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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2012 MEASURES NO. 6) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

General outline and financial impact

Native title benefits: Non-assessable non-exempt income

Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to make it clear that native title benefits are not subject to income tax (including capital gains tax).

Date of effect: These amendments commence on the day this Bill receives the Royal Assent. These amendments will apply in relation to income years starting on or after 1 July 2008, and, in relation to capital gains tax, to events happening on or after 1 July 2008.

These amendments also allow taxpayers to seek an amendment to a previous assessment in certain circumstances where the amendment period has expired.

The amendments provide certainty and clarity to taxpayers. The retrospectivity and modification to the amendment period are beneficial to taxpayers accessing the amendments.

Proposal announced: This measure was announced by the Attorney-General at the Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Conference on 6 June 2012, and via a joint press release by the Attorney-General and the Minister for Families, Communities and Indigenous Affairs of the same date.

Financial impact: The financial impact of this measure is not zero, but rounded to zero, in each of the income years from 2012-13 to 2015-16.

Human rights implications: This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.42 to 1.67.

Compliance cost impact: Nil

Deductible gift recipients

Schedule 2 to this Bill amends *Income Tax Assessment Act 1997* to update the list of deductible gift recipients (DGRs) by adding two entities as DGRs and extending the listing of another three entities.

Native title benefits: Non-assessable non-exempt income

Outline of chapter

1.1 Part 1 of Schedule 1 amends the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Income Tax Assessment Act 1936* (ITAA 1936) to make it clear that native title benefits are not subject to income tax. A change is also made to clarify that there are no capital gains tax (CGT) implications arising from certain CGT events involving native title rights.

1.2 Part 2 makes a number of technical changes to the ITAA 1997 and ITAA 1936 to update terminology.

1.3 References throughout this chapter are references to the ITAA 1997 unless otherwise specified.

Context of amendments

1.4 The *Native Title Act 1993* (NTA) came into operation on 1 January 1994. The NTA provides for the recognition and protection of pre-existing native title rights over land and waters, and establishes processes for the resolution of native title claims, including through negotiated settlements.

1.5 The NTA also deals with actions that affect native title rights and interests. These actions can be validated for native title purposes under an Indigenous Land Use Agreement (ILUA) (Subdivisions B to E, Division 3, Part 2 of the NTA), or in some cases under an agreement reached in accordance with the 'right to negotiate' provisions of the NTA (Subdivision P, Division 3, Part 2 of the NTA).

1.6 Section 238 of the NTA provides that for certain acts that affect native title, the non-extinguishment principle will apply. This means that if the act affects native title in relation to land or waters, then native title is not extinguished on a whole or partial basis.

1.7 The NTA provides for payments to native title holders in relation to acts that affect their native title rights and interests. These

payments may be determined through a specified negotiation process or by the courts. Section 51 of the NTA allows native title holders to request payments for acts that affect native title in monetary form, non-monetary form or as a combination of both.

1.8 In addition, the NTA provides that when the court is considering a native title determination the court may also determine that native title is held on trust by a Prescribed Body Corporate.

1.9 State and Territory legislation, such as the Victorian *Traditional Owner Settlement Act 2010,* also provides for the making of agreements in relation to native title.

1.10 The High Court has counselled against using traditional common law concept categories in the native title sphere. Instead it indicates native title should be considered on the basis of its uniqueness (See *Mabo (No 2) v Queensland* (1992) 175 CLR 1 at 89).

1.11 When applying the current rules of the income tax system based on traditional common law concepts, it is unclear whether benefits provided under a native title agreement would be assessable income.

1.12 In 2010, the Government released a consultation paper entitled *Native title, Indigenous Economic Development and Tax*. This paper provided and examined options to reduce the complexity and uncertainty of the income tax treatment of native title claims, including an option to clarify that certain payments under native title agreements are exempt from income tax.

1.13 Submissions to the consultation supported reforms to clarify that native title payments that are for the extinguishment or impairment of native title rights and interests are not subject to income tax. Expressly stating that such benefits are not subject to income tax presents a simple and clear path to providing broader clarity to native title groups.

1.14 On 27 July 2012 the Government released an exposure draft of a bill seeking to clarify the tax treatment of native title benefits. As part of consultation on the exposure draft, further clarification was sought regarding the CGT implications of certain acts relating to native title rights.

Summary of new law

1.15 The amendments confirm that benefits are not subject to income tax if they are provided for the extinguishment or impairment of native title.

1.16 In addition, the legislation confirms that there are no CGT consequences arising from certain events involving native title rights.

Comparison of key features of new law and current law

New law	*Current law*
Native title benefits are non-assessable non-exempt (NANE) income and therefore not subject to income tax.	There is uncertainty about the income tax treatment of native title benefits.
Capital gains or losses made from creating a trust that is an Indigenous holding entity over native title rights, transferring native title rights to an Indigenous holding entity or Indigenous person, or the surrendering or cancelling of native title rights are disregarded.	The CGT treatment of native title rights is unclear.

Detailed explanation of new law

Tax treatment of native title benefits

1.17 The amendments clarify that amounts or benefits that may otherwise be assessable income for an Indigenous person or an Indigenous holding entity are NANE income if the amount or benefit is a native title benefit. ***[Schedule 1, item 3, subsection 59-50(1)]***

1.18 A native title benefit is the amount or benefit that an Indigenous holding entity or Indigenous person receives directly from entering into a relevant agreement or as compensation under the NTA.

Example 1.1: Native title benefit received

An Indigenous person receives a $100,000 native title benefit directly from a mining company. This $100,000 is NANE income as it is a native title benefit.

1.19 An Indigenous holding entity or Indigenous person may also receive an amount or benefit, derived from a native title benefit but not from entering into a relevant agreement. Such an amount or benefit is not a native title benefit, but is an amount arising directly or indirectly from a native title benefit.

1.20 The amendments clarify that an amount or benefit is NANE income where it arises (directly or indirectly) from a native title benefit and an Indigenous person or an Indigenous holding entity receives the amount or benefit. This provides Indigenous communities with flexibility as to how they structure their financial affairs and confirms that the benefit remains NANE income where it continues to ultimately be held for the benefit of Indigenous persons. ***[Schedule 1, item 3, subsection 59-50(2)]***

Example 1.2: Native title benefit received indirectly

Indigenous Holding Entity A is a company acting as trustee in respect of a $2 million native title benefit it received from entering into an agreement with a mining company.

Indigenous Holding Entity A then transfers the full amount to Indigenous Holding Entity B. Indigenous Holding Entity B is a company acting as trustee in respect of the native title benefit. The amount transferred to Indigenous Holding Entity B is an amount arising directly from a native title benefit. Although Indigenous Holding Entity B did not receive a native title benefit, the amount received by Indigenous Holding Entity B is NANE income because the amount arose directly from a native title benefit of Indigenous Holding Entity A.

Indigenous Holding Entity B then transfers part of the amount it received from Indigenous Holding Entity A to an Indigenous person. The amount received by the Indigenous person is an amount arising indirectly from a native title benefit and is NANE income.

Limitations on non-assessable non-exempt income status

Non-NANE income

1.21 NANE income status will not apply to an amount or benefit if the amount or benefit arises, directly or indirectly, in respect of an aspect of a native title benefit that is not NANE income of an entity. This ensures that in order to receive the NANE income status the amount or benefit must have retained its connection to the native title benefit along the chain of transfers. Once it passes to a person or entity for which it is not NANE income it cannot reacquire that status. ***[Schedule 1, item 3, paragraph 59-50(4)(a)]***

Example 1.3: Native title benefit and non-NANE income

A native title benefit is paid to Company A. Company A is not an Indigenous holding entity. An Indigenous person receives an amount from Company A. Neither the payment of a native title benefit to Company A nor the amount received by the Indigenous person from Company A is NANE income. It is not NANE income for Company A as it fails to meet the definition of Indigenous holding entity. It is not NANE income for the Indigenous person as it is not NANE income of Company A.

Interest income

1.22 NANE income status will also not apply to an amount or benefit to the extent that it arises from investing the native title benefit or an amount or benefit arising directly or indirectly from the native title benefit. This ensures that income earned from investing a native title benefit is subject to the normal income tax rules. ***[Schedule 1, item 3, paragraph 59-50(4)(b)]***

Example 1.4: Native title benefit and interest income

Indigenous Holding Entity C receives a $1 million native title benefit. It invests that money and derives $50,000 in interest. Indigenous Holding Entity C subsequently distributes an amount of $540,000 to Indigenous Holding Entity D, consisting of $500,000 arising directly from the native title benefit and $40,000 of interest. The interest derived by Indigenous Holding Entity C needs to be included in its assessable income. Therefore, only the $500,000 is made NANE income for Indigenous Holding Entity D and the other $40,000 it received needs to be included in its assessable income.

Administrative costs and payment for goods and services

1.23 Any amount or benefit someone provides to meet their administrative costs or as remuneration or consideration for the provision of goods or service is not NANE income, even if the amount is, or arises from, a native title benefit. This is the case even where the amount or benefit is provided to an Indigenous holding entity or Indigenous person (who would be entitled to receive the native title benefit). Administrative costs is a broad term and includes, but is not limited to, fees for legal and accounting services and other necessary costs associated with the ongoing administration of the entity. ***[Schedule 1, item 3, subsection 59-50(3)]***

Example 1.5: Native title benefit and administrative costs

Indigenous Holding Entity F provides administrative services for Indigenous Holding Entity E. Indigenous Holding Entity F charges Indigenous Holding Entity E $100,000 for this service. The $100,000

derived by Holding Entity F is not NANE income as it is for the administrative costs of the payer (Indigenous Holding Entity E).

Example 1.6: Native title agreement and services provided

As part of an ILUA a native title group enters into with a mining company, the mining company agrees to employ some members of the native title group to undertake heritage surveys. The ILUA states that the amount that will be provided to the native title group for agreeing to perform this activity is $300,000. This $300,000, despite being an amount arising under an ILUA, is not NANE income for the native title holders as it is remuneration for a service.

Example 1.7: Native title benefit and services provided

Indigenous Holding Entity G receives a $2 million native title benefit. An Indigenous person to whom the native title benefit relates provides accounting services for Indigenous Holding Entity G and receives remuneration for this service of $75,000. This remuneration of $75,000 will not be NANE income for the Indigenous person and will be treated under existing income tax provisions as it is a payment for a service.

Non-assessable non-exempt income and apportioning deductible expenses

1.24 Paragraph 8-1(2)(c) provides that a taxpayer is unable to deduct a loss or outgoing to the extent that it is incurred in relation to gaining or producing NANE income. This is relevant to expenses incurred in receiving a native title benefit that is NANE income. To the extent that a loss or outgoing is incurred in producing both assessable income and NANE income that expense will be apportioned between the two.

Definition of native title benefits

1.25 A ***native title benefit*** is defined as an amount or non-cash benefit:

- that arises under an agreement made under Commonwealth, State or Territory legislation (or an instrument under such legislation), or an ancillary agreement to such an agreement, to the extent that the amount or benefit relates to an act that would extinguish native title or that would be otherwise wholly or partly inconsistent with the continuation of native title; or

- that is compensation under Division 5 of Part 2 of the NTA.

[Schedule 1, items 3 and 8, subsections 59-50(5) and 995-1(1)]

1.26 'Native title' has the same meaning as in the NTA. The non-extinguishment principle, as set out in the NTA, therefore remains relevant to the consideration of whether native title exists. ***[Schedule 1, item 7, subsection 995-1(1)]***

1.27 A native title benefit can arise under an agreement made under Australian legislation. Such agreements captured by this definition include, but are not limited to, ILUAs under the NTA and agreements under the *Traditional Owner Settlement Act 2010 (Vic)*. ***[Schedule 1, item 3, subsection 59-50(5)]***

Example 1.8: Indigenous Land Use Agreement and native title benefits

An Indigenous group enters into an ILUA with a mining company. Under the agreement, the group sets up a trust as an Indigenous holding entity to receive cash payments in the form of profit-sharing payments and milestone lump-sum payments. The agreement also provides for non-cash benefits in the form of training for the beneficiaries of the trust. As the agreement is an ILUA entered into under the NTA and the trust satisfies the definition of an Indigenous holding entity, the benefits received by the trust and its Indigenous beneficiaries are native title benefits and thus NANE income.

1.28 It is possible for an amount or benefit arising under an agreement to qualify as a native title benefit even if it is later found that native title does not exist or no formal determination of native title is ever made. It is sufficient that the agreement is made under Australian legislation and the amount or benefit otherwise meets the criteria of the provision, if the acts to which the agreement pertains would extinguish or impair native title if it was found to exist. This is consistent with the treatment of agreements under the NTA, where the agreement continues in force even if it is later found that native title does not exist. ***[Schedule 1, item 3, paragraph 59-5(5)(a)]***

Example 1.9: Indigenous Land Use Agreement where subsequently no native title exists and native title benefits

Members of an Indigenous group enter into an ILUA with a mining company. While the members of the group assert native title rights and interests over the land in question, they do not have a native title determination at the time the ILUA is entered into. Under the agreement the mining company will pay two lump sum amounts to the group, one at the time of signing the ILUA and another five years later. Prior to the second payment being received by the Indigenous group a determination is made that native title does not exist. However, the NTA provides for the ILUA to continue in operation regardless of whether native title is ultimately found to exist. As the agreement is an ILUA entered into under the NTA and the payment is being made directly to Indigenous persons all the benefits received by members of

the Indigenous group under the agreement are native title benefits and thus NANE income.

Example 1.10: 'Right to negotiate' agreement and native title benefits

An Indigenous group has a registered application for native title in place, but a determination has not yet been made. The Indigenous group enters into negotiations with a mining company under the 'right to negotiate' provisions of the NTA. The parties subsequently enter into a contractual agreement under the NTA. Under the terms of the agreement the members of the Indigenous group will set up a trust to receive cash payments. The payments under the agreement are to be paid to the trust at four different times during the life of the agreement. As the payments are made under an agreement made under Commonwealth legislation, and the payments satisfy the other criteria, they are native title benefits and thus NANE income of the persons in the Indigenous group.

1.29 A native title benefit includes amounts or benefits that arise under ancillary agreements to an agreement made under Commonwealth or State or Territory legislation. An ancillary agreement is a subsidiary agreement that is directly connected to a primary agreement and may provide details not contained in the primary agreement. ***[Schedule 1, item 3, subparagraph 59-50(5)(a)(ii)]***

Example 1.11: Ancillary agreements and native title benefits

Members of an Indigenous group enter into an agreement under section 31 of the NTA. This agreement provides that an ancillary agreement will be made later setting out the details of the payment of the native title benefit being provided. The ancillary agreement specifies that the members of the group will receive payments every six months for the next 10 years. As the ancillary agreement is part of the agreement which is made under Commonwealth legislation, and assuming the benefit provided satisfies the other criteria, the native title benefit provided to the Indigenous group under the ancillary agreement will be NANE income.

Definition of Indigenous holding entity

1.30 An ***Indigenous holding entity*** means:

- a distributing body; or
- a trust whose beneficiaries can only be Indigenous persons or distributing bodies.

[Schedule 1, items 3 and 5, subsections 59-50(6) and 995-1(1)]

1.31 A 'distributing body' is a defined term in section 128U of the ITAA 1936. It is a body established under Australian law that can distribute the moneys it receives to, or for the benefit of, Indigenous persons. A distributing body includes Aboriginal Land Councils established under the *Aboriginal Land Rights (Northern Territory) Act 1976* and corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006.*

1.32 Defining an Indigenous holding entity as including a trust for Indigenous persons and distributing bodies is intended to apply to a broad range of circumstances, such as where a native title benefit is held by an ordinary corporation but where that entity is acting as trustee in respect of the native title benefit.

Clarifying the capital gains tax implications for transfers of native title rights

1.33 The amendments confirm that there are no CGT implications resulting from native title rights (or the right to a native title benefit) being transferred to an Indigenous holding entity or to an Indigenous person, or from the creation of a trust that is an Indigenous holding entity over such rights. ***[Schedule 1, item 4, section 118-77]***

Example 1.12: No CGT implications for native title rights

As part of a native title determination process the Federal Court determines that Indigenous Holding Entity H holds native title rights on trust for a native title group. This provision confirms that there are no CGT implications arising from the transfer of native title rights to Indigenous Holding Entity H by the Federal Court.

1.34 In addition, the amendment puts beyond doubt that no CGT implications arise from a native title right being cancelled or surrendered or otherwise ended. ***[Schedule 1, item 4, subparagraph 118-77(1)(b)(iii)]***

Application and transitional provisions

1.35 The amendments made by items 1 to 4 in Part 1 of Schedule 1 apply in relation to income years starting on or after 1 July 2008 and in relation to CGT events happening on or after 1 July 2008. ***[Schedule 1, item 9]***

1.36 The amendments provide much needed certainty and clarity to taxpayers. The retrospectivity does not negatively impact taxpayers.

1.37 The operation of section 170 of the ITAA 1936 is modified for taxpayers accessing the amendments. This ensures taxpayers are able to seek an amended assessment to take advantage of the amendments where their original assessment was made before the commencement of the amendments and their period for seeking an amendment to their tax return has expired. Broadly, taxpayers are able to seek an amended assessment in these circumstances within two years of that commencement noting the effect of section 170A of the ITAA 1936. ***[Clause 4]***

Consequential amendments

1.38 A change is made to include native title benefits in the list of NANE income provisions in the Act. ***[Schedule 1, item 2, section 11-55]***

1.39 A consequential change is made to the definition of 'mining payment' in section 128U of the ITAA 1936 to make it clear that a native title benefit is excluded from the definition of a mining payment so that the payee does not have to withhold an amount from the payment. This ensures that the withholding provisions align with the treatment of native title benefits as NANE income. ***[Schedule 1, item 1, subsection 128U(1) of the ITAA 1936]***

1.40 A definition of 'Indigenous person' is inserted into the ITAA 1997 as a result of these changes. ***Indigenous person*** is defined to mean an individual who is a member of the Aboriginal race of Australia or a descendent of an Indigenous inhabitant of the Torres Strait Islands. This definition is consistent with the definition used in the NTA. ***[Schedule 1, item 6, subsection 995-1(1)]***

1.41 Part 2 of Schedule 1 makes a number of technical changes to the ITAA 1997 and ITAA 1936 to replace references to 'Aboriginal' with 'Indigenous person' and references to 'Aboriginal land' with 'Indigenous land'. In some cases definitions are moved from the ITAA 1936 into the ITAA 1997. ***[Schedule 1, items 10 to 23, Division 11C (heading) and subsections 6(1) and 128U(1) of the ITAA 1936 and section 11-55 and subsections 30-300(2), 59-15(1) and (2) and 995-1(1)]***

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Tax treatment of native title benefits

1.42 Schedule 1 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

1.43 This Schedule amends the ITAA 1997 and the ITAA 1936 to clarify that certain native title benefits provided to Indigenous persons, or to Indigenous holding entities, for the loss or impairment of their native title rights are not subject to income tax (including capital gains tax). Such native title benefits will be NANE income.

1.44 There has been longstanding uncertainty about whether certain native title benefits are subject to income tax or not. The amendments in this Schedule came about as a result of open public consultation on a 2010 consultation paper entitled '*Native title, Indigenous Economic Development and Tax*'. This consultation paper identified possible ways in which the uncertainty could be addressed, including making certain native title benefits NANE income. Submissions received supported the NANE income approach as a way of clarifying the application of the tax law.

1.45 This amendment defines ***native title benefits*** as an amount or non-cash benefit that:

- arises under either an agreement made under Commonwealth, State or Territory legislation (or an instrument under such legislation) or an ancillary agreement to such an agreement, to the extent the amount or benefit relates to an act that would extinguish native title or would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title; or

- is compensation under Division 5 of Part 2 of the NTA.

1.46 Benefits which do not relate to the diminution in value of native title rights and result in a taxable gain will continue to be treated in the

normal way. These include any payment or benefit provided out of a native title benefit to meet administrative costs or as consideration or remuneration for the provision of goods or services, and any returns received from investing or using the native title benefit.

1.47 This Schedule also makes a number of technical changes to the tax legislation, such as replacing references to 'Aboriginal' with 'Indigenous' in the ITAA 1936 and the ITAA 1997.

1.48 This Schedule is part of a package of reforms to native title announced by the Government to ensure a sustainable and fair native title system that creates economic and social opportunities for Indigenous Australians. These reforms were announced by the Attorney-General at the Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Conference on 6 June 2012.

Human rights implications

1.49 The Schedule engages the following human rights:

- the right to self-determination in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and

- the rights of equality and non-discrimination in Articles 2 and 26 of the ICCPR, Article 2(2) of the ICESCR and Articles 1, 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Right to self-determination

1.50 This Schedule promotes the right to self-determination as recognised in Article 1 of the ICCPR and Article 1 of the ICESCR. This includes peoples being free to pursue their economic, social and cultural development. Self-determination is a collective right applying to groups of 'peoples'. In Australia, this right is relevant to policies which impact on the rights of Indigenous peoples. This includes the rights and interests to land held by Indigenous persons under their traditional law and customs recognised by native title.

1.51 Also relevant are the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful elaboration on how human rights standards under the international

treaties apply to the particular situation of Indigenous peoples. In particular, the following Articles are relevant to this Schedule:

- Article 8(2)(b), which provides that States shall provide effective mechanisms for prevention of, and redress for any action which has the effect of dispossessing Indigenous peoples of their lands, territories or resources.

- Article 26(3), which provides that States shall give legal recognition and protection to these lands, territories and resources.

- Article 39, which provides that Indigenous peoples have the right to have access to financial and technical assistance for the enjoyment of the rights contained in the Declaration.

1.52 This Schedule promotes these principles by making clear that certain benefits (amounts or non-cash benefits) received by native title holders as a result of acts that extinguish or are otherwise inconsistent with the continued existence, enjoyment or exercise of native title are not subject to income tax. The Schedule provides much needed clarity and certainty to Indigenous persons about how native title benefits interact with the tax system.

1.53 Open public consultation was conducted on a 2010 consultation paper entitled *Native title, Indigenous Economic Development and Tax*, one outcome of which was the current amendment. Open public consultation was also conducted in mid-2012 on a draft of the legislative amendments contained in this Schedule. Native title representative bodies and native title service providers were directly notified of the release of the exposure draft amendments and were encouraged to make submissions as appropriate. This further supported the promotion of Indigenous persons' right to self-determination.

Rights to equality and non-discrimination

1.54 Article 2 of the ICCPR and Article 2(2) of the ICESCR require State Parties to respect and ensure to all individuals the rights recognised in the Covenants without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The right to equal protection of the law in Article 26 of the ICCPR prohibits discrimination in law or in practice in any field regulated by public authorities. Article 26 precludes discrimination in relation to the same list of prohibited grounds as Article 2 of the ICCPR and Article 2(2) of the ICESCR. Articles 2 and 5 of CERD similarly prohibit discrimination on the basis of race.

1.55 Differences in treatment will not amount to prohibited discrimination (that is, they will be legitimate) if the reasons for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate. The Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 32 (at paragraph 8), recognises that 'non-discrimination' does not necessitate uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment.

1.56 This Schedule engages the rights to equality and non-discrimination because it applies only to a certain group of persons within the population and draws a distinction between persons who have native title rights (namely, Indigenous people) and persons who do not (namely, non-Indigenous people).

1.57 Although, prima facie, this Schedule provides differential treatment in favour of Indigenous people who obtain native title benefits, the purpose which the Schedule aims to achieve is legitimate and the reasons for differentiation are reasonable and objective.

1.58 The object of the main amendments in this Schedule is to clarify how the unique rights that only Indigenous people can hold interact with the tax system. Indigenous people will benefit from being given this clarity. As recognised in domestic law, native title has special qualities that require a different tax treatment from other forms of title, independently of which racial groups are eligible to hold native title. The High Court has counselled against using traditional common law concept categories in the native title sphere and has indicated that native title should instead be considered on the basis of its uniqueness (see *Mabo (No 2) v Queensland* (1992) 175 CLR 1 at 89).

1.59 Even applying the current rules of the income tax system based on traditional common law concepts, it is unclear whether benefits provided under a native title agreement for the extinguishment of impairment of a native title right would be assessable income. This Schedule puts into law the tax treatment that is typically and reasonably assumed to apply to such native title payments.

1.60 As noted at paragraph 1.46, NANE income status only applies to that part of a native title benefit that relates to the extinguishment or impairment of native title. Any amount or benefit provided out of a native title benefit to meet administrative costs or as remuneration or consideration for the provision of goods or services will not be NANE income, even if the amount or benefit is provided to an Indigenous holding entity or Indigenous person (who would be entitled to receive the

native title benefit). This quarantines the application of the NANE income status.

1.61 The Schedule applies objectively to all native title holders who receive a native title benefit. It applies regardless of whether the native title benefit is received directly or indirectly. This provides Indigenous communities with flexibility to determine how they structure their financial affairs and confirms that the benefit remains NANE income provided it is held for the ultimate benefit of Indigenous persons.

1.62 The differential treatment given by this Schedule is legitimate: a feature of native title rights is that they are uniquely held by only one group of persons within the population, and the object of the Schedule is to clarify how these rights interact with the tax system.

1.63 There is, additionally, an argument to support the Schedule being a 'special measure' as provided by Articles 1(4) and 2(2) of CERD. Article 1(4) provides that special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination. According to the Committee on the Elimination of Racial Discrimination in its General Recommendation No. 32 (at paragraph 16), special measures should be appropriate to the situation to be remedied, be legitimate, be necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.

1.64 As outlined above, the existence of native title rights and benefits for Indigenous people constitutes an inherent difference in situation between certain Indigenous people (those who have native title rights) and non-Indigenous people. In this context, the clarification provided by this Schedule is appropriate, legitimate, necessary and respects the principle of fairness. Proportionality is demonstrated by the quarantining of NANE income status to only that part of a native title benefit that is for the extinguishment or impairment of native title, as described above.

1.65 Two limitations on the use of special measures are provided for in Article 1(4) of CERD. The first is that a special measure should not lead to the maintenance of separate rights for different racial groups. Paragraph 26 of the Committee on the Elimination of Racial Discrimination's General Recommendation No. 32 provides that the notion of inadmissible 'separate rights' needs to be distinguished from rights that are accepted and recognised by the international community to secure the existence and identity of groups such as Indigenous peoples. Native title, and rights that flow from it, such as the right to receive a

native title benefit, would constitute such rights. The clarification provided by this Schedule cannot be separated from the existence of native title rights and benefits.

1.66 The second limitation on the use of special measures provided for in Article 1(4) of CERD is that such measures must not be continued after the objectives for which they have been taken have been achieved (that is, they should be temporary). Paragraph 27 of the Committee on the Elimination of Racial Discrimination's General Recommendation No. 32 clarifies that special measures should cease to be applied when the objectives for which they were employed have been sustainably achieved. They should, essentially, be functional and goal-related. This Schedule is not inconsistent with this requirement. Although, once passed, the amendment will become permanent, so long as native title rights and benefits exist, permanence is the only way to sustainably achieve the objective of clarifying the tax treatment of native title benefits that are for the extinguishment or impairment of native title rights or interests. These amendments support the native title system, which recognises the need to secure the existence and identity of Indigenous peoples.

Conclusion

1.67 This Schedule is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Assistant Treasurer, the Hon David Bradbury