

**The Western Australian Government's Submission
on the
Commonwealth Government's Exposure Draft Package
on
The tax treatment of native title benefits**

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Introduction

On 6 June 2012, the Commonwealth Government announced a commitment to clarify the tax treatment of native title benefits. On 27th July 2012, exposure draft legislation and associated explanatory was released by the Assistant Treasurer. Interested parties were invited to comment on the materials.

The release of the 2012 material follows on from the 2010 circulation of a Consultation Paper, *Native Title, Indigenous Economic Development and Tax*, where three policy options were outlined for consideration:

- An income tax exemption;
- A new tax exempt vehicle; and
- A native title withholding tax.

The consideration of the options was justified on the grounds that the interaction between the income tax system and native title are complex and uncertain.

The exposure draft materials follow on from the earlier consultation paper by selecting income tax exemption as the proposed option to be implemented and indicating that approach was supported by the submissions that were received. The exposure draft materials provide that 'certain native title benefits are non-assessable non-exempt' and therefore 'not subject to income tax' including capital gains tax.

A native title benefit is defined as 'a payment or non-cash benefit provided under an agreement made under Commonwealth, State or Territory legislation ... to the extent the payment or benefit relates to an action affecting native title'. An action affecting native title is stated as 'one that extinguishes native title rights and interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment and exercise'.

The Western Australian Government thanks the Commonwealth Treasury for the opportunity to provide comment on the exposure draft legislation and associated explanatory material on the proposed changes to the tax treatment of native title benefits.

General comments

When the Consultation Paper *Native Title, Indigenous Economic Development and Tax* was originally released for comment in 2010, it linked the consideration of the three possible options to the broader objectives of 'a more flexible, less legalistic approach to native title that delivers practical outcomes for Indigenous Australians'.

In responding to the Consultation Paper, the Western Australian Government's submission sought clarification about several practical aspects that would arise if an income tax exemption were adopted, including:

- What will be the proposed tax treatment of multi-purpose agreements that do not differentiate between the benefit structures linked to addressing native title compensation and those benefits provided for other purposes?
- Is the tax exemption status is intended to also cover agreements with native title claimants where native title is not yet determined, and may not ultimately be determined in the positive? If so, what criteria will be used to determine that agreement has an adverse impact on native title?
- How to ensure that those Aboriginal people who are not party to the specific agreements achieved over resource-rich areas of Australia are also able to derive benefits;

It is unfortunate that in the time since the release of the 2010 Consultation Paper, the Commonwealth has not addressed these questions. Moreover, absent from the current explanatory material is an explanation as to how a general income-tax exemption is linked to broader public policy principles such as ensuring that:

- the taxation system applies equally to all Australians;
- the proposed approach is fair to all and free of bias; and
- the promotion of self-management among Aboriginal people.

In its July 2010 Discussion Paper *Leading practice agreement: maximising outcomes from native title benefits*, the Commonwealth Government states that native title agreement are generally considered to be commercial agreements. This would normally imply that tax exemption is inappropriate for native title agreements.

Additionally, in *Leading practice agreements* the Commonwealth Government advocated:

- Enhancing the transparency and accountability of payments to native title beneficiaries;
- Ensuring that benefits received under such agreements are adequately preserved for the benefit of current and future generations; and
- Improved governance.

Such concerns are consistent with the need to promote self-management and accountability by native title beneficiaries.

At the time the Discussion Paper acknowledged that a 'growing number of individual agreements deliver many millions of dollars each year to individual native title groups' and expressed concerns that some agreements had resulted in poor outcomes for native title holders, 'such as benefits being dispersed in ways that achieved limited outcomes for native title holders, including funds being dissipated to expert advisers and being placed at risk by poor governance and trust management practices'.

The exposure draft legislation is silent on how the proposed tax exemption will assist in achieving the Commonwealth's identified goals.

Indeed, the justification advanced by the Commonwealth for recommending an income tax exemption is totally reliant on the evidence that submissions responding to the 2010 Consultation Paper were 'supportive of reforms to clarify that native title payments that are for the extinguishment or impairment of native title rights and interests are not subject to income tax'. The absence of detailed analysis about the feedback received in the submissions received for *Native Title, Indigenous Economic Development and Tax*, and the lack of attention to addressing the questions previously raised, suggests that the Commonwealth Government is to a large extent going through the motions of consultation rather than seeking informed comments on the possible impact of the proposed amendments.

Financial implications

The explanatory material indicates that the amendment to the *Income Tax Assessment Act 1997* will have retrospective effect from 1 July 2008. The reason cited for this step is that this will clarify 'the tax position for cases currently being considered by the Australian Tax Office'.

The application of retrospectivity to tax law is a highly unusual step. The Western Australian Government is also concerned about the possible financial implications that may arise from applying the proposed changes to existing native title agreements the State has entered into since 1 July 2008. Initial advice has identified that the application of retrospectivity may incur additional costs for the State.

The characterisation of payments as compensatory

A key premise of the Commonwealth Government's proposal to apply an income tax exemption to native title agreements is that such agreements are generally detrimental to the native title rights and interests concerned, either being extinguished, impaired or suspended, and hence it is appropriate to characterise native title agreements as compensatory.

In 2010, Jon Altman, an academic at the Centre for Aboriginal Economic Policy Research at the Australian National University, observed that 'most benefit sharing agreements' include both a 'compensatory element as well as an additional payment ... that is influenced by the profitability of the mining venture'. As Altman notes this means that 'at least two reasons for payment might be embedded in the one agreement'. Furthermore, in native title agreements with mining companies native title compensation may be only a small portion of the total benefits payable. Typically the non-compensable aspects also may include a range of matters including land access, community development, indigenous employment, education, and business development outcomes.

The explanatory materials state that the proposed new law will be limited to the circumstances where native title is detrimentally affected. In the absence of a clear formula, or other specific criteria, to indicate the proportion of the native title agreement that is deemed for "native title compensation", the amendment will presumably apply to all native title agreements in their entirety.

Another risk of proceeding to provide an income tax exemption status is that it could lead to a narrow, legalistic focus on native title compensation occurring in agreement negotiations at the expense of ensuring that benefits are in the best interests of current and future generations.

WA Government position

In its submission in response to the Consultation Paper *Native Title, Indigenous Economic Development and Tax*, the Western Australian Government indicated that it was not supportive of tax exemption outside the normal parameters allowed for charitable/community trusts and that normal tax rules should apply to all other matters. This submission observed that the introduction of an income tax exemption or a new tax exempt vehicle will prevent the normalisation of the taxation obligations arising from native title agreements.

Moreover, normalising the taxation obligations would be consistent with the need to remove special measures in government policies and programs that impede the development of self-management and accountability. Based upon these principles the Western Australian Government submission argued that payments to individuals should incur a normal tax liability and those commercial investments or business development established as a result of a native title agreement should incur all normal business taxes. Only those payments that are made for genuine community purposes should attract a tax-exempt status.

Additionally, in a context where the Australian Taxation Office is currently implementing changes to the charity status of organisations, it will be particularly important to ensure that the taxation regime applicable to native title agreements is not inconsistent with the changes occurring to charity status.

Conclusion

As noted earlier in this submission, the recently circulated material from the Commonwealth Government has added little in terms of reasons for its decision to propose a general income tax exemption to native title agreements. The Western Australian Government reiterates that it is not supportive of this proposal for the following reasons:

- The taxation arrangements of native title agreements should be normalised;
- The proposal is premised on the assumption that native title agreements are always detrimental to native title rights and interests;
- Providing a general tax-free status to native title agreements overly simplifies the complexity contained in many native title agreements.
- The proposal appears to extend the income tax exemption status to agreements where native title may not be found to exist.