

Native Title, Indigenous Economic Development and Tax (October 2010)

Submission by BHP Billiton Ltd (30 November 2010)

1. BACKGROUND

This submission has been prepared by BHP Billiton Ltd (**BHP Billiton**) in response to the Australian Government's request for feedback and comments on the Consultation Paper "Native Title, Indigenous Economic Development and Tax" dated October 2010.

This submission can be read in conjunction with BHP Billiton's submission (**enclosed**) in response to the earlier discussion paper "Optimising Benefits from Native Title Agreements".

BHP Billiton thanks the Australian Government for the opportunity to provide feedback on the Consultation Paper and welcomes the Australian Government's initiative to clarify the taxation treatment of payments made pursuant to agreements with Indigenous groups relating to natural resource development.

2. SUMMARY

- (a) BHP Billiton welcomes the Government's focus on considering the context of the potential reforms, particularly with regard to:
 - (i) the significance of, and previous experience in relation to establishing, effective governance and management arrangements for benefits provided under agreements;
 - (ii) the breadth of matters typically covered by "native title" agreements, including more than native title matters; and
 - (iii) the very substantial amounts of money paid under some agreements, which may, in part, be inconsistent with the use of community or public benefit funds or concessional tax rates on public purpose grounds.
- (b) The proposal to create a new vehicle to provide genuine inter-generational community benefit with appropriate governance structures and which is more flexible than a charitable trust is supported. Accordingly, BHP Billiton supports the concept of the "Indigenous Community Fund" discussed at section 3.2 of the Consultation Paper.
- (c) Giving payments received by individuals a blanket tax exemption (or concessional treatment pursuant to a low rate of withholding tax) will:
 - (i) remove incentives to establish adequate governance regimes; and
 - (ii) not result in any material social benefit for disadvantaged Indigenous groups who currently lack the capacity to manage individual monetary payments in a sustainable manner.

Accordingly, BHP Billiton does not support the proposals for a general tax exemption or withholding tax regime referred to in the Consultation Paper.

- (d) Monetary benefits received by individuals should be taxed in the same manner as payments received by non Indigenous Australians.
- (e) The full income tax deductibility of payments by non Indigenous parties pursuant to land access agreements with Indigenous groups should be confirmed.

- (f) The GST and PAYG withholding treatment of payments under native title agreements should be expressly articulated.
- (g) An issues paper has recently been released in relation to the proposed Minerals Resource Rent Tax (**MRRT**) and extended Petroleum Resource Rent Tax (**PRRT**). Section 7 contains BHP Billiton's comments in relation to the deductibility of payments for MRRT and PRRT purposes and, in particular, emphasises:
 - (i) the purpose of the majority of "native title payments" is to obtain on-going rights to access land and carry out mining operations, not to achieve a profit-sharing;
 - (ii) there is significant potential for the quantum and form of commercial arrangements to be distorted if payments pursuant to land access agreements with Indigenous groups are not deductible for MRRT and PRRT purposes; and
 - (iii) the full deductibility for MRRT and PRRT purposes of payments by non Indigenous parties pursuant to land access agreements with Indigenous groups, should be confirmed.

3. CONTEXT

The following matters are essential to the context of any proposal to reform or clarify the tax treatment of "native title" payments.

- (a) Agreements between resource developers and Indigenous (native title) groups about land access and natural resource development are essentially private commercial arrangements. However, they have a clear interface with social policy because of the unique nature of native title (and other forms of Indigenous connection to land) and the special position of disadvantage faced by many Indigenous people.
- (b) Native title is a communal right which exists for the benefit of future generations as well as those people who are alive today and negotiate agreements with resource developers. Agreement making should be directed at inter-generational benefit for the whole Indigenous community that is affected by development.
- (c) The effective governance and management of funds paid under agreements is essential to their success and there is a clear linkage between the tax treatment of payments and governance.
- (d) Governance arrangements are generally negotiated between resource developers and Indigenous groups. There are no mandatory governance rules for the management of money paid under agreements with Indigenous groups relating to natural resource development (although BHP Billiton acknowledges recent releases by the Attorney General and Minister for Families, Housing, Community Services and Indigenous Affairs in that regard).
- (e) There are many examples of failed governance structures and only a few clear successes. In BHP Billiton's experience, Indigenous groups (or at least individuals within them) generally regard governance structures directed at ensuring benefits are used for genuine community benefit in a sustainable manner and for the long term as paternalism, and resist them.
- (f) Many Indigenous groups lack the capacity to effectively manage large monetary benefits from agreements without agreed governance structures including independent advice and assistance.
- (g) It can be misleading to characterise agreements between resource developers and Indigenous groups as "native title" agreements:

- (i) Native title and the operation of the *Native Title Act* are key drivers, but in most instances much more than native title is addressed. Agreements often provide for the support and agreement of an Indigenous community to all aspects of a development; not just "native title" consents.
- (ii) In many agreements entered into by BHP Billiton they continue to remain on foot irrespective of the existence of native title.
- (iii) Most agreements seek to ensure the "non-extinguishment principle" applies so that a new mine or other development coexists with any underlying native title and does not extinguish it.

Consequently, although the financial benefits payable in accordance with these kinds of agreements may include "compensation" for the impairment or extinguishment of native title, the payments are made in consideration for a range of agreements and commitments, not only in relation to native title.

- (h) Some agreements negotiated with Indigenous groups involve the payment of very large sums of money; in some cases much more than is needed for the purposes contemplated by the proposed Indigenous Community Funds. In these and other circumstances, individual members of Indigenous groups are increasingly insisting as a condition of any agreement that a proportion of the overall benefits are available for distribution to individuals in the form of money or personal benefits. Individual payments:
 - (i) are sometimes managed through discretionary trusts;
 - (ii) can amount to quite large amounts, sufficient to be a source of private wealth that supports a higher standard of living; and
 - (iii) are not capable of being made by charitable trusts and would not be able to be made by an Indigenous Community Fund.

The treatment of these potentially significant individual payments needs to be considered.

4. INDIGENOUS COMMUNITY FUND PROPOSAL SUPPORTED

BHP Billiton supports the proposal to develop a new form of vehicle for the management of benefits under agreements with Indigenous groups of the nature of the Indigenous Community Fund model proposed in the Consultation Paper (section 3.2).

Key issues that need to be addressed in further refining the proposal include:

- (a) The purposes for which money paid in to an Indigenous Community Fund must be clear and directly concerned with the provision of genuine community benefits on an inter-generational basis, but broader than those purposes for which funds can be applied under a charitable trust.
- (b) Transparent and effective governance requirements should be included. This should include the involvement of appropriately qualified independent assistance in the management of the fund.
- (c) The need to balance flexibility with an appropriate level of regulation. One option may be to provide for legislative criteria for recognition/registration as an Indigenous Community Fund and the ongoing maintenance of that status rather than the creation of an entirely new statutory vehicle.
- (d) An appropriate independent regulator with sufficient powers of investigation, supervision and, where appropriate, direction needs to be identified and empowered.

- (e) The limits (as to quantum and time) on the accumulation of benefits in an Indigenous Community Fund for future generations.
- (f) Appropriate transitional arrangements to ensure that existing agreements and structures (such as charitable trusts) can access the Indigenous Community Fund model.

5. TAX EXEMPTIONS OR WITHHOLDING TAX FOR INDIVIDUALS NOT SUPPORTED

The Consultation Paper proposes a general tax exemption or a withholding tax regime that could apply to "native title payments" as options in addition or in the alternative to the Indigenous Community Foundation proposal.

BHP Billiton submits those proposals are unnecessary, unlikely to give rise to constructive social policy outcomes and likely to undermine the efforts of government, resource developers and Indigenous groups to build more effective governance structures, for the following reasons:

- (a) If the Indigenous Community Fund model is adopted then it, in combination with existing tax exempt and tax concessional structures such as charitable trusts with adequate means to deliver effective and sustainable community outcomes in a tax effective manner. That is, a blanket tax exemption or concessional rate of withholding tax is unnecessary.
- (b) As noted above, in many instances, payments made under agreements with Indigenous groups are not necessarily capable of being characterised as wholly (or even primarily) made in consideration for the extinguishment or impairment of native title. Payments are not "split" in an explicit manner between "native title" and "non native title" objectives and it would be artificial to do so.
- (c) If "native title" payments are tax exempt or taxed on a concessional basis, the current incentive for the current generation of Indigenous people to agree to effective governance structures that provide sustainable community benefits for the current **and** future generations of Indigenous people will be removed. Indigenous groups will effectively be encouraged to insist that most of the financial benefits are directed towards payments to individuals who will be free to spend them at their discretion, on a tax exempt or tax concessional basis.
- (d) The provision of such a major tax concession would encourage the recipients of the payments to treat them in effect as "mining welfare" and no incentive or ability to become engaged with the wider economy. It also risks the creation of unhealthy resentment on the part of sections of the non-indigenous community and the majority of Indigenous people who will receive no benefit.

6. TAX DEDUCTIBILITY MUST BE CONFIRMED AND OTHER TAXES ADDRESSED

BHP Billiton supports the Government's commitment to providing greater clarity and certainty on how the income tax system and native title interact. The proposals contained in the Consultation Paper would provide certainty for recipients of payments. BHP Billiton considers that similar tax certainty should be provided to proponents making payments.

As the Consultation Paper acknowledges, the case law directly on the deductibility of native title payments indicates that payments will generally be on revenue account and deductible in the year they are incurred in circumstances where:

- (a) the payments are a series of recurrent payments linked to the life of the rights sought;
- (b) the amount of the payments is calculated by reference to the extent of use of the rights obtained, for instance because it is based on the value of the mining product obtained from a tenement; and

- (c) the payments are appropriately characterised as being akin to a rental payment for the use of the relevant right rather than for reduction in value of the rights due to mining activities.

BHP Billiton supports the introduction of legislative confirmation that periodic payments made under agreements with Indigenous groups concerning resource development will be deductible in the year they are incurred.

In addition to obtaining income tax certainty, BHP Billiton suggests that certainty also be provided in relation to the GST and PAYG Withholding treatment of payments under native title agreements.

7. MRRT AND EXTENDED PRRT

The Australian Government released an MRRT and PRRT Transitioning Issues Paper on 1 October 2010.

The Issues Paper asks for views on the deductibility of "native title" payments for MRRT and PRRT purposes and expresses a preference for maintaining symmetry between assessability and deductibility of such payments. There is no direct reference in the Issues Paper to the Consultation Paper and the Government's review of the interaction between the income tax system and native title. In this context, BHP Billiton notes that:

- (a) Determining the deductibility of relevant expenses, such as "native title" payments, is critical to the calculation of the profit attributable to the extraction of particular commodities, which is subject to the MRRT and PRRT.
- (b) While the Issues Paper draws some similarities between native title payments and private royalty payments based on the form of certain "native title" payments which are calculated as a proportion of mining revenues, the purpose of the majority of "native title" payments is to obtain on-going rights to access land and carry out mining operations, not to achieve a profit-sharing. A strict characterisation based on the form of payments should be rejected. Instead, "native title" payments are a necessary expense for the operation of mining projects.
- (c) As noted above, "native title" payments are critical to obtaining the support and agreement of an Indigenous community to the development of resources projects and the quantum of many such payments is very large. Accordingly, there is significant potential for the quantum and form of commercial arrangements to be distorted if "native title" payments are not deductible for MRRT and PRRT purposes.
- (d) In terms of symmetry, there is no necessary policy requirement for symmetrical treatment of "native title" payments under the MRRT and PRRT. For instance, there is no symmetry requirement for payments to third party contractors under the existing PRRT.
- (e) The full deductibility for MRRT and PRRT purposes of payments by non Indigenous parties pursuant to land access agreements with Indigenous groups, should be confirmed.