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Yamatji Marlpa
ABORIGINAL CORPORATION

By E-mail
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Attention: Chris Lyon

Dear Mr Chris Lyon

Submission: tax treatment of native title benefits

We understand that you are the Contact Officer for the Treasury in relation to the exposure draft legislation and explanatory material on the tax treatment of native title benefits.

We enclose our and Yamatji Malpa Aboriginal Corporation's joint submission on the exposure draft legislation and explanatory material.

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

Yours sincerely

Mark Leibler AC
Senior Partner

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YMAC

JOINT SUBMISSION TO TREASURY

EXPOSURE DRAFT LEGISLATION AND EXPLANATORY MATERIAL ON THE TAX TREATMENT OF NATIVE TITLE BENEFITS

PREPARED BY: ARNOLD BLOCH LEIBLER AND YAMATJI MARLPA ABORIGINAL CORPORATION

1 Introduction

1.1 Thank you for the opportunity to comment on the exposure draft legislation (**Draft Legislation**) and explanatory material (**Explanatory Material**) on the tax treatment of native title benefits.

1.2 Arnold Bloch Leibler provides strategic legal and commercial advice nationally to a diverse range of leading Australian corporations, high-net-worth individuals, large family businesses, international corporations, as well as Indigenous groups. The amendments to the tax laws proposed in the Draft Legislation are of significant importance and concern to Arnold Bloch Leibler and it's clients.

1.3 Yamatji Marlpa Aboriginal Corporation (**YMAC**) is a native title representative body with statutory functions under the *Native Title Act 1993* (***Native Title Act***), and whose primary purpose is to represent the traditional owners of the Pilbara, Murchison and Gascoyne regions of Western Australia in various native title matters. YMAC is an important client of Arnold Bloch Leibler. YMAC's representative area covers over 1 million square kilometres, and YMAC has offices in Geraldton, South Hedland, Karratha, Tom Price, and Perth. The amendments to the tax laws proposed in the Draft Legislation are also of significant importance and concern to the traditional owners represented by YMAC.

2 Overview

2.1 The Draft Legislation represents a significant positive 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*".

2.2 Despite this significant step, further amendments to the Draft Legislation and Explanatory Material are necessary to fully realise this clear and unambiguous policy intention.

2.3 Our submission focuses on three areas of critical importance:

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

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

(c) the definition of 'distributing body'.

2.4 Further, we have included an additional submission concerning the introduction of a new deductible gift recipient (**DGR**) category for Indigenous organisations that carry out activities across multiple DGR categories in Division 30.[1]

3 Definition of 'native title benefit'

3.1 Proposed subsection 59-50(5) contains the new definition of 'native title benefit' and incorporates existing terminology from the *Native Title Act*, as follows:

> (5) A ***native title benefit*** is a payment or *non-cash benefit provided:
>
> (a) under an agreement made under:
>
> (i) an Act of the Commonwealth, a State or a Territory; or
>
> (ii) an instrument made under such an Act;
>
> to the extent that the payment or benefit relates to an act affecting native title; or
>
> (b) as compensation determined in accordance with Division 5 of Part 2 of the *Native Title Act 1993*.
>
> In paragraph (a), ***act***, ***affecting*** and ***native title*** have the same meaning in that paragraph as they have in the *Native Title Act 1993*.
>
> Note: Examples of agreements that can be covered by paragraph (a) include:
>
> (a) indigenous land use agreements (within the meaning of the *Native Title Act 1993*); and

[1] Unless expressly stated otherwise, all legislative references are to *the Income Tax Assessment Act 1936* or *Income Tax Assessment Act 1997* as appropriate.

(b) recognition and settlement agreements (within the meaning of the *Traditional Owner Settlement Act 2010* of Victoria).

3.2 We respectfully submit that three changes should be made to proposed subsection 59-50(5),. In summary:

(a) proposed paragraph 59-50(5)(a) should be changed to ensure that it applies to all benefits received pursuant to the relevant agreement, whether or not the payment relates to an act affecting native title;

(b) the word 'agreement' in proposed paragraph 59-50(5)(a) should be replaced by 'agreement, arrangement, or understanding'; and

(c) the reference in proposed subsection 59-50(5) to definitions in the *Native Title Act* should be updated to ensure consistency with that legislation.

Act affecting native title

3.3 Under proposed paragraph 59-50(5)(a) a 'native title benefit' is a payment or non-cash benefit provided under a specified agreement to the extent that the payment or benefit relates to an act that extinguishes native title rights or interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (an '**act affecting native title**').

3.4 Proposed paragraph 59-50(5)(a) requires two things:

(a) there must be a payment made pursuant to a relevant agreement; and

(b) the payment must relate to an act affecting native title.

3.5 It appears that this does not properly reflect the clear and unambiguous intent of the legislature. In Attorney-General Nicola Roxon's Media release, Minister Roxon stated that "*we will clarify that income tax and capital gains tax will not apply to payments from a native title agreement*".[2] The additional requirement for a payment or benefit to

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

relate to an act affecting native title is also inconsistent with Example 1.1 of the Explanatory Material that appears to indicate (as is proper in our view) that no further inquiry is needed where a payment or non-cash benefit is made under an Indigenous Land Use Agreement (**ILUA**) or any native title related agreement.

3.6 In any event, the current drafting is inconsistent with general native title practice. In our experience ILUAs and native title related agreements do not always include provisions that the acts covered by them amount to acts affecting native title. 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. Finally, a requirement that a 'native title benefit' will only be non-assessable non-exempt income 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*.

3.7 There are extremely strong policy reasons why paragraph 59-50(5)(a) should not be a two-step process.

3.8 A two-step process would mean that subsequent to receiving the benefit, if it is determined by an order of the Federal Court that native title does not exist in respect of an area of relevance to an ILUA or any other native title related agreement (which could be many years after the ILUA is registered or agreement executed), the proposed legislation would not operate, the corollary of which would be that any payment or benefit stated in the ILUA or agreement to relate to an act affecting native title will not actually so relate.

3.9 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. If the test was intended

to be a two-step process then potentially many years after the ILUA is registered or agreement is executed lawyers will be required to forensically examine what, if any, aspects of the agreement in question concern payments relating to an act affecting native title. At best, confusion will abound, and at worst differences of interpretation will emerge, with litigation a likely result.

3.10 If ultimately after litigation has run its course and the entity is deemed through no fault of its own to have received a payment or benefit for an act affecting native title in circumstances where native title is determined by a court not to exist, the entity that derived the payment or non-cash benefit would be ordered to not only pay the significant costs of litigation, it will be required to make a voluntary disclosure and amend its return (if within the time period to amend), with the entity required to pay interest on any unpaid tax relating to the payment or non-cash benefit. To compound the misery, the entity may also be liable for penalties.

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

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

3.13 We submit that proposed paragraph 59-50(5)(a) should be changed to ensure that it applies to all benefits received pursuant to the relevant native title related agreement, whether or not the payment relates to an act affecting native title. This will provide clarity and will ensure consistency with the policy intent of the government, and will avoid confusion and ensuring litigation, created by any difference of interpretation. In particular, we suggest that proposed section 59-50(5) be amended as follows:

> (5) A ***native title benefit*** is a payment or *non-cash benefit provided:
>
> (a) under an Indigenous Land Use Agreement (within the meaning of the *Native Title Act 1993*) or an agreement, arrangement, or understanding made under an equivalent law of the Commonwealth, a State, or a Territory relating to Indigenous

persons, or an equivalent common law agreement, arrangement, or understanding; or

(b) as compensation determined in accordance with Division 5 of Part 2 of the *Native Title Act 1993*.

3.14 If, contrary to our submission, Parliament actually intends that proposed paragraph 59-50(a) does require a two-step test, we submit that Example 1.1 in the Explanatory Material should be clarified to make it clear that the payment is an act affecting native title under proposed paragraph 59-50(5)(a) (or alternatively compensation under proposed paragraph 59-50(5)(b)).

Use of the word 'agreement'

3.15 Proposed paragraph 59-50(5)(a) refers to an 'agreement' made under an Act of the Commonwealth, a State, or a Territory (or an instrument under such Act).

3.16 'Agreement' in proposed paragraph 59-50(5)(a) should be replaced by '*agreement, arrangement, or understanding*' to ensure that all statutory and common law native title agreements and arrangements, memoranda of understandings and the like are included, whether or not the agreement is pursuant to Statute and whether or not a particular current or future Commonwealth, State or Territory Act specifically uses the word '*agreement*'.

3.17 In our proposed paragraph 59-50(5)(a) we have incorporated this extended meaning of the word agreement (see paragraph 3.13).

Reference to terms used in the *Native Title Act*

3.18 The following change to proposed subsection 59-50(5) is only relevant if, contrary to our submission, Parliament does not accept the amendments to subsection 59-50(5) outlined above at paragraph 3.13.

3.19 Proposed subsection 59-50(5) contains the following:

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

3.20 "*Affecting*" is not defined in the *Native Title Act* and the phrase "*act affecting native title*" is specifically defined. We suggest that that proposed subsection would need to be amended to ensure consistency with the *Native Title Act,* as follows:

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

4 Definition of 'Indigenous person'

4.1 'Indigenous person' will be a newly defined term in subsection 128U(1), replacing the previous term 'Aboriginal'. The term 'Indigenous person' will be replicated in subsection 995-5(1). The proposed definition of 'Indigenous person' is as follows:

> ***Indigenous person*** means a person who is:
>
> (a) a member of the Aboriginal race of Australia; or
>
> (b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

4.2 While the proposed definition of "Indigenous person" is consistent with the equivalent definitions in the *Native Title Act*,[3] proposed paragraph (b) may lead to inequitable outcomes for certain descendants of Torres Strait Islanders.

4.3 We can easily forsee several examples where a descendant of Torres Strait Islanders may not fall within a literal reading of the proposed definition due to the requirement of having to be a descendant of an 'inhabitant'. For example:

(a) if all the members of a family have left the Torres Strait Islands the family members would not be descendants of an inhabitant;

(b) the oldest living person in each family would not be a descendant of an inhabitant; and

[3] See definitions of 'Torres Straits Islander' and 'Aboriginal People' in section 253 of the *Native Title Act*.

(c) if parents leave the Torres Strait Islands, but the children remain, the children would not be descendants of an inhabitant.

4.4 We submit that proposed paragraph (b) be amended to eliminate the possibility of inequitable (and obviously unintended) outcomes as a result of that paragraph being given a literal interpretation. In particular, we submit that proposed paragraph (b) be amended to state "*a descendant of an Indigenous inhabitant (past or present) of the Torres Strait Islands",* to make it clear that a Torres Strait Islander includes all lineal descendants of Indigenous inhabitants of the Torres Strait Islands.

5 Definition of 'Indigenous holding entity'

5.1 The definition of 'Indigenous holding entity' in proposed subsection 59-50(6) provides:

> (6) An ***Indigenous*** holding ***entity*** means:
> (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.

5.2 We submit the use of the words 'can only be' in the proposed subsection 59-50(6) 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:

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

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

5.3 Arnold Bloch Leibler and YMAC are aware of Indigenous entities that have entered into ILUAs and native title common law agreements where some of the benefits under that agreement are paid to a trust, where the beneficiaries of the trust include a charitable trust (with a purpose to benefit an Indigenous community). The trust that entered into the

agreement would not be an 'Indigenous holding entity' under the proposed definition. We reasonably assume this potentially egregious outcome is again unintended, and as such the draft should be amended.

5.4 Further, the definition would result in an immediate compliance burden on all trusts that seek to afford themselves of the tax exemption in proposed section 59-50. 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 in proposed subsection 59-60(6) then 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.

5.5 We submit that the proposed subsection 59-60(6) be amended to reduce the compliance burden and correspond more fully with the policy intent of 'native title benefits' being non-assessable non-exempt when provided to an 'Indigenous holding entity' or, an Indigenous person (or applied for their benefit).

5.6 The definition of 'Indigenous holding entity' in proposed subsection 59-50(6) should provide as follows:

> (6) An ***Indigenous*** holding ***entity*** means:
>
> (a) a *distributing body; or
>
> (b) a trust, if the beneficiaries of the trust are:
>
> (i) *Indigenous persons; or
>
> (ii) distributing bodies; or
>
> (iii) Indigenous persons and distributing bodies; or
>
> (iv) any other body that is empowered or required to pay moneys received by the body to Indigenous persons or to apply such moneys for the benefit of Indigenous persons, either directly or indirectly.

6 Definition of 'distributing body'

6.1 The existing definition of 'distributing body' in section 128U reads as follows: