CAPE YORK LAND COUNCIL
ABORIGINAL CORPORATION

ICN 1163
ABN 22 965 382 705

32 Florence Street
PO Box 2496
CAIRNS QLD 4870
Phone (07) 4053 9222
Fax (07) 4051 0097

Our ref:
Contact: Peter Callaghan
Email: pcallaghan@cylc.org.au

24 August 2012

Manager
Corporate Tax Unit
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: nativetitle@treasury.gov.au

Dear Sir/Madam

Re: Submissions in relation to tax treatment of native title benefits

Please find attached the submissions of the Cape York land Council Aboriginal Corporation (CYLC) in relation to the Exposure Draft of the proposed amendments to the *Income Tax Assessment Act 1936*.

CYLC is the Native Title Representative Body for Cape York pursuant to the *Native Title Act 1993* (Cth) and has a proud history of representing Traditional Owners and native title holders in the region since 1990.

The Aboriginal people of Cape York actively seek ownership, management and use of their traditional lands. The proposed legislative amendments will assist them in meeting those aspirations; by clarifying the present uncertainty and confirming that native title payments are not subject to income tax.

Please do not hesitate to contact us if you have any queries.

Yours faithfully,

Peter Callaghan
CEO

Submission of Cape York Land Council Aboriginal Corporation (CYLC)

CYLC has previously made submissions supporting the need for clarification of tax implications for native title payments, including submissions made in response to the Commonwealth's Consultation Paper of May 2010 "Native Title, Indigenous Economic Development & Tax".

We hold the view that "native title payments" (including non-cash benefits) for the extinguishment or impairment of native title rights and interests are unlikely to be assessable income for tax purposes under current legislation, but acknowledge that the proposed amendments will provide certainty by expressly stating that payments made in respect of native title are not subject to income tax (including capital gains tax).

We provide the following comments on the proposed amendments:-

- The amendments propose to define "native title benefit" as "a payment or non-cash benefit provided under an agreement made under Commonwealth, State or Territory legislation (or an instrument under such legislation) to the extent the payment or benefit relates to an act affecting native title, **or** compensation under Division 5 of Part 2 of the NTA. An action affecting native title is said to be one that extinguishes or is inconsistent with the continued existence, enjoyment and exercise of native title. We confirm that ILUAs are given as an example. The words "act", "affecting" and "native title" have the same meaning as they have in the *Native Title Act 1993 (Cth).* It appears that these provisions are broad enough to cover the sorts of benefits that are or are likely to be contained in Cape York native title settlements.

- The amendments provide that the native title benefit must be provided to an "Indigenous holding entity" or to one or more Indigenous persons or applied for their benefit. An Indigenous holding entity means "a distributing body" (as defined in the ITAA 1936) **or** a trust where the beneficiaries can only be Indigenous persons and/or distributing bodies. On the basis that a distributing body includes a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006, Prescribed Bodies Corporate and other existing Cape York corporations should qualify as distributing bodies. The trust provision are said to be intended to cover a broad range of circumstances, such as where a native title benefit is held by an ordinary corporation but that entity acts in the capacity of trustee in respect of the native title benefit. This provision appears to adequately extend to cover circumstances where a Land Trust established under the *Aboriginal Land Act 1991 (Qld)* holds a native title benefit.

- The tax free (non-assessable non-exempt or "NANE") status of the payment will be preserved where an Indigenous holding entity provides a native title benefit to another such entity, or to one or more Indigenous persons, so as to provide flexibility in the structuring of financial affairs. The NANE status is therefore preserved in the hands of an Indigenous person where the payment to that person is made by an Indigenous holding entity. This amendment clarifying that income tax is not payable in the hands of the ultimate beneficiary will assist Indigenous people by ensuring that benefits obtained under native title settlements do not result in a loss of other financial entitlements, such as pensions.

- However, the amendments will not extend to a native title benefit provided for any other purpose than the provision to an Indigenous holding entity or an Indigenous person (or applied for their benefit). So for example, investment income from investing a native title benefit would ordinarily be assessable income in the hands of the investor. We are aware of circumstances where investment income is the only income source for an Indigenous entity, and suggest that this scenario will be common at least for at least some period following a native title settlement while organisations build capacity. We suggest that consideration be given to provision for some level of investment opportunity without loss of the tax-free status of income, such as interest on money held in a bank account. We note that the establishment of a new Indigenous economic and taxation vehicle, as has been previously discussed, might provide the solution here.

- Any payment or benefit provided out of a native title benefit to meet administration costs or for remuneration or consideration for the provision of goods and services will not be NANE income. This includes things such as fees for accounting and legal services. We note that concerns have been raised in the past about difficulties associated with cultural heritage payments to Traditional Owners, and suggest that further consideration be given to the inclusion of such payments as NANE income.

- We support the proposal for transitional provisions to include retrospective application, to native title benefits provided on or after 1/7/2008.

- We support the proposed amendment to the definition of “mining payment” in s.128U of Income Tax Assessment Act 1936 to make it clear that a “native title benefit” is excluded from the definition of a mining payment, so there is no liability for mining withholding tax on native title benefits.

While the amendments will provide important clarification on the issue of income tax and native title payments, there are other aspects associated with Indigenous rights to land where tax implications can stymie economic and other development opportunities. We urge the Commonwealth Government to follow through with proposals to establish a new Indigenous taxation and economic vehicle (referred to in previous submissions as an “Indigenous Community Development Corporation").

We also note on-going uncertainty and financial difficulties associated with State taxes and native title related benefits. For example, where ordinary freehold land is transferred to a PBC or Land Trust as part of a native title settlement package, it may be liable for stamp duty, land tax and local government levied rates, even though the land is not producing income. Most Indigenous groups will require a period of time post-determination to consolidate and develop the capacity to maximise the benefits contained in settlement package. This can be extremely difficult if the package contains little in the way of cash payments but money is required to meet tax liabilities. The creation of an Indigenous taxation vehicle might assist in resolving some of these issues.