SUBMISSION 4

Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

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Yamatji Marlpa
ABORIGINAL CORPORATION

By E-mail
Private & Confidential

Ms Julie Owens MP
Chair
Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

Your Ref
Our Ref ML
File No. 011749052

Contact
Mark Leibler AC
Direct 61 3 9229 9999
Facsimile 61 3 9229 9966
mleibler@abl.com.au

Attention: Julie Owens MP

Dear Julie

Submission: *Tax Laws amendment (2012 Measures No 6) Bill 2012*

In your capacity as the Chair for the House Standing Committee of Economics in relation to the *Tax Laws amendment (2012 Measures No 6) Bill 2012* on the tax treatment of native title benefits we enclose for your and the Committee's review our joint submission on the *Tax Laws amendment (2012 Measures No 6) Bill 2012*.

We would welcome an opportunity to discuss the contents of our submission with you in due course.

Yours faithfully

Mark Leibler AC
Senior Partner
Arnold Bloch Leibler

Peter Seidel
Partner, Public Interest
Arnold Bloch Leibler

Simon Hawkins
Chief Executive Officer
YMAC

Michael Meegan
Principal Legal Officer
YMAC

JOINT SUBMISSION TO HOUSE STANDING COMMITTEE ON ECONOMICS

TAX LAWS AMENDMENT (2012 MEASURES NO 6) BILL 2012

PREPARED BY: ARNOLD BLOCH LEIBLER AND YAMATJI MARLPA ABORIGINAL CORPORATION

1.1 On 29 November 2012 the *Tax Laws Amendment (2012 Measures No 6) Bill 2012* (the **Bill**) was introduced to the Parliament. The Bill provides that, if enacted, native title benefits will be exempt from Australian tax. If enacted the changes will apply retrospectively from 1 July 2008.

1.2 The Bill represents a significant step towards achieving the policy intention behind Attorney-General Nicola Roxon's announcement at the National Native Title Conference in Townsville on 6 June 2012 that "*income tax and capital gains tax will not apply to payments from a native title agreement*".

1.3 In our view though, despite this significant step, further amendments to the Bill are absolutely necessary to fully realise this clear and unambiguous policy intention.

1.4 This Submission, which has been prepared by Arnold Bloch Leibler and Yamatji Marlpa Aboriginal Corporation, focuses on three areas of critical importance to the working ability of the Bill:

(a) the definition of "native title benefit";

(b) the definition of "Indigenous holding entity"; and

(c) the definition of "distributing body".

1 Definition of "native title benefit"

1.1 By the Bill, the exemption from income tax and capital gains tax will only apply to 'native title benefits'.

1.2 A "native title benefit" is defined in the Bill as an amount or non-cash benefit provided under certain specified agreements, 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.

1.3 The definition of "native title benefit" in the Bill requires two things:

(a) there must be an amount or non-cash benefit provided under a relevant agreement; and

(b) the amount or benefit must relate 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. (For ease of exposition, we will refer to this 'act' as '**an act affecting native title**').

1.4 This two-step process does not at all properly reflect the clear and unambiguous intent of the Attorney-General Nicola Roxon's Media release of 6 June 2012 when she stated that "we will clarify that income tax and capital gains tax will not apply to payments from a native title agreement".[1]

1.5 The additional requirement for an amount or benefit to relate to an act affecting native title is also inconsistent with Example 1.8 in the Explanatory Material that appears to indicate (as is absolutely proper in our view) that no further inquiry is needed when an amount or benefit is made under an Indigenous Land Use Agreement (**ILUA**) or any native title related agreement.

1.6 In any event, the current drafting in the Bill is inconsistent with general native title commercial practice. In our experience ILUAs and native title related agreements very often do not include provisions that payments or amounts are being made in consideration for acts that amount to acts affecting native title.

1.7 As such this aspect of the Bill actually flies in the face of common commercial practice, which is the very opposite of what is being sought to be achieved here, as we understand it

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

1.8 Further, an ILUA or a native title related agreement can cover past acts, as well as acts that amount to something less than an act of extinguishment or being wholly or partly inconsistent with the right or interest's continued existence, enjoyment or exercise. For example, an agreement may address issues of access or coexistence – both of which may not be wholly or even partly inconsistent with continued existence, enjoyment or exercise of native title rights or interests.

1.9 In addition, a requirement that a "native title benefit" will only be exempt from Australian tax to the extent it is an act affecting native title is not necessarily consistent with the application of the 'non-extinguishment principle', as defined in the *Native Title Act*.

1.10 There are also extremely strong policy reasons why the definition of "native title benefit" should not be a two-step process.

1.11 Native title agreements contain a wide variety of payment and benefit provisions, some of which may be expressly referable to acts affecting native title, whilst many others may be cast in more neutral language. Others still may be less clear on any such nexus.

1.12 If the test was intended to be a two-step process then potentially many years after the ILUA is registered or agreement is executed the Australian Taxation Office may question whether payments or amounts under an ILUA related to an act affecting native title. At best, confusion will abound, and at worst the ATO may assess the payments or amounts as subject to tax (and potentially penalties and interest), with litigation the likely result.

1.13 Such a result would singularly defeat the very reason why the tax laws are being amended here as a beneficial and positive measure.

1.14 It is obvious to us that the two-step test has no place in these amendments.

1.15 The definition of "native title benefit" should be changed to ensure that it applies to all benefits received pursuant to the relevant native title related agreement. The Bill should be silent on whether or not the

payment or amount relates to an act affecting native title. This will provide clarity and will ensure consistency with the policy intent of the government. In the result, it will avoid confusion and inevitable ensuing litigation, created by differences of interpretation.

2 Definition of "Indigenous holding entity"

2.1 A "native title benefit" is not assessable if received by an Indigenous person or an "Indigenous holding entity".

2.2 An "Indigenous holding entity" can be either a "distributing body" (see 3 below) or a trust, provided the beneficiaries of the trust **can only be** Indigenous persons or distributing bodies.

2.3 The use of the words 'can only be' results in overly rigid criteria for a trust to be an "Indigenous holding entity". For example, the following would seemingly not fall within the definition:

(c) a trust with a charitable unincorporated association or trust as a beneficiary; or

(d) a trust that has only Indigenous persons and/or 'distributing bodies' as beneficiaries, but the trust deed includes a general power to appoint additional beneficiaries.

2.4 From our work in this jurisdiction for nearly two decades now, we are aware of Indigenous entities that have entered into ILUAs and other native title related agreements where some of the benefits under that agreement are paid to a trust, and where the beneficiaries of the trust include a charitable trust (with a purpose to benefit an Indigenous community or communities). The trust that entered into the agreement would not be an "Indigenous holding entity" under the definition in the Bill.

2.5 Further, the definition would result in an immediate compliance burden on all trusts that seek to afford themselves of the tax exemption for native title benefits in the Bill. That is, all trusts would need to review, and possibly amend, the terms of their trust deeds to ensure all

beneficiaries are of the required type and there is not a general power to appoint additional beneficiaries. To the extent that an existing trust did not meet the criteria to qualify as an "Indigenous holding entity" the trust deed would need to be amended (if possible) or a new arrangement entered into. Difficult issues may arise under ILUAs and other arrangements if a new entity is required.

3 Definition of "distributing body"

3.1 The income tax legislation contains an existing definition of "distributing body". The Bill does not change this definition, except to the extent that the references to "Aboriginal" are replaced with "Indigenous person". If a "distributing body" receives a "native title benefit", the native title benefit is exempt from Australian tax.

3.2 The existing definition of "distributing body" is limited to incorporated bodies formed under laws that relate specifically to Indigenous persons.

3.3 We remain strong in the view that the existing definition of "distributing body" is **far too narrow in scope**, in that it prevents incorporated bodies, formed for the purpose of benefitting Indigenous persons, from being 'distributing bodies' where the body was formed, for example, under the *Corporations Act 2001* for the benefit of Indigenous persons, rather than under a law that relates specifically to Indigenous persons.

3.4 Many of the Indigenous organisations that we are associated and work with include companies limited by guarantee, where the 'not for profit' purpose or the object of the company is to principally benefit Indigenous persons. As it stands, under the existing definition of "distributing body" in the Bill, 'native title benefits' received by a company limited by guarantee under the *Corporations Act 2001* with a purpose of benefiting Indigenous persons would not qualify for the tax exemption. This is an anomalous outcome.

3.5 Further, many Indigenous organisations we work with do not necessarily want to be incorporated under laws that specifically relate to Indigenous persons, particularly under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

3.6 To prescribe, as the Bill does, that organisations that are empowered to benefit Indigenous persons must only be established under laws that specifically relate to Indigenous person risks being perceived as archaic, paternalistic and discriminatory.

3.7 Again, this seems to be anathema to what the Attorney General mandated was to be achieved when she made the announcement about the Bill at the National Native Title Conference in Townsville on 6 June 2012.

4 Conclusion

4.1 The Bill represents a significant positive step towards achieving the policy intention behind Attorney-General Nicola Roxon's announcement that "income tax and capital gains tax will not apply to payments from a native title agreement".

4.2 Despite this significant step, further amendments to the Bill are necessary to fully realise this clear and unambiguous policy intention.

4.3 We would be delighted to be given the opportunity to provide further detail on our concerns with the Bill at any time convenient to the committee.

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