



Native Title (Assistance from Attorney-General) Guideline 2012¹

Native Title Act 1993

I, Nicola Roxon, Attorney-General, make the following guideline under subsection 213A (5) of the *Native Title Act 1993*.

Dated 12 December 2012

NICOLA ROXON
Attorney-General

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Part 1 Preliminary

1.1 Name of guideline

This guideline is the *Native Title (Assistance from Attorney-General) Guideline 2012*.

1.2 Commencement

This guideline commences on 1 January 2013.

1.3 Purpose of guideline

This guideline is to be applied in authorising the provision of assistance under section 213A of the Act.

Note Section 213A of the Act allows certain persons to apply to the Attorney-General for legal or financial assistance in relation to certain inquiries, mediations, agreements, or disputes, or in relation to the development or review of certain standard form agreements. Subsection 213A (5) of the Act provides that the Attorney-General may make guidelines that are to be applied in authorising the provision of the assistance.

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Part 2 Interpretation

2.1 Definitions

In this guideline:

Act means the *Native Title Act 1993*.

agency has the same meaning as in the *Public Service Act 1999*.

applicant means an entity or group that applies for assistance, or on whose behalf an application for assistance is made, under section 213A of the Act.

applicant considerations: see section 4.8.

application means an application for assistance made under section 213A of the Act.

assessment of costs document means the document titled *Commonwealth Legal Financial Assistance Schemes Assessment of Costs*, dated July 2012.

Note The document is available at: www.ag.gov.au.

assets: see section 4.12.

complete application: see section 3.3.

court includes any court or tribunal established by or under Commonwealth law.

decision maker means the Attorney-General or a person delegated by the Attorney-General to authorise the provision of assistance under section 213A of the Act.

disbursements has the meaning given by section 2.2.

entity means any of the following:

- (a) an individual;
- (b) a body corporate;
- (c) a body politic;
- (d) an incorporated body;
- (e) an unincorporated body.

excluded costs: see section 2.3.

expenses: see section 4.14.

financially-associated entity: see section 4.9.

financial circumstances: see subsection 4.8 (2).

group means 2 or more entities that:

- (a) have similar interests in a matter in relation to which assistance is sought under section 213A of the Act; and
- (b) make an application for assistance under section 213A of the Act together; and
- (c) are all represented by the same legal representative.

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Examples

- 1 A group of pastoralists who make an application as a group.
- 2 Two local governments who apply together for assistance.

ILUA means an indigenous land use agreement as defined in section 253 of the Act.

income: see section 4.11.

legal action means:

- (a) legal proceedings; or
- (b) a process (other than legal proceedings) to resolve a dispute; or
- (c) an action associated with the negotiation of an agreement mentioned in paragraph 213A (2) (a) of the Act; or
- (d) an action associated with the development of a standard form of agreement mentioned in paragraph 213A (3) (a) or (b) of the Act.

legal considerations: see section 4.15.

legal practitioner means a legal practitioner (however described) of the High Court or the Supreme Court of an Australian State or Territory.

legal representation costs means costs incurred for legal representation in a legal action (other than disbursements).

liabilities: see section 4.13.

Note Unless the contrary intention appears, an expression in this guideline has the same meaning as in the Act.

2.2 Meaning of *disbursements*

- (1) In this guideline ***disbursements***:
 - (a) means amounts of money paid by an entity to discharge a debt or expense for the purposes of legal action; and
 - (b) includes, but is not limited to, the following:
 - (i) fees in relation to initiating or taking a step in a legal action;
 - (ii) fees for the preparation of expert opinions;
 - (iii) travel expenses (other than travel expenses mentioned in paragraph 2.3 (f));
 - (iv) fees for obtaining copies of reports and records;
 - (v) fees charged for the provision of transcripts from courts;
 - (vi) fees charged by interpreters;
 - (vii) any other item contained within the assessment of costs document.
- (2) However, ***disbursements*** does not include legal representation costs for a legal practitioner.

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2.3 Excluded costs

In this guideline, a cost is an *excluded cost* if it is any of the following:

- (a) compensation for loss of earnings due to time spent in preparing for, or appearing in, legal action;
- (b) compensation for costs (including legal representation costs) incurred by an applicant to make an application under Part 3 or for a review under Part 5;
- (c) compensation for costs (including legal representation costs) incurred by a grant recipient in dealing with the Department in relation to the grant;
- (d) compensation for costs incurred in the preparation of an itemised bill of costs;
- (e) giving an indemnity for costs that may be awarded against the grant recipient;
- (f) travel for the purposes of participating in legal action in person unless attendance is reasonably required by an entity presiding over the action;
- (g) living expenses;
- (h) filing fees for courts in jurisdictions where the court is able to waive all or part of the filing fee;
- (i) a fee paid to a legal practitioner in advance to secure the legal practitioner to act on the grant recipient's behalf (whether or not it is described as a retainer).

2.4 References to amounts of money

A reference in this guideline to an amount of money expressed in dollars is a reference to that amount:

- (a) in Australian dollars; and
- (b) inclusive of any goods and services tax payable on the amount under the *A New Tax System (Goods and Services Tax) Act 1999*.

Part 3 Application process

3.1 Application must be in accordance with Part 3

- (1) A decision maker must not authorise the provision of assistance under section 213A of the Act unless the application for the provision of the assistance is made in accordance with this Part.

Note Subsections 213A (1), (2) and (3) of the Act set out who may apply for the provision of assistance.

- (2) However, the decision maker may authorise the provision of assistance to an applicant whose application is not made in accordance with this Part if there are exceptional circumstances that justify authorising the provision of the assistance.

3.2 Application requirements

A decision maker may refuse to consider an application that is not a complete application.

3.3 What is a complete application?

An application is a *complete application* if the application is:

- (a) made in writing using the application form provided by the Department; and
- (b) submitted to the Department electronically (including by online lodgement when available), by mail or by fax to the following address:
Assistant Secretary
Legal Assistance Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Fax: (02) 6141 4926
Email: finass@ag.gov.au; and
- (c) either:
- (i) all information required by the decision maker is contained in, or attached to, the application; or
 - (ii) not all the information required by the decision maker is contained in, or attached to, the application, but:
 - (A) the applicant provides the missing information in response to a request from the decision maker under section 3.4, or on the applicant's own initiative; or
 - (B) the decision maker tells the applicant in writing that the applicant is not required to provide the missing information.

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Note Forms are available at: www.ag.gov.au.

3.4 Request for further information

- (1) A decision maker may, by notice in writing, ask an applicant to provide any information, within the period specified in the notice, that the decision maker reasonably requires to enable the decision maker to decide the application.
- (2) If the information is not provided to the decision maker within the specified period, the decision maker may refuse the application without further consideration.

3.5 Consent to obtaining, disclosing and using further information

- (1) By making an application, an applicant consents to a decision maker disclosing information in the application to, or obtaining information from, any of the following persons:
 - (a) an agency;
 - (b) an organisation that provides legal aid;
 - (c) a relevant industry body;
 - (d) the applicant's legal practitioner;
 - (e) a legal practitioner not associated with the matter to which the application for assistance relates.
- (2) The decision maker must only disclose or obtain the information for the purpose of performing functions relating to the provision of assistance in relation to the application.

3.6 Responsibilities of applicants

- (1) An applicant has the following responsibilities:
 - (a) to give honest and accurate information, that is not misleading, in an application and to a decision maker when required;
 - (b) to tell the decision maker if the circumstances of the applicant change before the decision maker makes a decision on the application, if the change may affect the application.
- (2) The decision maker may refuse to consider an application if:
 - (a) the application contains dishonest, inaccurate or misleading information; or
 - (b) the circumstances of the applicant change in a way that may affect the application and the applicant does not tell the decision maker of the changed information.

Part 4 Decisions on applications

Division 1 General requirements

4.1 Making a decision on an application

- (1) A decision maker must decide whether or not to authorise the provision of assistance in relation to a complete application.
- (2) In deciding whether to authorise the provision of assistance, the decision maker must have regard to the following:
 - (a) the interest of the applicant in the matter in relation to which the assistance is sought in accordance with Division 2;
 - (b) for assistance for disbursements—the matters in Division 3;
 - (c) for assistance for legal representations—the matters in Division 4;
 - (d) whether the authorisation of the provision of the assistance is reasonable in all the circumstances;
 - (e) the likely cost of the legal action;
 - (f) the availability of funds, in any given year, under the appropriation for financial assistance towards legal costs and related expenses;
 - (g) the number and relative merits of other applications for grants made under all schemes administered within the appropriation for financial assistance towards legal costs and related expenses;
 - (h) the number and relative merits of grants likely to be made under all schemes administered within the appropriation for financial assistance towards legal costs and related expenses;
 - (i) whether the applicant is a group, and whether it is more appropriate that:
 - (i) an applicant who is not a group should form part of a group; or
 - (ii) a group should form part of another group.
- (3) The decision maker may decide the weight that should be given to each matter relevant to the circumstances of the case.
- (4) The decision maker must not authorise the provision of assistance for an excluded cost.
- (5) The decision maker may authorise the provision of assistance for disbursements or legal representation to an applicant who does not meet the requirements of this Part, or may authorise the provision of assistance for legal representation in excess of the maximum amounts in section 4.7, if the decision to authorise the provision of the assistance is reasonable and is justified by the exceptional circumstances of the case.

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4.2 No assistance for retrospective costs

A decision maker must not authorise the provision of assistance for costs incurred before the date on which the Department receives a complete application, except in exceptional circumstances.

4.3 Notice of decision

- (1) The decision maker must, not later than 28 days after the receipt of the complete application, give the applicant, or the entity that applied on behalf of the applicant, written notice of the decision maker's decision.
- (2) The notice must:
 - (a) give reasons for the decision maker's decision; and
 - (b) include information about how the applicant may seek a review of the decision.

Division 2 Interest of applicant

4.4 Interests for which assistance is not to be granted

A decision maker must not grant assistance under section 213A of the Act to an applicant if the applicant's interest in the matter for which assistance is sought:

- (a) is a previous exclusive possession act; or
- (b) has extinguished native title according to law; or
- (c) is a low impact future act; or
- (d) is a Scheduled interest; or
- (e) relates to connection or other anthropological issues; or
- (f) relates to compensation.

Division 3 Assistance for disbursements

4.5 Matters to be considered—assistance for disbursements

- (1) A decision maker may authorise the provision of assistance for disbursements to an applicant if the requirements of subsections (2) to (5) are met.

Note Division 4 sets out the considerations for the provision of assistance for legal representation.

- (2) If subsection 213A (1) of the Act applies to the applicant, the decision maker must consider the applicant considerations unless the applicant is a group.

Note The **applicant considerations** are dealt with in Division 5.

- (3) If subsection 213A (2) of the Act applies to the applicant and the application is for assistance with negotiating an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act:
 - (a) the applicant must have identified a native title party or other relevant party who is willing and able to negotiate an agreement with the applicant; and
 - (b) the decision maker must consider the applicant considerations unless the applicant is a group.
- (4) If subsection 213A (2) of the Act applies to the applicant and the application is for assistance with an inquiry, mediation or proceeding in relation to an agreement mentioned in paragraph (a), or the resolution of a dispute about rights conferred under subsection 44B (1) of the Act:
 - (a) the applicant must have identified a native title party or other relevant party who is willing and able to negotiate an agreement with the applicant; and
 - (b) the applicant must be joined, or intend to be joined, as a party to a dispute about the agreement; and
 - (c) the decision maker must consider the applicant considerations unless the applicant is a group.
- (5) If subsection 213A (3) of the Act applies to the applicant:
 - (a) the applicant must have identified a native title party or other relevant party who is willing and able to negotiate, with the applicant, an agreement to which paragraph 213A (3) (a) or (b) applies; and
 - (b) the decision maker must consider the applicant considerations unless the applicant is a group.

Division 4 Assistance for legal representation

4.6 Matters to be considered—assistance for legal representation

- (1) A decision maker may only authorise the provision of assistance for legal representation to an applicant to whom subsection 213A (1) of the Act applies if the decision maker is satisfied that:
 - (a) the inquiry, mediation, proceeding, agreement or dispute involves new or novel questions of law directly related to the applicant's interests; or
 - (b) a court requires the applicant's participation beyond participation in standard procedural processes.
- (2) The decision maker, in deciding whether to authorise the provision of assistance for legal representation to an applicant to whom subsection 213A (1) of the Act applies:
 - (a) if the applicant is not a group—must consider the applicant considerations; and
 - (b) if the applicant is a group—may consider the applicant considerations; and

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- (c) must consider the legal considerations.
- (3) In considering whether to authorise the provision of assistance for legal representation to an applicant to whom subsection 213A (2) of the Act applies, a decision maker:
 - (a) if the applicant is not a group—must consider the applicant considerations; and
 - (b) if the applicant is a group—may consider the applicant considerations; and
 - (c) must consider the merits of the application, including, but not limited to, the following matters:
 - (i) whether a standard form of agreement, or template for an agreement, exists;
 - (ii) whether all parties necessarily involved in the matter in relation to which assistance is sought are willing and able to negotiate;
 - (iii) whether there are new or novel questions of law directly relevant to the applicant's interests;
 - (iv) whether there is a need for the applicant to be involved having regard to the stage proceedings have reached;
 - (v) the legal considerations.

4.7 Limits on assistance for legal representation

- (1) A decision maker must not authorise the provision of more than \$50,000 assistance for a 6 month period to an applicant (whether or not the applicant is a group) to whom subsection 213A (1) of the Act applies.
- (2) A decision maker must not authorise the provision of more than \$50,000 assistance to an applicant (whether or not the applicant is a group) to whom subsection 213A (2) of the Act applies, in relation to a particular ILUA or agreement.

Division 5 Matters to be taken into consideration

Subdivision A Applicant considerations

4.8 What are the applicant considerations?

- (1) For Divisions 3 and 4, the *applicant considerations* are an assessment of whether the applicant has the means to meet the cost of the legal action without incurring serious financial difficulty having regard to the financial circumstances of the applicant.
- (2) The *financial circumstances* of the applicant include, but are not limited to, the following:
 - (a) the applicant's income;

- (b) the applicant's assets (including whether the applicant is able to sell assets, or to secure a loan against the assets);
- (c) the applicant's liabilities;
- (d) the applicant's expenses;
- (e) the applicant's style or standard of living;
- (f) the income of a financially-associated entity of the applicant;
- (g) the assets of a financially-associated entity of the applicant.

4.9 Who is a financially-associated entity?

- (1) A *financially-associated entity* of an applicant is any entity:
 - (a) from which the applicant usually receives financial support, or to which the applicant usually provides financial support; and
 - (b) that could reasonably be expected to financially assist the applicant in obtaining legal services.
- (2) For the purposes of determining whether a financially-associated entity of an applicant could reasonably be expected to financially assist an applicant to fund the legal action, the decision maker may have regard to any relevant matter including, but not limited to, whether:
 - (a) the income or assets, or both, of the financially-associated entity of the applicant are available for the use or benefit of the applicant; or
 - (b) the applicant has access to the income or assets of the financially-associated entity of the applicant; or
 - (c) the financially-associated entity has a contrary interest to the applicant in the legal action.

4.10 Additional applicant considerations for entities other than individuals

- (1) For an applicant that is not an individual, the decision maker may have regard to other financial resources that may be available to the applicant, including, but not limited to:
 - (a) for an incorporated body—the use of personal guarantees from directors of the body as security for a loan; and
 - (b) for an entity that has shareholders or members—the capacity of the entity to seek additional financial resources from the shareholders or members.
- (2) A publicly listed corporation is taken to have sufficient means to meet the cost of legal action without incurring serious financial difficulty.

4.11 What is income?

In this Division *income* includes, but is not limited to, the following:

- (a) wages or salaries;
- (b) business income;

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- (c) any benefit payable under legislation by the Commonwealth or a State or Territory;
- (d) workers compensation benefits;
- (e) superannuation payments;
- (f) maintenance payments;
- (g) proceeds from the rent or lease of property;
- (h) interest earned and dividends paid on investments.

Example for paragraph (c)

A pension payable to the applicant.

4.12 What are assets?

In this Division *assets*:

- (a) include, but are not limited to, property or money; but
- (b) do not include the following unless its value is unusually high:
 - (i) clothes;
 - (ii) tools of trade;
 - (iii) household furniture;
 - (iv) equity in applicant's principal home;
 - (v) a motor vehicle which is reasonably necessary for domestic or employment purposes.

4.13 What are liabilities?

In this Division, *liabilities* are any amounts of money that the applicant is legally obliged to pay to another entity.

4.14 What are expenses?

In this Division, *expenses* are any amounts of money that the applicant usually or regularly pays or remits to obtain a good or service for the domestic or business purposes of the applicant.

Subdivision B What are the legal considerations?

4.15 What are the legal considerations?

- (1) The *legal considerations* to which a decision maker may have regard include, but are not limited to, the following:
 - (a) the prospects of success of the legal action;
 - (b) whether parties have taken genuine steps to resolve the dispute before initiating proceedings (within the meaning of the *Civil Dispute Resolution Act 2011*);
 - (c) whether a party to the proceeding has been found by a court to be a vexatious litigant.

Note for paragraph (b) This includes, for example, participating in mediation.

- (2) In determining the prospects of the success of the legal action, matters to which the decision maker may have regard include, but are not limited to, the following:
 - (a) whether a party to the legal action has a reasonable case to argue;
 - (b) whether the legal action is fanciful or raises only speculative arguments.
- (3) In deciding whether a particular proceeding will settle a new or novel question of law, the decision maker may have regard to an opinion from counsel (whether sought by the Department or another entity) and the views of a relevant government organisation with responsibility for administering the relevant law.

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Part 5 Review

5.1 Review of decisions

- (1) This section applies if a decision maker makes one of the following decisions (the ***reviewable decision***):
 - (a) to refuse to grant assistance to an applicant;
 - (b) to make a grant of assistance for an amount that is less than the amount applied for by the applicant;
 - (c) to impose terms and conditions on a grant of assistance (whether set out in these guidelines or in the grant offer).
- (2) However, this section does not apply if the reviewable decision is made because there are no funds available to make a grant under section 213A of the Act.
- (3) The applicant may apply for internal review by the Department of the reviewable decision.
- (4) The application for internal review must be made in writing not later than 28 days after the day on which the applicant is notified of the reviewable decision.
- (5) The Secretary must, as soon as practicable after receiving the application for internal review, arrange for a person (other than the person who made the original decision) to review the decision.
- (6) The decision maker for the review must decide the application for review within 28 days of the receipt by the Department of the application for review.

Part 6 Repeal and transitional provisions

6.1 Repeal

The *Native Title (Provision of Financial Assistance) Guidelines 2006* are repealed.

6.2 Transitional

An application for assistance under section 213A of the Act made on or before 1 January 2013, but not decided by that date, is to be decided in accordance with this guideline.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.comlaw.gov.au.