

Schedule 2

Date

Address

Dear xx

Native Title Respondent Funding Scheme

You may be aware of the Federal Government's changes to the Native Title Respondent Funding Scheme ("the Scheme") that came into effect on 1 January 2013. These changes have effectively eliminated funding to local governments for legal representation costs relating to native title proceedings in the Federal Court.

The Local Government Association of Queensland (LGAQ) has, on a number of occasions expressed grave concerns about these changes to the Commonwealth Attorney-General who is responsible for administering the Scheme. We consider that the funding cuts are a "false economy" that will disrupt recently streamlined native title processes just as they begin to have a positive effect. Similar views have also been expressed on a number of occasions by Federal Court Judges both outside of Court and during hearings of particular proceedings.

Since the commencement of the native title claim system under the *Native Title Act 1993* (Cth), Queensland local governments have participated constructively as both respondent parties in claim resolution and as parties to innovative native title agreements, particularly Indigenous Land Use Agreements (ILUAs). The Australian Human Rights Commission's 2007 Native Title Report to the Commonwealth Parliament (Chapter 11), commended the work being done by local governments, particularly in Queensland, in the development of ILUAs for use in conjunction with the mediated resolution of native title claims. That work has only been possible because of the funding assistance which the Scheme provided.

Local governments have previously qualified for financial assistance in relation to these matters under s213A of the Act. That provision remains in place and gives the Attorney-General a discretion to decide funding applications. Section 213A(5) empowers the Attorney-General to make written guidelines that are to be applied in authorising the provision of assistance. The changes which the Attorney-General has made in respect of local government funding have come about through alterations made by the Attorney-General to existing guidelines, rather than through any legislative change.

An original parliamentary intention behind s213A centred on the fact that the legislation created new impacts and obligations on persons with existing interests in native title claim areas (including responding to claims). The legislation acknowledged that there were new costs involved. Parliament accepted that it should therefore make provision for the Australian Government, through the Attorney-General, to defray those costs by way of the Scheme.

The Scheme has been vital to Queensland local government involvement, particularly as Queensland councils have a much larger range of statutory responsibilities and interests capable of being affected by native title determinations than in other States and Territories.

Even before the Scheme guidelines were changed on 1 January 2013, the Scheme never covered all of the costs incurred by local governments in addressing native title. For example, substantial expenditure of time and resources occurs in-house by way of council officers collecting information, providing instructions, participating in mediation meetings and liaising with council members about local government involvement in

claim resolution. The Scheme did not cover any of these in-house costs. All councils also expend considerable resources of their own in addressing compliance for “future acts” under Part 2 Division 3 of the Act.

The LGAQ believes that Queensland local governments have, as a class of respondents to claims, exceptional circumstances, and thus should be able to continue to access funding under the Scheme irrespective of the changes. The terms of the altered guidelines could allow the Attorney-General to continue funding for local government respondents on an “exceptional circumstances” basis.

Exceptional circumstances include the following:-

- **Extent** – Determinations of native title are now being made throughout Queensland, including over or in the vicinity of major regional cities and towns such as the Quandamooka claim adjacent to metropolitan Brisbane. Local government interests in this claim included a wide array of proprietary interests, such as reserve land holdings, other trusteeship interests in land, permit, licence and non-extinguishing leasehold interests, substantial untenured infrastructure, extensive operational interests and regulatory interests. Indeed, for most claims, the nature and extent of local government interests is far greater than those of any other respondent, with perhaps the exception of the State itself.
- **Broader Advocacy Role** – During the claim process, local government respondents frequently advocate for the interests of community groups which do not themselves join as respondents. That may include sporting and recreational groups that have interests in claim areas and grantees of interests, such as trustee leases and permits over local government reserves. This itself generated efficiencies and cost savings in the claim resolution process.
- **No State Representation** – The Queensland Government has made it clear that it does not represent local government interests in the claims process. There would also be a conflict of interest in the State legally representing its own interests and the often different, and sometimes conflicting, interests of local government.
- **Indigenous Local Governments** – In Queensland, many local governments have been established specifically for Aboriginal and Torres Strait Islander communities, and determinations thus are being made over the great majority of land within the Indigenous councils’ local government area. These councils generally have very little, if any, rateable land from which to generate their own rates revenue, and they are almost entirely dependent on Commonwealth and State grants.
- **Tenure Resolution** – In Queensland, there is provision for “land swaps” between native title parties and the State in respect of State (non-freehold) land, a process otherwise known as “tenure resolution”. Legal representation is vital in ensuring local government land holdings (particularly reserve land) are properly protected, as these feature substantially in most tenure resolution dealings.
- **Local Government Added Value** – The successful use of a template ILUA approach in Queensland, which was developed under the leadership of the LGAQ, has been positively acknowledged by the Australian Human Rights Commission, as an optimum process for enabling native title parties to decide their own priorities for social, cultural and economic development. The continued use of the template ILUA is largely contingent on local governments being able to access appropriate funding under the Scheme.
- **Special Interest in Accrued Compensation Liabilities** – In Queensland, councils play a vital role in augmentation of the freehold land supply, particularly for regional and remote towns. In addition, resources projects in these areas has led to an exhaustion of existing freehold land supply, which has escalated land prices and caused housing shortages. Local governments regularly apply to the State for the grant of new freehold titles over State land in relevant communities, and in many cases the circumstances are such that this means compulsory acquisition of native title. The local government then incurs a contingent compensation liability to any eventual native title holders if there is a

successful determination of native title. That liability is obviously a vital interest particularly requiring council involvement as a respondent party to a native title claim.

- Financial Capacity – In Queensland, councils must balance their budget each year, unlike other levels of government. Over the past few years, natural disasters combined with State Government policy decisions have placed councils under significant financial pressure which is extremely unlikely to ease. In addition, rural and remote councils have a very small rates base. Without access to legal assistance, most Queensland councils are unable to afford to participate in the native title claim resolution process.

In addition, LGAQ believes that continued financial assistance for claim resolution purposes is essential under the Access to Justice principles contained in the Attorney-General Department's Access to Justice Strategic Framework for the following reasons:

- Native title is a “dispute” of significant public interest.
- Resolution of native title issues is for the “public good”. Local government makes no private gain, but protects public interests and ensures there will be in the future a workable relationship between native title rights and local government/public interests.
- The provision of information of itself will not assist local government to effectively engage in the native title jurisdiction without legal assistance.
- Native title requires detailed technical knowledge, and local government officers must rely on lawyers to assist them in both negotiations and Court proceedings. There is no realistic capacity for councils to address native title claims or compliance issues by themselves.
- There are no options to choose cheaper methods of resolving native title disputes, which of themselves are still very new within the law and are also largely non-recurring. There are still approximately 100 native title claims in Queensland which still to be resolved.

The LGAQ and other Queensland councils have repeatedly raised these issues with the Attorney-General, and argued that the exceptional circumstances should mean that they continue to qualify for assistance in respect of *both* costs and disbursements.

The Attorney-General, in a reply letter to the LGAQ of 2 November 2012, stated that legal advice for native title issues should form part of standard operational expenditure for local governments, though funding may still be available on a case-by-case basis where there are new or novel questions of native title law or where the Court requires local government to participate beyond standard procedural process. Of course it is never a matter of the Court “requiring” local government involvement.

The Attorney-General's comments demonstrate a lack of understanding of Queensland local governments' unique situation. With the funding now at an end, most councils involved in these claims will be forced to withdraw from being a respondent party.

Essentially, the LGAQ believes that there has not been due consideration of the impacts of the Attorney-General's decision on Queensland local governments.

Your assistance is sought in securing legal assistance for Queensland local governments to allow them to continue to participate as respondents in native title claims on behalf of their communities.

It would be extremely unfortunate if an unintended consequence of the current decision is that that Queensland local governments are unable to continue their important and constructive participation in the claim resolution process.

Warm regards, CR MARGARET DE WIT, PRESIDENT