



National
Native Title
Council

*spirit
of
Change*

Submission

Exposure Draft Materials to Provide Clarity on the Tax Treatment of Native Title Benefits Joint Submission

Introduction

The National Native Title Council (NNTC) has advocated strongly for the importance of, and opportunity for, native title payments being used to facilitate greater economic development and wealth creation for current and future generations of traditional owners, their families and communities. The NNTC believes that using such an approach will establish vibrant, diverse and sustainable regional communities, particularly in areas where there is limited mainstream economic opportunity.

The *Exposure Draft for Tax Laws Amendment Bill 2012: tax treatment of native title benefits* (the Exposure Draft) is a welcome and positive step towards facilitating greater economic development opportunities for Indigenous communities. As we understand it, the proposal as set out in the Exposure Draft is to exempt payments and non-monetary benefits that are made under an agreement relating to native title and/or payments and non-monetary benefits that are compensation for the effect of actions on native title rights and interests (native title compensation).

The NNTC agrees that native title payments are a form of compensation and that they should therefore be considered as non-assessable non-exempt (NANE) income, meaning they are not subject to income tax (including capital gains tax).

However, whilst we support the extension of NANE to income generated from native title benefits we believe that the Exposure Draft needs further refinement in some areas. Our concerns and comments are set below:

1. Complexity of Native title agreements

Native title payments are comprised of a complex mix of both compensation and benefit sharing arrangements. The benefit sharing arrangements are negotiated with Traditional Owners and Indigenous communities to deliver tangible community development, economic development and wealth creation opportunities. In part, these benefits represent compensation for impacts on native title rights, land rights or cultural heritage and are delivered as a mix of monies held in trust and other purposes such as community assets/infrastructure, and payments to individuals.

Mining companies and other businesses commence negotiations with Indigenous groups most usually on the basis of their native title claim, however agreements can also make provision to:

- Acknowledge traditional connection even where native title may ultimately be found not to exist;
- Acknowledge traditional connection where native title has been extinguished by subsequent dealings in land.

These sorts of agreements can deliver very significant monetary benefits and non-monetary benefits as well as “participation” measures such as commitments to job readiness initiatives, training employment and mentoring of Indigenous employees as well as initiatives aimed at the development of opportunities for Indigenous contracting.

The NNTC considers it is essential that the NANE income treatment be applied to the full suite of benefit sharing arrangements provided under native title related agreements, as without this treatment sustainable and intergenerational benefits may well be unachievable.

It is within the Government’s own objectives to encourage these sorts of “best practice” agreements that deliver significant benefits to Indigenous groups that are not merely linked to the effect of acts on native title but also to ensure those benefits are managed and distributed for the gain of current and future members of the community to which they are directed.

The Explanatory Memorandum in clause 1.15 confirms that the NANE income treatment will *apply to any payments or non-cash benefits* provided under an agreement relating to native title. However clause 1.13 states that ‘**certain**’ native title benefits are NANE income but is not explicit about what payments/benefits will not be considered. These clauses are inconsistent and clarity is required to generate greater confidence about their intent.

While the Exposure Draft clearly states that the NANE income treatment is applicable to agreements made under the Native Title Act and the Victorian Settlement Act, it makes no reference to a wide range of other agreements including those currently being negotiated with Traditional Owners for the purposes

of securing access to land. For those agreements viewed as being ‘outside of scope’ substantial effort will be required in seeking ATO determination and advice on the appropriate tax treatment.

An example of this is the emergence of what is colloquially known as ‘as if’ agreements. ‘As if’ agreements are negotiated between parties where there isn’t a registered native title claim, where extinguishment has been found by the courts to have occurred, or where native title rights have been limited in law. Across these situations the impetus for the agreement may vary however the negotiation process and agreement outcomes are generally the same.

The NNTC considers that not applying the NANE income treatment to ‘as if’ agreements could be viewed as further discriminating against Indigenous people who have lost their right to legal recognition of native title. Further, such an approach would limit the economic value of such agreements.

The NNTC notes that the Exposure Draft is also unclear on situations where an agreement may be signed with native title claimants who are subsequently found to not have met connection requirements, or the rights have been extinguished by law. Issues of retrospective tax liability may discourage the willingness of parties to negotiate agreements prior to determination, or if it is held that the tax treatment remains, may encourage the delay of court determination pending negotiations of agreements.

2. Definition of ‘Indigenous holding entity’ and ‘distributing body’

The NNTC believes there are significant limitations under section 59-50(6) of the Exposure Draft. Specifically, the limitation of beneficiaries, as defined under an ‘Indigenous holding entity’, to Indigenous people may have unintended consequences for the investment of communal funds in community infrastructure such as remote area health services, which may also service a small proportion of non-Indigenous clients. It should also be noted that the limited focus on beneficiaries may be inconsistent with the requirements for charitable trusts in relation to the public benefits test. It is important that the development of this legislation is not conducted in isolation of the proposed ‘Not for Profit Sector Reforms’ in the Charitable Act.

A further limitation to section 59-50(6) of the Exposure Draft would be the potential exclusion of certain entities, such as: trusts with a charitable unincorporated association or trust as a beneficiary; or a trust that has only Indigenous persons and/or ‘distributing bodies’, but the trust deed includes a general power to appoint additional beneficiaries.

Further, the definition of 'distributing body' is also too narrow, in that it would not allow other incorporated bodies, such as those incorporated under the *Corporations Act 2001*, to be considered a distributing body. A number of corporations have been established with a 'not for profit' purpose or for the benefit of Indigenous persons yet are public companies limited by guarantee rather than CATSI corporations. The NNTC would therefore consider that these definitions be broadened to ensure all corporations that operate for the benefit of Indigenous persons can be captured under the legislation.

3. Short term focus

The NNTC is concerned about the tax treatment of investment income, such as interest income derived from investing a native title benefit, which according to the Exposure Draft will not be considered NANE income. It is the NNTC's view that inadequate consideration has been given to the tax treatment of investment funds to ensure benefits for future community and economic development initiatives and future generations. Example 1.3 of the Explanatory Memorandum, if implemented, would discourage long term investment strategies, which is contrary to the objective of agreements that are about recognising impacts on native title rights of both current **and future** generations. If distributions are not able to be made in this context there may not be an effective catalyst for social and economic development towards Closing the Gap in the longer term.

Further, the NNTC believes that the exclusion of investment income from receiving NANE income treatment may have perverse outcomes in relation to long term investment strategies for some groups. Not all native title agreements attract significant amounts of money, which means that traditional owners groups have to employ well thought out and strategic investment tactics to ensure the best possible outcomes for their communities. The exclusion of investment income from receiving NANE treatment could potentially undermine the development of strong and rational decision-making towards long term economic development and wealth creation.

The NNTC fully supports the policy intent of current **and future** recipients of native title related revenue benefiting from the application of preferential tax treatment of these funds. We consider that the narrow focus on immediate benefit rather than long term investment income into the future does not provide an optimal framework to achieve these shared outcomes.

Conclusion

The NNTC fully supports the introduction of NANE income treatment for native title payments and benefits as set out in the Exposure Draft. However, the NNTC is

concerned that there is inadequate consideration given to how accumulation, wealth creation and intergenerational benefits are encouraged. To address this, and other concerns, the NNTC recommends that:

- More certainty that benefit sharing arrangements will receive the NANE income treatment, and guidance provided as to how it will be applied;
- 'As if' agreements should receive the same NANE income treatment;
- Clarity provided on how retrospectivity will be managed;
- The definitions of 'Indigenous holding entity' and 'distributing body' should be broadened;
- The Exposure Draft be amended to provide a framework that enables current *and future* recipients of native title related revenue to benefit from the application of preferential tax treatment of these funds. The tax treatment of investment income (rather than just the original payments) should be addressed.

The NNTC would request that there is further engagement between the Government and native title and other key stakeholders to address the issues raised in this submission.

Should you wish to discuss any of the issues outlined in this paper in further detail, please contact Brian Wyatt, Chief Executive Officer on 03 9326 7822 or Carolyn Betts, Senior Administration Officer on 08 9358 7421.