AUSTRALIAN PROPERTY INSTITUTE INC.

SUBMISSION TO

BUSINESS TAX DIVISION
THE TREASURY

ON

CONSULTATION PAPER:

NATIVE TITLE, INDIGENOUS ECONOMIC DEVELOPMENT AND TAX

12 JULY 2010

TABLE OF CONTENTS

TABLE OF STATUTES

Racial Discrimination Act 1975 (Cwth.)
Native Title Act 1993 (Cwth.)

TABLE OF CASES

Elense No.15 Pty. Ltd. v Minister for Public Works (1990) 77 LGRA 46
Mabo v.Queensland (No.2) (1992) 175 CLR 1
Wik Peoples-v-Queensland (1996) 187 CLR 1

PREFACE

This submission to the Business Tax Division of The Treasury has been prepared by the Australian Property Institute (API) as part of ongoing research efforts and dissemination of factual and dispassionate information about native title as an emerging Australian property right.

These efforts commenced substantially in January 1997 in response to the High Court decision in *Wik Peoples-v-Queensland (1996)* 187 CLR 1 (*Wik)* and since then, the API has been involved in the preparation of numerous submissions to Commonwealth and State governments on matters impinging upon native title in Australia. The API has also developed a close working relationship with many jurists and legal practitioners, together with academics in various Universities both in Australia and overseas, on issues involving Indigenous property rights.

This close disciplinary collaboration over many years by the API as the peak professional body in Australia for property rights has been further strengthened through the preparation of this submission to The Treasury. In addition, the API records its appreciation for the invaluable discussions that occurred during the preparation of the submission with the National Native Title Tribunal and David Hocking, Chief Executive Officer, Spatial Industries Business Association Australia (SIBA).

INTRODUCTION

This submission constitutes a response by API to the Consultation Paper *Native Title, Indigenous Economic Development and Tax* released by the Business Tax Division of The Treasury in May 2010 for public consultation and input.

The overall need for an investigation into the position of native title within the tax system is supported by the API, and in particular it is noted that the Assistant Treasurer Senator The Hon. Nick Sherry in the *Foreword* to the Consultation Paper states as follows:

> *This consultation paper outlines three approaches:*
>
> - *An income tax exemption;*
> - *A new tax exempt vehicle ;and*
> - *A native title withholding tax.*[1]

It is noted with approval the many and varied issues addressed in the Consultation Paper, and The Treasury is to be commended for its attempt to address these issues given the *sui generis*[2] nature of native title. It is further noted that in preparing the Consultation Paper the authors have endeavoured to ensure :

> - *[the paper] provides an overview of how the current income tax law may apply to payments under agreements recognised by the Native Title Act 1993;*
> - *describes the approaches the Government intends to consider; and*
> - *discusses some of the benefits and limitations of these approaches from the perspective of native title groups and industry.*[3]

In analysing the content of the Consultation Paper, API has formed the view that there are *inter alia* two distinct elements embedded within the various matters canvassed, firstly compensation for native title extinguished or suspended to be paid once only in monetary or non-monetary form, or in a blend of both, and secondly, compensatory payments primarily for "future acts" paid either once only or paid in the form of income streams in monetary or non-monetary form, or in a blend of both. With such understanding, this submission has been prepared recognising that both elements have a number of aspects which require careful consideration. These aspects are dealt with in the main body of this submission following the introductory comments below.

Importantly, it is noted by the API with approval that the Consultation Paper in introducing "Native Title Groups" observes that:

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[1] Consultation Paper, v.
[2] Of its own kind, unique.
[3] Consultation Paper, 1.

…native title does not strictly accord with the traditional property law principles used throughout much of the tax law…

In contrast, native title is a unique legal right. It may be recognised, affected or extinguished, but never transferred or rented out beyond the group.[4]

Finally, the API would be pleased to discuss any of the matters raised in this submission or to provide any additional information that may be requested. Arrangements can be made by contacting Tony McNamara, API Professional Standards Manager on telephone number 0413 235 432.

The following comments adopt the order of content as detailed in the Consultation Paper.

[4] Consultation Paper, 2.

COMMENTS AND RECOMMENDATIONS

The following comments and recommendations have been framed to respond to the sequence of the pages and headings in the Consultation Paper.

p. 2 ***Introduction***

The API agrees that native title does not accord with traditional anglo-Australian concepts of property. It is pointed out the High Court decided in *Mabo v.Queensland (No.2) (1992) 175 CLR 1* that rights to land held by Indigenous people had survived British colonisation, and that these rights (native title) had to be considered in existing Australian laws. It is accepted that native title is a unique legal right which does not fully accord with Australian property law principles, and sits separate from anglo-Australian common law rather having its roots in traditional Indigenous law and customs.

As the Consultation Paper observes at ***2.1 para.2***[5], native title cannot be transferred, sold or rented out from the native title holding group.

While it is not intended to consider in this submission in any extensive detail the *Native Title Act 1993*(Cwth) which was passed subsequent to the *Mabo* decision , however, the API considers it is important to recognise the *Act* grants Indigenous people certain statutory rights to access Crown land for such activities as travel, ceremonies, and to gather traditional food through hunting and fishing. Importantly, such rights only accrue to native title holders.

The existence of a native title determination or claim over an area of Crown land requires an understanding of how any non-Indigenous activity proposed on that land will affect Indigenous rights and interests, including to what extent, or if all. The absence of physical occupation of Crown land by Indigenous people does not generally indicate an absence of native title, and as a profoundly spiritual people an area of land may have great importance even if rarely visited, or never visited in the past.

This is reflected in the reasoning of the High Court in the *Mabo* decision and the subsequent statutory protection of native title in the *Native Title Act 1993* (Cwth). When an activity is proposed on Crown land an assumption must be made as to the likely presence of native title notwithstanding the absence of a determination or claim. Importantly, the absence of a claim is not a diagnostic marker indicating the absence of native title.

To achieve this end, a method of incorporating Indigenous pre-existing interests into the Australian legal system is the future act procedures set in the *Native Title Act1993* (Cwth). Where a future act is determined to affect native title, the *Act* provides for monetary and non-monetary compensation to be paid to the native title holders, such payments occurring through a specified negotiation process under the *Act*, or by the

[5] Consultation Paper, 2.

relevant Court. The native title holders can request non-monetary or monetary payment, or a combination of both as compensation.

The *Act* also establishes that future acts affecting native title can be validated if the parties execute an agreement termed an Indigenous Land Use Agreement (ILUA), or if procedural requirements under the *Act* are complied with as regards notification, consultation or negotiation.

Future acts generally are categorised as either extinguishing acts, or acts to which the non-extinguishment principle is applicable. Extinguishing acts are such that native title rights and interests are permanently extinguished and cannot revive at some future time even if the act has subsequently ceased.[6] The issue of a freehold title by the Crown is an example of a permanent extinguishment of native title.

Alternatively, when a non-extinguishing act occurs on Crown land, the rights and interests held by native title holders can revive once the act ceases to occur. During the time when the non-extinguishing acts is occurring, the native title is said to be suspended for that period. The conduct of mining on Crown land is an example of an act that does not extinguish native title.

In addition, the *Act* establishes that compensation for extinguishment or impairment of native title caused by an act must be assessed in accordance with s.51(xxxi) of the Australian Constitution, which requires that such compensation meet the criteria of just terms. Arguably, the *Act* attempts somewhat to equate native title with freehold title for the purpose of assessing compensation. The API agrees that apart from the above compensatory provisions, benefits can extend beyond the aegis of s.51 (xxxi) as described at ***2.1 para.4***.of the Consultation Paper.

The processes involved in ensuring that all future acts comply are set out in the *Native Title Act 1993* (Cwth). Crucially, parties initiating a future act incur four interrelated obligations under the *Act*, which must be discharged, namely:

- There must be negotiations[7]
- The negotiations have to relate to the proposed undertaking of the future act.
- The negotiations have to be conducted in good faith.
- The negotiations have to occur within a six month timespan.

[6] Except when *s.47,s.47A* or *s.47B Native Title Act, 1993* (Cwth.) apply.
[7] *s.24MD(6B) Native Title Act, 1993* (Cwth.)

p.5 ***The current income tax system.***

As previously mentioned in this submission, the API notes with approval the Consultation Paper displays an understanding of the *sui generis* nature of native title, however it is with concern that native title appears to treated as a "capital asset" at ***2.3.1 para.5*** presumably capable of not only generating income but also being taxed.

In responding to the Consultation questions, the API advises:

(a) Any payments arising from extinguishment or impairment are compensation as envisaged by s.51 (xxxi), and as a general rule because compensation for non-Indigenous property rights is not subject to income tax, native title should also be exempt. Indeed the incidence of tax has no relevance to the assessment of compensation viz. *Elense No.15 Pty. Ltd. v Minister for Public Works* (1990) 77 LGRA 46.[8]

(b) Anecdotal evidence strongly suggests that there is little confusion regarding the applicability of taxation to compensation arising from extinguishment or impairment, however as regards payments or benefits arising from ILUAs or other agreements beyond the compensation provisions of s.51(xxxi), there appears to be uncertainty.

(c) A clear directive is required from the Commissioner for Taxation clarifying the obligation for taxation of benefits which are not envisaged by s.51(xxxi).

[8] The absence of relevance of income tax to the assessment of compensation is also discussed in detail in, Hyam, Alan (2009) *The Law Affecting Valuation of Land in Australia* 4th ed. (Sydney: The Federation Press) 348-349.

p.10 ***Possible reforms to the income tax system***

In responding to the Consultation questions, the API advises:

(a) Any payments arising from extinguishment or impairment are compensation as envisaged by s.51 (xxxi) and if upfront, exemption from taxation would need to be identified during the negotiation of any agreement. Compensation in monetary form or non-monetary form would need to be clarified, particularly if exempt.

(b) The concept of an ILUA or other agreement dealing with native title should be required to clearly establish *ab initio* exempt and non-exempt payments for the understanding of all parties to the negotiations. Nevertheless, there is considerable difficulty in defining the compensable losses caused by extinguishment or impairment, as such losses can be extensive and unfamiliar. Any recasting of the concept of a native title agreement in the *Native Title Act 1993* (Cwth.) will require sensitivity to such losses. The spatial, temporal, cultural, and spiritual dimensions of native title and hence, losses arising from extinguishment or impairment of native title, present considerable challenges for definitional purposes. [9]

(c) Difficulty is seen in any prescriptive list of purposes, and may be in contravention with the *Racial Discrimination Act 1975* (Cwth.) which requires equivalence.

[9] For a detailed discussion on the difficulties of assessing the losses arising from extinguishment see Sheehan,J.B. (2009) *Dyschronous Property Rights in Australia: Encountering Indigenous land tenures*. Department of Geography and Environmental Development Seminar, Ben Gurion University of the Negev, Beer Sheva, Israel, 31 May.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed over eighty years ago in 1926, the Institute today represents the interests of more than 8000 property experts throughout Australia. As the nation's peak professional property organisation, the API has been pivotal in providing factual, objective and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by overseas bodies such as the United Nations, the FAO and the World Bank, evidencing a level of expertise within the API and its membership which is recognised globally.

However, as a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, and architecture. Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and life long continuing professional development.

The Membership of the Australian Property Institute is bound by:

- A Code of Ethics and
- Rules of Conduct

APPENDIX 2

SUBMISSION COMMITTEE

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