonly entered into by the Ngaanyatjarra Corporations, and others, would be non-assessable non-exempt income; and

- remove any need to characterise a payment as being either a native title benefit or a mining payment, or to apportion the amount of each (as the consequences would be the same either way).

3.2 Alternatively, if mining payments are to remain subject to Mining Withholding Tax at the current rate, the Ngaanyatjarra Corporations submit that proposed subsection 59-50(5) should be amended, and a new subsection 59-50(6) should be inserted in the ITAA1997 for clarification, as follows (with the existing proposed subsection 59-50(6) renumbered to be 59-50(7)):

(5) A *native title benefit* is a payment or non-cash benefit provided:

- (a) under an agreement concerning an act in relation to native title, provided the payment or benefit relates to that act; or
- (b) as compensation determined in accordance with Division 5 of Part 2 of the *Native Title Act 1993*.

In paragraph (a), *act* and *native title* have the same meaning in that paragraph as they have in the *Native Title Act 1993*.

(6) A native title benefit may relate to an act in relation to native title notwithstanding the payment or non-cash benefit also relates to Indigenous land (as that term is defined in subsection 128U(1) of the *Income Tax Assessment Act 1936*).

This will:

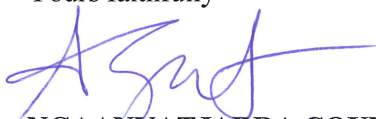
- ensure that payments under native title agreements of the kind commonly entered into by the Ngaanyatjarra Corporations, and others, would be non-assessable non-exempt income; and
- remove uncertainty as to whether a payment is a native title benefit or a mining payment (or partly both), as the whole of the payment will be characterised as being a native title payment except insofar as the payment is entirely unrelated to native title (in which case it may be a mining payment).

3.3 Note that in the proposed drafting above, the third concern of the Ngaanyatjarra Corporations has been addressed by referring to “an act in relation to native title” rather than an act “affecting” native title.

#### 4. Confidentiality

This submission is not confidential.

Yours faithfully



**NGAANYATJARRA COUNCIL**

Alex Knight

Manager, Land & Culture