Responses requiring no further comment

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

FRLI: F2013L02084
Portfolio: Attorney-General
Tabled: House of Representatives and Senate, 11 February 2014
PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2014
Response dated: 27 February 2014

Information sought by the committee

3.171 The committee was concerned that the broader eligibility criteria re-instated by the instrument for the provision of support to native title respondents may result in the participation of more parties and lead to additional length and complexity in proceedings, thus presenting additional barriers to native title claimants. The committee sought further information on the likely impact of re-instating the broadened eligibility on the ability of native title claimants to have their claims heard and resolved.

3.172 The Attorney-General's response is attached.

Committee's response

3.173 The committee thanks the Attorney-General for his response.

3.174 In light of the information provided, the committee makes no further comments on this instrument. The committee recommends that the government monitor the impact of the broadened eligibility criteria on native title proceedings, in particular the impact of the broadened criteria on the ability of native title claimants to have their claims heard and resolved.

ATTORNEY-GENERAL

CANBERRA

MC14/04311

27 FEB 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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CANBERRA ACT 2600

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Dear Senator Smith Dean,

Thank you for your letter dated 11 February 2014, on behalf of the Parliamentary Joint Committee on Human Rights, seeking additional information about the *Native Title (Assistance from Attorney-General) Amendment Guideline 2013* [F2013L02084] (the guideline).

As per paragraph 2.166 of the committee's *Second Report of the 44th Parliament*, additional information is provided below 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.

The committee's concerns

The committee is concerned that the broader eligibility test enabling greater respondent assistance 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.

Effect of the instrument on native title claimants' rights

The policy underpinning the guideline is to promote faster and more equitable resolution of native title claims for all native title parties, including native title claimants.

Under the guideline, respondents may receive financial assistance for their legal representation costs if their interests are likely to be adversely affected in a real and significant way by the native title proceedings, or if there is likely to be a significant benefit (to them or to others) of an agreement being negotiated or a dispute being resolved (s 4.6(2), (3)). In practice, this means a broader range of respondent legal costs can be covered by a grant of legal financial assistance than under the previous guideline.

However, my department continues to assess all applications closely, and only approves assistance to a level that is considered reasonable. Grants are refused, or approved for a smaller amount than was requested, if aspects of the respondent's proposed participation in proceedings are considered to be unnecessary. For example, there is specific provision in the guideline to refuse or reduce assistance, having regard to the nature of the respondent's interest and the native title rights being claimed (s4.6(1)(d)). Assistance may also be refused if the respondent has low prospects of success (s 4.15(1)(a)) or is a vexatious litigant (s 4.15(1)(c)). Decision makers also have regard to the outcomes achieved during the previous funding period when determining a reasonable amount to approve under a new grant.

Importantly, assistance under the guideline is not means tested where respondents group together and share legal representation (s 4.6(1)(g)). This provides an incentive for respondents to coordinate and share legal representation, thus reducing the number of lawyers appearing in proceedings. By contrast, without legal financial assistance being available, there is a risk that multiple respondents with the same interests would participate individually in proceedings, either as self-represented litigants or with their own lawyer. This would have the potential to significantly increase the number of parties involved in the resolution of a claim. The guideline enables my department to demand efficiencies in the conduct of respondent participation in the native title matters it funds.

The reinstatement of a broader test for legal financial assistance reflects concerns expressed from time to time by the Federal Court during the period when the availability for legal financial assistance was limited to respondents whose interests raised only a 'new or novel' question of law. For example:

- In *Levinge and others v State of Queensland* QUD346/2006 (on 28 February 2013), Justice Rares noted that limiting financial assistance to respondents would 'impose an enormous burden on the parties, including the Commonwealth…[and] on the court [as] pastoralists should be made to appear for themselves [or] organise their own representation separately, and that's going to interfere in the orderly process of the court'.
- In the *Tagalaka People v State of Queensland* [2012] FCA 1396 (on 10 December 2012), Justice Logan noted that 'In the aftermath of *Wik Peoples v Queensland* (1996) 187 CLR 1, the Executive Government of the Commonwealth made provision for legal assistance to be provided to pastoralists in relation to native title claims. Over the time during which I have been responsible for the management of the list of native title cases in this region, I have directly observed how, in combination with responsible legal representation of applicants, via the North Queensland Land Council, of the State, via the Crown Solicitor and of other respondents, this legal assistance to pastoralists has repeatedly and beneficially contributed to the administration of justice and thus to Parliament's goal of national reconciliation in this important area of the Court's jurisdiction. Recently, it has been announced by the Attorney-General that this legal assistance to pastoralists will cease with effect from the end of this year. Such value judgments are for the Executive Government of the day to make. What I can say, based on direct experience, is that the addressing of the hitherto "unacceptably long time" for the resolution of native title cases and the recent experience of "faster and better claim resolution" to which the Attorney has made reference (Echoes of Mabo: AIATSIS Native Title Conference, 6 June 2012, Speech by the Honourable Nicola Roxon MP,

Attorney-General, http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Second%20Quarter/6-June-2012---Echoes-of-Mabo---AIATSIS-Native-Title-Conference.aspx Accessed 7 December 2012) requires a combination of responsible legal representation of all interested parties and intensive case management and proactive, targeted use of alternative dispute resolution where appropriate by the judges and registrars of this Court. There is much work yet to be done in the native title list in this State and much scope for misunderstanding and unnecessary acrimony and delay in relation to native title claims in the absence of responsible legal representation'.

- In a mediation report for the *Nyikina and Mangala* native title claim (WAD6099/1998) dated 11 April 2013, Deputy District Registrar Gilich stated that 'respondent funding should be addressed by the Commonwealth Government as a matter of urgency to maintain momentum in the mediated resolution of native title claims' and that 'due to lack of funding the pastoralists are ill informed in relation to the proceedings'.

Both the Courts and the Executive have a role in ensuring that claimants and respondents are equal before the law in the resolution of native title matters. The Courts are responsible for ensuring the *Native Title Act 1993* is administered fairly with respect to all parties and the Executive is responsible for ensuring all parties have an opportunity to access the system through the provision of legal assistance schemes that are fair and equitable.

As was noted in the statement of compatibility with human rights accompanying the instrument, the Government provides assistance to native title claimants for their legal representation through a separate scheme administered by the Department of Prime Minister and Cabinet. I note that no corresponding changes were made to this scheme (then administered by the Department for Families, Housing, Community Services and Indigenous Affairs) at the time the guidelines were amended for respondents.

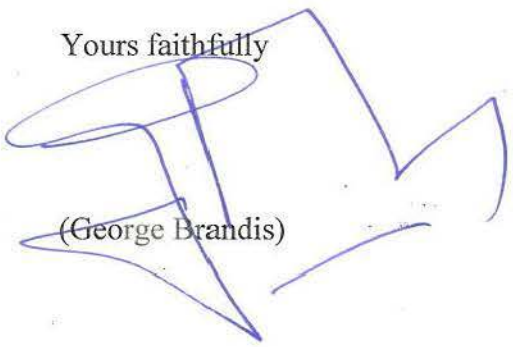
In summary, the guideline restores balance to native title financial assistance, with assistance once again provided to both parties to native title proceedings, to promote more equitable and efficient resolution of native title claims.

For the reasons set out above, I consider that the measures contained in the Native Title (Assistance from Attorney-General) Guideline 2012 are compatible with human rights, including Articles 1 and 15 of the International Covenant on Economic, Social and Cultural Rights and Articles 1 and 27 of the International Covenant on Civil and Political Rights.

The adviser responsible for this matter in my office is Liam Brennan who can be contacted on (02) 6277 7300.

Thank you again for writing on this matter.

Yours faithfully



(George Brandis)