

**TREASURER**

NO. 62

EMBARGO

JOINT STATEMENT BY THE HON JOHN HOWARD, M.P., TREASURER AND
THE HON IAN VENER, M.P., MINISTER FOR ABORIGINAL AFFAIRS

TAXATION OF REVENUES RECEIVED BY ABORIGINAL GROUPS FROM MINING

The Treasurer and the Minister for Aboriginal Affairs today announced a decision by the Government to clarify the taxation position of revenues received by Aboriginal groups from mining on aboriginal land. The Ministers commented that, because of the unusual nature of the Aboriginal bodies to which revenues from mining would flow, if the present income tax law were allowed to apply there could be some inappropriate and unintended effects. The Government considered that it was desirable to make clear in the law the way in which income tax would fall on these moneys.

The Government has decided that, from 1 July 1979, revenues received by Aboriginal groups from mining operations anywhere in Australia will be taxed on the basis of the standard rate of personal income tax (32 per cent) applied to 20 per cent of gross revenues. The Government will introduce an amendment to the income tax law to give effect to this decision. The tax will be collected by the withholding system, that is, it will be deducted before payments are made. The withholding will be made at the first payment point. The tax deducted will be

- 2 -

the final tax, ie. there will be no subsequent tax assessment process. This means that Aboriginal groups will not have to bring the amounts they receive to account for income tax purposes. Distribution by the groups will also be free of any further income tax in the hands of the recipients.

Canberra

20 July 1978

We expect that Northern Territory Aboriginal land councils will shortly seek to discuss the Mining Withholding Tax (MWT) **s.47C(1)**
s.47C(1)

s.47C(1) I am keen to answer the questions in red in preparation for any discussions that should occur and would appreciate any advice Treasury can provide on these or related matters.

Concerns raised by stakeholders in relation to MWT

- **s.47C(1)**

- Some stakeholders argue that if native title benefits have been clarified as being non-assessable non-exempt (NANE) income, ALRA-related payments should also be considered NANE income when paid for the benefit of Indigenous holding entities or persons (both types of payments are made in relation to traditional association with land and can be characterised as compensatory in nature).

- **s.47C(1)**

Was the decision to clarify native title benefits as NANE income based on these benefits/payments satisfying particular criteria under tax law? Or was it a policy decision of Government?

The measure to clarify the treatment of native title benefits was a measure in the 2012-13 MYEFO. (http://www.budget.gov.au/2012-13/content/myefo/download/08_Revenue.pdf)

The measure stated that:

'The Government will clarify that income tax is not payable on certain native title benefits by making such benefits non-assessable non-exempt income. This measure was part of a range of native title reforms announced by the Attorney-General in Townsville on 6 June 2012, and will apply to native title benefits received on or after 1 July 2008, consistent with the standard four year amendment period. This measure is estimated to have no revenue impact over the forward estimates period. Further information can be found in the press release and accompanying exposure draft legislation of 27 July 2012 released by the Assistant Treasurer.'

s.47C(1) The EM says:
(http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4939_ems_295ae5d9-6fc1-4113-922e-4a211322fe62/upload_pdf/375149.pdf; fileType=application%2Fpdf)

'The High Court has counselled against using traditional common law concept categories in the native title sphere. Instead it indicates native title should be considered on the basis of its uniqueness (See *Mabo (No 2) v Queensland* (1992) 175 CLR 1 at 89).

1.11 When applying the current rules of the income tax system based on traditional common law concepts, it is unclear whether benefits provided under a native title agreement would be assessable income.'

s.47F(1) As to the scope of what native title benefits should be NANE income (policy rationale), please refer to Chapter 2 of the Advisory Report on the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 (the 2012 Amending Bill) referred to in my covering email above.

For an amount to be a native title benefit under s59-50 of the ITAA 1997, it will need to satisfy the criteria set out in that section including that the payment:

- would otherwise be included in assessable income (subsection 59-50(1))
- must be made to an Indigenous person or Indigenous holding entity (subsection 59-50(1))
- must arise under an agreement (paragraph 59-50(5)(a)(i)) or an ancillary agreement (paragraph 59-50(5)(a)(ii))
- 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 title (paragraph 59-50(5)(a)) OR is compensation determined in accordance with Division 5 of Part 2 of the *Native title Act 1993* (paragraph 59-50(5)(b))

s.47C(1)

s.47C(1)

- **s.47C(1)**
 - MWT is defined as income tax payable under section 128V of the *Income Tax Assessment Act 1936* (ITAA).
 - Part or all of negotiated payments made by mining companies to Aboriginal groups and statutory payments made to royalty associations under s64(3) of the ALRA may take the form of cash payments to individuals and be accurately characterised as income for these individuals.
 - However, some stakeholders have argued that it is unclear why income tax should be levied on purposes that are for broader community benefit, including payments to Land Councils (s64(1) of the ALRA) and funding directed to projects for the benefit of Aboriginal people living in the Northern Territory (s64(4) of the ALRA).

Is there a clear policy or legal justification for the application of MWT to the breadth of negotiated and statutory payments made in relation to Aboriginal land in the Northern Territory? **s.47C(1)**

s.47C(1)

- Some stakeholders have argued that ABA payments using statutory royalty equivalents (SREs) are subject to multiple forms of taxation and characterised this as “double taxation”.
 - For example, amounts received by a Land Council under s64(1) of the ALRA are NANE income for the relevant Land Council. However, where that income is subsequently used to purchase goods and services (including the salaries or wages of staff), the exemption no longer applies.
 - This was the intent of the MWT as outlined in the Explanatory Memorandum to the *Income Tax Assessment Amendment Act (No. 2) 1979*.
s.47C(1)
s.47C(1)

s.47C(1)

s.47C(1)

The EM to Tax Laws Amendments (2012 Measures No. 6) Bill 2012 says:

(http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4939_ems_295ae5d9-6fc1-4113-922e-4a211322fe62/upload_pdf/375149.pdf; fileType=application%2Fpdf)

'Administrative costs and payment for goods and services'

1.23 Any amount or benefit someone provides to meet their administrative costs or as remuneration or consideration for the provision of goods or service is not NANE income, even if the amount is, or arises from, a native title benefit. This is the case even where the amount or benefit is provided to an Indigenous holding entity or Indigenous person (who would be entitled to receive the native title benefit). Administrative costs is a broad term and includes, but is not limited to, fees for legal and accounting services and other necessary costs associated with the ongoing administration of the entity.'

The EM also has the following example:

'Example 1.7: Native title benefit and services provided'

Indigenous Holding Entity G receives a \$2 million native title benefit. An Indigenous person to whom the native title benefit relates provides accounting services for Indigenous Holding Entity G and receives remuneration for this service of \$75,000. This remuneration of \$75,000 will not be NANE income for the Indigenous person and will be treated under existing income tax provisions as it is a payment for a service.'

s.47C(1)

s.22(1)(a)(ii)

From: s.22(1)(a)(ii)
Sent: Wednesday, 18 January 2017 4:56 PM
To: s.22(1)(a)(ii)
Cc: McKenna, Brendan; s.22(1)(a) s.22(1)(a)(ii)
Subject: Request from PM&C - Mining Withholding Tax [DLM=For-Official-Use-Only]

Follow Up Flag: Follow up
Flag Status: Flagged

Hi s.22(1)(a)(ii)

As discussed, could you please prepare a proposed response to the questions set out in red text in the email below?

PM&C is keen to have a response by 27 January.

Please let me know if you would like more information.

Kind regards

s.22(1)(a)(ii)

s.22(1)(a)(ii)
Corporate and International Tax Division
The Treasury, Langton Crescent, Parkes ACT 2600
phone: s.22(1)(a)(ii)
mobile:
email: s.22(1)(a)(ii) @treasury.gov.au

From: s.22(1)(a)(ii)
Sent: Monday, 16 January 2017 9:34 AM
To: s.22(1)(a)(ii)
Cc: s.22(1)(a)(ii)
Subject: FW: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]

Hi s.22(1)(a)(ii)

As discussed, we received this request from PM&C's Indigenous Affairs area on Friday regarding interactions between the Mining Withholding Tax and the Aboriginal Land Rights Act. s.47F(1) has asked for a response by Friday 27 January.

Thanks very much for your help with this!

Kind regards

s.22(1)(a)(ii)

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Social Policy Division
The Treasury, Langton Crescent, Parkes ACT 2600
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email: s.22(1)(a)(ii) @treasury.gov.au

From: [s.47F\(1\)](#) [mailto:[s.47F\(1\)](#) @pmc.gov.au]

Sent: Friday, 13 January 2017 4:07 PM

To: [s.22\(1\)\(a\)\(ii\)](#)

Cc: [s.47F\(1\)](#)

Subject: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]

For Official Use Only

Hi [s.22\(1\)\(a\)\(ii\)](#)

As discussed, we expect that Northern Territory Aboriginal land councils will shortly seek to discuss the Mining Withholding Tax (MWT) [s.47C\(1\)](#)

[s.47C\(1\)](#)

[s.47C\(1\)](#)

I am keen to answer the questions in red in preparation for any discussions that should occur and would appreciate any advice Treasury can provide on these or related matters.

Appreciate that this is likely something for your taxation colleagues to advise on but thought I'd run by you in the first instance.

It would be great if we could receive advice by Friday 27 January. Happy to discuss if further information/clarification is required.

Concerns raised by stakeholders in relation to MWT

- [s.47C\(1\)](#)

- Some stakeholders argue that if native title benefits have been clarified as being non-assessable non-exempt (NANE) income, ALRA-related payments should also be considered NANE income when paid for the benefit of Indigenous holding entities or persons (both types of payments are made in relation to traditional association with land and can be characterised as compensatory in nature).
- [s.47C\(1\)](#)

Was the decision to clarify native title benefits as NANE income based on these benefits/payments satisfying particular criteria under tax law? Or was it a policy decision of Government?

If it was the former, do ALRA payments made in relation to mining also satisfy these particular criteria?

- [s.47C\(1\)](#)

- MWT is defined as income tax payable under section 128V of the *Income Tax Assessment Act 1936* (ITAA).
- Part or all of negotiated payments made by mining companies to Aboriginal groups and statutory payments made to royalty associations under s64(3) of the ALRA may take the form of cash payments to individuals and be accurately characterised as income for these individuals.
- However, some stakeholders have argued that it is unclear why income tax should be levied on purposes that are for broader community benefit, including payments to Land Councils (s64(1) of the ALRA) and funding directed to projects for the benefit of Aboriginal people living in the Northern Territory (s64(4) of the ALRA).

Is there a clear policy or legal justification for the application of MWT to the breadth of negotiated and statutory payments made in relation to Aboriginal land in the Northern Territory? **s.47C(1)**
s.47C(1)

- Some stakeholders have argued that ABA payments using statutory royalty equivalents (SREs) are subject to multiple forms of taxation and characterised this as “double taxation”.
 - For example, amounts received by a Land Council under s64(1) of the ALRA are NANE income for the relevant Land Council. However, where that income is subsequently used to purchase goods and services (including the salaries or wages of staff), the exemption no longer applies.
 - This was the intent of the MWT as outlined in the Explanatory Memorandum to the *Income Tax Assessment Amendment Act (No. 2) 1979*. **s.47C(1)**
s.47C(1)

s.47C(1)

Thanks

s.47F(1)

s.47F(1) Adviser
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s.47F(1)

The Department acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

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s.22(1)(a)(ii)

From: **s.47F(1)** @ato.gov.au>
Sent: Tuesday, 31 January 2017 9:20 PM
To: **s.22(1)(a)(ii)**
Cc: **s.22(1)(a)(ii) s.47F(1)**
Subject: RE: Questions about the Mining Withholding Tax [DLM=For-Official-Use-Only]

Hi **s.22(1)(a)(ii)**

Our response to the questions raised by PM&C about the mining withholding tax is set out in your email of 20 January 2017 below. While we are unable to comment on some of the policy questions raised, we have cross referenced to the following documents found online.

1. Joint statement by the Hon. John Howard, MP., Treasurer and the Hon. Ian Viner, MP, Minister for Aboriginal Affairs dated 20 July 1978 – [Taxation of Revenues Received by Aboriginal Groups from Mining](#)

Announced the introduction of a withholding tax regime with effect from 1 July 1979 in relation to revenues received by Aboriginal groups from mining operations (initially proposed taxing 20% of gross revenues at standard personal tax rate of 32%). The withheld tax was to be a final tax. This led to the enactment of the *Income Tax Assessment Amendment Act (No. 2) 1979* and the *Income Tax (Mining Withholding Tax) Act 1979*. Under the mining withholding regime, as enacted, the withholding rate was set at 6.4% of payments received

2. Joint media release by the Treasurer, the Hon. Peter Costello MP and the Attorney General, the Hon. Daryl Williams, AM, QC, MP – [Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters](#)

Announced proposed amendments designed to clarify tax implications of native title benefits. At the time, the Treasurer announced that the existing tax law would apply to native title related transactions wherever possible and that departures could only occur where the administrative and compliance costs involved in applying existing law outweigh the potential benefit or where departures will provide a more equitable treatment for certain transactions. A table attached (see (3) below) to this minute outlined the proposed changes.

In October 2010, the government issued the consultation paper [Native Title, Indigenous Economic Development and Tax](#). In this paper, the government indicated that it would also decide upon how to proceed in relation to the native title withholding tax and capital gains tax measures announced in 1998

3. Joint media Release of 6 June 2012, [The Future of Native Title](#), by the Hon. Nicola Roxon MP, Attorney General, Minister for Emergency Management; and the Hon. Jenny Macklin MP, Minister for Families, Communities and Indigenous Affairs, Minister for Disability Reform,

Announced that the government will clarify that income tax and capital gains tax will not apply to payments from native title benefits. Income tax law was amended by the *Tax Laws Amendment (2012 Measures No. 6) Act 2012*.

4. [House of Representatives Standing Committee on Economics, Advisory Report on the Tax Laws Amendment \(2012 Measures No. 6\) Bill 2012.](#)

Pages 4 to 7 of the report outlines policy development and consultations and, at page 4, the Table (outlining proposed changes to the tax regime) referred to in the joint media release described at (2) above is extracted. Chapter 2 (pages 28 to 44) of the report provides useful commentary on various matters raised in relation to the amending bill, for example:

- the amendment proposed was narrow; should the scope be broadened?
- should the meaning of native title benefit be expanded?
- should the definition of indigenous holding entity be broadened?
- should the amendments be backdated to the time the *Native Title Act 1993* commenced?

5. Joint media release [Benefitting Indigenous Communities through Native Title Reform](#) of 3 August 2013 by the Hon. David Bradbury, Assistant Treasurer, Minister Assisting for Financial Services & Superannuation and Minister for Competition Policy & Consumer Affairs; the Hon. Jenny Macklin MP, Minister for Families,

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Community Services and Indigenous Affairs, Minister for Disability Reform; and the Hon. Mark Dreyfus QC,
MP, Attorney General

Please phone me on **s.22(1)** should you wish to discuss this matter further.
(a)(ii)

Regards
s.47F(1)

s.47F(1)

Senior Technical Adviser, Tax Counsel Network
Law Design and Practice Group
Australian Taxation Office
P **s.47F(1)** F 08 9268 5250

From: **s.47F(1)**
Sent: Friday, 20 January 2017 2:33 PM
To: **s.47F(1)**
Subject: FW: Questins about the Mining Withholding Tax [DLM=For-Official-Use-Only]

Thanks **s.47** – as discussed
F(1)

s.47F(1)
Senior Law Design Adviser
Law and Policy Design | Policy, Analysis and Legislation
P **s.47F(1)** M **s.47F(1)** 

From: **s.22(1)(a)(ii)** [mailto:**s.22(1)(a)(ii)** @TREASURY.GOV.AU]
Sent: Friday, 20 January 2017 12:09 PM
To: **s.47F(1)**
Subject: Questins about the Mining Withholding Tax [DLM=For-Official-Use-Only]

Hi **s.47F(1)**

I hope you are well and had a nice break over Christmas!

We have received a request from PM&C about the Mining Withholding Tax (MWT). See below – the questions from PM&C are in red. They have asked for a response from us by Friday 27th.

I must say I have not heard of the MWT before, and the questions are quite specific! Do you know if there is someone at the ATO I could talk to about it?

Thanks and happy to discuss.

Regards,
s.22(1)(a)

s.22(1)(a)(ii)

Large Corporates Unit
Corporate and International Tax Division

*The Treasury, 100 Market St Sydney
phone: +61 s.22(1)(a)(ii)
email: s.22(1)(a)(ii) @treasury.gov.au

Concerns raised by stakeholders in relation to MWT

- **s.47C(1)**

- Some stakeholders argue that if native title benefits have been clarified as being non-assessable non-exempt (NANE) income, ALRA-related payments should also be considered NANE income when paid for the benefit of Indigenous holding entities or persons (both types of payments are made in relation to traditional association with land and can be characterised as compensatory in nature).

- **s.47C(1)**

Was the decision to clarify native title benefits as NANE income based on these benefits/payments satisfying particular criteria under tax law? Or was it a policy decision of Government?

s.47F(1) As to the scope of what native title benefits should be NANE income (policy rationale), please refer to Chapter 2 of the Advisory Report on the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 (the 2012 Amending Bill) referred to in my covering email above.

For an amount to be a native title benefit under s59-50 of the ITAA 1997, it will need to satisfy the criteria set out in that section including that the payment:

- would otherwise be included in assessable income (subsection 59-50(1))
- must be made to an Indigenous person or Indigenous holding entity (subsection 59-50(1))
- must arise under an agreement (paragraph 59-50(5)(a)(i)) or an ancillary agreement (paragraph 59-50(5)(a)(ii))
- 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 title (paragraph 59-50(5)(a)) OR is compensation determined in accordance with Division 5 of Part 2 of the *Native title Act 1993* (paragraph 59-50(5)(b))

If it was the former, do ALRA payments made in relation to mining also satisfy these particular criteria?

s.47F(1) We do not have sufficient knowledge of the particulars of ALRA payments to determine if they would satisfy any or all of the above criteria in s59-50 of the ITAA 1997.

However, from statements made at the inquiry into the 2012 Amending Bill that the definition of native title benefit was kept narrow as there were concerns, at the time, over the integrity of the measure should the definition be broadened (refer para 2.33 to 2.37 of the Advisory Report). We cannot discern, from the publicly available information, if ALRA payments were considered at the time.

- **s.47C(1)**

- MWT is defined as income tax payable under section 128V of the *Income Tax Assessment Act 1936* (ITAA).
- Part or all of negotiated payments made by mining companies to Aboriginal groups and statutory payments made to royalty associations under s64(3) of the ALRA may take the form of cash payments to individuals and be accurately characterised as income for these individuals.
- However, some stakeholders have argued that it is unclear why income tax should be levied on purposes that are for broader community benefit, including payments to Land Councils (s64(1) of the ALRA) and funding directed to projects for the benefit of Aboriginal people living in the Northern Territory (s64(4) of the ALRA).

Is there a clear policy or legal justification for the application of MWT to the breadth of negotiated and statutory payments made in relation to Aboriginal land in the Northern Territory? **s.47C(1)**

s.47C(1)

s.47F(1) Unable to comment other than to draw your attention to what was expressed in Chpt 2 of the Advisory Report for the inquiry into the 2012 Amending Bill and to earlier Government announcements (listed in my cover email above) about the genesis, and evolution, of the MWT.

- Some stakeholders have argued that ABA payments using statutory royalty equivalents (SREs) are subject to multiple forms of taxation and characterised this as "double taxation".
 - For example, amounts received by a Land Council under s64(1) of the ALRA are NANE income for the relevant Land Council. However, where that income is subsequently used to purchase goods and services (including the salaries or wages of staff), the exemption no longer applies.
 - This was the intent of the MWT as outlined in the Explanatory Memorandum to the *Income Tax Assessment Amendment Act (No. 2) 1979*. **s.47C(1)**

s.47C(1)

s.47C(1)

s.47F(1) This treatment is consistent with the treatment of NANE native title benefits under s.59-50 of the ITAA 1997. Where an amount is paid for the purposes of meeting a provider's administrative costs, or as remuneration or consideration for the provision of goods or services, the amount or benefit will not be a native title benefit (subsection 59-50(3) ITAA 1997). Further, where a native title benefit is invested, any income generated will not be non-assessable non-exempt (paragraph 59-50(4)(b) ITAA 1997 and paragraphs 1.21, 1.22 and examples 1.3 and 1.4 of the EM to TLAB No.6 2012).

Refer also to Chpt 2 of the Advisory Report for the inquiry into the 2012 Amending Bill where at para 2.20 the committee considered whether the concessional tax status of native title benefits (i.e. as NANE income) should extend to investment income derived from the native title payments.

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s.47C(1)



s.22(1)(a)(ii)

From: s.47F(1) @pmc.gov.au>
Sent: Friday, 3 February 2017 11:25 AM
To: s.22(1)(a)(ii)
Cc:
Subject: RE: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]
Attachments: Inquiry - MWT and amendments to IITA Act [SEC=UNCLASSIFIED]; DPMC Annual Report 2015-16 - Appendices.pdf; itaab21979357.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

For Official Use Only

Hi s.22(1)(a)(ii)

Thanks for the opportunity to discuss my MWT queries with you yesterday.

Please find below and attached some additional background that will hopefully assist you in providing your advice (though a lot of this will no doubt be familiar to you).

As I flagged yesterday, we will likely be engaging with NT land councils on this throughout March/April ahead of a meeting scheduled in early May, so it would be great if we could receive your advice by the end of February. Please let me know if you would like to discuss anything further.

- Aboriginals Benefit Account (ABA)
 - The 2015-16 PM&C Annual Report Appendices provide a good summary of the operation and functions of the ABA (see attached).
- MWT
 - The MWT applies in a variety of circumstances, but in practice mainly to statutory and negotiated payments made in association with mining activity on land under the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA).
 - The MWT was introduced in 1979 and the current rate is 4%.
 - It is a substitute for taxation of individuals, where it is determined that administrative compliance is not cost effective.
 - The MWT liability from ABA payments using statutory royalty equivalents (SREs) was approximately \$5.5m in 2015-16 and \$5.0m in 2014-15.
 - It is levied on mining payments broadly defined in the ITAA as payments made to Aboriginal people or a distributing body in the following instances.
 - Out of ABA statutory-royalty-equivalent revenues (i.e. not revenue from earnings of the fund or Office of Township Leasing revenues). All payments made by the ABA pursuant to section 64 of the ALRA using SRE revenues are subject to MWT. With the exception of payments to royalty associations under subsection 64(3), the ABA meets the MWT liability for these payments. The Department of the Prime Minister and Cabinet seeks to reduce the MWT liability where possible by making payments using non-SRE revenue. In relation to subsection 64(3) payments, the MWT liability is met by royalty associations.
 - Under a Commonwealth, State or Territory law that relates to Aboriginals, or an agreement made in accordance with such a law, in connection with the issuing of mining or exploration rights on Aboriginal land (defined in the ITAA as land held under a Commonwealth, State or Territory law for the use or benefit of Aboriginals). In practice, this appears only to apply to privately negotiated royalty and other payments made under the ALRA.
 - The entity making the mining payment (for example the ABA or the person seeking or exercising mining or exploration rights) must withhold MWT and pay it to the Australian Tax Office. Subsequent distributions or applications of amounts subjected to MWT do not attract income tax

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liability in the hands of the Aboriginal beneficiaries when passed on by a distributing body (see the attached EM of the relevant 1979 legislation).

- From 1 July 2003, the Australian Taxation Office determined the ABA to be a large pay-as-you-go withholdee.
- Tax treatment of native title benefits and implications for the application of MWT to mining-related payments under the ALRA
 - **s.47C(1)**
 - In relation to whether MWT has been applied differently to mining-related payments under existing ALRA agreements following 2013 legislation clarifying the tax treatment of native title benefits:
 - MWT has continued to be applied to payments made by the ABA using SRE revenues (i.e. no change);
 - We do not have oversight of whether industry has continued to pay MWT in relation to privately negotiated royalty and other payments made under the ALRA.

Cheers

s.47F(1)

s.47F(1) Adviser

Aboriginal Benefit Account Policy and Management | Land Branch
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s.47F(1)

The Department acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

From: **s.22(1)(a)(ii)** [mailto:**s.22(1)(a)(ii)** @TREASURY.GOV.AU]
Sent: Thursday, 2 February 2017 12:14 PM
To: **s.22(1)(a)(ii)**
Cc:
Subject: RE: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]

3:30pm sounds great. We'll call you.

Thanks,
s.22(1)(a)(ii)

From: **s.47F(1)** [mailto:**s.47F(1)** @pmc.gov.au]
Sent: Thursday, 2 February 2017 11:58 AM
To: **s.22(1)(a)(ii)**
Cc:
Subject: RE: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]

For Official Use Only

Thanks **s.22(1)(a)(ii)** any time from 3.30pm would work for me, should we say 3.30-4pm? Shall I call your number or will you call me?

Cheers

s.47F(1)

s.47F(1) Adviser

Aboriginals Benefit Account Policy and Management | Land Branch

Housing, Land and Culture Division | Department of the Prime Minister and Cabinet

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PO Box 6500 CANBERRA 2600

s.47F(1)

The Department acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

From: **s.22(1)(a)(ii)** [mailto:**s.22(1)(a)(ii)** @TREASURY.GOV.AU]

Sent: Thursday, 2 February 2017 11:38 AM

To: **s.47F(1)**

Cc: **s.22(1)(a)(ii)**

Subject: RE: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]

Hi **s.47F(1)**

We are looking into your queries about the Mining Withholding Tax.

Are you free to discuss this with us later today? Say, sometime between 1:30-2:30 or 3:30 onwards?

Thanks,

s.22(1)(a)(ii)

s.22(1)(a)(ii)

Large Corporates Unit

Corporate and International Tax Division

The Treasury, 100 Market St Sydney

phone: +61 **s.22(1)(a)(ii)**

email: **s.22(1)(a)(ii)** @treasury.gov.au

From: **s.47F(1)** [mailto:**s.47F(1)** @pmc.gov.au]

Sent: Friday, 13 January 2017 4:07 PM

To: **s.22(1)(a)(ii)**

Cc: **s.47F(1)**

Subject: For advice - Mining Withholding Tax [DLM=For-Official-Use-Only]

For Official Use Only

Hi **s.22(1)(a)(ii)**

As discussed, we expect that Northern Territory Aboriginal land councils will shortly seek to discuss the Mining Withholding Tax (MWT) **s.47C(1)**

s.47C(1)

s.47C(1)

I am keen to answer the questions in red in preparation for any discussions that should occur and would appreciate any advice Treasury can provide on these or related matters.

Document 6

Appreciate that this is likely something for your taxation colleagues to advise on but thought I'd run by you in the first instance.

It would be great if we could receive advice by Friday 27 January. Happy to discuss if further information/clarification is required.

Concerns raised by stakeholders in relation to MWT

- **s.47C(1)**
 - Some stakeholders argue that if native title benefits have been clarified as being non-assessable non-exempt (NANE) income, ALRA-related payments should also be considered NANE income when paid for the benefit of Indigenous holding entities or persons (both types of payments are made in relation to traditional association with land and can be characterised as compensatory in nature).
 - **s.47C(1)**

Was the decision to clarify native title benefits as NANE income based on these benefits/payments satisfying particular criteria under tax law? Or was it a policy decision of Government?

If it was the former, do ALRA payments made in relation to mining also satisfy these particular criteria?

- **s.47C(1)**
 - MWT is defined as income tax payable under section 128V of the *Income Tax Assessment Act 1936* (ITAA).
 - Part or all of negotiated payments made by mining companies to Aboriginal groups and statutory payments made to royalty associations under s64(3) of the ALRA may take the form of cash payments to individuals and be accurately characterised as income for these individuals.
 - However, some stakeholders have argued that it is unclear why income tax should be levied on purposes that are for broader community benefit, including payments to Land Councils (s64(1) of the ALRA) and funding directed to projects for the benefit of Aboriginal people living in the Northern Territory (s64(4) of the ALRA).

Is there a clear policy or legal justification for the application of MWT to the breadth of negotiated and statutory payments made in relation to Aboriginal land in the Northern Territory? **s.47C(1)**

s.47C(1)

- Some stakeholders have argued that ABA payments using statutory royalty equivalents (SREs) are subject to multiple forms of taxation and characterised this as "double taxation".
 - For example, amounts received by a Land Council under s64(1) of the ALRA are NANE income for the relevant Land Council. However, where that income is subsequently used to purchase goods and services (including the salaries or wages of staff), the exemption no longer applies.
 - This was the intent of the MWT as outlined in the Explanatory Memorandum to the *Income Tax Assessment Amendment Act (No. 2) 1979*. **s.47C(1)**

s.47C(1)

Thanks

s.47F(1)

s.47F(1) Adviser

Aboriginals Benefit Account Policy and Management | Land Branch
Housing, Land and Culture Division | Department of the Prime Minister and Cabinet
p. **s.47F(1)** | e. **s.47F(1)** @pmc.gov.au
www.dpmc.gov.au | www.indigenous.gov.au
PO Box 6500 CANBERRA 2600

s.47F(1)

The Department acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

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s.22(1)(a)(ii)

From: s.22(1)(a)(ii)
Sent: Monday, 27 March 2017 5:38 PM
To: s.47F(1) @pmc.gov.au'
Cc: s.22(1)(a)(ii)
Subject: RE: MWT Questions Response [SEC=UNCLASSIFIED]
Attachments: Mining Withholding Tax - Request for advice (IITD comments) (2).docx

Hi s.47F(1)

Attached is the draft MWT document for your internal use.

We suggest it may be best to have a discussion over the phone about this sometime over the coming week at your convenience. What time suits you?

Best regards,

s.22(1)(a)(ii)



s.22(1)(a)(ii)

Policy Analyst
Individuals and Indirect Tax Division | Revenue Group
The Treasury, Langton Crescent, Parkes ACT 2600
P +61 s.22(1)(a)(ii) | E s.22(1)(a)(ii) @treasury.gov.au

From: s.22(1)(a)(ii)
Sent: Monday, 27 March 2017 9:25 AM
To: s.47F(1) @pmc.gov.au'
Cc: s.22(1)(a)(ii)
Subject: MWT Questions Response [SEC=UNCLASSIFIED]

Hi s.47F(1)

Hope you are well,

By way of introduction my name is s.22(1)(a)(ii) and I work with s.22(1)(a)(ii) in the Small Business Entities and Industry Concessions Unit, in the Individuals and Indirect Tax Division at Treasury. Our unit has responsibility for native title and indigenous taxation matters.

Your query in respect of the Mining Withholding Tax (MWT) and native title taxation has been referred on to us. s.22(1)(a)(ii) the senior adviser in my team left you a voice message Thursday asking for a call back. We have prepared a draft document but would like to discuss the issue with you prior to sending it across so we can understand how you intend it to be used.

You will appreciate that native title taxation and the MWT are perennial issues and we would like to ensure the document we have prepared suits your purposes.

You can reach s.22(1)(a)(ii) and he is also copied on this email. Alternatively, feel free to reach out to me.

Best regards,

s.22(1)(a)(ii)



s.22(1)(a)(ii)

Policy Analyst

Individuals and Indirect Tax Division | Revenue Group

The Treasury, Langton Crescent, Parkes ACT 2600

P +61 s.22(1)(a) | E s.22(1)(a)(ii) @treasury.gov.au

s.22(1)(a)(ii)

From: **s.47F(1)** (Unclassified) <**s.47F(1)**@network.pmc.gov.au>
Sent: Monday, 16 January 2017 1:38 PM
To: **s.47F(1)**
Subject: Inquiry - MWT and amendments to IITA Act [SEC=UNCLASSIFIED]
Attachments: MWT and tax treatment of native title benefits (background).DOCX; Attachment A - email from **s.47F(1)** DOCX

s.47F(1) | Advisor

Land Branch | Indigenous Affairs Group
Department of the Prime Minister and Cabinet
T: **s.47F(1)** | E: **s.47F(1)** @network.pmc.gov.au
PO Box 6500, CANBERRA, ACT 2600

From: **s.47F(1)**
Sent: Friday, 17 August 2012 6:28 PM
To: **s.47F(1)** @ag.gov.au; **s.47F(1)** @ag.gov.au
Cc: **s.47F(1)**
Subject: Inquiry - MWT and amendments to IITA Act [SEC=UNCLASSIFIED]

Hi **s.47F(1)**

Attached fyi is some background briefing we prepared on the relationship between the ITAA amendments and mining withholding tax. As previously discussed, it was triggered by an inquiry from **s.47F(1)**

Treasury cleared a previous version and provided some additional comments (see below). **s.47C(1)**
s.47C(1)

Regards

s.47F(1)
Native Title Policy
Land Programs Branch
Department of Families, Housing, Community Services & Indigenous Affairs
Tel: **s.47F(1)**
Mob: **s.47F(1)**

From: **s.22(1)(a)(ii)** [mailto: **s.22(1)(a)(ii)** @TREASURY.GOV.AU]
Sent: Friday, 10 August 2012 7:01 PM
To: **s.47F(1)**
Cc: **s.47F(1)** | **s.22(1)(a)(ii)**
Subject: RE: Inquiry - MWT and amendments to IITA Act [SEC=UNCLASSIFIED]

Hi **s.47F(1)**

s.47C(1)

'Mining payments' are subject to a 4 per cent mining withholding tax. As noted by Treasury yesterday, the proposed native title amendments would amend the definition of 'mining payments' so that the definition excludes 'native title benefits'. This would ensure that a 'native title benefit' (however else it may be characterised) would be non-assessable, non-exempt income and would not be subject to income tax or the mining withholding tax.

A recipient of a 'mining payment' that cannot also be characterised as a 'native title benefit' will still be required to pay the mining withholding tax.

s.47C(1)

Thank you, once again, for checking these points with us.

Kind regards

s.22(1)
M&Viii

s.22(1)(a)(ii)

Senior Adviser
Corporate Tax Unit
Business Tax Division
The Treasury, Langton Crescent, Parkes ACT 2600
phone: s.22(1)(a)(ii)
mobile:
email: s.22(1)(a)(ii) @treasury.gov.au

From: s.47F(1)
Sent: Thursday, 9 August 2012 3:51 PM
To: s.47F(1)
Cc: s.47F(1) s.22(1)(a)(ii)
Subject: RE: Inquiry - MWT and amendments to ITA Act [SEC=UNCLASSIFIED]

Hi s.47F(1)

On our initial analysis, the interpretation of the interaction between MWT and Native title is correct. We have carved out '*native title benefits*' from the definition of mining payments in the ITAA36 legislation. This effectively means under the proposed legislation, mining payments in relation to native title benefits are NANE in the hands of the receiver.

When s.47F(1) is back on 20 August 2012, we may be able to provide further clarification as to the interaction between MWT and Native Title if required.

Thank you,
s.47F(1)

From: s.47F(1) [@fahcsia.gov.au\]
Sent: Thursday, 9 August 2012 3:24 PM
To: s.47F\(1\)](mailto:@fahcsia.gov.au)

Cc: s.47F(1) ; s.22(1)(a)(ii)

Subject: RE: Inquiry - MWT and amendments to ITA Act [SEC=UNCLASSIFIED]

s.47F(1)

In s.47F(1) absence today would you mind cc'ing me into any comments?

Many thanks

s.47F(1)

s.47F(1)

Director

Native title policy

Land Programs Branch

Department of Families, Housing, Community Services and Indigenous Affairs

P:s.47F(1) | M: s.47F(1) | F: 03 6133 8221 | E:s.47F(1) @fahcsia.gov.au

From: s.47F(1)

Sent: Wednesday, 8 August 2012 4:03 PM

To: s.47F(1) @treasury.gov.au

Cc: s.47F(1)

Subject: Inquiry - MWT and amendments to ITA Act [SEC=UNCLASSIFIED]

Hi s.47F(1)

Further to recent discussions, we have received an inquiry from s.47F(1) (who has a long background in Indigenous land and resource development negotiations) asking whether payments made to an Aboriginal Trust under Part IV of the ALRA are covered by the proposed amendments to the ITAA to clarify the tax status of native title benefits. s.47F(1) inquiry is focussed on payments made by the s.47C(1) which is owned by s.47C(1)

We have prepared the attached briefing for a proposed meeting between s.47F(1) and our Secretary based on previous discussions with Treasury.

We would appreciate any comments you may have on the briefing by cob tomorrow.

Please let me know if this timing presents difficulties for you – otherwise s.47F(1) or I would be happy to discuss (I am out of the office tomorrow).

Regards

s.47F(1)

Native Title Policy

Land Programs Branch

Department of Families, Housing, Community Services & Indigenous Affairs

Tel: s.47F(1)

Mob:

Relationship between proposed amendments to the *Income Tax Assessment Act 1936* (ITAA) to clarify the tax treatment of native title benefits and the payment of mining withholding tax

August 2012

Inquiry from **s.47F(1)**

On 31 July 2012, **s.47F(1)** emailed **s.47F(1)** (Attachment A) inquiring about the relationship between proposed amendments to the *Income Tax Assessment Act 1936* (ITAA) to clarify the tax treatment of native title benefits, and payment of MWT. **s.47F(1)** has a long background in Indigenous land and resource development negotiations. His current query relates to payments made in relation to the **s.47C(1)**

s.47C(1)

s.47C(1)

Amendments to Income Tax Assessment Act to clarify tax treatment of native title benefits

In June 2012, Minister Macklin and the Attorney-General announced the Australian Government's commitment to clarify the tax treatment of native title benefits.

On 27 July 2012, the Assistant Treasurer released public consultation exposure draft legislation and associated explanatory material to give effect to that announcement (Attachments B.1 and B.2). The exposure draft package clarifies that native title benefits are non-assessable, non-exempt income and are therefore not subject to income tax (which includes capital gains tax).

s.47C(1)

s.47C(1)

Mining withholding tax

- Introduced in 1979 - current rate is 4%.
- Levied on *mining payments* – broadly speaking, defined in the ITAA as payments made to Aboriginal people or a distributing body (for example, a Land Council or CATSI corporation):
 - out of ABA statutory-royalty-equivalent revenues (ie not revenue from earnings of the fund). (All payments made by the ABA pursuant to section 64 of the ALRA using statutory-royalty-equivalent revenues are subject to MWT. With the exception of payments to royalty associations under subsection 64(3), the ABA meets the MWT liability for these payments. However, in relation to subsection 64(3) payments, the MWT liability is met by royalty associations.); or
 - under a Commonwealth, State or Territory law that relates to Aboriginals, or an agreement made in accordance with such a law, in connection with the issuing of mining or exploration rights on *Aboriginal land* (defined in the ITAA as land held under a Commonwealth, State or Territory law for the use or benefit of Aboriginals).
- In practice, the second heading above appears only to apply to privately negotiated royalty and other agreements made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).
- The entity making the mining payment (ie, the ABA or the person seeking mining or exploration rights) must withhold MWT and pay it to the ATO. Subsequent distributions or applications of amounts subjected to MWT do not attract income tax liability.

s.47C(1)

From: s.47F(1)
Sent: Tuesday, 31 July 2012 9:33 AM
To: s.47F(1)
Cc: [REDACTED]
Subject: s.47F(1)

s.47F(1)



MINING WITHHOLDING TAX

Question 1:

- **s.47C(1)**

- Some stakeholders argue that if native title benefits have been clarified as being non-assessable non-exempt (NANE) income, ALRA-related payments should also be considered NANE income when paid for the benefit of Indigenous holding entities or persons (both types of payments are made in relation to traditional association with land and can be characterised as compensatory in nature).
- **s.47C(1)**

Was the decision to clarify native title benefits as NANE income based on these benefits/payments satisfying particular criteria under tax law? Or was it a policy decision of Government?

If it was the former, do ALRA payments made in relation to mining also satisfy these particular criteria under tax law?

Tax treatment of ALRA and Native Title benefits

- Generally, any income will be assessable income and subject to tax under the *Income Tax Assessment Act, 1936* (ITAA).
- The key feature of a native title benefit is that it is **compensation for the extinguishment of a native title holder's land rights and, accordingly, does not represent a net gain to Indigenous Australians**. Specifically, for an amount to be a native title benefit under s59-50 of the ITAA 1997, it must be linked to extinguishment of native title (see extract below):

“[The amount] 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 title (paragraph 59-50(5)(a)) OR is compensation determined in accordance with Division 5 of Part 2 of the Native title Act 1993 (paragraph 59-50(5)(b)) of the Native Title Act”

- None of the Aboriginal Land Rights Act (ALRA) payments (described in s64 1-5 of Land Rights Act) relate to the extinguishment of existing rights, **s.47C(1)**

- Under the ALRA, mining activities on Aboriginal land in the Northern Territory are required to pay the royalty equivalent of 30 per cent of the revenue raised from the venture to the Aboriginal Benefit Account (ABA).
 - These amounts are then distributed in accordance to the function of the ABA and the MWT is levied on these payments at a rate of 4 per cent. Any on-distribution of these payments once MWT has been levied is generally NANE in the hands of the recipient.
 - The rate of the MWT (currently set at 4 per cent) is considerably less than the rates that are applied to individuals, which can be up to 49% for individuals which earn in excess of \$180,001 (including applicable surcharges) and has not been adjusted over time

Policy consideration of ALRA amount and potential impacts of inclusion in Native Title Benefits

- Expanding native-title benefits so that ALRA-related payments would receive the same tax treatment as native title benefits was investigated in the committee for the Inquiry into the 2012 Amending Bill.
 - The committee concluded that any commercial payment to an indigenous community, without a clear link to native title, does not necessarily warrant becoming NANE income without reference to a larger debate on native title (refer para 2.34 of the [Advisory report](#)).
- s.47C(1)
-

Question 2:

s.47C(1)

s.47C(1)

Question 3:

- Some stakeholders have argued that ABA payments using statutory royalty equivalents (SREs) are subject to multiple forms of taxation and characterised this as “double taxation”.
 - For example, amounts received by a Land Council under s64 (1) of the ALRA are NANE income for the relevant Land Council. However, where that income is subsequently used to purchase goods and services (including the salaries or wages of staff), the exemption no longer applies.
 - This was the intent of the MWT as outlined in the Explanatory Memorandum to the *Income Tax Assessment Amendment Act (No. 2) 1979*. s.47C(1)

s.47C(1)

s.47C(1)

- As outlined in the Explanatory Memorandum for the Income Tax Assessment Amendment Act (No. 2) 1979, it is important to distinguish between payments that are compensation for the extinguishment of a native title right, and payments to a native title holder that relate to other things (such as the provision of goods, services, rights, or access). This means that it necessary to apportion payments that are partly for a native title benefit and partly for other rights or activities.
 - Where an amount is paid for the purposes of meeting a provider’s administrative costs, or as remuneration or consideration for the provision of goods or services, the amount or benefit will not be a native title benefit (subsection 59-50(3) ITAA 1997).
- MWT is generally a final tax where the recipient of resulting payments is an indigenous Australian (i.e. the MWT applies instead of income tax and the amount received by the individual is treated as NANE).
 - This is not the case where a body (such as a land council) in receipt of amounts that have been subject to MWT applies such funds for the purposes of administrative costs, salaries of the staff of the bodies, or on any amounts paid for the provision of goods or services. Amounts applied to these purposes cease to be NANE, despite the fact the MWT has been paid.
 - This is because these amounts are no longer being withheld for the indigenous beneficiaries, but rather are being applied (and thus on-paid) to entities or individuals which may have no link to the relevant land that is subject to the ALRA / Native title.
- The Explanatory Memorandum to Tax Laws Amendment (2012 Measures No. 6) Bill 2012 illustrates a similar example in respect of native title benefits:

- **Example 1.7: Native title benefit and services provided**
Indigenous Holding Entity G receives a \$2 million native title benefit. An Indigenous person to whom the native title benefit relates provides accounting services for Indigenous Holding Entity G and receives remuneration for this service of \$75,000. This remuneration of \$75,000 will not be NANE income for the Indigenous person and will be treated under existing income tax provisions as it is a payment for a service.'
- Further, where a native title payment is invested by the recipient, any income generated will **not** be non-assessable non-exempt income (paragraph 59-50(4)(b) ITAA 1997 and paragraphs 1.21, 1.22 and examples 1.3 and 1.4 of the EM to TLAB No.6 2012). This is because the returns on the investment are ordinary income and not a payment under the ALRA or native title benefit.