



South West Aboriginal
Land & Sea Council

Our Ref: DOC2010/2307

1 July 2010

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Native Title, Indigenous Economic Development and Tax Consultation Paper

The South West Aboriginal Land and Sea Council is pleased to have this opportunity to respond to the above paper.

Our experience in relation to these matters is limited, in that within our Region there have been few agreements which have given rise to payments. Although negotiations are underway at present which may give rise to a Native Title Settlement, there are currently no Prescribed Bodies Corporate.

Consultation Questions

- (a) Our view is that taxation questions should not dominate a discussion about native title settlement. Discussions and the settlement structure should not be distorted or complicated by taxation considerations.

Notwithstanding, there is a lack of certainty and high levels of complexity around taxation matters. In the absence of a simpler taxation regime, it will be necessary for us to consider very carefully how any potential settlement in the South West will need to be structured so as to avoid unintended taxation consequences.

- (b & c) We have been advised that our proposed structure for a native title settlement will qualify as an Income Tax Exempt Charity (ITEC). However, such endorsement is not automatic, and there is therefore a level of uncertainty which we would prefer to not be faced with.

A further area where there has been substantial confusion has been around the issue of the differences between income definitions as used by Centrelink and the Australian Taxation Office (ATO). It would be useful if the policies applied by these departments could be unified in some way so as to improve the clarity of the rules. The various rules which apply are highly complex, complex enough so that professional staff working in the sector have trouble understanding them and therefore cannot be expected to provide worthwhile advice or guidance on the matter to our clients.

Although not referred to in this consultation paper, the matter of what responsibility a Representative body or other payer has in relation to accepting the "Statement by Supplier" forms (known as "Hobby Declarations") remains unclear. We generally accept these forms in good faith, ensuring that the payee is made aware that payments may be taxable and that there may be Centrelink implications. The same applies in relation to payments made which are in the nature of expense reimbursements, known as Travel Allowance (TA).

It would be helpful to have some clear rulings on these matters. If particular payments to individuals connected with native title activity could be automatically classified as exempt from taxation **and** Centrelink assessment, administrative efficiency may improve, without any substantial loss to the revenue or overpayment of benefits.

A further matter not covered in the Consultation Paper is the issue of whether or not entities in the sector should qualify for deductible gift recipient (DGR) status. The matter has not been tested, to our knowledge, since the case of Northern Land Council v Commissioner Taxes (NT) (2002).

In that case, the definition of "benevolence" came under question. The concept was established that the work of the Land Council was directed towards the relief of distress, and that this was most certainly a benevolent purpose. We believe that entities which qualify as Indigenous Community Funds (ICF), should also qualify as Public Benevolent Institutions (PBI).

- (d) We have limited experience with this. The main issue in fact has been in relation to developing a workable system for assessing applications, seeking approvals and making the payments.
- (e) We have used the services of a Trustee company to administer and manage Trust Funds. This has been satisfactory, although there have been concerns about the fees charged by the Trustee.
- (f) An upfront exemption would obviously mean that we do not have to give a lot of thought to this aspect of the structure. However, we would not be comfortable with any residual complexity arising from a need to differentiate payments between benefits which are strictly related to native title and those which are "not strictly related to either the extinguishment or impairment of native title ...".
- (g) We are not able to offer comment on this matter.
- (h) If this sort of complexity is going to arise, we would suggest not going down this path at all.
- (i) Our preference is for the ICF model. We believe that native title agreements must be accompanied with appropriate governance arrangements. We believe that an ICF can provide for a good governance structure and provide appropriate taxation exemptions to native title groups.

- (i,ii & iii) We would like all the proposed entities we plan to establish under the settlement to be ICFs for taxation purposes. As such, their objects will be defined in their Constitutions so as to align with the ICF compliance definitions agreed upon. They should be able to receive payments related to the proposed settlement with the State, and they should also be able to seek program and other funding as they see fit, which is consistent with their objectives.

These entities will operate as community service organisations, and will seek to advance the interests of the NT group, as defined by the Constitutions of those entities. They are likely to pursue all of the purposes listed on page 11, including engagement in property development in furtherance of the objective of asset accumulation.

We believe that so long as all income of the Fund, by way of direct income, interest, dividends or profit on developing land assets is kept in the Fund and never distributed to individuals other than by way of payments for financial distress, scholarships, funerals and other programmes, that all income should remain exempt.

We agree however with the suggestion made later in the paper that not all business activity should have a DGR status. We believe that the rules adopted within the charitable sector should apply in this sector, in that limited trading activity in support of the objects of the organisation, such as Op Shops, may be operated without affecting the DGR status of an organisation. However when a substantial business is developed which has only a thin connection with the primary purpose of the ICF, then DGR status would not be applicable.

- (iv) The ICF entities should be subject to the on-going self assessment regime that applies currently to PBIs. In addition, a process of audit compliance would need to be established within the ATO, consistent with existing policies and procedures.

Where an ICF is not a Trust, the entity should be registered under CATSI. Where the ICF is a Trust, the Trust rules would need to ensure that ICF compliance was achieved by writing appropriate objects.


- (v & vi) We have no worthwhile comment to offer. It would seem appropriate to allow a transition to the adoption of new arrangements without penalties such as Stamp Duty, CGT or unrecoupable GST arising.
- (j) As noted elsewhere, we have limited experience with these arrangements and are mainly focused on the future.
- (k) Although the native title withholding tax system has attractions from the point of view of simplicity, our view is this system has the potential to bring the sector into disrepute unless it is accompanied by a range of governance controls designed to instil "integrity measures", which would otherwise be lacking.

We have no further comments on this suggestion. We are curious as to why the government may be favouring this option.

- (n) See various comments above. We are not convinced that a new DGR category is required. If an institution is an ICF, it should be endorsed as a PBI. Significant trading activity would disqualify an entity from being an ICF.

We hope that our comments are of use to you in your deliberations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Glen Kelly', with a small 'AP' or similar mark to the left.

Glen Kelly
Chief Executive Officer
South West Aboriginal Land and Sea Council