Western Australian Government's Submission

on the

Commonwealth Government's Discussion Paper

on

'Native Title, Indigenous Economic Development and Tax'

November 2010

Introduction

In mid-May 2010, the Commonwealth Government released a consultation paper on Native Title, Indigenous Economic Development and Tax. The consultation paper discusses the interaction between the income tax system and native title, identifying the present complexity and uncertainty in the treatment of payments made under native title agreements as justification as to why reform of arrangements is necessary.

The consultation paper describes three approaches the Commonwealth Government has proposed:

- an income tax exemption;
- a new tax exempt vehicle; and
- a native title withholding tax.

Since the release of the Consultation Paper, in a speech to the Native Title Conference 2010 on 3 June, the Hon Jenny Macklin, MP, Minister for Indigenous Affairs linked the proposed changes to the tax system and the introduction of a new oversight mechanism to the broader strategic goal of building 'a platform for economic and social development for the long-term benefit of traditional owners'. It thus appears that the Commonwealth Government is considering restricting access to income tax exemption to only those native title agreements that comply with certain specified governance requirements. However, the current paper does not provide any indication on how the Commonwealth Government intends to link the reform of the taxation arrangements with the establishment of an oversight mechanism for native title agreements.

The Western Australian Government welcomes the opportunity to comment on the consultation paper and the proposed introduction of a new oversight mechanism for native title agreements. This submission focuses on several aspects of the broader strategic approach to the extent that it has been outlined so far by the Commonwealth Government.

The normalisation of the native title taxation system

The Commonwealth Government has identified an income tax exemption and a new tax exempt vehicle as two of the three preferred models for native title agreements.

The Western Australian Government does not support tax exemption outside the normal parameters for charitable/community trusts and argues that normal tax rules should apply to all other matters. Hence, the introduction of either of these models will prevent the normalisation of the taxation obligations arising from native title agreements.

Normalising the taxation obligations is consistent with the need to remove special measures in government policies and program that impede self-management and accountability. Thus, it is the view of the Western

Australian Government that payments to individuals should incur a normal tax liability and commercial investments or business development established through 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.

As many native title agreements have a life that is measured in decades, it is important to ensure that any amendments to the taxation system are not simply a reaction to the attention that has been given to the shortcomings in the governance of particular agreements but are more considered and do no create unintended consequences, less certainty and increased complexity.

The impairment or extinguishment of native title

All three of the approaches described in the consultation paper justify changes to the tax liability on the basis that the agreements have an adverse impact on native title rights and interests (i.e. the agreement allows tenure to be granted that either suspends or extinguishes native title).

While some native title agreements involve the suspension or extinguishment of native title, many other agreements between resource developers and native title groups, or traditional owners, in Western Australia have no impact on native title rights, for example the 2005 Argyle Agreement.

Amendments to the taxation system to address what is seen as the adverse impact on native title rights through native title agreements could potentially be applicable to agreements which do not impair native title rights and attract taxation benefits. In any event, there are agreements made freely between parties in exchange for valuable consideration. For individuals and businesses consideration would normally be treated as taxable.

A further complication that arises from the adoption of the single premise that the taxation arrangements are to address the adverse impact of tenure arrangements on native title concerns the status of agreements made with native title claimants where it is subsequently found that they are not native title holders for the claimed area.

Some agreements specify that the payment of benefits cease if the claimant fails to demonstrate that native title exists. Other agreements are silent on this matter. Furthermore, some agreements are entered into with competing (overlapping) native title claim groups so that the central purpose addressed in the agreement can proceed. Subsequently though the claim boundaries and/or the claim membership has been modified. However, the modelling in the consultation paper does not address such circumstances and therefore presumably any tax exempt status would continue regardless of whether a claimant is later found not to have a native title status.

The purpose of agreements

Another premise of the modelling outlined in the consultation paper is that native title agreements have a singular purpose and outcome, i.e. the provision of a benefits package as compensation for the extinguishment of native title rights and interests.

To the contrary, many resource development agreements are multi-purpose and do not differentiate between the benefit structures linked to addressing 'native title compensation' and 'good neighbour programs' or 'indigenous community development'. Similarly, there are a number of agreements in Western Australia that include some areas in which native title rights and interests may exist and some areas where those rights and interests have already been extinguished, without identifying separate benefit structures.

The Western Australian Government does not support a generalised tax exemption status that conflates the extinguishment or impairment of native title rights with other benefits.

Goods and Services Tax and non-monetary benefits

The Western Australian Government has previously raised concern about the impact of Goods and Services Tax (GST) on the manner in which native title agreements and benefits are structured. Under the current system, according to rulings by the Australian Taxation Office (ATO), the provision of non-monetary benefits in native title agreements (for example, land) and the use of the non-extinguishment principle has a detrimental GST implication for Government in that it will be liable for the payment of GST on the supply of such benefits.

These rulings from the ATO in relation to GST and native title matters suggest that the extinguishment of native title by statute does not involve a taxable supply by the native title parties. Similarly, consent to the granting of future acts under the non-extinguishment principle will not involve a taxable supply on the basis that the native title parties are not considered to be carrying on an enterprise for this purpose.

The payment of non-monetary benefits as part of a package that settles compensation, comprising land and most likely a range of other monetary benefits, will result in the State being liable for the payment of GST on the supply. In such circumstances the State will bear the cost of the GST and is not able to claim an input tax credit. Hence, the current taxation treatment provides a disincentive to providing non-monetary benefits as compared to packages comprising monetary benefits only as the latter would have no GST implications.

The existence of a disincentive to the payment of non-monetary benefits appears to be inconsistent with the goal of 'achieving broader practical and sustainable benefits attuned to the interests of Indigenous native title claimants', as supported by the 2009 Native Title Ministers' Meeting.

When considering the proposal to introduce a new tax exempt status it will be important to ensure that there is no detrimental GST impact on native title parties which may adversely impact on future native title agreements.

Conclusion

The Western Australian Government does not support the options outlined in the consultation paper for four reasons. It is the view of the Western Australian Government that:

- the taxation arrangements of native title agreements should be normalised;
- the options outlined are premised on the assumption that native title agreements are always detrimental to native title rights;
- the provision of a general tax-free status to native title agreements does not address the complexity of some native title agreements; and
- the models outlined in the paper appear to extend the income tax exemption status to agreements where native title may not be found to exist.

The Western Australian Government agrees there is a need to address the complexity of the tax system in relation to native title agreements but is of the view that this is better addressed by improved education and ensuring access to taxation advice so that a native title party is clear about their tax obligations.

The Western Australian Government submits that rather than the proposed amendments to the taxation system, there is a greater need to address the present taxation disincentive relating to the GST implications of the provision of non-monetary benefits in native title agreements. The current complexity is contrary to efforts to encourage Governments to enter into broad native title agreements consisting of both monetary and non-monetary benefits.