National Native Title Council

Spirit of Change

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11 May 2012

The Manager
Philanthropy and Exemptions Unit
Indirect Tax Division
The Treasury
Langton Crescent
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Via Email: NFPreform@treasury.gov.au

Dear Sir / Madam

Thank you for the opportunity to comment on the *Exposure Draft Restating and standardising the special conditions for tax concession entities (including the 'in Australia' conditions)* (the Exposure draft).

The National Native Title Council ('NNTC') is an alliance of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) from across Australia. Our role is to provide a national voice and advocacy on matters of significance affecting the native title rights and interests of Aboriginal and Torres Strait Islander peoples.

The NNTC was incorporated as a public company limited by guarantee under the Corporations Act in 2006. It is registered for GST and was endorsed with DGR status as a Public Benevolent Institution in February 2010.

All NTRBs/NTSPs are Not-For-Profit ('NFP') entities and are either incorporated as Aboriginal Corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the 'CATSI Act') or as public companies limited by guarantee under the *Corporations Act 2001*.

The NNTC has sought comments from its members in formulating this response, however the information contained in our submission should not compromise any comments received from individual NTRBs/NTSPs.

The following comments are provided by way of general response to the Exposure Draft and accompanying information.

Firstly, the NNTC supports the definition of 'not-for-profit' being standardised across tax laws by adopting the term 'not-for-profit' in place of 'non-profit'.

The NNTC is also supportive of restating the 'in Australia' special conditions by ensuring that income tax exempt entities must generally be operated principally in Australia. However NTRBs/NTSPs would be concerned by the inflexible implications suggested by the requirement that entities must operate for the "broad benefit of the Australian community".

Under the provisions of the Native Title Act 1993 (Cth) native title groups or native title claimants are generally familial groups with the requirement to trace their ancestry back to apical ancestors in order for native title applications to be determined. Once native title has been found to exist, prescribed bodies corporate (PBCs), as required under the Native Title Act, and trusts are established to act on behalf of the native title group and to receive native title payments for the benefit of the group.

Unfortunately, there is some confusion and inconsistency as to the structures, and types of income tax endorsement received by structures, that have been created to receive native title payments. In general they are unable to be recognised as charitable, even in situations where the purposes are exclusively charitable and the not for profit requirement is satisfied.

A significant number of PBCs and trusts adopt the wording required for a public benevolent institution (PBI) as a result of the wording approved in the *Northern Land Council v Commissioner of Taxes (NT) 2002 ATC 5117,* where a court held that a corporation negotiating land rights in the Northern Territory was a PBI, largely due to the state of disadvantage experienced by the Aboriginal groups in the relevant region. Some traditional owner groups have been advised or led to understand that this wording is necessary in order to receive charitable status.

We understand the ATO endorses these entities as PBIs on the basis that they are for the relief of poverty and therefore can be restricted to a family grouping. However restricting native title groups to PBI status and not enabling general charitable purposes:

- restrains the application of the money preventing a number of activities such as education, health and well being, economic development, environmental and cultural activities;
- may not always be applicable or appropriate if not all the native title members fall within the PBI definition of needing benevolent relief; and
- if broad public benefit is to be required for relief of poverty, not even this opportunity will be available to native title groups.

Native title groups are therefore caught between the operation of 2 opposing sets of laws – one relating to native title that requires them to restrict the receipt of benefits to a familial group, and the other denying them relevant tax concessions because it is restricted to a familial group.

In order to provide clarification and simplicity we recommend that where an entity is established to receive native title payments and in all other respects meets the requirements for recognition as a charity other than the familial connection, it is able to be charitable. This would also enable the Indigenous Community Development Corporation (ICDC) proposed by the NNTC and the MCA to be charitable and enable existing charitable entities established by native title groups to transition to an ICDC.

By way of summary, the ICDC would:

- be established using a model constitution/trust deed with appropriate governance and integrity measures included;
- be approved by the Minister and placed on a register of ICDCs;
- recognise and respect the fundamental connection between native title groups and their ICDC;
- have a Future Fund for accumulation for future generations;
- attract a range of tax exemptions and concessions to incentivise investment in community and economic development; and

- still be subject to compliance with the appropriate incorporating legislation (i.e. Corporations Act, CATSI Act, Trustees Act or the proposed Australian Charities and Not-for-Profits Commission (ACNC)).

To date, there have been 84 PBCs established, not all of which are not-for-profit entities or endorsed as PBIs. However, with 339 native title claims still in the system, the number of PBCs could expand to around 250 (based on a conservative estimate of the number of native title claims being successful). Currently the majority of extant PBCs struggle with a lack of funding. Whilst some PBCs are established in resource rich areas and are therefore able to negotiate agreements for independent revenue to benefit their native title group, the majority are not.

By way of example, in the 2011-12 financial year total funding of $1.69m was granted through the Department of Families, Housing, Community Services and Indigenous Affairs to only 34 of the PBCs registered in Australia. That is an average of around $50,000 per organisation for the year to cover operational costs.

PBCs are required to perform statutory duties on behalf of disadvantaged constituents without any recurrent operational funding and should therefore be entitled to PBI status as a matter of course rather than being granted after a convoluted application process. PBCs also risk being unsuccessful in any application for PBI status due to the familial nature of the native title group, rather than being for broad community benefit. As stipulated in the Preamble of the Native Title Act, "… Aboriginal peoples and Torres Strait Islanders have become…the most disadvantaged in Australian society". If a PBC goes into voluntary liquidation in part due to a burdensome tax regime this would not only repeat the disadvantage that the NTA attempts to redress but in all likelihood would compound it.

It should also be noted that PBCs must be incorporated under ORIC and the Federal Court must determine that the PBC holds the native title on behalf of the "common law holders". This ensures that there are stringent accountability measures in place and that such organisations will comply with the reporting requirements under the ICDC model as well as the proposed ACNC being developed through the not for profit reforms of the Department of Treasury.

Should the reforms to the not for profit sector place an additional burden or remove an income stream or in-kind support by virtue of changing DGR status it is going to have a deleterious effect upon the intended beneficiaries of PBCs; being, traditional owners. This could particularly be the case if PBCs can not satisfy the requirements of "being for the broad benefit of the Australian community".

We would also like to take this opportunity to restate some of the concerns previously raised in relation to the establishment of the ACNC, including the governance provisions.

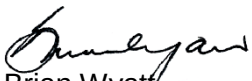
The role of the Office of the Registrar of Indigenous Corporations (ORIC) and the new ACNC remains uncertain. Notwithstanding any ongoing issues with ORIC, it would be difficult for the one entity (ie. ACNC) to promote training and education on the one hand, while being solely responsible for compliance on the other. For example, how willing would a PBC be to undertake training if, by doing so, they expose themselves to being identified as a non-compliant PBC, such as to lose income tax exemption.

We also still have some concerns with respect to where the line will be drawn for assessing whether there has been a breach of a 'substantive' governing rule, which allows the ATO to remove an entity's income tax exemption. For example, what may be considered 'substantial' for a non-Aboriginal corporation may be different to the 'substantive' governing rules of a PBC. As mentioned above, it could be argued that the

primary purpose of a PBC is to hold native title rights and interests and comply with the Native Title Act. NTRBs/NTSPs would question what happens if, by complying with the NTA the common law holders instruct the PBC to do one thing, which is in contravention of a governing rule considered to be ‘substantive’ for a non-Aboriginal corporation?

I trust that the above comments are useful for your purposes, however if you have any queries or require any further information please do not hesitate to contact me at your convenience.

Yours sincerely



Brian Wyatt
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