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Human Rights
Commission
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Consultation Paper: Native Title, Indigenous Economic Development and Tax

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Australian Human Rights Commission Submission
to the Treasury

30 November 2010

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Treasury in response to its consultation paper titled *Native Title, Indigenous Economic Development and Tax* (the Consultation Paper).¹
2. The Commission is Australia's national human rights institution and has powers and functions under the *Australian Human Rights Commission Act 1986* (Cth) and the *Racial Discrimination Act 1975* (Cth).
3. In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner) has specific responsibilities under the section 209 of the *Native Title Act 1993* (Cth) to report annually on the operation of that Act and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.
4. The Commission is not directly involved in the negotiation or implementation of native title agreements and does not have experience in the intricacies of taxation law. The Commission is however deeply conscious of the significance to Aboriginal and Torres Strait Islander peoples of their right to their lands, territories and resources and their right to development.²
5. In particular, previous *Native Title Reports* have included extensive analysis and recommendations regarding the role of native title in achieving economic and social development for native title parties.³
6. The Commission strongly supports the general aims outlined in the Consultation Paper. In particular, the Commission supports both legislative and non-legislative approaches to reduce complexity and improve certainty as to the tax implications of native title payments.
7. The discussion paper outlines three approaches to achieving these general aims:

¹ Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010). At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 25 November 2010).

² See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 23 November 2010); *Declaration on the Right to Development*, GA Resolution 41/128 (Annex), UN Doc A/RES/41/128 (1986). At <http://www.un.org/documents/ga/res/41/a41r128.htm> (viewed 23 November 2010).

³ See, for example, W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Human Rights and Equal Opportunity Commission (2004); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004*, Human Rights and Equal Opportunity Commission (2005); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2005); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007). These reports are available online at http://humanrights.gov.au/social_justice/nt_report/index.html (viewed 26 November 2010).

- the introduction of an income tax exemption for payments received pursuant to a native title agreement
 - the introduction of a new tax exempt vehicle
 - a native title withholding tax.
8. The Consultation Paper also raises the possibility of extending the deductible gift recipient (DGR) concessions to include a new category specifically for Aboriginal and Torres Strait Islander organisations. However, at the same time, the Consultation Paper notes that an extension of DGR categories to include business development activities is not supported.
9. The Commission notes the Government's position that direct spending programs are ordinarily better suited to promote Aboriginal and Torres Strait Islander economic development. However, the Commission encourages the Government to further consider legislative approaches to using the tax system to promote economic development for Aboriginal and Torres Strait Islander peoples.

2 Summary

10. The Commission is not in a position to provide substantive comment in relation to the matters raised in the Consultation Paper. However, the Commission:
- reiterates the unique compensatory nature of native title payments and rejects any form of taxation on them, regardless of the nature of the payments
 - supports the introduction of the proposed income tax exemption and the proposed introduction of a new tax exempt vehicle in combination
 - opposes the introduction of the withholding tax on native title payments
 - supports the introduction of a new category of deductible gift recipient concessions for Indigenous organisations that carry out activities across multiple DGR categories
 - supports the expansion of DGR concessions to include Aboriginal and Torres Strait Islander business development activities or, in the alternative, the formulation of other means of supporting business development activities such as those discussed in the report of the Native Title Payments Working Group⁴
 - encourages further examination of the taxation implications of native title payments particularly in relation to the goods and services tax (GST)

⁴ Native Title Payments Working Group, *Report* (2008), pp 11–12. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.DOC/\\$file/Working+Group+report+-+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.DOC/$file/Working+Group+report+-+final+version.DOC) (viewed 22 November 2010).

- recognises that, while robust governance arrangements are necessary, the design of the new tax exempt vehicle must be flexible and able to accommodate the distinct needs of Aboriginal and Torres Strait Islander peoples. Further, Aboriginal and Torres Strait Islander peoples need to be able to be fully engaged in the design of the governance mechanisms.

3 Recommendations

Recommendation 1: That an income tax exemption for all payments flowing from native title agreements be introduced as proposed in the Consultation Paper.

Recommendation 2: That a new tax exempt entity be established to receive payments under native title agreements and to use those funds for a range of purposes as proposed in the Consultation Paper.

Recommendation 3: That a new category of deductible gift recipient (DGR) concessions for Aboriginal and Torres Strait Islander peoples' organisations that carry out activities across multiple DGR categories be created.

Recommendation 4: That the new DGR category permit Aboriginal and Torres Strait Islander business development activities.

Recommendation 5: That the proposal to implement a Native Title Withholding Tax not proceed.

4 Income tax exemption

11. The Commission remains of the view that all native title payments, monetary and non-monetary are in the form of compensation and should not be subject to taxation.⁵
12. By creating a specific exemption for native title payments, there will be certainty of treatment for those in receipt of such payments.
13. The Commission is unable to comment on the appropriate definition of 'native title agreement' in this context but would encourage the Government to adopt the definition that is most broadly accepted by Aboriginal and Torres Strait Islander peoples and will bring most benefit to the recipients.

⁵ Australian Human Rights Commission, *Submission to the Australian Government's Native Title Payments discussion paper – Optimising Benefits from Native Title Agreements* (4 March 2009), paras 199–205. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20090304_ntpayments.html (viewed 23 November 2010).

5 Tax exempt vehicle: Indigenous Community Funds

14. While a tax exemption on payments under a native title agreement is supported, the Commission believes it is also appropriate to establish a new form of tax exempt vehicle for use by Aboriginal and Torres Strait Islander peoples in receiving and utilising payments under native title agreements for the benefit of those peoples.
15. In addition to payments from native title agreements, such bodies could also receive funding from other sources for use in accordance with the requirements established for such an entity.

5.1 Payments received by the fund

16. The Commission is unable to comment specifically on what payments should be able to be accepted by the fund but would encourage the government to allow the range of such payments to be as wide as possible to ensure full maximisation of the benefits to the Aboriginal and Torres Strait Islander peoples who access the resources of the entity.

5.2 Purposes for which the funds can be used

17. The Commission also encourages the Government to ensure that the purposes for which the funds from the entity can be used are as broad as possible to ensure maximum benefit to the communities who receive such funds. The activities listed in the Consultation Paper are all appropriate activities for the funds.

5.3 Governance arrangements

18. The Commission notes the importance of ensuring that Aboriginal and Torres Strait Islander peoples are able to be fully engaged in the design and development of corporate governance arrangements. In this regard, the Commission refers to its submission⁶ in response to the *Leading practice agreements: maximising outcomes from native title benefits* discussion paper.⁷

⁶ Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010).

⁷ The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Nativetitereform (viewed 23 November 2010).

6 Withholding tax

19. As indicated above, native title payments are in the nature of compensation and should not be taxable. A withholding tax would be contrary to this principle and should not proceed.
20. A further concern in relation to a withholding tax is the inequitable nature of a flat tax on all payments. For example, the individual recipient of a native title payment may be under the tax free threshold and not liable for income tax. If a withholding tax is imposed, every recipient will be taxed.

7 Deductible Gift Recipient concessions

21. While some of the existing DGR categories cover some community-based activities of Aboriginal and Torres Strait Islander organisations, there is no specific category for organisations that operate for the public benefit to generally advance the conditions and welfare of Aboriginal and Torres Strait Islander peoples.
22. Many Aboriginal and Torres Strait Islander organisations provide a range of services. Some of these services may fall within the recognised categories, others may not. As a result of some of their activities falling outside of the existing categories, the organisations are unable to obtain the concessions. A new category capturing all of the activities of these organisations would allow the concessions to be utilised.
23. A specific category would also provide recognition of the unique nature and the extraordinary role that Aboriginal and Torres Strait Islander organisations play in their communities.
24. The Commission believes the DGR category should be defined to allow business development activities. As affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*, 'Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions'.⁸ Allowing DGR concessions for business development activities in Aboriginal and Torres Strait Islander communities will greatly enhance development.
25. It may be argued that allowing concessions to apply in this manner will be contrary to the principle that the DGR concession is a philanthropic concession. However, Aboriginal and Torres Strait Islander peoples have suffered from historic injustices as a result of, *inter alia*, colonisation and dispossession of their lands, territories and resources. This has prevented 'them from exercising, in particular, their right to development in accordance with their own needs and interests'.⁹

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, above note 2, art 21(1).

⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, above, preambular para 6.

26. In such circumstances, Australia is under an obligation to take effective measures and, where appropriate, special measures to ensure continuing improvement of the economic and social conditions of Aboriginal and Torres Strait Islander peoples.¹⁰ In this sense, the concessions will indeed be philanthropic.
27. Alternatively, or in addition to extending DGR concessions to business development activities, measures to support Aboriginal and Torres Strait Islander business development, such as those outlined in the report of the Native Title Payments Working Group¹¹ should be actively pursued.

¹⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, above, art 21(2).

¹¹ Native Title Working Group, above note 4, pp 11–12.