



*spirit
of
Change*

ABN 32 122 833 158

638 Queensberry Street
North Melbourne 3051
PO Box 431
North Melbourne 3051

Tel: +613 9326 7822
Fax: +613 9326 4075

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Committee Secretary
Standing Committee on Economics
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Via email: economics.reps@aph.gov.au

Dear Committee Secretary

Re: Tax Laws Amendment (2012 Measures No. 6) Bill 2012

Please find attached the submission of the National Native Title Council to the House Standing Committee on Economics Inquiry.

The National Native Title Council is the peak body of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) from around Australia being formally incorporated in November 2006. The objects of the National Native Title Council are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The National Native Title Council would be happy to provide further information about its submission should this be required.

Yours sincerely


Brian Wyatt
Chairperson



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Submission

Tax Laws Amendment (2012 Measures No. 6) Bill 2012: Tax Treatment of Native Title Benefits

Introduction

The National Native Title Council (NNTC) has advocated strongly for the importance of, and opportunity for, native title payments being used to facilitate greater economic development and wealth creation for current and future generations of traditional owners, their families and communities. The NNTC believes that using such an approach will establish vibrant, diverse and sustainable regional communities, particularly in areas where there is limited mainstream economic opportunity.

The *Tax Laws Amendment (2012 Measures No. 6) Bill 2012* (the 'Amendment Bill') is a welcome and positive step towards facilitating greater economic development opportunities for Indigenous communities. As we understand it, the provisions set out in the Amendment Bill are to exempt payments and non-monetary benefits that are made under an agreement relating to native title and/or payments and non-monetary benefits that are compensation for the effect of actions on native title rights and interests (native title compensation).

The NNTC agrees that native title payments are a form of compensation and that they should therefore be considered as non-assessable non-exempt (NANE) income, meaning they are not subject to income tax (including capital gains tax).

However, whilst we support the extension of NANE to income generated from native title benefits, and to this effect some of the NNTC comments to the initial Exposure Draft have been taken into consideration, the NNTC has some residual concerns about the Amendment Bill. Our concerns and comments are set below:

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1. Benefit Sharing Agreements

In its submission to the Exposure Draft, the NNTC stated that more certainty was required in order to ensure that benefit-sharing arrangements would receive the NANE income treatment. The NNTC stated that guidance should be provided as to how the NANE income treatment would be applied. There are no details in relation to benefit sharing arrangements under the Amendment Bill, however such arrangements would receive NANE income treatment so long as they fit the criteria for a 'native title benefit' as set out in s 59-50(5) ITAA 1997.

S 59-50(5) ITAA 1997, as inserted under the Amendment Bill, provides that a 'native title benefit' is an amount or non-cash benefit that arises under an agreement made under Australian legislation, or an ancillary agreement to such an agreement, to the extent that the amount or benefit relates to an act that would extinguish native title or that would be otherwise wholly or partly inconsistent with the continuation of native title; or a payment/benefit that is compensation under the NTA. This reflects the proposed amendments under the Exposure Draft.

The only clarity that the Amendment Bill provides in relation to benefit-sharing agreements is the Example 1.8 set out in the Explanatory Memorandum, which states:

Example 1.8: Indigenous Land Use Agreement and native title benefits

An Indigenous group enters into an ILUA with a mining company. Under the agreement, the group sets up a trust as an Indigenous holding entity to receive cash payments in the form of profit-sharing payments and milestone lump-sum payments. The agreement also provides for non-cash benefits in the form of training for the beneficiaries of the trust. As the agreement is an ILUA entered into under the NTA and the trust satisfies the definition of an Indigenous holding entity, the benefits received by the trust and its Indigenous beneficiaries are native title benefits and thus NANE income.

Benefit-sharing agreements are negotiated with Traditional Owners and Indigenous communities to deliver tangible community development, economic development and wealth creation opportunities. These benefits can represent compensation for impacts on native title rights, land rights or cultural heritage and are delivered as a mix of monies held in trust and other purposes such as community assets/infrastructure, and payments to individuals. The provisions under the Amendment Bill will limit the extent to which payments/benefits under such agreements are subject to NANE income treatment. It will only be such payments/benefits that arise out of an agreement to the extent that it relates to an act affecting native title, and the beneficiaries of the payment / benefits are Indigenous people.

In its submission, the NNTC stated that clarity was required with respect to paragraphs 1.13 and 1.15 of the Explanatory Memorandum. Paragraph 1.15 confirmed that the NANE income treatment would apply to any payments or non-cash benefits provided under an agreement relating to native title. However, clause 1.13 stated that '*certain*' native title benefits are NANE income but was not explicit about those payments / benefits that would not be considered.

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The NNTC seeks confirmation that paragraphs 1.13 and 1.15 of the Explanatory Memorandum of the Amendment Bill do in fact clarify that native title payments for the extinguishment or impairment of native title rights and interests are NANE income.

2. Native Title Benefit

The Exposure Draft to the Amendment Bill stated that the NANE income treatment was applicable to agreements made under the *Native Title Act 1993* (Cth) and the *Traditional Owner Settlement Act 2010* (Vic). In its submission, the NNTC noted that the Exposure Draft made no reference to a wide range of other agreements, such as ‘as if’ agreements. The Amendment Bill inserts s 59-50(5) to the ICAA 1997 to define a ‘native title benefit’.

The Amendment Bill, like the Exposure Draft, provides that a native title benefit may arise under an agreement made under Australian legislation. The Amendment Bill includes Note 1 to s 59-50(5) of the ICAA 1997 which states that a native title benefit *includes* agreements under the NTA and the *Traditional Owner Settlement Act 2010* (Vic). Paragraph 1.27 of the Explanatory Memorandum of the Exposure Bill clearly states that a native title benefit includes, but is not limited to, ILUAs under the NTA and agreements under the *Traditional Owner Settlement Act 2010* (Vic).

‘As if’ agreements may be excluded under s 59-50(5), which states a payment/benefit is only a native title benefit to the extent that the amount or benefit relates to an act that would extinguish native title or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title. The Amendment Bill provides that the ICAA 1997 adopts the same meaning of ‘native title’ as under the NTA. Therefore, the non-extinguishment principle, as set out in the NTA, remains relevant to considering whether native title exists for the purposes of a native title benefit.

3. Definition of ‘Indigenous holding entity’ and ‘distributing body’

In its submission to the Exposure Draft, the NNTC raised concerns about the limitation of beneficiaries, as defined under an ‘Indigenous holding entity,’ to Indigenous people. The Amendment Bill includes the same definition of ‘Indigenous holding entity’ as the Exposure Draft. Therefore, the NNTC’s concern about the limitation of beneficiaries to Indigenous people remains.

The NNTC considers that the limitation of beneficiaries, as defined under an ‘Indigenous holding entity,’ to Indigenous people may have unintended consequences for the investment of communal funds in community infrastructure such as remote area health services, which may also service a small proportion of non-Indigenous clients. The limited focus on beneficiaries may be inconsistent with the requirements for charitable trusts in relation to the public benefits test. The limitation on beneficiaries could potentially exclude certain entities such as: trusts with a charitable unincorporated association or trust as a beneficiary; or a trust that has only Indigenous persons and/or ‘distributing bodies’, but the trust deed includes a general power to appoint additional beneficiaries.

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In its submission to the Exposure Draft, the NNTC also stated that the definition of ‘distributing body’ was too narrow as it did not capture all corporations that operate for the benefit of Indigenous persons. Under the definition of ‘distributing body’ in s 128U(1) ICAA 1936, the Amendment Bill amends subsection (d) to provide that the definition of a ‘distributing body’ includes an incorporated body:

- established under the provision of an Australian law relating to Indigenous people, and
- that can distribute the moneys it receives to, or for the benefit of, Indigenous persons, either directly or indirectly.

In this respect, the NNTC’s concerns remain in that the definition of a ‘distributing body’ could exclude certain entities such as public companies limited by guarantee. We therefore seek clarification of the definition of ‘distributing body’ to ensure it fully captures all entities that operate for the benefit of Indigenous people.

4. Short term focus

In its submission, the NNTC raised concerns that the tax treatment of investment income under the Exposure Draft discouraged long-term investment, which would be contrary to the objective of the agreements. The NNTC noted its particular concern that, under the Exposure Draft, interest income derived from investing a native title benefit would not be considered NANE income.

Investment income is dealt with under the Amendment Bill the same way as it was under the Exposure Draft, which provides that income earned from investing a native title benefit is subject to the normal income tax rules.

The NNTC therefore remains concerned about the tax treatment of investment income, such as interest income derived from investing a native title benefit, which will not be considered NANE income. It is the NNTC’s view that inadequate consideration has been given to the tax treatment of investment funds to ensure benefits for future community and economic development initiatives and future generations. Example 1.4 of the Explanatory Memorandum, if implemented, would discourage long term investment strategies, which is contrary to the objective of agreements that are about recognising impacts on native title rights of both current **and future** generations. If distributions are not able to be made in this context there may not be an effective catalyst for social and economic development towards Closing the Gap in the longer term.

Further, the NNTC believes that the exclusion of investment income from receiving NANE income treatment may have perverse outcomes in relation to long term investment strategies for some groups. Not all native title agreements attract significant amounts of money, which means that traditional owners groups have to employ well thought out and strategic investment tactics to ensure the best possible outcomes for their communities. The exclusion of investment income from receiving NANE treatment could potentially undermine the development of strong and rational decision-making towards long term economic development and wealth creation.

The NNTC fully supports the policy intent of current **and future** recipients of native title related revenue benefiting from the application of preferential tax treatment of these funds. We consider

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that the narrow focus on immediate benefit rather than long term investment income into the future does not provide an optimal framework to achieve these shared outcomes.”

Conclusion

The NNTC fully supports the introduction of NANE income treatment for native title payments and benefits as set out in the Amendment Bill. However, the NNTC is concerned that there is inadequate consideration given to how accumulation, wealth creation and intergenerational benefits are encouraged. To address this, and other concerns, the NNTC recommends that:

- Confirmation that benefit sharing arrangements will receive the NANE income treatment;
- ‘As if’ agreements should receive the same NANE income treatment;
- The definitions of ‘Indigenous holding entity’ and ‘distributing body’ should be broadened;
- The Amendment Bill be amended to provide a framework that enables current **and future** recipients of native title related revenue to benefit from the application of preferential tax treatment of these funds. The tax treatment of investment income (rather than just the original payments) should be addressed.