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## **Native Title (Assistance from Attorney-General) Amendment Guideline 2013**

*FRLI: F2013L02084*

*Portfolio: Attorney-General*

*Tabled: Scheduled for House of Representatives and Senate, 11 February 2014*

### **Summary of committee concerns**

2.154 The committee seeks clarification as to the possible impact of the changes on the ability of native title claimants to have their claims resolved.

### **Overview**

2.155 The *Native Title Act 1993* allows for the provision of assistance by the Attorney-General to a person who is a party to an inquiry, mediation or proceeding related to native title.<sup>1</sup> The instrument amends the *Native Title (Assistance from Attorney-General) Guideline 2012* to broaden the eligibility test for assistance for native title respondents' legal representation costs. According to the explanatory statement, native title respondents are organisations with an interest that may be impacted on by a claim of native title over a particular area and typically include pastoralists, local governments, commercial fishers and small mining companies.<sup>2</sup>

2.156 As a result of the instrument, legal representation costs may be available where a respondent's interest is likely to be adversely affected in a significant way if a native title claim is recognised or a respondent would likely derive a significant benefit from negotiating an agreement or resolving a dispute. According to the explanatory statement, the instrument re-instates the broader eligibility test for legal representation costs for respondents that was operative prior to 1 January 2013 and will enable more native title respondents to be eligible for assistance.<sup>3</sup>

### **Compatibility with human rights**

#### ***Statement of compatibility***

2.157 The instrument is accompanied by a statement of compatibility which states that the instrument promotes native title respondents' access to courts and tribunals by contributing to the cost of legal representation. The statement concludes that the instrument does not negatively engage any human rights.

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1 *Native Title Act 1993*, section 213A.

2 Explanatory statement, p 1.

3 Explanatory statement, p 1.

### **Committee view on compatibility**

2.158 The committee notes that our predecessor committee considered the instrument which previously narrowed the availability of financial assistance for native title respondents' legal representation costs so that such assistance would only be available in exceptional circumstances (the 2012 instrument).<sup>4</sup> Such circumstances were limited to where new or novel questions of law directly related to a respondent's interests are considered or where a court requires a respondent's participation beyond participation in standard procedural processes.

2.159 The committee sought further information from the former Attorney-General as to the possible impact of the 2012 instrument on fair trial and fair hearing rights. The Attorney-General's response stated that, in the past, the broader criteria led to the provision of financial assistance for legal representation to respondents in the majority of native title matters. According to the response:

[t]he free availability of funding in the past has led to respondents becoming a party to matters where their interests may already have been protected. The current interests of native title respondents are in most cases protected by either the common law or the Native Title Act, largely because much of the law in respect of co-existing interests has been settled.<sup>5</sup>

2.160 The response also stated that:

[t]he vast majority of native title respondents are commercial entities or local councils. As such the native title activities should form part of respondents' ordinary business costs. Such costs are likely to be tax deductible.<sup>6</sup>

2.161 The response noted that the 2012 instrument, in particular the narrower eligibility test, was developed following an independent review of the native title respondent funding scheme by Mr Anthony Neal SC. The review noted that in relation to other schemes of financial legal assistance, legal representation costs are generally only paid in exceptional circumstances. Accordingly, the purpose of the instrument was to bring the native title respondent scheme in line with other such schemes and to 'ensure that funding for such assistance is consistent with the principles of access to justice by ensuring that assistance is provided to those most in need'.<sup>7</sup> The committee concluded that in light of this information it had no further comment on that instrument.

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4 *Native Title (Assistance from Attorney-General) Guideline 2012*, see PJCHR, *Third Report of 2013*, p 90 and *Sixth Report of 2013*, p 289.

5 The Attorney-General's response is set out in the PJCHR's *Sixth Report of 2013*, p 290.

6 PJCHR, *Sixth Report of 2013*, p 290.

7 PJCHR, *Sixth Report of 2013*, p 290.

2.162 The committee understands that the effect of the current instrument will be to increase the number of native title respondents who will be eligible for assistance and therefore able to participate in proceedings. It is not clear to the committee what the impact of this change will be on native title *claimants* and their ability to have native title claims resolved.

2.163 The right to culture includes the right of all persons to take part in cultural life and protects the cultural rights of individuals belonging to minority groups.<sup>8</sup> This right includes the need to ensure that Indigenous peoples' cultural values and rights associated with their land are respected and protected. These rights are also central to the right of self-determination.<sup>9</sup>

2.164 Further, the right to a fair hearing guarantees equality of access to courts and tribunals. This requires recognition of the interests of all parties to a proceeding and respect for the principle of 'equality of arms' – that is, all parties to a proceeding must have a reasonable opportunity to present their case under conditions that do not disadvantage them as against other parties to the proceedings.

2.165 According to the statement of compatibility accompanying the instrument, the government 'continues to provide assistance for native title claimants through a separate scheme administered by the Department of the Prime Minister and Cabinet'.<sup>10</sup> However, the committee is concerned that the broader eligibility criteria may result in the participation of more parties (in cases where their participation may not always be necessary) and lead to additional length and complexity in proceedings, thus presenting additional barriers to native title claimants in resolving their claims.

**2.166 The committee intends to write to the Attorney-General to seek further information on the impact of re-instating the broadened eligibility criteria for the provision of support to native title respondents on the ability of native title *claimants* to have their claims heard and resolved.**

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8 Article 15 of the International Covenant on Economic, Social and Cultural Rights and article 27 of the International Covenant on Civil and Political Rights.

9 Article 1 of the ICESCR and article 1 of the ICCPR.

10 Statement of compatibility, p 1.

