

EXPLANATORY STATEMENT

Legislative Instruments Act 2003 – Section 26

Native Title (Assistance from Attorney-General) Guideline 2012

The Attorney-General has made the *Native Title (Assistance from Attorney-General) Guideline 2012* under subsection 213A(5) of the *Native Title Act 1993*.

The Act specifies no other conditions that need to be satisfied before the power to make the proposed guideline may be exercised.

This guideline is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Commencement

The *Native Title (Assistance from Attorney-General) Guideline 2012* commences on 1 January 2013.

Purpose and effect of the Guideline

This guideline replaces the *Native Title (Provision of Financial Assistance) Guidelines 2006*.

The guideline is to be applied in authorising the provision of assistance by the Attorney-General for respondents to native title matters under s213A of the *Native Title Act 1993*.

The guideline sets out the considerations that the decision maker must have regard to in making a decision on grants of financial assistance.

The guideline provides for a revised interest test to apply to native title respondents. Under the new arrangements; native title respondents will continue to receive assistance for disbursements related to native title claims. Legal representation costs may be available where there are new or novel questions of native title law, or where a court requires the respondent's participation beyond standard procedural processes.

The new guideline brings the native title respondent funding scheme into line with access to justice principles. It also ensures a more consistent approach to the provision of financial assistance across all schemes under the appropriation for financial assistance towards legal costs and related expenses.

The guideline sets out how applications for financial assistance are to be lodged and what the decision maker must consider when deciding applications for financial assistance.

Collective representation is still encouraged under the guideline. An assessment of the applicant's financial circumstances for grouped applications will not be considered for disbursements but may be considered for applications for legal representation. There is also the ability for the decision maker to consider if the applicant forms part of a group or should form part of a group in making a decision.

The guideline also provides for limits in the amount of assistance that can be approved for applications for legal representation costs.

Details of the guideline are set out in the Attachment.

Consultation

The Budget decision in 2011 which significantly reduced the appropriation for financial assistance towards legal costs and related expenses, made the previous funding arrangements under the native title respondent funding scheme unsustainable.

The budget decision created a move to the provision of assistance for disbursements only, with financial assistance for legal representation costs for exceptional circumstances.

As a result of this, a review of the Native Title Respondent Funding Scheme occurred in 2011. The review was conducted by an independent consultant.

During this review, extensive consultation occurred with respondents and funding recipients, representatives of peak industry bodies, native title claimants (via the native title representative bodies), state and territory governments, the National Native Title Tribunal and the Native Title Unit.

Written submissions were also received during this consultation and published on the department's website. The consultant's report was also published on the department's website.

This consultation process was used in the development of the policy which the *Native Title (Assistance from Attorney-General) Guideline 2012* implements.

The policy outcomes were widely publicised with stakeholders. Stakeholders and recipients of funding under the native title respondent funding scheme were emailed directly to advise of the changes to the policy underpinning the native title respondent funding scheme. At this time, a fact sheet and frequently asked document were also provided to outline the specific changes. This information was also published on the department's website. There was also specific correspondence addressing any issues raised by stakeholders.

Given the extensive consultation outlined above, and that the guideline only implemented the policy changes advised, no further consultation was undertaken in relation to the specific guideline document.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) has considered the matter and formed the view that a regulatory impact statement is not required.

Statement of Compatibility with Human Rights

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

Native Title (Assistance from Attorney-General) Guideline 2012

This Legislative Instrument 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 of the Legislative Instrument

The Legislative Instrument provides for new guidelines that are to be applied in authorising the provision of financial assistance by the Attorney-General for respondents under s213A *Native Title Act 1993*.

The purpose is to provide guidance to the decision maker in assessing applications for grants of legal financial assistance.

The guidelines provide for a revised interest test to apply to native title respondents from 1 January 2013. Under the new arrangements; native title respondents will continue to receive assistance for disbursements related to native title claims. Legal representation costs may be available where there are new or novel questions of native title law, or where the Court requires the respondent's participation beyond standard procedural processes.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms. The legislative instrument relates to the provision of legal financial assistance for respondents to native title matters and reflects changes to the revised interest test for native title respondent funding.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Nicola Roxon MP, Attorney-General, Minister for Emergency Management

Attachment

Description of the provisions of this Guideline

1.1 – Name of the Guideline

The guideline is to be referred to as the *Native Title (Assistance from Attorney-General) Guideline 2012*.

1.2 – Commencement

The guideline commences on 1 January 2013.

1.3 – Purpose of the guideline

This sets out the purpose of the guideline.

2.1 – Definitions

Contains the definitions of terms used in the guideline.

2.2 – Meaning of disbursements

Provides for the definition of disbursement, and includes a number of items that would qualify as a disbursement. Legal representation costs for a legal practitioner are specifically excluded as a disbursement.

2.3 – Excluded costs

This contains a list of types of costs that are specifically excluded from the provision of assistance.

2.4 – References to amounts of money

References to money in the guideline are in Australian dollars and are GST inclusive.

3.1 – Application must be in accordance with Part 3

This specifies that assistance must not be authorised, unless the application for assistance is made in accordance with Part 3 of the guideline.

3.2 – Application requirements

If an application is incomplete, the decision maker may refuse to consider the application.

3.3 – What is a complete application?

This specifies what a complete application is, and how applications are to be made and lodged.

3.4 – Requests for further information

This provides that further information may be obtained by the decision maker, if it is reasonably required by the decision maker to make a decision on an application.

3.5 - Consent to obtaining, disclosing and using further information

Specifies that information about the application may be obtained from specified persons, and that information may be disclosed or obtained for the purpose of performing functions relating to the provision of assistance.

3.6 – Responsibilities of applicants

Applicants have a responsibility to provide honest and accurate information and to alert the decision maker if there is a change in circumstances that may affect the application.

4.1 – Making a decision on an application

Sets out the considerations that the decision maker must have regard to in making a decision on an application for financial assistance. This includes not only the considerations in 4.4, 4.5 and 4.6, but also the availability of funds under the appropriation, the number and relative merit of other applications made under the appropriation, and whether the applicant is or should form part of a group.

4.2 – No assistance for retrospective costs

This provides that financial assistance must not be authorised for costs incurred prior to the complete application being received, unless there are exceptional circumstances.

4.3 – Notice of decision

Provides that a decision must be given within 28 days following receipt of the complete application. It also specifies that a notice of decision must contain reasons for the decision, and review options.

4.4 – Interests for which assistance is not to be granted

This specifies that assistance must not be provided if an applicant's interest is a previous exclusive possession act; or has extinguished native title according to law; or is a low impact future act; or is a Scheduled interest; or relates to connection or other anthropological issues; or relates to compensation.

4.5 – Matters to be considered – assistance for disbursements

4.5 sets out the specific considerations that the decision maker must consider in making a decision on an application for disbursements under subsections 213(1), 213A(2) or 213A(3) of the *Native Title Act 1993*.

The decision maker must make an assessment of the applicant's means for non-grouped applications. No assessment of means will be done for a grouped application. 4.8 provides for the assessment of means.

A number of particular considerations are provided for applications under sections 213A(2) and 213A(3).

4.6 – Matters to be considered – assistance for legal representation

4.6 sets out the specific considerations that the decision maker must consider in making a decision on an application for assistance for legal representation under subsections 213(1), or 213A(2) of the *Native Title Act 1993*.

An assessment of the applicant's means must be made for non-grouped applications. It may also be considered for grouped application. 4.8 provides for the assessment of means

As assessment of the legal considerations must also be made as set out in 4.15.

For applications made under s213A(1) of the *Native Title Act 1993*, the decision maker must be satisfied that there is a new or novel question of law that relates directly to the applicant's interests, or a court requires the applicant's participation beyond standard procedural processes.

For applications made under s213A(2) of the *Native Title Act 1993*, the decision maker must consider a number of matters including whether a standard form of agreement or a template exists; whether all the parties are willing and able to negotiate; whether all there are new or novel questions of law directly relevant to the applicant's interests; and whether the applicant needs to be involved given the stage of the proceedings.

No assistance will be provided for legal representation costs under s213A(3).

4.7 – Limits on assistance for legal representation

This provides for limits on how much the decision maker can approve for assistance for legal representation costs for applications under sections 213A(1) and 213A(2) of the *Native Title Act 1993*.

4.8 – What are the applicant considerations?

This provides for the assessment of the applicant's means referred to in 4.5 and 4.6, and whether the applicant has the ability to meet the costs sought without incurring serious financial difficulty.

4.9 – Who is a financially-associated entity?

This provides a definition of financially-associated entity, and how it is to be considered in the assessment of the applicant's means in 4.8.

4.10 – Additional applicant considerations for entities other than individuals

This provides additional considerations for the assessment of means in 4.8 for an applicant that is not an individual, for example and incorporated body, or an entity that has shareholders or members.

4.11 – What is income?

This provides for a definition of income.

4.12 – What are assets?

This provides for a definition of assets.

4.13 – What are liabilities?

This provides for a definition of liabilities

4.14 – What are expenses?

This provides for a definition of expenses.

4.15 – What are the legal considerations?

This sets out the considerations that the decision maker must have regard to (referred to in 4.6), when deciding an application for legal representation. These include the prospects of success and whether genuine steps have been taken to resolve the dispute.

5.1 – Review of decisions

This provides for internal review of a decision to refuse a grant of assistance, to approve a grant for less than the amount sought, or to impose terms and conditions on a grant of assistance.

Clause 6.1 – Repeal

This provision provides for the repeal of the previous guidelines.

Clause 6.2 - Transitional

Provides for how applications are to be dealt with that were received before 1 January 2013 but not yet decided. It specifies that those applications are to be dealt with in accordance with this guideline.