

## EXPLANATORY STATEMENT

*Legislative Instruments Act 2003* – section 26

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

The *Native Title (Assistance from Attorney-General) Amendment Guideline 2013* amends eligibility requirements for legal financial assistance for native title respondents' legal representation costs, under section 213A of the *Native Title Act 1993* (the Act).

### **Authority for making the legislative instrument**

The Attorney-General has made the *Native Title (Assistance from Attorney-General) Amendment Guideline 2013* (the amendment guideline) under subsection 213A(5) of the Act.

### **Commencement arrangements**

The amendment guideline commences on 1 January 2014. On the same day, the *Native Title (Assistance from Attorney-General) Amendment Guideline 2013* and the *Native Title (Assistance from Attorney-General) Guideline 2012* will be compiled.

The amendment guideline is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and is subject to disallowance. That Act specifies no other conditions that need to be satisfied before the power to make the proposed amendment guideline may be exercised.

### **Purpose and effect of the legislative instrument**

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

The amendment guideline broadens the eligibility test for assistance for native title respondents' legal representation costs. In general, native title respondents are organisations with an interest that may be impacted upon by a claim of native title over a particular area. Respondents typically include pastoralists, local governments, commercial fishers and small mining companies.

Upon commencement, legal representation costs may be available where a respondent's interest is likely to be adversely affected in a real and significant way if a native title claim is recognised. Legal representation costs may also be available in respect of negotiating a native title agreement or resolving a dispute where there is likely to be a significant benefit to the respondent, or to others, of an agreement being negotiated or a dispute being resolved. More native title respondents will be eligible for assistance with their legal representation costs under the amended guideline.

### **Consultation**

No specific consultation process was undertaken. The nature of the guideline amendments were such that specific consultation was considered to be unnecessary, consistent with section 18 of the *Legislative Instruments Act 2003*.

The amendment guideline reinstates the broader eligibility test for legal representation costs for native title respondents that was operative prior to 1 January 2013. The test was originally included in the *Native Title (Provision of Financial Assistance) Guidelines 2006*, which were repealed by the *Native Title (Assistance from Attorney-General) Guideline 2012*. There was widespread stakeholder support for reinstating the broader eligibility test, following the tightening of the scheme eligibility on 1 January 2013. The department maintains ongoing liaison with native title respondent stakeholders in relation to the native title respondent funding scheme.

### **Regulatory impact**

The Office of Best Practice Regulation 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) Amendment Guideline 2013***

The 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 amends the current *Native Title (Assistance from Attorney-General) Guideline 2012*, which authorises the provision of legal financial assistance by the Attorney-General to native title respondents under section 213A of the *Native Title Act 1993*.

The legislative instrument broadens the eligibility test for assistance for native title respondents' legal representation costs. Upon commencement, more native title respondents will have access to legal financial assistance to cover legal representation and disbursement costs reasonably incurred in native title proceedings. The broadened eligibility test will promote fair and equitable finalisation of existing native title claims.

The legislative instrument also provides guidance to the decision maker in assessing applications for grants of legal financial assistance.

#### **Human rights implications**

The broadened eligibility test contained within the legislative instrument promotes native title respondents' access to courts and tribunals by contributing to the cost of legal representation. The legislative instrument does not directly affect access to courts or tribunals, nor does it change respondents' rights of appearance or representation.

The Commonwealth continues to provide assistance for native title claimants through a separate scheme administered by the Department of the Prime Minister and Cabinet.

The legislative instrument does not negatively engage any of the applicable rights or freedoms.

#### **Conclusion**

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

**Senator the Hon George Brandis QC, Attorney-General and Minister for the Arts**

## **Description of the provisions of the amendment guideline**

### **1 – Name of guideline**

States the name of this legislative instrument.

### **2 – Commencement**

States that the amendment guideline will commence on 1 January 2014.

### **3 – Authority**

States that the amendment guideline is made under the *Native Title Act 1993*.

### **4 – Schedule(s)**

States that the *Native Title (Assistance from Attorney-General) Guideline 2012* is amended or repealed as specified in the schedule.

## **Schedule 1—Amendments**

### **Item 1 – Section 2.4**

Repeals section 2.4 of the current guideline (references to amounts of money). As section 4.7 of the current guideline is being repealed, the guideline no longer contains any reference to specific amounts of money.

### **Item 2 – Paragraphs 4.1(2)(f), (g) and (h)**

Amends references to the ‘appropriation for financial assistance towards legal costs and related expenses’ to the ‘appropriation for assistance from the Attorney-General’. A new, separate appropriation is being established for administration of the native title respondent funding scheme.

### **Item 3 – Subsection 4.1(5)**

This subsection sets out the circumstances in which a decision maker may authorise assistance. It has been amended to remove reference to ‘the provision of assistance for legal representation in excess of the maximum amounts in section 4.7’, as section 4.7 is being repealed.

### **Item 4 – Sections 4.6 and 4.7**

Repeals the test of reasonableness of an application for assistance for legal representation costs as contained in sections 4.6 and 4.7 in the current guideline.

It substitutes a new eligibility test, setting out considerations that the decision maker must have regard to in making a decision on an application for legal financial assistance.

Section 4.6(1) sets out general considerations to be taken into account when assessing applications for assistance under subsections 213A(1) and (2) of the Act.

Section 4.6(2) sets out specific considerations in relation to applications for assistance for respondents’ participation in native title inquiries, mediations or proceedings, under subsection 213A(1) of the Act.

Section 4.6(3) sets out specific considerations in relation to applications for assistance for respondents’ participation in native title agreements or disputes under subsection 213A(2) of the Act.

Section 4.6(4) sets out considerations in relation to assistance for participation in trials or preliminary or interlocutory proceedings.

**Item 5 – Subsection 4.15(3)**

Removes reference to the eligibility test in the current guideline.

**Item 6 – Part 6—Transitional provisions**

Repeals Part 6 in the current guideline and substitutes a new process for dealing with applications for assistance that were made before 1 January 2014, but not yet decided. It specifies that those applications are to be dealt with in accordance with this amendment guideline.