



GUMALA
ABORIGINAL
CORPORATION

ICN 2744

Submission in response to the Native Title, Indigenous Economic Development and Tax Consultation Paper May 2010

Gumala Aboriginal Corporation (ICN 2744) on behalf of the Innawonga, Banyjima
and Nyiyaparli Peoples

July 2010

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GAC Director Darren Injie and Mark Rodgers, General Manager of Yandicoogina Rio Tinto Iron Ore Mine at the Yandicoogina mine in April 2010.

Executive Summary

1. The Federal Government has commenced consultation with interested parties to explore possible reforms to Australia's current income tax regime which will provide flexibility and certainty in the treatment of payments made pursuant to native title agreements.
2. This submission is made by the Gumala Aboriginal Corporation (ICN 2744) (**GAC**) in response to the *Native Title, Indigenous Economic Development and Tax Consultation Paper* (May 2010) on behalf of the Innawonga, Banyjima and Nyiyaparli Peoples, collectively the **Traditional Owners** of land subject to the Yandi Land Use Agreement (**Yandi Agreement**).
3. The Yandi Agreement provides the Traditional Owners with a stream of benefits including land use compensation (**Compensation Funds**) which is:
 - a. received and held by a charitable trust, Gumala General Foundation;
 - b. managed by GAC; and
 - c. distributed by an independent trustee, Gumala Investments Pty Ltd (the **Trustee**).

Accordingly, it is through the relatively complicated interaction between the Trustee, General Gumala Foundation and GAC that Compensation Funds are received, maintained for future generations and distributed to the Traditional Owners in the most accountable and tax effective manner available to GAC under Australia's current income tax system.

4. However, whilst GAC achieves great outcomes for its Traditional Owner members under Australia's current income tax system, its ability to utilise the Compensation Funds to best meet the needs of its Traditional Owner members is somewhat limited.
5. GAC supports income tax reforms and more particularly those, which enable Indigenous corporations, such as GAC, to distribute native title payments (such as Compensation Funds) in a more flexible, certain and practical manner therefore better meeting the objectives of the Traditional Owner members it represents.
6. Most significantly, GAC supports income tax reforms which:
 - a. enable native title payments (such as Compensation Funds) to be distributed on a tax exempt basis both in the hands of the payee (where such a payee may be a charitable trust or some other newly created tax effective vehicle) and in the hands of traditional owners; as such payments are fundamentally compensatory in nature; and
 - b. will facilitate and support the progress of Indigenous people to economic independence and self determination.

Submission Summary

Background

7. GAC is the seventh largest indigenous corporation in Australia and the largest indigenous corporation in the Pilbara region of Western Australia. The head office for GAC is located in the town of Tom Price in the Pilbara region of Western Australia.
8. GAC was formed in 1996 to negotiate the Yandi Land Use Agreement (**Yandi Agreement**) with Hamersley Iron Pty Ltd (a wholly owned subsidiary of Rio Tinto Iron Ore) on behalf of the Innawonga, Banyjima and Nyiyaparli Peoples (collectively the **Traditional Owners** of land the subject to the Yandi Agreement). GAC currently has 1141 Traditional Owner members.¹
9. The Yandi Agreement (YLUA) was incepted in 1997, making it the first major Indigenous land use agreement (**ILUA**) to be signed in Australia. More particularly the Yandi Agreement:
 - a. enabled Hamersley Iron Pty Ltd (**Hamersley**) to develop the Yandicoogina iron ore mine (**Yandicoogina**), 120 kilometres west of Tom Price in the Pilbara region of Western Australia²;
 - b. established the amount of land use compensation (**Compensation Funds**) to be paid by Hamersley to the Traditional Owners annually;
 - c. established other benefits which the Traditional Owners are entitled to during the life of Yandicoogina, including;
 - i. education, training and employment opportunities and initiatives;
 - ii. support for pastoral station operations;
 - iii. heritage protection work;
 - iv. in-kind assistance for community development;
 - v. business development;
 - vi. community development; and
 - vii. health and well-being programs,
 - d. set out how the Compensation Funds and other entitlements are to be managed and distributed to the Traditional Owners; and

¹ This reference is to the 1141 Traditional Owner members who are over the age of 18 years. GAC estimates that there are currently 400 Traditional Owners under the age of 18 years.

² Opened in 1998, though originally conceived on a far smaller scale, its first full year of operations produced 10.7 million tonnes. In 2009 Yandicoogina achieved an annual production of 50 million tonnes making it Australia's largest producing iron ore mine. For further information please refer to Rio Tinto Iron Ore, *Rio Tinto's Yandicoogina becomes first mine in Australia to produce 50 million tonnes a year* (2009) <http://www.riotinto.com/whoweare/who_we_are_features_5132.asp> at 23 June 2010

- e. provided for the establishment of two charitable trusts for the Compensation Funds to be paid into for distribution to the Traditional Owners, namely the;
 - i. General Gumala Foundation; and
 - ii. Foundation for the Elderly and Infirm.³



Karijini Eco Retreat, located in the Karijini National Park and 100% owned by Gumala Aboriginal Corporation

- 10. The General Gumala Foundation was established as a public benevolent institution for the objects of the relief of poverty, sickness, suffering, distress, misfortune or destitution of the Traditional Owners, particularly those Traditional Owners in the Pilbara Region. Accordingly, the Compensation Funds are paid into the General Gumala Foundation on a tax exempt basis and are subject to distribution by an independent trustee, Gumala Investments Pty Ltd (**Trustee**) through certain prescribed programs and activities which maintain and promote the General Gumala Foundation's charitable purpose.
- 11. GAC was established as a public benevolent institution to manage the General Gumala Foundation, and as such, is responsible for consulting with the Traditional Owners, developing, researching and preparing proposals for investments, community projects and other matters falling within the objects of the General Gumala Foundation and putting those proposals forward to the Trustee.

³ The Foundation of the Elderly and Infirm had a life of five years and no longer exists.



Gumala Contracting machinery in operation in Tom Price.

12. The role of GAC as the manager of the General Gumala Foundation is much more extensive than that of the Trustee. Accordingly, great care has traditionally been taken to ensure that GAC's often complex commercial activities and programs do not extend beyond the permitted 'charitable purpose' of the General Gumala Fund, thereby maintaining the General Gumala Foundation's tax exempt status. It is important to note however, that the often prescriptive nature of the 'charitable purpose' often restrains GAC's ability to propose activities and programs that better serve the changing needs of the Traditional Owners, and as such, Compensation Funds are not necessarily used in the most economically efficient manner.
13. In general GAC represents a group of Indigenous Australian's who are arguably some of Australia's most socially and economically disadvantaged people. Accordingly, whilst the tax exempt status of the General Gumala Foundation is of significant benefit in assisting to preserve the Compensation Funds for current and future generations of Traditional Owners, the ability of GAC to utilise the Compensation Funds to facilitate the shift of its Traditional Owner members from a position of poverty and welfare dependence, to a position of economic independence and material comfort, is somewhat limited by Australia's current income tax laws.

Submissions

14. Economic independence of Indigenous people is a challenge which GAC submits may be addressed through reforms to Australia's income tax system. Accordingly, these submissions support such reforms which enable Indigenous corporations, such as GAC, to distribute native title payments (such as Compensation Funds) in a more flexible,⁴ certain and practical manner therefore better meeting the objectives of the Traditional Owner members it represents.

⁴ The term 'native title payment' and 'native title funds' are used in this paper to include payments made pursuant to native title agreements including but not limited to future act agreements and Indigenous land use agreements.

15. GAC submits that the current welfare system combined with the manner in which charitable trusts such as the General Gumala Foundation are permitted to distribute Compensation Funds (in an attempt to maintain its tax exempt status) to its Traditional Owner members, can at times operate as a disincentive for engagement in the real economy and progression towards economic independence. Accordingly, GAC supports taxation reforms which provide statutory confirmation of the income tax treatment of native title payments, such as Compensation Funds, in the hands of traditional owners such as its Traditional Owner members.



Youngaleena Community – 130Kms east of Tom Price

16. GAC supports reforms which enable native title payments (such as Compensation Funds) to be distributed on a tax exempt basis both in the hands of the payee (where such a payee may be a charitable trust or some other newly created tax effective vehicle) and in the hands of traditional owners.
17. GAC submits that all native title payments should be tax exempt in the hands of traditional owners; as such payments are compensatory in nature. It is GAC's view that traditional owners should be given every opportunity to further their economic independence, and as such, GAC submits that a 'means test' should not apply to determine whether a traditional owner is able to receive native title payments on a tax exempt basis.
18. GAC further submits that the distribution of native title payments should not jeopardise the entitlement of individual traditional owners for welfare payments.

19. Finally, GAC supports reforms which would enable native title payments (such as Compensation Funds) to be used for capacity building enterprise and investment purposes without jeopardising the:
- a. tax exempt status of the native title payments in the hands of charitable trusts (such as the General Gumala Foundation); and
 - b. the entitlement of individual traditional owners for welfare payments.

It is GAC's submission that such capacity building enterprise purposes invest in traditional owner skills and employability which in turn benefits their family and community, thus turning the welfare cycle around. An example of such enterprise is Gumala Enterprises Pty Ltd (**GEPL**) (a wholly owned subsidiary of GAC) which was established to develop a portfolio of substantial and diversified commercial assets. GEPL forms an essential part of GAC's long term commitment to bring socio-economic benefits to the Pilbara region. GEPL currently consists of three divisions:

- a. Gumala Contracting (fully owned and managed);
- b. ESS Gumala Joint Venture (40% interest); and
- c. Karijini Eco Retreat (fully owned and under third party management).

Gumala Contracting and ESS Gumala Joint Venture were established in response to the mining industry's position as the principal economic driver of the Pilbara region. The entry of GEPL into the local tourism industry also provides important balance to its portfolio of business assets. It is important to note that GEPL does not have the benefit of 'charitable status', and as such, income both in the hands of GEPL and Traditional Owner employees is subject to income tax. Accordingly, it is GAC's submission that capacity building enterprise, such as GEPL, which are run for the benefit of Traditional Owners, should be income tax exempt both in the hands of the enterprise and Traditional Owner employees, as such enterprise provides:

- a. both security and the potential for long term investment growth which will serve the needs of generations of Traditional Owners in years to come; and
- b. a vehicle to facilitate the shift of Traditional Owners from a position of poverty and welfare dependence to a position of economic independence and material comfort.

Accordingly, GAC submits all payments associated with capacity building enterprise should be income tax exempt both in the hands of the Indigenous enterprise and traditional owner employee.⁵ It is GAC's view that traditional owners should be given every opportunity to advance their economic independence, and as such, GAC submits that a 'means test' should not apply to determine whether a traditional owner is able to receive payments associated with capacity building enterprise on a tax exempt basis.

⁵ For example income generated by Indigenous enterprise commercial agreements.



Entrance to the Bellary Springs (Innawonga) Community, 50Kms south west of Tom Price.

Journey to economic independence and self determination

20. The recent transition of Aboriginal traditional owners from resource industry observers to active participants fully engaged in the native title agreement making process, presents both an opportunity and a dilemma for traditional owners.
21. Aboriginal people occupy a unique socio- economic position within the greater Australian community, as a result of a very distinct history and culture. This history has resulted in some distinct health, welfare, employment, education, housing, income and opportunity disadvantages to Aboriginal people. Accordingly, a distinct solution is required to reverse these disadvantages.
22. Care must be taken by policy makers to ensure that the opportunity presented to Aboriginal people by their participation in the native title agreement process is not wasted or counterproductive. For example, this was the experience for many Aboriginal pastoral workers in the late 1960s when equal wages for Aboriginal pastoral workers became law. Whilst this legislative change was principled and correct, its unplanned implementation rapidly turned into a social and economic disaster for large numbers Aboriginal pastoral workers who found themselves unexpectedly unemployed and welfare dependent. That history demonstrates that care and preparation are necessary to adequately position intended Aboriginal recipients to take advantage of policy and legislative changes; ad hoc policy and legislative changes may become self defeating, thus presenting Aboriginal people with an illusory benefit.
23. The transition from welfare dependence to economic self sustainability and independence is a gradual process. Self determination is an important objective which should be encouraged pragmatically to ensure that such an ideal be realised.

Submissions

24. GAC submits that the taxation treatment of payments made pursuant to native title agreements is pivotal in facilitating the progress of Aboriginal people to economic independence and self determination.
25. GAC recognises the substantial opportunity that the negotiation of native title agreements presents to its Traditional Owner members, as such opportunities initiate a move away from what has become an entrenched 'welfare' mindset of Aboriginal people to one of economic independence and self determination.

GAC is optimistic that the negotiation of native title agreements presents traditional owners with a genuine opportunity to partner with proponents for projects occurring on their country.



Gumala Contracting employees at a Pilbara iron ore mine site

26. GAC supports those reforms which are conducive to Aboriginal people having a genuine commercial stake as investors and participants in all levels of the resource industry, whilst maintaining their unique cultural identity and connection to country.
27. GAC submits that the policy underpinning reforms to the income tax system should focus on promoting Aboriginal people's journey to economic independence rather than a means to increase the Federal Government's short term tax revenue base.
28. Accordingly, GAC submits that payments made pursuant to native title agreements should be income tax exempt both in the hands of the native title group (albeit in the hands of an Indigenous corporation) and in the hands of the individual traditional owners, on the basis that such payments should properly be considered as compensation to traditional owners, for their loss of enjoyment and connection to their country.
29. It is GAC's observation that traditionally compensation paid in respect of:
 - a. loss of capacity to earn an income, such as workers compensation, is the subject of income taxation; whereas
 - b. loss of enjoyment or amenity is not subject to income tax because such compensation is not considered compensation for lost income.
30. Accordingly, it is GAC's submission that native title payments should be income tax exempt in the hands of traditional owners as such payments are not:

- a. ‘...simply concerned with physical damage to the land itself, but the damage to the associated rights and interests, the capacity to carry on cultural activities that sustain connection to country, and the laws and customs of the group;⁶ or
 - b. for the compensation of a lost income capacity.
31. Finally, GAC submits that a ‘means test’ should not apply to determine whether a traditional owner is able to receive native title payments on a tax exempt basis, as such testing would detract from the enormous benefit that economic independence may espouse an individual traditional owner, their family and community.



Karjini Eco Retreat, located in the Karjini National Park and 100% owned by Gumala Aboriginal Corporation

⁶ Lisa Strelein, *Taxation of Native Title Agreements* (No.1 / 2008) 46.

Restrictive nature of charitable trusts

32. Indigenous corporations most commonly use charitable trusts to manage and preserve native title payments due to their income tax exempt status under Australia's current income tax system. However, whilst charitable trusts are commonly used they do have significant limitations. For example:
- a. native title payments can only be distributed to traditional owners for charitable purposes which are inflexible and at times an inefficient use of resources;
 - b. the Australian Taxation Office considers the '...distribution of a substantial part of the income (but not necessarily capital gains) as essential' to maintain the charitable trusts income tax exempt status;⁷ and
 - c. it is unclear whether the Australian Taxation Office requires a charitable trust to apply both the native title payment and the income generated to charitable purposes, if it is to maintain its charitable trust status.



Gumala regularly visits our members who live in our towns and communities to address their queries and needs. This photo of our Member Jennifer Cox and young Kelwyn was taken during a 2010 visit to Onslow.

33. It is these limitations which cause much frustration amongst many GAC Traditional Owner members. In general GAC Traditional Owner members are of the view that Compensation Funds should be capable of application to a broad range of purposes, not necessarily charitable purposes. GAC Traditional Owner members have made the following observations in relation to their difficulty in accessing Compensation Funds:⁸

'We feel as if we won the lottery, but someone else came along and ran away with all the money'

⁷ Australian Taxation Office, Taxation Ruling 2000/11 (2000) at [21].

⁸ As expressed and noted by GAC during discussions with Traditional Owner members in 2008.

'Everyone has used our money and our land – we got nothing'.

34. There is a strong view among GAC's Traditional Owner members that Compensation Funds should be capable of application to capacity building projects and wealth creation objectives rather than strictly for 'charitable' and 'welfare' purposes. GAC's Traditional Owner members have expressed the view that having to pass the poverty test to access Compensation Funds is paternalistic and somewhat humiliating. Members have also expressed the view that charitable and welfare objectives are really the responsibility of the government and there is little point only allowing Compensation Funds to replicate the services that the government should already be providing. Accordingly, GAC Traditional Owner members have made the following observations:⁹

'I remember going to the native welfare with my Nana for rations. I am a Great Grandmother now and I'm still going for rations – but now they are called Gumala food vouchers'

Many Traditional Owner members find the concept of the poverty test offensive and cannot see why compensation money held on their behalf cannot be more readily directed at wealth creation and capacity building objectives.

35. Whilst GAC's Traditional Owner members welcome the opportunities mining projects to their country provide, there is a growing sense of frustration with the burgeoning wealth divide in the Pilbara, as GAC Traditional Owner members continue to occupy a bleak socio-economic position whilst the recipients of mining wealth continue to prosper.
36. GAC currently runs three targeted programs for the benefit of Traditional Owner members, including:
- a. health and wellbeing programs;
 - b. development programs including education and scholarship programs; and
 - c. cultural programs.

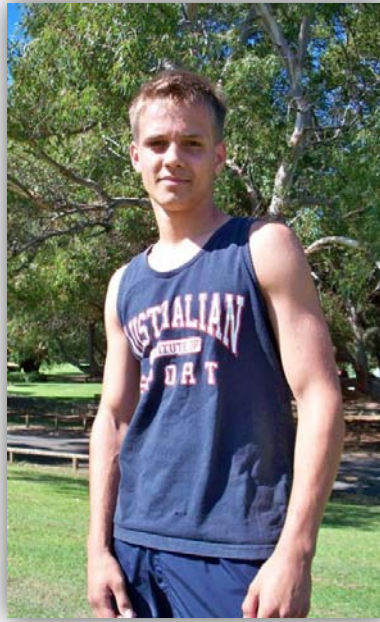
Whilst these programs are of great assistance to Traditional Owner members it is clear that these programs are restrained by the General Gumala Foundation's 'charitable purpose'. Accordingly, GAC Traditional Owner members have made the following observations:¹⁰

'All this money and it has not really made any difference'

'The programmes are band aid stuff'

⁹ As expressed and noted by GAC during discussions with Traditional Owner members in 2008.

¹⁰ As expressed and noted by GAC during discussions with Traditional Owner members in 2008.



Gumala Member Jayden Hansen, proudly sponsored by GAC to attend the boxing world championships in Azerbaijan in May 2010.

Submissions

37. GAC supports legislative amendments extending the definition of 'charitable purpose' in the *Extension of Charitable Purposes Act 2004* (Cth).
38. GAC supports legislative amendments to Divisions 30 and 50 of the *Income Tax Assessment Act 1997* (Cth) which clarify and confirm that entities such as Indigenous corporations established for the advancement and development of Indigenous communities fall within the definition of 'charity', and as such, are exempt from the payment of income tax.
39. GAC supports legislative reform that would enable charitable trusts to distribute native title funds in a non restrictive, innovative and efficient manner without jeopardising the charitable trust's income tax exempt status. Accordingly, GAC submits that charitable trusts should have the flexibility to distribute both the native title payment and income generated without jeopardising the charitable trust's income tax exempt status.
40. It is GAC's submission that native title funds should be capable of being distributed for capacity building enterprise purposes and wealth creation objectives without affecting the current and long term tax exempt status of charitable trusts.



Wakathuni Community – 25Kms south west of Tom Price

41. GAC further submits that all payments associated with capacity building enterprise should be income tax exempt both in the hands of the Indigenous enterprise and traditional owner employee.¹¹ Accordingly, GAC submits that income streams derived from commercial agreements for the provision of goods and services by traditional owners should be income tax exempt both in the hands of the enterprise and traditional owner employee.
42. GAC supports taxation reform which would enable charitable trusts to accumulate and invest native title funds for the benefit of future generations without jeopardising its charitable trust status. In GAC's view, charitable trusts should have the flexibility to invest and accumulate native title funds for the communal and intergenerational benefit of traditional owners.
43. In GAC's view, a more flexible taxation system would enable it to provide better service delivery of a greater range of services and programs to its Traditional Owner members.
44. Finally, GAC submits that a 'means test' should not apply to determine whether a traditional owner is able to receive payments associated with capacity building enterprise on a tax exempt basis, as such testing would detract from the enormous benefit that economic independence may espouse an individual traditional owner, their family and community.
45. In GAC's view, it is such reforms that would promote the journey of Aboriginal people to economic independence and self determination.

¹¹ For example, income generated by Indigenous enterprise through commercial agreements.

Transition from welfare dependence to economic independence

46. The current welfare system combined with the manner in which charitable trusts are permitted to distribute native title payments to traditional owners can at times operate as a disincentive for their engagement in the real economy and progression towards economic independence.
47. Many GAC Traditional Owner members are dependent upon welfare payments. It is not uncommon for some families to experience significant reliance on welfare funds for generations. For some GAC Traditional Owner members the reliance on welfare payments is engrained in the social fabric of everyday life.
48. With intergenerational dependence on welfare funds it takes no small amount of preparation on the part of government bodies and some courage on the part of welfare recipients to facilitate the move towards economic independence and self determination.

Submissions

49. GAC supports changes to the income tax system which encourages and facilitates the transition of traditional owners from welfare dependence to economic independence.
50. GAC submits that the current welfare system combined with the manner in which charitable trusts are permitted to distribute native title funds can at times operate as a disincentive for engagement in the real economy and progression towards economic independence. Accordingly, GAC supports taxation reforms which provide statutory confirmation of the income tax treatment of native title payments, in the hands of its traditional owners.
51. It is GAC's experience that the distribution of native title funds is not made where such a distribution results in a traditional owner being ineligible for welfare payments; as such distributions may not be able to sustain a traditional owner in the long term. As a result, the opportunity to progress to economic independence is lost. Accordingly, it is GAC's submission that the distribution of native title funds should be income tax exempt and not affect a traditional owner's eligibility for welfare payments. GAC further submits that the distribution of native title funds should not be taken into account for the purposes of the social security income test.¹²
52. GAC does not support a income tax regime which in practice penalises traditional owners who choose to engage and participate in activities which promote their own economic independence.

¹² See *Social Security Act 1991* (Cth).



The Gumala's bus service regularly services our communities in the Pilbara, including Tom Price, Wakathuni, Bellary, Paraburdoo, Youngaleena and Port Hedland.

Income tax considerations and the negotiation of native title agreements

53. The income tax treatment of native title payments in the hands of traditional owners is surrounded by uncertainty.
54. Determining the income tax liability of native title payments both in the hands of Indigenous corporations and traditional owners is complex and uncertain.¹³
55. The Federal Court in *Cape Flattery Silica Mines v Federal Commissioner of Taxation* [1997] FCA 706; 97 ATC 4552 held that a company making recurrent payments to a native title party (calculated as a percentage of gross sales) pursuant to a mining agreement, could be claimed by the company as a tax deduction on the basis that such payments were the subject of the day- to-day operations of the company. It is important to note that the taxation treatment of payments in the hands of the company does not determine the taxation treatment of the payment in the hands of the recipient.¹⁴
56. Assessable income is commonly characterised as being recurrent, repeated or continual.¹⁵ There is a distinction between payments which are recurrent, repeated or continual, which will ordinarily amount to income, and payments which are one off and final, which will ordinarily constitute capital payments for the purchase of an asset such as rights to land.
57. Under the current income tax regime native title agreements which provide for lump sum payments by the mining proponent are less likely to attract income tax liability than native title agreements which provide for periodic payments.
58. A further complication to income tax liability considerations is whether the future act contemplated by a native title agreement extinguishes, suspends or co-exists with native title rights. The payment models with the possible income tax treatments under the current income tax system include:
 - a. a lump sum payment in relation to a future act which extinguishes native title;
 - b. a lump sum payment in relation to a future act which does not extinguish native title;
 - c. a periodic payment in relation to a future act which extinguishes native title; and
 - d. a periodic payment in relation to a future act which does not extinguish native title.

¹³ Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit, *Native Title Payments & Benefits* (August 2008) 5.

¹⁴ *Cliffs International Inc. v Federal Commissioner of Taxation* 79 ATC 4064; (1979) 142 CLR140.

¹⁵ *Cape Flattery Silica Mines v Federal Commissioner of Taxation* [1997] FCA 706; 97 ATC 4552.

The first of these scenarios presents the most likely category of a native title payment which will not attract an income tax liability under the current income tax regime. The remaining scenarios present real uncertainty in relation to, what if any, income tax liability they attract.

Accordingly, this may have the consequence of encouraging native title agreements with lump sum payments as the principle compensation for the proposed land use due to its income tax treatment.



Wirrillimarra Community – 150Kms east of Tom Price

Submissions

59. It is GAC's view that whilst income tax implications should be considered during the negotiation of native title agreements, native title parties should not be influenced to choose a particular native title payment model based solely on its favourable income tax exempt treatment. It is GAC's submission that native title parties should have the opportunity to consider a range of factors before deciding which native title payment model optimises their interests.
60. GAC further submits that native title payment models should all be income tax exempt both in the hands of the Indigenous corporation and in the hands of the recipient traditional owner on distribution.

International perspectives

61. A targeted taxation regime for Indigenous organisations and individuals is not a novel concept on the international stage.

The Canadian experience

62. Section 87 of the Canadian *Indian Act*, R.S.C. 1985 creates an exemption on the obligation to pay tax on any personal property owned by a registered Indigenous person located on a designated reserve.¹⁶
63. The judicial definition of what can constitute *personal property* has received a broad interpretation and includes employment income.¹⁷
64. Accordingly, in Canada a registered Indigenous employee who receives income from employment situated on a reserve is not required to pay income tax on wages derived from that employment.
65. The question of whether an individual's employment is situated on a reserve can become complicated, and as such, a number of indicia have been identified to assist in the determination of the location of an individual's employment. The location of where a person's employment duties are carried out is an important consideration but not necessarily determinative of the overall question of employment location.
66. The Canadian Revenue Agency has produced a set of guidelines to assist in the determination of whether a registered Indigenous person's income is income tax exempt or not. These guidelines provide that generally:¹⁸
- a. all income earned by an Indigenous person will be income tax exempt, when 90% or more of the employment duties are performed on a reservation;¹⁹
 - b. if the employment duties of an Indigenous person on a reserve constitutes less than 90% of that individuals duties then the proportion of wages derived from the work performed on a reservation will be income tax exempt;²⁰
 - c. when an employer and employed Indigenous person are resident on a reserve then all of the Indigenous person's income will usually be income tax exempt;²¹ and
 - d. all income earned by an Indigenous person will usually be income

¹⁶ Registered Indigenous people, more commonly referred to as 'Status Indians' refer to those persons who are recognised by the Canadian Federal Government as a person registered under the *Indian Act*, R.S.C. 1985.

¹⁷ Canada Revenue Agency, *Indian Act Exemption for Employment Income Guidelines* (2003) <<http://www.cra-arc.gc.ca/brgnls/gdlns-eng.html>> at 23 June 2010.

¹⁸ Ibid.

¹⁹ See Canada Revenue Agency, above n 13, Guideline 1.

²⁰ Ibid

²¹ See Canada Revenue Agency, above n 13, Guideline 2.

tax exempt when more than 50% of the employment duties are performed on the reservation and the employer or the Indigenous person are resident on a reserve.²²

67. Business income for self employed registered Indigenous people is similarly subject to income tax exemptions where their business activity is located on a reserve. Factors such as whether the business operator lives on the reserve, maintains an office on the reserve, maintains book keeping records on the reserve and whether administrative, clerical or accounting activities occur on the reserve are all relevant to the question of whether the business activities are conducted on the reserve.²³



Wakathuni Community, 25Kms west of Tom Price.

68. Further tax exemptions are also available to:²⁴
- a. businesses such as logging, fishing, farming provided that the business is located on a reserve; and
 - b. income generating investments, provided that those investments are located on a reserve.

It is important to note however, that income generated by a corporation or a trust can never be tax exempt except where the shareholder is an Indigenous person and the recipient of any dividends.²⁵ This tax exemption

²² See Canada Revenue Agency, above n 13, Guideline 3.

²³ Canadian Revenue Agency, *Information for Status Indians* (2010) <<http://www.cra-arc.gc.ca/brgnls/s/stts-eng.html>> at 23 June 2010.

²⁴ *Ibid.*

²⁵ *Ibid.*

applies only to Indigenous people and a separate corporate identity can never have any racial characteristic.²⁶

69. This is a relatively complicated tax exemption regime that has been developed to suit the Canadian experience.

The experience of the United States of America

70. The US has adopted a more progressive approach to the tax status of Indigenous Americans (more commonly referred to as 'Native Americans' which involves a consideration of sovereignty and separate nation status for Indigenous groups.

Individual tax liability

71. Section 1 of the *Internal Revenue Code* Title 26 of the United States Code (26 U.S.C.) imposes an obligation on all US citizens to pay federal tax on all taxable income.
72. Native Americans are obliged to pay income tax in the same manner as all US citizens unless there is an exemption explicitly created by treaty or statute.²⁷
73. Accordingly, where a treaty between a federally recognised Tribal Government and the United States Government creates an exception to the obligation to pay income tax,²⁸ then that exception is enforceable by any Native American who is a member of that tribe and to whom the treaty applies.²⁹
74. Importantly, any income tax exemption must be based on the clear and unambiguous language of the treaty itself and not on some vague interpretation of a treaty which does not expressly deal with the relevant topic.³⁰

Tax Liability of Tribal Governments

75. Historical relations between the United States Government and separate federally recognised Native American tribal groups have led to the recognition of separate Native American sovereign states which pre-date the existence of the United States Government and Constitution.³¹

²⁶ Ibid.

²⁷ *Squire v Capoeman*, 351 U.S. 1, 6 (1956).

²⁸ Federally recognised Tribal Governments refer to Tribal Governments which is recognised by the US Federal Government and is contained on the Federal Register as an 'Indian entity recognised and eligible to receive services from the United States Bureau of Indian Affairs'.

²⁹ *Estate of Poletti v Commissioner*, 99 T.C 554, 557-58 (1992).

³⁰ *Ramsey v. United States*, 302 F.3d 1074 (9th Cir.2002); *Cook v. United States*, 86 F.3d 1095 (Fed. Cir. 1996).

³¹ Native American Rights Fund, *Answers to Frequently Asked Questions about Native People* (2010)



Rio Tinto Yandicoogina iron ore mine.

76. Federally recognised Native American tribes have the right to self government over their lands. This right is recognised by treaty relations with the US Government. The treaties themselves do not grant Native American tribal groups autonomous powers; rather the treaties give the United States Government power to deal with land and other matters which were previously the sole preserve of the autonomous Native American tribe. By implication, any powers that are not ceded to the United States Government in the treaty by remain part of the sovereign power of the federally recognised Native American Tribal Government.³²
77. Accordingly once a Native American tribe is 'recognised' it is able to have a legal relationship with the United States Government.
78. The Native American tribal lands are recognised by the United States Government as 'reservations'. Reservations are the areas of land that a Native American tribal group reserved for itself at the same time as it ceded other traditional lands to the United States government.³³
79. As a result of this 'recognition', Native American tribal governments are able to generate income from running tribal businesses which is used to fund essential services undertaken by the Native American tribal government. Significantly, this revenue stream is not subject to state or federal taxation.
80. Furthermore, Native Americans who live on reservations are not subject to

<<http://www.narf.org/pubs/misc/faqs.html>> at 23 June 2010.

³² Utah Basin Teaching American History Project, *American Indians 101/Frequently Asked Questions* (2010) <<http://www.uintahbasinrh.org/ai101.html>> at 24 June 2010.

³³ National Congress of American Indians, *Taxation* (2006) <<http://ncai.org/Taxation.31.0.html>> at 24 June 2010.

state taxes due to the state's constitutional inability to regulate matters occurring on federally recognised reservations.

81. The taxation experience of the United States is varied and complex with a number of distinct taxation regimes brought about as a result of both State and Federal relations and treaty negotiations between sovereign Native American states and the United States Government. It is important to note that this unique taxation regime is very much developed to suit the American experience.

Submissions

82. It is GAC's observation that the taxation regimes established in Canada and the United States provides a precedent for the establishment of a targeted taxation regimes for particular application to Indigenous people.
83. GAC further observes that these targeted taxation regimes promote Indigenous economic prosperity.
84. In light of the above, GAC supports targeted taxation reforms which promotes the journey of Indigenous people to economic independence and self determination.



Houses currently being built at the Wirrillimarra Community, 150Kms east of Tom Price

Conclusion

85. GAC is a forward looking Indigenous corporation which aims to provide the best possible range of services and benefits to its Traditional Owner members.
86. GAC is optimistic about the future and believes that taxation reform is an avenue which will provide its Traditional Owner members with greater opportunities to engage in the real economy so that they may progress to financial independence. In GAC's view, financial independence of an individual Indigenous person results in prosperity for their family and community alike; the multiplier effect of one person's success is not to be discounted.
87. In this way, GAC aspires to be able to deliver a greater range of services and programs which better support and nurture the engagement of its Traditional Owner members in the real economy. For example, GAC hopes to be able to provide direct funding in the form of business development grants to tangibly assist its Traditional Owner members reach their goals of economic independence.
88. GAC supports taxation reform which will facilitate and support the progress of Indigenous people to economic independence and self determination.
89. To this end, GAC acknowledges the pertinent comments by Hon. Jenny Macklin MP:³⁴

We cannot allow the big issues of Indigenous policy to be hijacked by ideology. If we do that we risk being trapped in an intellectual straightjacket, limiting our ability to draw on the full diversity of ideas and options. Passionate but ultimately unproductive argument about rights versus the practical agenda simply fails to recognise that we can have both. They are not mutually exclusive.

³⁴ Hon. Jenny Macklin MP, 'Beyond Mabo: Native title and closing the gap' (Speech delivered at the 2008 Mabo Lecture, James Cook University, 21 May 2008).

References

Legislation

Income Tax Assessment Act 1997 (Cth).

Social Security Act 1991 (Cth).

Extension of Charitable Purposes Act 2004 (Cth).

Indian Act, R.S.C. 1985.

Journals and Treaties

Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Research Unit, *Native Title Payments & Benefits* (August 2008) 1.

Lisa Strelein, 'Taxation of Native Title Agreements' (2008) 1 *Australian Institute of Aboriginal and Torres Strait Islander Studies* 1.

Cases

Cape Flattery Silica Mines v Federal Commissioner of Taxation [1997] FCA 706; 97 ATC 4552.

Cliffs International Inc. v Federal Commissioner of Taxation 79 ATC 4064; (1979) 142 CLR140.

Estate of Poletti v Commissioner, 99 T.C 554, 557-58 (1992).

Ramsey v. United States, 302 F.3d 1074 (9th Cir.2002); *Cook v. United States*, 86 F.3d 1095 (Fed. Cir. 1996).

Squire v Capoeman, 351 U.S. 1, 6 (1956).

Orders and Rulings

Australian Taxation Office, *Income Tax: Endorsement of income tax exempt entities*, TR 2000/1, 28 June 2000 at [21].

Websites

Canada Revenue Agency, Indian Act Exemption for Employment Income Guidelines (2003) <<http://www.cra-arc.gc.ca/brgnls/gdlns-eng.html>> at 23 June 2010.

Canadian Revenue Agency, Information for Status Indians (2010) <<http://www.cra-arc.gc.ca/brgnls/s/stts-eng.html>> at 23 June 2010.

National Congress of American Indians, *Taxation* (2006)
<<http://ncai.org/Taxation.31.0.html>> at 24 June 2010.

Native American Rights Fund, *Answers to Frequently Asked Questions about Native People* (2010) <<http://www.narf.org/pubs/misc/faqs.html>> at 23 June 2010.

Rio Tinto Iron Ore, Rio Tinto's Yandicoogina becomes first mine in Australia to produce 50 million tonnes a year (2009)
<http://www.riotinto.com/whoweare/who_we_are_features_5132.asp> at 23 June 2010.

Utah Basin Teaching American History Project, *American Indians 101/Frequently Asked Questions* (2010) <<http://www.uintahbasintrh.org/ai101.html>> at 24 June 2010.

Speeches

Hon. Jenny Macklin MP, 'Beyond Mabo: Native title and closing the gap' (Speech delivered at the 2008 Mabo Lecture, James Cook University, 21 May 2008).