



Tax Laws Amendment Bill – Tax Treatment of Native Title Benefits

House of Representatives Economics Committee

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Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the *Tax Laws Amendment Bill 2012* (the Bill). The focus of this Submission is Schedule 1 of the Bill, relating to tax treatment of native title benefits.
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 60,000 lawyers across Australia.
3. This Submission has been lodged by the authority delegated by the Law Council's Board of Directors to the Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.
4. In preparing this Submission, the Law Council has consulted with its Indigenous Legal Issues Committee.
5. 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 Most recently, the Law Council made a Submission to Treasury in relation to an exposure draft Bill relating to *Tax Treatment of Native Title Benefits*, the provisions of which now largely appear in Schedule 1 of the Bill.³
6. This Submission builds upon the Law Council's previous Submissions. It suggests some amendments to the Bill to improve its operation and further promote the aims of Schedule 1 of the Bill, which the Law Council understands is to assist native title claimants to maximise the benefits of native title payments, to promote Indigenous economic development and preserve an intergenerational asset for the benefit of future generations of native title holders.
7. The Law Council would be pleased to expand on any aspect of this Submission or respond to any enquiries.

Income tax exemption

8. Clause 3 of the Bill proposes to amend the *Income Tax Assessment Act 1936* to introduce a new section 59-50, subsections (1) and (2) of which provide that:

(1) a native title benefit provided to an Indigenous person or Indigenous holding entity; and

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

³ See Law Council submission dated 31 August 2012:
http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8E92EBEF-1999-B243-6EC1-1A148DDAD562&siteName=lca

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- (2) an amount, or other benefit, arising directly or indirectly from native title benefit provided to an Indigenous person or Indigenous holding entity, is 'non-assessable, non-exempt' income for income tax purpose .
9. 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.
10. 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'.
11. 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 Indigenous persons distributing bodies.
12. 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.
13. 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 to Treasury:
- “... 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

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framework to ensure favourable tax treatment of benefits derived from native title agreements and determinations.”⁴

14. The Law Council considers that the proposed definition of ‘Indigenous holding entity’ is appropriate; the term is defined broadly, to enable native title holders to structure their affairs in a manner that suits their needs.
15. The 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*.
16. 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 unnecessarily exclude other potential legal structures. The Law Council suggests that the Bill be amended to remove this limitation, to ensure native title beneficiaries are not limited in the choice of tax-exempt vehicles.
17. The Law Council notes that the income tax exemption under the Bill will apply to any native title benefit made under an agreement made under Australian legislation. This is regardless of whether it is later found that native title does not exist or no formal native title determination is ever made. The Law Council supports this aspect of the Bill.

Investment income

18. 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 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.
19. Notwithstanding this, the Law Council considers that there is a broader justification for this Bill, including promoting the capacity of native title holders to develop and improve upon an intergenerational asset. As noted in the Explanatory Memorandum accompanying the Bill:

‘This Schedule is part of a package of reforms to native title announced by the Government to ensure a sustainable and fair native title system that creates economic and social opportunities for Indigenous Australians.’
20. The Law Council submits that exemption of interest income derived from investing a native title benefit would be consistent with these objectives. 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.

⁴ http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4CACAEAC-1999-B243-6E38-9D755A0D4518&siteName=lca

21. 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.
22. The Law Council recommends that the income tax exemption be extended to interest income derived from investing native title benefits.

Definition of native title benefit

23. Under sub-section(5) of Clause 3 of the Bill, a native title benefit is defined as an amount or non-cash benefit that arises under an agreement made under Commonwealth, State or Territory legislation (or an instrument under such legislation) or an ancillary agreement to such an agreement; and compensation under Division 5 of Part 2 of the NTA.
24. The Law Council supports this definition, including the extension of the definition to non-cash benefits which are increasingly provided for under native title agreements.

Capital Gains Tax

25. The Bill provides that a capital gain or capital loss is disregarded for Indigenous persons and Indigenous holding entities if the capital gain or loss arises because the Indigenous person or holding entity:
 - (a) transfers the CGT asset to one or more persons who are also Indigenous persons or holding entities; or
 - (b) creates a trust that is an Indigenous holding entity over the CGT asset; or
 - (c) ends their ownership of the CGT asset, resulting in the CGT event occurring.
26. CGT assets are defined as either 'native title' or 'a right to be provided with a native title benefit'.
27. The Law Council supports the exclusion of capital gains and losses by Indigenous persons and holding entities.

Date of application

28. Clause 9 of the Bill provides that:

'The amendments made by this Part apply in relation to native title benefits provided on or after 1 July 2008.'
29. The Explanatory Memorandum for the Bill explains at paragraph 1.37 that the four year retrospectivity aligns with the four-year amendment period for tax returns.
30. 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*

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(Cth). The Law Council acknowledges that this may result in some challenges associated with retrospective tax refunds over a significant period of time. However, the Bill represents 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 60,000 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.