3 December 2010

The First Assistant Secretary
Social Inclusion Division
Attorney General's Department
3-5 National Circuit
BARTON ACT 2600

Cc: Department of the Treasury

Native Title, Economic Development and Tax Consultation Paper and **Leading Practice Agreements: Maximising Outcomes from Native Title Benefits**

Please find attached our submission on the issues raised in *Native Title, Economic Development and Tax Consultation* and *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits.*

Reconciliation Australia welcomes the opportunity to make a submission to the Treasury and Attorney-General's Department's consultations on their respective discussion papers. A well-functioning and fair Native Title system is important to all Australians and we applaud the ongoing efforts of the Government to streamline laws and processes to ensure timely and just resolutions as well as sound and equitable agreement making.

Our submission responds to three main issues outlined in the consultation papers, namely, the issues of governance capacity, use of exempt payments and definition of native title agreements and payments. In responding to these issues, our submission identifies seven recommendations for your consideration. We hope that both our submission and recommendations will assist you and contribute to fairer, more positive outcomes for Aboriginal and Torres Strait Islander peoples.

Yours sincerely,

Ara Cresswell and Adam Mooney

Acting co-CEOs

Reconciliation Australia

Reconciliation Australia: A submission on the issues raised in *Native Title, Indigenous Economic Development and Tax* and *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*

Introduction

Reconciliation Australia welcomes the opportunity to make a submission to the Treasury and Attorney-General's Department's consultations on the respective discussion papers *Native Title, Indigenous Economic Development and Tax* and *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*

Reconciliation Australia is an independent, not-for-profit organisation that has recently celebrated its 10th Anniversary. We are the peak national organisation building and promoting reconciliation between Indigenous and non-Indigenous Australians for the wellbeing of the nation. A well-functioning and fair Native Title system is important to all Australians and we applaud the ongoing efforts of the Government to streamline laws and processes to ensure timely and just resolutions as well as sound and equitable agreement making.

Native Title laws, the agreements made as a result of them and the processes for distributing any benefits to title holders are still relatively new areas. It's appropriate that the Government research and consider what might be best practice in each of these areas. In doing this, it's important for there to be recognition of the diversity of Indigenous peoples; the uniqueness of Indigenous governance; the need for non-discriminatory approaches and the space for Indigenous aspirations and decision-making processes to be supported. Reconciliation Australia agrees with the Government's stated aim, that "Native title, particularly agreement-making, can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians".

The main intention of the Native Title Act, outlined in its preamble, is the provision of a legal framework for the recognition of the unique land rights of Aboriginal and Torres Strait Islander peoples as the inhabitants of Australia before European settlement; "It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests"[1] .

Some of the proposed changes in the discussion papers stray from this intent, and move towards a more prescriptive system that places further limitations on the capacity of Aboriginal and Torres Strait Islander title holders and their representative bodies capacity to enjoy fully their rights and interests. Reconciliation Australia's submission looks to some of these areas in providing input on the questions raised for consultation.

[1] Native Title Act, 1993, Preamble

We'd like to address three issues raised in the consultation paper:

- **Proposed Governance measures**: drawing on research undertaken by Reconciliation Australia in collaboration with the Australian National University's Centre for Aboriginal Economic Policy Research (CAEPR), we will provide an overview of key learnings around Indigenous governance which the consultation committee might take into account when considering how payments received under native title agreements are likely to be used and managed
- **Use of payments:** whether the purposes for which an exempt payment can be used should be prescribed;
- **Defining native title agreements and payments**.

1. Governance Measures (*Leading Practice Agreements: Maximising Outcomes from Native Title Benefits)*

The Government is considering measures to encourage entities that receive native title payments to adopt measures to strengthen governance, such as:

- **incorporating under either the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (the CATSI Act) or the *Corporations Act 2001* (Corporations Act)**
- **appointing one or two independent directors, and**
- **adopting enhanced democratic controls, such as by encouraging transparency and accountability to beneficiaries, including through measures that enable beneficiaries to hold directors to account in discharging their functions, and by requiring directors to inform and explain to members details of payments received under native title agreements and disbursements of the resulting funds (these rights and obligations would not duplicate those already contained in the CATSI or Corporations Act).**

Reconciliation Australia supports investing in governance capacity building among Indigenous communities and organisations. Improved governance capacity means greater involvement in decision-making, greater empowerment and greater ownership over the outcomes of decision-making processes.

Good Indigenous governance, we've found in our work with BHP Billiton and the Indigenous Governance Awards as well as the Indigenous Community Governance Project (ICGP) is central to strong organisations and functioning communities. What we've also found is that there

are unique characteristics of Indigenous governance – or 'design principles' – that require attention. Chief among these is cultural legitimacy. That is, in order to be considered effective, Indigenous organisations and entities must incorporate and practice measures which reflect the values and structures (culture) of their constituents/communities. Cultural legitimacy cannot be imposed from without. Strong Indigenous organisation/entities have found the main ingredient to their success is balancing cultural legitimacy with financial and procedural accountability to funders and/or stakeholders. Following is a more detailed overview of some of the pertinent findings of the Indigenous Governance Research Project.

From 2005- 2007 Reconciliation Australia, in collaboration with the Australian National University's Centre for Aboriginal Economic Policy Research (CAEPR), undertook research on Indigenous community governance with participating Indigenous communities, regional Indigenous organisations, and leaders across Australia.

The project explored:

- The current state of community governance on the ground, including its cultural, economic, legal, policy, service delivery and historical contexts.
- The different modes of governance that have been established and are emerging in communities, and the governance processes, institutions, structures, powers and capacities involved.
- The factors influencing culturally legitimate governance arrangements in Indigenous communities.
- The shortfalls in community governance skills and capacities, as well as the governance strengths.
- The wider 'governance environments' and policy networks within which community governance operates, including the role and impacts of State, Territory and Federal Government policy and service delivery on the effectiveness of community governance.

Case study research was undertaken at 13 varied sites across Australia, in collaboration with participating communities and organisations. The project depended on guidance from an Advisory Committee with a significant Indigenous membership, which comprised experts from across Australia as well as international researchers from the United States and Canada.

The case studies consistently showed that the process of building sustainable governance structures and institutions has to be based on local realities. It has to encompass different governance relationships and hierarchies which resonate with traditional relationships, jurisdictions, laws, customs and specific histories. As a result **there is no single governance model suitable for all communities or organisations; each must be actively designed to reflect differing aspirations while also meeting people's needs.**

Among the project's key recommendations was that policy makers must ensure that legislative, policy and funding frameworks allow for diverse governance arrangements which take account of local complexities. This goes to the kinds of regimes or Acts Indigenous organisations are registered under and any structural requirements imposed by these Acts. While many entities

find that the CATSI Act suits them, many have chosen not to register under the Act. Many have made this as a careful and informed decision based on their needs and circumstances. While it's important that governments assist entities in strengthening their accountability, this must be in a manner that is supportive of, rather than undermining, their legitimacy and decision-making authority.

Rather than limit entities in receipt of Native Title payments to CATSI or the Corporations Act, perhaps it is more appropriate to look to a more flexible approach that supports good governance practices while also being responsive to the differing needs and circumstances of different entities. While the appointment of independent directors may be welcomed by some entities, for others it would be an unwelcome and destabilising imposition.

Reconciliation Australia, based on our research and experience in this field, are in favour of the government offering assistance of the kinds outlined in the Governance Measures section of the discussion paper, but recommend strongly that these measures are not made mandatory. Instead, we endorse an approach of increasing the investment in and scope of initiatives aimed at supporting Indigenous communities and organisations to sustainably develop and strengthen their governance structures,

Reconciliation Australia in partnership with BHP Billiton has developed an online training resource for Indigenous organisations, the Indigenous Governance Toolkit. The Toolkit makes freely available online for the first time material developed expressly to assist Indigenous communities, businesses and organisations to build and strengthen their governance. It provides practical help to Aboriginal and Torres Strait Islander organisations of all sizes and locations in key areas like planning, defining roles and responsibilities, resolving disputes, and engaging with constituents and stakeholders. The new toolkit maps out pathways for these and other important elements of good Indigenous governance with interactive tools, downloadable checklists and planning templates. The Toolkit draws its material from the Indigenous Governance Awards and the Indigenous Community Governance Project.

Although only released in August this year, the toolkit is already being widely used and the feedback to date from organisations and communities is overwhelmingly positive. Recently, the Aurora Project, which delivers a number of services to Native Title Representative Bodies, including training and professional development programs, used the toolkit in a training course for Community Liaison and Field Officers to assist them in their work with Prescribed Bodies Corporate. They found the toolkit an easy and accessible way to deliver governance training and support.

One of the main recommendations of the final report of the ICGP was the establishment of a National Institute for Indigenous Governance:

> *There is an urgent need for a nationally coordinated approach to the provision of governance capacity development and training that is targeted, high quality and place-based. Governance capacity development is needed for leaders, managers and staff of*

organisations and community groups. Given the pivotal role of governance for Indigenous social, economic and cultural outcomes on the ground, serious consideration should be given to the early establishment of an Australian Indigenous Governance Institute to:

a) *foster, encourage, communicate and disseminate best practice in Indigenous governance and design*
b) *encourage, facilitate and, where practicable, collaborate with relevant bodies at the national, state, territory and local levels to develop practical, culturally-informed educational and training materials, tools and resources to support the delivery of governance and organizational development at the local level*
c) *facilitate and implement the development of 'train the governance trainer' and mentoring courses, particularly targeted at developing a sustainable pool of Indigenous people with the requisite professional skills, and;*
d) *Commission and undertake applied research to support those functions.*

The Institute should be funded on a joint basis by the Australian, state and territory governments, and also be able to seek support from the philanthropic and private sectors. (Hunt & Smith, 2007)

In Australia there remains no fully established national institute or peak body tasked with providing training, research and support materials on Indigenous governance. Recently, the fledgling Australian Indigenous Governance Institute has established itself and is in a development phase. Reconciliation Australia believes an Institute of this nature would go some way to addressing some of the gaps in governance support revealed by our research and the Discussion Paper. The AIGI will build community capacity for good governance by operating as a resource and advocate for community governance needs, developing and distributing resources, training, best practice guidelines and quality assurance frameworks for Indigenous governance.

Recommendations:

a) Reconciliation Australia recommends that the proposed governance measures and associated supports are widely offered to entities that receive native title payments, but are not made mandatory. Instead, FaHCSIA and the Attorney General's department investigate a program of broadening the range of assistance programs offered to these entities to ensure appropriate support is available.
b) That the Government look to using and/or promoting the use of RA/BHP Billiton's Indigenous Governance Toolkit to support good governance in Indigenous entities that receive native title payments.
c) That the responsible departments investigate the possibility of supporting the newly established Australian Indigenous Governance Institute as a Centre of Excellence in practice and research for Indigenous governance.

2. Use of Payments (*Native Title, Indigenous Economic Development and Tax)*

Consultation question (h)
Should the purposes for which an exempt payment may be used be prescribed? For example, should there be a restriction on an exempt payment being used for purely private consumption?

Reconciliation Australia supports Australia's position as a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination and endorser of the United Nations Declaration on the Rights of Indigenous Peoples. Australia has made a strong commitment to uphold the principles of non-discrimination and this is reflected in our domestic laws through the Racial Discrimination Act, among others. While Native Title is a unique legal framework applying to a specific section of the population, this should not make its application exempt from the core principles of non-discrimination.

Prescribing the purposes for which tax exempt native title payments may be used presents some concerns. Applying a prescriptive regime to Indigenous people while not placing similar constraints on non-Indigenous people in comparable circumstances demonstrates aspects of discriminatory treatment. The moneys received for the diminution of native title should be seen as capital moneys, a compensation for the loss of capital value, a rollover of native title rights into a cash sum. For the Government to prescribe or mandate purposes for these payments, exempt or not, would be to treat Indigenous compensation moneys from what are largely private corporations differently from compensation moneys received by non-Indigenous persons. As noted in, the Australian Human Rights Commission's 2009 Submission on the *Optimising Benefits from Native Title Payments* Discussion paper:

> The Commission further notes that Indigenous landowners should be treated similarly to non-Indigenous landowners, namely in a non-discriminatory, fair and just manner (and that) … legislation or policy must be consistent with the provisions of the *Racial Discrimination Act 1975* (Cth)[2].

The proportion of payments in agreements that can be used for private consumption should be decided by the parties to the agreement.

Another emerging concern is the conceptualisation by governments of these benefits as public funds that government might direct for general Aboriginal benefit. This overlooks the fact that

[2] Australian Human Rights Commission, "Native title payments discussion paper – *Optimising Benefits from Native Title Agreements"* Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Australian Government's native title payments discussion paper, 4 March 2009

these are a private property right, albeit held on a communal basis. The existence of these moneys should not be seen as a basis for the state to transfer its responsibilities to native title holders, to cost shift as has often occurred when miners provide assistance to Aboriginal communities only to see governments withdraw. In no way should these moneys be used to supplement or replace what are the citizenship entitlements of title holders, wherever they reside.

However, Reconciliation Australia notes the unique nature of these payments and the non-perpetual nature of the benefits that flow from agreements. That is, a definition of title holders should include those future generations who will inherit the title and, insofar as it is possible, should receive compensation for its loss of capital value. The objectives of creating more lasting benefits could be better facilitated by mining agreements if taxation law recognised native title payments which are preserved in a capital fund as rollover capital and as non taxable. Provided that the income from the capital fund is taxed in the hands of the recipients, this would be consistent with general property law and taxation principles

To encourage an emphasis on social investment, it could be further provided that this taxation treatment (or exempt status) would not be disturbed where an agreement provided that the capital sum could be accessed for certain purposes related to the long term benefit of the title holders. Guidelines, or laws, for this long term benefit could be developed *in partnership* with title holders and their representative entities and *modelled on existing best-practice agreements*, but some examples could include education support (illustrated in the Warlpiri Education and Training Trust example, below) and investment in other long term assets likely to have intergenerational benefits. This would mean the capital fund could be accessed by agreement provided the purpose matched the guidelines, or laws, defining future benefit.

It could help considerably in shaping negotiations in this area if taxation law provided a non PBI option which recognised the true nature of the property rights being dealt with.

Therefore while RA is against, in principle, any prescriptive treatment of payments, we support governments working with entities and title holders to adopt a community development approach to managing payments. Further, we support the recognition of native title payments preserved in capital funds as non taxable. While the use of these non-taxed funds should not be prescribed, in recognising the need to create lasting benefit for future generations of title holders it would be appropriate to consultatively develop guidelines/laws for the use and access of these funds. It is already increasingly becoming the norm that agreements include a dedicated community development or community benefit component. This component is often included at the request of the Title holders themselves. Most contemporary agreements contain a mixture of benefits that will be invested, benefits that are paid directly and benefits that are put into community funds. Research into the efficacy of this 'mix' and how it is administered has found that there is no single 'right way' or one-size-fits-all approach to the management of payments.[3]

[3] CLC research, preliminary report seminar, *Broadening the benefits of land use agreements*

An example for Government to look to in the management of payments, and to encourage other bodies to learn from, is the Central Land Council (CLC). The CLC works with its Traditional Owners and communities to use portions of royalty rent and affected areas payments from land use agreements for community development projects. The aim is to put Indigenous people in the role of making the key decisions about how, where and on what the payments should be spent, "their participation is essential," the CLC notes, "to bring wide community benefits that last."[4] The Warlpiri Education and Training Trust (WETT) is one of these agreements. WETT is steered by an advisory group of community representatives with education and training knowledge who work with the communities to identify priority areas and determine how the fund will be used to pursue these priorities. To date, WETT has funded a range of community-endorsed initiatives including a World Vision-run early childhood program, language and culture programs in schools, a Youth and Media program and Adult learning centres.

A recent report on the evaluation of the CLC's royalty association community development projects has found that key to the relative success of the programs was the level of Indigenous involvement in priority-setting and decision-making. Alongside the program or 'tangible' outcomes were the improvements in decision-making capacity, empowerment of communities and a sense of greater ownership of the outcomes of the decision-making process.

RA's position reinforces the fact that examples of Indigenous communities overcoming disadvantage and achieving success in Australia and internationally, uniformly have Indigenous people leading and owning the ideas, and other parts of the community encouraging, enabling and supporting them in the long term. RA believes that, in moving forward, Governments must make a coordinated, long-term community development approach. In the context of tax reform, this involves allowing and actively supporting Indigenous people to make decisions about how they spend native title compensation.

Recommendations:

d) Reconciliation Australia does not support the government prescribing the purposes of Native Title payments.

e) Reconciliation Australia supports the recognition of native title payments preserved in capital funds as non taxable. In recognising the need to create lasting benefit for future generations of title holders it would be appropriate to consultatively develop guidelines or laws for the use of these funds. These guidelines, or laws, must be drawn up in partnership with title holders and their representative entities.

f) Reconciliation Australia encourages the application of not only the Racial Discrimination Act but the principles of the International Convention on the Elimination of All Forms of Racial Discrimination and the United Nations Declaration on the Rights of Indigenous Peoples to its approach to Native Title tax reform.

g) Reconciliation Australia recommends supporting entities to adopt a community development approach to the management of portions of payments decided in agreement to be used for community benefit.

3. Defining native title agreements and payments (*Native Title, Indigenous Economic Development and Tax)*

Consultation question (g)

How should the concept of a native title agreement be defined? Should this concept be defined with respect to the NTA?

Reconciliation Australia supports efforts to ensure that native title agreements and benefits flowing from them are properly defined. The proper characterisation of native title payments is essential to ensuring that the rights of Indigenous people are protected, particularly the right to freedom from racial discrimination.

As outlined in the consultation paper, native title payments are a unique form of property under Australia's legal system. The source of the property right stems from Indigenous law and custom and a recognition by the non-Indigenous legal system of the pre-existing rights held under Indigenous law and custom. There is, therefore, no useful direct comparison to be made between native title and other rights held under the dominant legal system and proper care must be taken to ensure that such assumptions are not made. For example, many native title payments are compensatory in nature (and are not in fact income) and therefore should not be treated as such. Currently, the treatment of payments made pursuant to native title agreements is uncertain.

As Director of AIATSIS Research Program and Native Title Research Unit Dr Lisa Strelein points out:

> Where payments received for the surrender of native title under a compulsory acquisition order, or threat of compulsory acquisition through the NTA processes, it is generally accepted that the payments would compensate for loss of capital (pre-1985) and therefore tax exempt. Where the non-extinguishment principle applies, the treatment is less certain. There is no right to say no, or veto, once a notice has been issued under the NTA for a development or project. Thus agreements that authorise the doing of an act should properly be treated as compensation for diminution in the value or amenity of the asset… It is arguably not compensation for lost income, as native title restricts native title holders in most circumstances to non-commercial activities. Similarly, the payment cannot be rent because native title is inalienable under the common law, that is, native title holders cannot grant interests in their land to non-

> native title holders, or, more correctly, cannot grant interests outside the traditional system of law and custom.[5]

If native title agreements and the benefits flowing from them are not properly defined there is a risk that Indigenous people will subject to discrimination where they are taxed for types of payments (such as payments properly characterised as compensation) which non-Indigenous people are not similarly taxed for. Any definition of native title payments needs to be based on a recognition of the unique nature of the right. As Strelein points out, the definition of native title rights for the purposes of tax law in other jurisdictions has been based on such recognition:

> In other jurisdictions, such as Canada and the United States, the unique status of native title as emerging from the laws and customs of the Indigenous people is recognised as placing transactions concerning those rights outside the taxation system. The tax exemption is supported by judicial theory of Aboriginal title (in many respects common to all three jurisdictions) but is yet to be tested in Australia.[6]

Recommendation:

e) Reconciliation Australia encourages the application of not only the Racial Discrimination Act but the principles of the International Convention on the Elimination of All Forms of Racial Discrimination and the United Nations Declaration on the Rights of Indigenous Peoples to its approach to Native Title tax reform.

Conclusion

The native title system should offer up a range of opportunities and lasting benefits for Aboriginal and Torres Strait Islander peoples. Critical to reforming the system to deliver these benefits is the role title holders and their representative entities play in defining and driving these opportunities and benefits. The reform process should actively foreground this role. Reforms that are top-down and prioritise government rather than title holder aspirations will not deliver lasting benefits. The capacity to own and drive decision-making and the space to design and implement changes is in itself a key benefit to Indigenous title holders that is largely overlooked. Fostering this capacity and supporting Indigenous-led decision making in the use of native title benefits should be the chief imperative of the reform process.

[5] Strelein, L. *Taxation of Native Title Agreements* AIATSIS Native Title Research Monograph no.1/2008, May 2007
[6] Ibid.