

5 JULY 2013

NATIVE TITLE TAXATION MEASURES PASS IN FINAL SITTING WEEK

NATIVE TITLE UPDATE

SUMMARY

In its final sitting week, the Commonwealth Parliament passed three pieces of legislation which include important measures aimed at clarifying the taxation treatment of payments and benefits provided under native title agreements. Together, the *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (Cth) and the *Tax Laws Amendment (2013 Measures No. 2) Act 2013* (Cth) (together "**Tax Amendment Acts**") and also the *Charities Act 2013* (Cth) ("**Charities Act**") answer key questions about how relevant payments and benefits are to be treated for the income and capital gains tax purposes in an area that will continue to develop.

BACKGROUND

The "right to negotiate" and Indigenous Land Use Agreement provisions of the *Native Title Act 1993* (Cth) ("**NTA**"), as well as certain other State and Territory legislation (for example, the *Traditional Owner Settlement Act 2010* (Vic)), establish frameworks for the making of agreements between developers, groups of Aboriginal and Torres Strait Islander people who hold, or claim to hold, native title rights and interests in land and, in certain circumstances, the relevant State, Territory or Commonwealth government.

These agreements typically contemplate the making of payments and the provision of benefits to certain individuals and entities to be held and applied for

the benefit of the relevant group, often by means of one or more trusts. However, except in certain circumstances, the taxation treatment of these payments and benefits has been unclear and amenable to various interpretations depending on the relevant circumstances.

TAX AMENDMENT ACTS

The *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (Cth) introduces the term "native title benefit" into the *Income Tax Assessment Act 1997* (Cth) and provides that a "native title benefit", or any amount or other benefit arising directly or indirectly from a native title benefit and which is paid to an Indigenous person or an "Indigenous

holding entity" is not assessable for income tax purposes.

The Act also provides that any capital gain or loss by an Indigenous person or an Indigenous holding entity will be disregarded where that gain or loss arises as a result of:

- the transfer of native title, or the right to be provided with a native title benefit, between Indigenous persons and Indigenous holding entities;
- the creation of a trust that is an Indigenous holding entity over native title, or the right to be provided with a native title benefit; or
- the cancellation or surrender of native title or the right to be provided with a native title benefit.

Significantly, the provisions have retrospective effect and apply to income years starting, or CGT events occurring on or after 1 July 2008.

What is a "native title benefit"?

"Native title benefit" is defined as an amount or benefit that:

- arises under an agreement made under State or Territory legislation (or an agreement that is ancillary to such an agreement) to the extent that the amount or benefit relates to an act that would extinguish or that would be otherwise wholly inconsistent with the continued existence, enjoyment or exercise of native title; or
- is determined under the NTA to be payable as compensation for the effects of certain acts on native title.

The first limb of this definition raises some practical issues for those involved in the administration of the payments under relevant agreements. Agreements typically include a range of payments and benefits which do not always clearly distinguish between payments and benefits that are intended to be linked to the doing of a particular "act" that may affect native title (which are not assessable) and those which, for example, constitute payment for administrative costs or for the provision of goods and services (which are assessable).

As a matter of good practice, those involved in the negotiation and implementation of relevant

agreements should now ensure that agreements clearly express the parties' intentions as to whether or not a payment or benefit relates to a relevant "act" that may affect native title, including with due regard to the principles set out in the explanatory memorandum accompanying the *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (Cth). While such statements of intention cannot ultimately displace the responsibility of those involved in the administration of payments to satisfy themselves as to the appropriate tax treatment, it will provide a sound foundation from which they can form their own views.

What is an "Indigenous holding entity"?

"Indigenous holding entity" is defined as:

- a "distributing body", meaning a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), any other incorporated body established under Commonwealth, State or Territory laws relating to Aboriginal people that is empowered or required to pay money it receives to Aboriginal people or to apply money it receives for the benefit of Aboriginal people or the Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council;
- a trust, if the beneficiaries of the trust can only be Indigenous persons or Indigenous holding entities; or
- a registered charity.

CHARITIES ACT

The Charities Act introduces a new definition of "charity" for the purposes of all Commonwealth laws, codifying and expanding on existing law and with broad implications for the not-for-profit sector. Two aspects of the Act, the broadening of "charitable purposes" and certain exceptions from the requirement of "public benefit", have key implications for the ambit of charitable trusts set up to receive and administer payments and benefits under native title agreements.

Specifically, the Act codifies the categories of charitable purpose for Commonwealth purposes, moving from four categories (relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community) to twelve (advancing health, advancing education,

advancing social or public welfare, advancing religion, advancing culture, promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia, promoting or protecting human rights, advancing the security or safety of Australia or the Australian public, preventing or relieving the suffering or animals, advancing the natural environment and any other analogous purposes that are beneficial to the general public).

The exception from the requirement of "public benefit" specifically provides that entities which receive, hold or manage amounts or non-cash benefits relating to native title or traditional Indigenous rights of ownership, occupation, use or enjoyment of land for a charitable purpose will be treated as being for the "public benefit" even if that purpose is limited to the benefit of Indigenous individuals who are related as a result of being part of a communal native title claimant or holding group.

While these changes may have few implications for the treatment of payments and benefits that are "native title benefits", the broadening of the purposes and public benefit exception may nevertheless mean that charitable trusts continue to be an attractive proposition as a receiver of relevant payments and benefits, as they will allow funds derived from the native title benefits which would otherwise be subject to income tax (for example, interest generated on relevant payments, which continue to be reportable for income tax purposes), to take advantage of applicable exemptions while being put to a broader set of purposes and for the benefit of a more limited group of people than was previously the case.

COMMENT

Taken together, the Tax Amendment Acts and the Charities Act provide a useful first step toward clarifying the law in a challenging area. However, the sustainable management of payments made under native title agreements will continue to be an area of interest and development for Indigenous communities, industry and government alike.

At the same time as progressing the Tax Amendment Acts and the Charities Act measures through Parliament, the Commonwealth announced the formation of a Treasury-led working group to "examine the tax treatment of native title payments

and how they can better benefit Indigenous communities now and into the future". The remit of this working group, which was due to report on 1 July 2013, was to consider a range of options to help hold, manage and distribute native title benefits, including examination of tax-exempt vehicles, such as the Indigenous Community Development Corporation model supported by the National Native Title Council, the Minerals Council of Australia and others. These discussions should be expected to continue, as parties involved in the negotiation and implementation of relevant agreements work to try and determine arrangements that are best suited to their own particular circumstances.

MORE INFORMATION

For more information, please contact:



Alex Jones

Partner

T +61 8 6467 6204

alex.jones@dlapiper.com



James Newnham

Partner

T +61 3 9274 5346

james.newnham@dlapiper.com



Rhys Davies

Senior Associate

T +61 8 6467 6079

rhys.davies@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.

For further information, please refer to www.dlapiper.com

Copyright © 2012 DLA Piper. All rights reserved.

JZR/TAH/BUSDEV/AUS/AUG/1201498697.1