

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Output 1.7

Question No. 46

Senator Moore asked the following question at the hearing on 24 May 2006:

Can the guidelines or the letter that explains, in relation to grants, how the variation process operates be provided?

The answer to the honourable senator's question is as follows:

A template of the letter sent to Native Title Respondent Funding Scheme grant recipients and /or their representatives explaining the variation process is at **Attachment A**. The paragraphs advising applicants of the procedure for extending grants, and applying for new grants where there has been a change of circumstances, have been italicised.

A copy of the *Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines* is at **Attachment B**. The relevant paragraphs are 7.6 to 7.8 and 7.24 to 7.26

The Attorney-General's Department has consulted stakeholders on proposed new Guidelines as part of the package of native title reforms announced by the Attorney-General. The new Guidelines are subject to the approval of the Attorney-General. The consultation draft of the Guidelines is at **Attachment C**. The relevant paragraphs are 46 – 49 and 103 – 105.

Template of the letter sent to Native Title Respondent Funding Scheme grant recipients and/or their representatives

Dear

Native Title Act (section 183)

I refer to your application on behalf of your clients for an extension of financial assistance in these proceedings.

An extension of the grant of financial assistance in this matter has been approved to a limit of \$xxxx, exclusive of GST, towards your clients' further legal costs relating to anticipated work to agree a consent determination and ILUA. This grant extension takes effect from xx 2006 and is for attendances anticipated to and including 30 June 2006.

Approval to provide the legal services determined by the Attorney-General or his delegate to the applicant in this matter involves acceptance by the legal service provider that the Attorney-General or his delegate instructs the legal service provider as to the services to be provided and the terms and conditions applicable to those services.

In the exercise of these terms and conditions, the Attorney-General or his delegate will, in the grant of assistance or from time to time thereafter, specify the nature or ambit of the legal services the legal service provider is to provide to the applicant and/ or the terms on which those services are to be provided.

This grant extension is made subject to the terms and conditions set out in the *Provision of Financial Assistance by the Attorney General in Native Title Cases Guidelines*, and subject to the additional terms and conditions set out in this letter.

This grant comprises amounts (exclusive of GST) for the following:

- solicitors' fees:
subject to a daily limit of \$1774.55 (at \$221.82per hour)
- counsel's fees
 - junior counsel's fees:
subject to a daily limit of \$1816.00 (at \$227 per hour)
- other – solicitor's disbursements:
- *total*

Extracts from the cost estimate included with your application is attached, marked-up to indicate the items that have not been included in your grant. A detailed breakdown of the grant amount is also attached. The amounts that have been included make up the components of this grant that are identified above.

To obtain payment, you must present an itemised account for assessment and approval. The account must be in accordance with the Federal Court Scale. The account must set out, on a

day-to-day basis:

- the date of the work
- the specific nature of the main activity or task undertaken
- the person or persons who undertook the work
- the applicable item under the Federal Court Scale
- the time involved, on each day, in undertaking the work or other basis for calculating the cost of the item (eg the number of pages for photocopying)
- the unit cost per item (eg 25 cents per page for photocopying), and
- the total cost of the item.

Receipts or vouchers must be provided for all travel-related disbursements, and for any other disbursement over \$100.

Each account must be in the form of, or accompanied by, a tax invoice to the 'Attorney-General's Department' that clearly identifies the itemised amounts (exclusive of GST) and the total GST component of the invoice. (Note that the amounts listed in the Federal Court Scale are inclusive of GST.) Each account must include sufficient detail to enable the Department to determine the reasonableness of costs. In preparing an account, you should consider the purpose and terms of the grant.

For further information on the assessment of accounts, see the 'Assessment of costs in native title matters' document on our website at http://www.ag.gov.au/assessment_of_costs.

Each itemised account that is provided to the Department must be accompanied by a report indicating how the matter has progressed and enclosing copies of any orders made and any newsletters, legal opinions or expert reports prepared or obtained.

Grants do not cover the payment of GST; the Department will pay you the GST component separately by way of direct credit.

This grant extension (and each of its components, identified above) must not be exceeded without prior approval from the Attorney-General's Department. No part of an amount specified as the upper limit for one component of this grant extension can be used towards another component, without the Department's prior written approval.

If you, or your client, consider that further assistance is required to complete the current stage of work, or to cover work outside the terms of the extended grant, you must contact the Department to seek a further extension of the grant before any additional costs are incurred. Similarly, if you, or your client, decide to seek a further extension of the grant, or to seek a new grant, for the next stage of the proceedings, you must advise the Department before any additional costs are incurred.

If a grant extension is urgently required, you must provide the Department with written notice of this and, as soon as possible afterwards, provide full details in the application for extension. Only in these circumstances can a grant extension date from before the receipt of the application.

The result of this current application should not be taken as providing any indication of the likely outcome of any further application, including an application for a further extension of this grant.

If you disagree with this decision (or any part of it) you may have it reviewed by an officer of the Department who did not make the original decision. A review may be requested by writing to: First Assistant Secretary, Indigenous Justice and Legal Assistance Division, Attorney-General's Department, National Circuit, BARTON ACT 2600. The written request must explain why you believe that the decision was wrong, and must be received by the Department within 28 days of your receipt of this letter.

**GUIDELINES FOR THE PROVISION OF FINANCIAL ASSISTANCE
BY THE ATTORNEY-GENERAL IN NATIVE TITLE CASES**

1. COMMENCEMENT

1.1 These guidelines come into effect on 30 November 1998. They replace the previous guidelines for the Provision of Financial Assistance by the Attorney-General in Native Title Cases which ceased to have effect from this date.

2. THE SCHEMES

Section 183 Native Title Act 1993

2.1 Sub-section 183(1) of the *Native Title Act 1993* provides that a “person” who is a party, or who intends to apply to be a party, to an inquiry, mediation or proceeding related to native title may apply to the Attorney-General for assistance.

2.2 Sub-section 183(2) of the *Native Title Act 1993* provides that a “person” who is a party, or who intends to become a party to an indigenous land use agreement or rights of access for traditional activities; or is in dispute with any other person about rights of access for traditional activities may apply to the Attorney-General for assistance in relation to:

- negotiating the agreement;
- any inquiry, mediation or proceeding in relation to the agreement; or
- resolving the dispute.

2.3 Financial assistance may be granted under sub-section 183(3) if the Attorney-General, or a delegate of the Attorney-General, is satisfied that:

- the applicant is not eligible to receive assistance from any other source;
- the provision of assistance to the applicant is in accordance with the guidelines determined under sub-section 183(4); and
- in all the circumstances, it is reasonable that the application be granted.

2.4 Sub-section 183(4) provides that the Attorney-General may determine guidelines that are to be applied in authorising assistance under section 183. These guidelines have been determined in accordance with this provision.

Special Circumstances (Native Title) Scheme

2.5 Assistance may also be available under the Special Circumstances (Native Title) Scheme to persons involved in a native title matter which does not come within the scope of section 183 and

where, in all the circumstances, it is considered reasonable that the application be granted.

Common Law (Native Title) Scheme

2.6 Assistance may also be available to people involved in common law native title matters under the Common Law (Native Title) Scheme.

Definitions

2.7 Under these guidelines, the following definitions apply:

- an “applicant” is a person seeking financial assistance;
- a “claimant” is a party who is making a native title determination application;
- a “group representative” is a peak or constituent industry body which represents the interests of its members;
- a “non-claimant applicant” is a party who applies to the Federal Court of Australia for a native title determination other than as a claimant;
- a “party” is either an individual, incorporated or unincorporated body, partnership or trust that is involved directly in a native title matter;
- a “person” includes an individual, a body politic as well as all classes of incorporated bodies; and
- a “respondent” is a party who is responding to a native title claim.

3. ADMINISTRATION OF SCHEMES

The decision maker

3.1 Delegates in the Legal Aid Branch, Attorney-General’s Department, have been appointed by the Attorney-General to deal with applications for assistance under section 183, and under the Special Circumstances (Native Title) Scheme and the Common Law (Native Title) Scheme.

4. HOW TO APPLY

Information required

4.1 An application form must be completed by either the applicant personally or their agent or by the solicitor handling the matter. A copy of this form is attached to these guidelines. Solicitors are encouraged to make multiple copies of the form.

Lodgement of applications for assistance

4.2 All applications for assistance should be lodged with:

Assistant Secretary
Legal Assistance Branch

Attorney-General's Department
National Circuit
BARTON ACT 2600

Fax: (02) 6250 5934

Telephone inquiries

4.3 Telephone inquiries should be directed to (02) 6250 6770.

Internet Address

4.4 Additional copies of these guidelines can be accessed on the internet at the following address:

http://www.law.gov.au/aghome/commaff/lafs/legal_aid/ntguide.html

5. SCOPE OF SCHEMES

Who is eligible for assistance

5.1 Individuals, partnerships, small businesses, local government bodies and other organisations may be eligible for assistance. Incorporated bodies as well as unincorporated bodies such as community clubs and associations may be eligible for assistance.

5.2 Where a group representative, eg a peak or constituent organisation such as a farmer organisation, acts as agent of a party or parties then the group representative may apply as agent on behalf of that party or parties for assistance.

Scope of assistance

5.3 Financial assistance is available to persons not only in litigation cases in the Federal Court, High Court, or State and Territory Supreme Courts but also for the purpose of obtaining legal advice, pursuing mediation in the National Native Title Tribunal or equivalent State or Territory body, and in relation to agreements and disputes.

5.4 As native title claimants are funded through Native Title Representative Bodies, the Attorney-General may not provide them with financial assistance (s183(6)). Where an area is not covered by such a body, application should be made to the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC also has power to provide assistance where a representative body has refused to provide assistance

5.5 Where a native title claimant had been granted assistance under section 183 for a native title claim before 1 September 1998 he or she may be able to apply for and be granted further assistance for that claim. The criteria for such grants is as set out in these guidelines.

Type of assistance available

5.6 Assistance may cover some or all costs of the following:

- professional legal and other costs;

- counsel's fees;
- court fees;
- expert fees, eg. anthropological or historical;
- reasonable accommodation and travelling expenses; and
- other reasonable disbursements.

6. RELEVANT CONSIDERATIONS

Applications under section 183 Native Title Act 1993

6.1 In determining whether assistance should be authorised under section 183 regard is had to the requirements set out in sub-section 183(3). These requirements include:

- the availability of assistance from any other source;
- whether the provision of assistance is in accordance with these guidelines; and
- whether it is reasonable that the application be granted.

6.2 The decision to grant or refuse assistance is a global assessment giving appropriate weight to all the considerations according to the circumstances of the case. Discretion can be exercised in these circumstances to ensure that the following factors, amongst others, are taken into account.

Availability of assistance from any other source

6.3 Assistance is not available to applicants who have access to assistance from any other source.

6.4 In the first instance, and where an applicant may be eligible for assistance from another source, application should be made to that source. Where assistance has not been approved evidence of that refusal is generally required.

Reasonableness

6.5 In assessing "reasonableness" consideration is given to a range of factors, including the following:

- (a) the severity and the extent of the implications of the native title claim for the applicant for financial assistance eg. the interests of the party which are claimed to be affected by the native title claim, as well as what is being claimed by the native title claimants and the extent of their claim;
- (b) the number of claims which directly affect the applicant and in respect of which that person is a registered party;
- (c) does the applicant really have a role or a genuine interest in the claim process. What will happen if the person/group does not have the opportunity to put forward its views;

- (d) whether the benefit to the applicant is worth the cost of the case;
- (e) the benefit which the parties will gain from an agreement or a mediated outcome;
- (f) the novelty or legal importance of the issues raised; and
- (g) the benefit which the general public will gain from obtaining a decision in the matter.

6.6 Where appropriate, an applicant's financial circumstances will be taken into account in assessing an application for legal or financial assistance. In assessing an application for assistance regard is had to any detriment that the applicant may suffer if assistance is refused. It is acknowledged that not having legal representation is likely to create a detriment (emotional, business management and financial) for individual parties.

6.7 Any person who has significant financial backing is unlikely to be provided assistance. Where the applicant is not a natural person consideration will be given to what other financial resources may be available to it, eg. guarantees from directors, provision of further funds from shareholders and levies from members.

Group Applications

6.8 Group applications will be encouraged where the interests, rights, and obligations of individuals in a particular group are essentially identical. Where the interests of definable groups can be clearly shown to differ, or are in conflict, then there may be justification for separate representation. In some instances it may be appropriate for a group representative to promote and co-ordinate the representation of a group.

6.9 Where a number of applicants who have common interests apply as a group the legal services may be provided for one of those parties as a representative of the group or to the group as a whole. To the extent that it is appropriate and/or desirable group representation of persons or bodies having similar interests in a matter is to be facilitated/encouraged.

6.10 In considering whether group assistance should be approved issues such as the number of people that the group represents, the detriment that the applicants may suffer if assistance is refused are taken into account.

6.11 Where assistance is approved to a group, separate assistance to others with interests, rights and obligations which are essentially identical to the group but who elect not to join the group will be subject to individual evaluation.

6.12 In order to avoid the funding of overlapping representation, in the case of parties with the same class of interest, there will be a prima facie presumption in favour of group representation.

Prospects of success

6.13. Where financial assistance is sought in relation to litigation, the prospects of success will be a relevant criteria. The prospects of success, means:

- for a respondent, whether they have a good case to argue or are likely to be able to protect their interests through mediation;

- for a non-claimant applicant, whether it is necessary to have a native title determination made.

6.14 The weight to be given to good prospects of success will depend to some extent on the importance of the case and the questions of law that will be resolved.

Advice from other agencies

6.15 Advice may be sought from other government agencies or industry bodies to help decide whether it would be reasonable to grant the request for financial assistance. Where external advice is sought care is taken to ensure that any affected applicant is accorded natural justice and, where appropriate, confidentiality protected.

Information to be provided in respect of individual applications

6.16 Where an application for assistance is made by a person individually then that applicant or his/her representative will need to provide:

- a submission providing details of the case and of the work required to be undertaken;
- a financial statement providing details of income, assets and liabilities. The statement should list separately the assets that will be affected by the claim for native title (Note: these assets are not taken into account when assessing eligibility for financial assistance);
- details about the arrangements proposed for the representation, including the names of all the parties who are proposed to assist the applicant (eg mediator, solicitor, barrister, anthropologist, land planners, technical adviser) together with the scope of involvement of each; and
- details of all costs including the manner in which these costs have been calculated.

Information to be provided in respect of group applications

6.17 Where an application for assistance is made on behalf of a group, then the parties will not be subject to individual evaluation of their position and there is no need for individual application forms to be completed. However, the group representative or the solicitor who is representing the group will need to provide:

- a submission providing details of the case and of the work required to be undertaken;
- details about the arrangements proposed for the representation, including the names of all the parties who are proposed to assist the applicant/s (eg mediator, solicitor, barrister, anthropologist, land planners, technical adviser) together with the scope of involvement of each; and
- details of all costs including the manner in which these costs have been calculated.

Applications under Special Circumstances (Native Title) Scheme

6.18 In determining whether assistance should be authorised under the Special Circumstances (Native Title) Scheme regard is had to the requirements set out in paragraphs 6.1-6.14 above.

6.19 Where an application for assistance is made by a person individually an applicant or his/her representative will need to provide the information set out at paragraph 6.16 above.

6.20 Where an application for assistance is made by a group or an unincorporated or incorporated body an applicant or his/her representative will need to provide the information set out at paragraph 6.17 above.

Applications under Common Law (Native Title) Scheme

6.21 In determining whether assistance should be authorised under the Common Law (Native Title) Scheme regard is had to the requirements set out in sub-section 183 (3), as set out in paragraphs 6.1-6.14 above.

6.22 Where an application for assistance is made by a person individually an applicant or his/her representative will need to provide the information set out at paragraph 6.16 above.

6.23 Where an application for assistance is made by a group or an unincorporated or incorporated body an applicant or his/her representative will need to provide the information set out at paragraph 6.17 above.

6.24 Assistance may be available under this Scheme in respect of disputed land owners claims that certain titles should be included in Schedule 1 of the *Native Title Amendment Act 1998* where favourable legal opinion is provided to support the particular claim.

7. CONDITIONS OF GRANTS OF ASSISTANCE

7.1 Conditions upon which a grant of assistance may be made have been determined. When the applicant's legal representative or the applicant are advised of the grant of assistance, a document containing the conditions of the grant will be provided.

Retrospective grants and dating of grants

7.2 Financial assistance cannot be authorised retrospectively. Generally grants of assistance date from the date of receipt of an application for assistance.

7.3 Retrospective grants of assistance are defined as grants of assistance relating to applications received:

- (i) after the proceedings are concluded; or
- (ii) after legal services have been provided and assistance is then requested for those services.

Legal and associated costs

7.4 Generally all legal and associated costs will be covered. If a legal representative is not engaged only reasonable disbursements will be paid. An applicant will not be provided with a money equivalent of lost earnings or time spent in preparing a case. In cases where the hearing or preparation is of lengthy duration, fees may be either for a lump sum or at agreed rates.

Dealings in relation to applications for assistance

7.5 Assistance does not extend to costs incurred in completing an application for assistance or interviews and consultations between an applicant and his/her legal representatives for the purpose of making an application for assistance or concerning the grant or refusal of assistance. Neither does assistance extend to attendances on, and correspondence with, the Attorney-General's Department in relation to the making of an application or the terms of assistance. Assistance will not extend to preparation for and work done in connection with any itemised bill of costs.

Assistance in stages

7.6 Usually assistance will be provided in stages. At the end of each stage a decision will be made as to whether it is reasonable to continue assistance. It should not be assumed that assistance will continue beyond the stage for which approval has been given. For example, a limited grant may be made to investigate the reasonableness of the case or a grant may be made for mediation purposes only.

7.7 All applications for extensions must provide the details normally required for an application for assistance.

Limits on grants of assistance

7.8 Applicants will be advised of the upper limit of a grant of assistance for any stage. It is essential that this amount not be exceeded. If it is considered that there will be a need for an additional amount to complete the work needed at any stage then the Attorney-General's Department must be contacted to seek an extension to the original amount.

Assistance through lawyers and other professionals

7.9 In some circumstances, particularly at the mediation stage, it may be considered appropriate for assistance to be made available through persons/bodies other than lawyers. A person proposing to provide assistance and/or representation will need to show that they have:

- relevant adequate professional qualifications;
- knowledge of the native title issues involved; and
- a requisite level of experience in providing the assistance required.

7.10 The wishes of an applicant about which lawyers, consultants and researchers are to be involved in the conduct of the matter will be taken into account, however practitioners (both legal and non-legal) must be members of the panel established by the Attorney-General's Department. Level of experience in native title matters will be a relevant consideration for inclusion of a

practitioner on the panel.

Costs of group representative

7.11 In principle, a group representative may be able to obtain financial assistance in administering claims and providing general advice and other assistance to their members in relation to a specific native title claim.

7.12 Therefore, in appropriate cases, financial assistance may be available to cover the direct costs of a group representative such as printing, telephone, facsimile and postage. In special circumstances costs to covering an agreed part of the staff time of peak and constituent organisations in attending to Native Title matters may be approved.

7.13 A group representative may also be able to obtain financial assistance in respect of matters where they are acting as agents.

Solicitors' costs

7.14 The policy in respect of solicitors' costs is as follows:

- (a) generally, solicitors' fees are paid at 100% of the Federal Court scale. Where there is no applicable scale item relevant to the services provided, fees on an hourly basis will be allowed.
- (b) where considered appropriate assistance may be authorised for a lump sum;
- (c) no uplift for care skill and responsibility will be allowed; and
- (d) solicitors' professional costs incurred subsequent to the grant of financial assistance will ordinarily be paid at the conclusion of the stage of a matter or the proceedings.

7.15 The policy in relation to solicitors' accounts is as follows:

- (a) solicitors should submit an itemised account of their work sufficient to enable a determination as to the reasonableness of their costs;
- (b) where the information supplied is insufficient to enable a determination to be made as to the reasonableness of their costs, the solicitor may be requested to supply further information;
- (c) where agreement in relation to the assessment of costs is not able to be reached, the solicitor may be requested to get the bill of costs taxed;
- (d) generally a solicitor is expected not to render his/her account until the conclusion of the stage of the matter or at the conclusion of the matter. Interim payments, however, may be authorised where a solicitor has incurred disbursements exceeding \$100 in total or where proceedings have reached a stage where there will be a substantial delay before further work needs to be undertaken on behalf of an assisted person;
- (e) the Attorney-General's Department reserves the right to call for a solicitor's file in an assisted matter in relation to any account rendered for payment.

Counsel's fees

7.16 The policy in respect of counsel's fees is as follows:

- (a) counsel will only be funded in matters where the case is judged to warrant the retainer of counsel;
- (b) counsel's fees will generally be allowed in accordance with the scale authorised by the Attorney-General's Department, or by agreement;
- (c) in cases where the hearing or preparation is of lengthy duration fees may be either for a lump sum or at agreed rates;
- (d) solicitors should forward counsel's memoranda of fees to the Attorney-General's Department together with their bill of costs.

Disbursements

7.17 In respect of disbursements:

- (a) solicitors must furnish a copy of an account for any one disbursement which exceeds \$100;
- (b) payments for anticipated disbursements will not be advanced unless there are special circumstances requiring payment in advance. In such cases details of the disbursements should be supplied;
- (c) approval will be required to be obtained prior to incurring any one disbursement for an expert report which exceeds \$500;

Solicitors prohibited from demanding payments from assisted persons

7.18 A private legal practitioner is prohibited from demanding or receiving payment, other than a final contribution determined in accordance with these guidelines, from a financially assisted person or any other person on his behalf in respect of work under a grant of assistance except with the approval of the Attorney-General's Department.

Recovery of costs

7.19 Any costs recovered from another party must be reimbursed to the Commonwealth to the extent that the Commonwealth has contributed towards the costs of the action. The Commonwealth has the first right to be paid from any recovered costs.

Indemnity for costs

7.20 A grant of assistance does not, as a general rule, extend to an indemnity for costs that may be awarded against a legally assisted person. In exceptional cases, however, consideration may be given to providing assistance to cover costs that are or may be awarded against a legally assisted person.

Reporting

7.21 An assisted person or his/her solicitor shall provide any information that may reasonably be requested from time to time in relation to the subject matter of their case. This information would include the following:

- results of the action, including a copy of any orders made;
- a copy of any legal opinion obtained; and
- a copy of any anthropological or historical report obtained.

7.22 On completion of a matter the legal representative shall forward a report to the Attorney-General's Department which shall provide the following information:

- the result of the action, including details of orders made;
- particulars of any orders as to costs;
- an itemised bill of costs.

7.23 In those cases where a matter is settled on the basis of undertakings as to confidentiality, such terms of settlement will not be relied upon as a basis for the non-disclosure of information to the Attorney-General's Department in relation to the subject matter of the grant of assistance.

Withdrawal, discontinuance of proceedings

7.24 The Attorney-General's Department must be advised of the reasons for the withdrawal and/or discontinuance within fourteen days of any notice being filed.

7.25 Where the withdrawal and/or discontinuance is due to:

- (a) failure of a legal representative to comply with the requirements of the National Native Title Tribunal or State/Territory equivalent body or Court rules;
- (b) the disclosure of false information in the application; or
- (c) failure of the applicant and/or his/her legal representatives to pursue the case;

the Attorney-General's Department may terminate the grant of assistance and require reimbursement of any monies advanced.

Misrepresentation

7.26 All information provided in support of the application must be true and correct at the time it is provided. Where it is shown that the applicant and/or his/her legal representative misrepresented the application in any particular, the Attorney-General or delegate reserves the right to terminate the grant and require immediate reimbursement of monies advanced. Applicants are referred to section 29B of the *Crimes Act 1914*.

7.27 Legally assisted persons and/or their legal representatives are required to give an undertaking to notify the Attorney-General's Department of any changes to their circumstances which may have a bearing on their continuing eligibility for financial assistance.

Final contributions

7.28 Where the applicant obtains an award of the court for costs in his/her favour then, to the extent that those costs equal or exceed monies paid or payable under a grant of assistance, an amount equal to monies paid or payable under the grant of assistance must be reimbursed within 60 days of the date of receipt of judgment/settlement monies or taxed/agreed costs, whichever is the relevant date. Where those costs are for a lesser amount then the lesser amount must be reimbursed.

7.29 Where the applicant negotiates a monetary settlement of his/her claim, without recourse to the court then, to the extent that those costs equal or exceed monies paid or payable under a grant of assistance, an amount equal to monies paid or payable under the grant of assistance amount must be reimbursed within 60 days of the date of receipt of settlement monies or taxed/agreed costs, whichever is the relevant date. Where those costs are for a lesser amount then the lesser amount must be reimbursed.

8. TERMS OF GRANTS OF FINANCIAL ASSISTANCE

Legal Professional Fees

- legal professional fees for solicitors at 100% of Federal Court Scale. Where it is considered that there is no scale item relevant to the services provided, fees of \$172.00 per hour up a maximum of \$1,376.00 per day are payable.
- fees for junior counsel are in the range of \$172.00 - \$206.00 per hour or \$1,376.00 - \$1,648.00 daily depending on the experience of counsel.
- fees for senior counsel are in the range of \$206.00 - \$385.00 per hour or \$1,648.00 - \$3,080.00 daily depending on the experience of counsel.
- hourly/daily rates for solicitors and counsel will only apply to matters of short duration.
- assistance in respect of matters other than those of short duration will be authorised on a fee package basis. Fee packages will be costed by the application of a discounted factor in recognition of the duration of the work and the guarantee of payment.
- travel time by solicitors or counsel for the purpose of obtaining instructions or attending hearings will be paid at the rate of \$140.00 per hour.

NOTE: In May 2003, the Attorney-General approved a 10% increase in legal professional fees for counsel for work undertaken on or after 1 May 2003.

Fees for junior counsel for work undertaken on or after 1 May 2003 are payable at an hourly rate in the range of \$172.00 to \$227.00 per hour, to a maximum daily amount in the range of \$1,376.00 to \$1,816.00 per day (equivalent to 8 hours at the applicable hourly rate), depending on the experience of counsel.

Fees for senior counsel for work undertaken on or after 1 May 2003 are payable at an hourly rate in the range of \$227.00 to \$424.00 per hour, to a daily maximum amount in the range of \$1,816.00 to \$3,392.00 per day (equivalent to 8 hours at the applicable hourly rate), depending on the experience

of counsel.

Para-legal/clerks' fees

- para legal staff at \$25.00 per hour;
- research clerks who are permanent employees at \$45.00 per hour.

Anthropologists' Fees

- anthropologists fees are in the range of \$400.00 - \$600.00 per day depending on the experience of the anthropologist.
- photography and copying expenses will be considered on submission of receipts or invoices.

Other professional costs

- Consultants researchers and other professionals costs will be approved at 100% of the scale set by the appropriate professional association, or for a fixed fee.

Other general terms of grants of assistance

- photocopying is payable at 25 cents per page.
- facsimile transmissions are payable at \$2.00 per page up to \$40.00 per transmission.
- telephone calls are payable at cost.
- travel expenses: air travel by lawyers for the purpose of obtaining instructions or attending hearings of the Federal Court or National Native Title Tribunal or State or Territory equivalent body are at economy rates unless there are exceptional circumstances why business class should be allowed. It is expected that travel costs will be kept to a minimum and discounted airfares will be used where possible. Motor vehicle travel costs are payable at the rate per kilometre allowable by the Commissioner of Taxation for taxation purposes (based on engine capacity of the vehicle).
- accommodation required by legal or other representatives for the purpose of obtaining instructions or attending hearings of the National Native Title Tribunal or State or Territory equivalent body or Federal Court is payable at Senior Executive Service rates for accommodation and meals.
- Accommodation and other travelling expenses for witnesses and financially assisted persons is payable at non-Senior Executive Service rates, provided the travel was considered reasonable and necessary in the circumstances of the particular case.
- other properly incurred disbursements at cost will be paid on production of an invoice or receipt.
- fees and disbursements in excess of the agreed grant will not be paid unless the grant is formally extended by the Attorney-General's Department.

9. PROCEDURAL FAIRNESS

Review of Decisions

9.1 Where an application for financial assistance is refused the reasons for refusal will be provided. The applicant will also be advised of the mechanism to seek a review of the decision and any request for review must be lodged within 28 days after reasons for refusal have been given to the applicant. The review shall be conducted by a nominated officer other than the original decision maker.

9.2 Similarly, where an application for assistance is approved subject to conditions and the applicant is dissatisfied with any part of the decision, the applicant may seek a review of the decision by lodging a request in writing. Applications for review must be made within 28 days after reasons for imposing the conditions have been given to the applicant. The review shall be conducted by a nominated officer other than the original decision maker.

Ombudsman & Complaints

9.3 Where a person is dissatisfied with any aspect of the administration of his/her application, a complaint may be made to the Commonwealth Ombudsman.

Freedom of Information Act 1982

9.4 Any person has the right to apply for access to documents under the Freedom of Information Act (FOI) 1982. Section 15 of the FOI Act sets out the requirements for an application under the Act. The application has to:

- be in writing;
- refer specifically to the FOI Act;
- be accompanied by payment of the fee required;
- provide sufficient information to enable identification of the document/s;
- be lodged at the Attorney-General's Department; and
- request the particular form of access.

Privacy Act 1988

9.5 The Privacy Act 1988 requires staff in Commonwealth Government departments and agencies to comply with Information Privacy Principles (IPP). Where a person believes that his/her privacy has been infringed because of a breach of an IPP, that person may complain to the Privacy Commissioner.

Confidentiality

9.6 All information provided by an applicant, or on the applicant's behalf, will be treated in confidence and will not be disclosed to any other person or agency other than in accordance with an express authority by the applicant or, where required, by law.

* * * * *

CONSULTATION DRAFT

GUIDELINES ON THE PROVISION OF FINANCIAL ASSISTANCE BY THE ATTORNEY-GENERAL UNDER THE NATIVE TITLE ACT 1993

PART I INTRODUCTION

1. Subsection 183(3) of the *Native Title Act 1993* allows the Attorney-General to authorise the provision of legal or financial assistance by the Commonwealth to an applicant in certain circumstances.
2. The assistance may be provided unconditionally or subject to such conditions as the Attorney-General determines. The extent of the assistance is also a matter for the Attorney-General's determination.
3. The Attorney-General may delegate his powers under subsection 183(3) of the *Native Title Act 1993*, and his powers have been delegated to certain officers within the Attorney-General's Department.
4. The Attorney-General may determine guidelines that are to be applied in authorising assistance under subsection 183(3) of the *Native Title Act 1993*.
5. The Attorney-General is prohibited, by subsection 183(6) of the *Native Title Act 1993*, from authorising assistance to a person who holds or claims to hold native title.

NOTE: As part of the technical amendments to section 183 consideration is being given to remove the reference to legal assistance.

PART II COMMENCEMENT

6. These Guidelines are made under subsection 183(4) of the *Native Title Act 1993* and come into effect on [insert date] 2006. They replace the previous *Guidelines for the Provision of Financial Assistance by the Attorney-General in Native Title Cases*.
7. Provisions for dealing with existing grants, or undetermined applications for assistance, at the date of commencement of these Guidelines are set out in Part XI.

PART III INTERPRETATION OF THESE GUIDELINES

8. Terms used in these *Guidelines* have the following meanings:

Act means the *Native Title Act 1993*.

Applicant means a person described in subsection 183(1) or subsection 183(2) of the *Act* who

DRAFT

makes an *application* for *assistance* under these *Guidelines* (including a person to whom *assistance* has been authorised under these *Guidelines*), and a *group representative*;

Application means any application for *assistance* made in accordance with these *Guidelines* and includes an application for an extension of *assistance*;

Assessment of costs means a document to be published, and periodically updated, by the *Department*;

Assistance means financial assistance applied for or authorised under these *Guidelines*;

Claimant means a person who:

- (a) claims to hold native title; or
- (b) is making an application authorised by a native title claim group for a native title determination; or
- (c) is authorised by the compensation claim group to make an application for a compensation determination.

Department means the Australian Attorney-General's Department;

Group representative means a society, organisation, association or other body which acts as an agent for a party in a proceeding, or in the negotiation of an *ILUA* or in relation to any of the other matters listed in subsection 183(2) of the Act;

Guidelines mean this document titled the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*;

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

Native Title Officer means a person who is engaged by a *group representative* for the purpose of undertaking work on native title matters for which assistance has been authorised under these *Guidelines*;

Non-claimant applicant means a person, other than a *claimant*, who applies to the Federal Court of Australia for a native title determination;

Party means a person who:

- (a) is a party to an inquiry, mediation, proceeding, negotiation, or
- (b) has entered into an *ILUA*; or
- (c) has entered into an agreement under subsection 44B(3) of the Act;

Person means an individual, a body politic, an incorporated or unincorporated body;

Respondent means a party who is responding to a native title claim;

DRAFT

9. Unless the contrary intention appears in these *Guidelines*, any term used in these *Guidelines* has the same meaning as in the *Act*.
10. Unless the contrary intention appears in these *Guidelines*, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.
11. The singular includes the plural, and vice versa.
12. References to dollar amounts are exclusive of GST payable under *A New Tax System (Goods & Services Tax) Act 1999*.

PART IV THE SCOPE OF SECTION 183 OF THE ACT

13. The activities for which *assistance* may be provided are the subject of subsections 183(1) and 183(2) of the *Act*.

WHAT ASSISTANCE CAN BE AUTHORISED UNDER SUBSECTION 183(1) OF THE ACT

14. Subsection 183(1) of the *Act* provides that a person who is a party, or who intends to apply to be a party, to an inquiry, mediation or proceeding related to native title may apply to the Attorney-General for *assistance* in relation to the inquiry mediation or proceedings.
15. As the *Act* contains various provisions regarding inquiries, mediation and proceedings, an *application* for *assistance* may only be authorised under subsection 183(1) for an inquiry, mediation or proceedings pursuant to a provision of the *Act*, such as:
 - 15.1. a native title determination application (*claimant* and *non-claimant*);
 - 15.2. mediation in relation to claims under Part 4 Division 1B;
 - 15.3. special inquiries under section 137 or inquiries under section 139;
 - 15.4. mediation by the arbitral body (pursuant to subsection 31(3)) to assist in obtaining an agreement under the right to negotiate process;
 - 15.5. an application for a determination under section 35.

NOTE: As part of the technical amendments to section 183 consideration is being given to extend the scope to include negotiations under the future act right to negotiate processes.

What assistance can be authorised under subsection 183(2) of the Act

16. Subsection 183(2) of the *Act* provides that a person who is a party, or who intends to become a party, to an *ILUA* or an agreement about the rights of access for traditional activities (conferred by subsection 44B(1) of the *Act* in respect of non-exclusive

DRAFT

agricultural and pastoral leases), or a person who is in dispute with any other person about rights of access for traditional activities, may apply to the Attorney-General for *assistance* in relation to:

- 16.1. negotiation of an *ILUA* or an agreement about rights of access for traditional activities; or
- 16.2. any inquiry, mediation or proceeding in relation to such an agreement; or
- 16.3. resolution of a dispute about rights of access for traditional activities.

Matters of which the Attorney-General must be satisfied before assistance can be authorised under the Act

17. Financial *assistance* may be authorised under subsection 183(3) in respect of *applications* for the purposes set out in subsection 183(1) and subsection 183(2) of the *Act* only if the Attorney-General, or a delegate of the Attorney-General, is satisfied that:
 - 17.1. the *applicant* is not eligible to receive assistance in relation to the matter concerned from any other source (including from a representative Aboriginal/Torres Strait Islander body);
 - 17.2. the provision of *assistance* to the *applicant* is in accordance with the *Guidelines* determined under subsection 183(4); and
 - 17.3. in all the circumstances, it is reasonable that the *application* be granted.

NOTE: As part of the technical amendments to section 183 consideration is being given to omit section 183(3)(a).

PART V ELIGIBILITY FOR ASSISTANCE

18. It follows from the scope of section 183 of the *Act* that to be eligible for *assistance*, a person must:
 - 18.1. be a party, or intend to become a party, to an inquiry, mediation or proceeding related to native title; or
 - 18.2. be a party to an *ILUA* or to an agreement about right of access for traditional activities and be seeking *assistance* for an inquiry, mediation or proceeding in relation to the agreement; or
 - 18.3. intend to become a party to an *ILUA* or to an agreement about right of access for traditional activities, and be seeking *assistance* for the negotiation of such an agreement; or

DRAFT

18.4. be in a dispute with another person about rights of access to land for traditional activities, and be seeking *assistance* for resolving the dispute;

AND

18.5. *assistance* must not be available from any other source; and

18.6. the provision of *assistance* must be in accordance with these *Guidelines*; and

18.7. the provision of *assistance* must be reasonable in all of the circumstances.

HOW REASONABLENESS IS DETERMINED FOR AN APPLICATION FOR ASSISTANCE
FOR AN INQUIRY, MEDIATION OR PROCEEDING UNDER SUBSECTION 183(1) OF THE
ACT

19. Subject to paragraphs 20 and 21 below, in deciding whether it is reasonable to authorise *assistance* for an inquiry, mediation or proceeding, consideration must be given to each of the following matters:
- 19.1. whether the *applicant* has sufficient financial resources if the *applicant* is not to be represented by a *group representative*;
 - 19.2. the nature of the *applicant's* interest and the native title rights being claimed;
 - 19.3. if the *applicant's* interests do not extinguish native title as a matter of law, whether the *applicant's* interest are likely to be adversely affected in a real and significant way if the native title were to be recognised;
 - 19.4. whether the *applicant's* interest is a scheduled interest;
 - 19.5. whether the *applicant's* interest is a low impact future act;
 - 19.6. whether the *applicant's* interests are protected or capable of being protected under the regime for future acts in the *Act*;
 - 19.7. the number of claims which directly affect the *applicant*;
 - 19.8. the likely benefit to the *applicant* of participation in the inquiry, mediation or proceeding relative to the likely cost of *assistance*;
 - 19.9. whether a *group representative* is acting as an agent of any party in the inquiry, mediation or proceeding;
 - 19.10. whether the *applicant's* interests are appropriately protected having regard to the identity and interests of other parties to the proceeding;
 - 19.11. if *assistance* is sought for legal services to participate in a court proceeding, whether:
 - 19.11.1. the proceeding raises any new and significant question of law;
 - 19.11.2. the *applicant's* case has reasonable prospects of success;

DRAFT

- 19.11.3. the *applicant's* participation in preliminary or interlocutory matters will enhance the prospect of a mediated outcome;
 - 19.11.4. mediation has failed for reasons beyond the *applicant's* control;
 - 19.11.5. the court requires the *applicant's* participation.
20. It is not necessary for regard to be given to all of the above matters if the *applicant's* interest is a previous exclusive possession act or native title has been extinguished according to law, or if the *applicant's* interest is a low impact future act, or if the *applicant's* interest is a scheduled interest. In such a case, it would not be reasonable to authorise *assistance*.
 21. The provision of *assistance* is not considered to be reasonable if any of the matters in subparagraphs 19.11.1 to 19.11.3 is answered in the negative.

How reasonableness is determined for an application for assistance under subsection 183(2) of the Act

22. Subject to paragraph 23 below, in deciding whether it is reasonable to authorise *assistance* for the negotiation of an agreement, or for an inquiry, mediation or proceeding in relation to such an agreement, consideration must be given to each of the following matters:
 - 22.1. whether the *applicant* has sufficient financial resources if the *applicant* is not to be represented by a *group representative*;
 - 22.2. the nature of the *applicant's* interest and of the native title rights being claimed;
 - 22.3. whether the *applicant's* interest is a scheduled interest;
 - 22.4. whether the *applicant's* interest is a low impact future act;
 - 22.5. whether the *applicant's* interests are protected or capable of being protected under the regime for future acts in the *Act* and the *claimant* is asserting non-exclusive native title rights;
 - 22.6. whether the *applicant's* interests are appropriately protected having regard to the identity and interests of another party to the negotiations or to the inquiry, mediation or proceeding in relation to such an agreement;
 - 22.7. whether a *group representative* is acting as an agent of any party in the negotiation of such an agreement, or in an inquiry, mediation or proceeding in relation to such an agreement, or in the resolution of a dispute about rights of access for traditional activities;
 - 22.8. whether there is a significant benefit to the *applicant*, or others potentially, of an agreement being negotiated having regard to:

DRAFT

- 22.8.1. the extent of any adverse effect of a successful native title claim on the *applicant's* interest;
 - 22.8.2. the likelihood of success of a native title claim;
 - 22.8.3. the area of the proposed agreement;
 - 22.8.4. the potential parties to the proposed agreement;
 - 22.8.5. the duration of the proposed agreement;
 - 22.8.6. the matters to be dealt with under the agreement;
 - 22.8.7. any indications by native title *claimants* or State of an intention or willingness to negotiate an agreement; and
 - 22.8.8. the likely cost of the negotiation of an agreement, or of the inquiry, mediation or proceeding in relation to an existing agreement.
23. It is not necessary for regard to be given to all of the above matters if the *applicant's* interest is a:
- 23.1. previous exclusive possession act or native title has been extinguished according to case law;
 - 23.2. low impact future act;
 - 23.3. scheduled interest.

In such a case, it would not be reasonable to authorise *assistance*.

Assessment of financial circumstances and of contribution

24. Whether an *applicant* has sufficient financial resources will be assessed having regard to the likely cost of the *assistance* sought and to the income and assets of the *applicant*.
25. Where the *applicant* is not a natural person or is a trustee, consideration must be given to what other financial resources may be available to the *applicant*. For example, in the case of a company, consideration will be given to the financial circumstances of those owning it; in the case of an association, consideration will be given to its capacity to levy its members; and in the case of a trustee, consideration will also be given to the financial circumstances of the beneficiaries of the trust.
26. A publicly listed company is regarded as having sufficient financial resources.
27. An *applicant* may be required to pay a contribution towards the cost of *assistance* as a condition of the authorisation of *assistance*. The maximum amount of the contribution which may be required will be determined from time to time by the

DRAFT

35. Advice may be sought from other government agencies or industry bodies regarding an *application* or *assistance*. In the course of obtaining such advice, information regarding an *applicant's* financial affairs or any legal advice obtained by an *applicant* is not to be disclosed by the Department.

ASSESSMENT OF CONTRIBUTION

36. A decision must be made as to the amount (if any) that an *applicant* will be required to pay by way of contribution.

Assistance can not be authorised retrospectively

37. *Assistance* cannot be authorised from a date prior to the date of receipt by the Department of an *application*. This means that *assistance* cannot be authorised after the legal services have been provided or costs incurred irrespective of whether invoices have been issued for those services at the date of *application*.
38. If a grant is urgently required, *assistance* may be authorised from the date of notice of an *application* providing a complete *application* is received within 14 days of the notice. If a complete *application* is not received within that period no *assistance* will be authorised.

Assistance will be authorised in stages

39. *Assistance* will be authorised for services which are likely to be required in a 6 month to 12 month period. *Assistance* may be authorised for a shorter period if appropriate. The period for which *assistance* is authorised is referred to as a stage.
40. If the services will not be completed in the stage, a fresh *application* must be made prior to the expiry of that stage. However, the *assistance* does not terminate until such time as the Department notifies the *applicant* in writing.
41. *Assistance* will not necessarily be extended at the end of each stage. A decision will be made as to whether it is reasonable to extend *assistance* having regard to paragraphs 19 to 23 of these *Guidelines*.

LIMITS MUST BE IMPOSED ON ASSISTANCE AUTHORISED

42. *Applicants* will be advised of the maximum amount of the *assistance* authorised for a stage. If it is considered that the maximum amount will be insufficient to complete the work for that stage, an extension may be sought from the *Department*. However, an extension for this reason can be approved only in exceptional circumstances. Exceptional circumstances include:
- 42.1. court attendances are increased as a result of orders made by the court;
- 42.2. changes beyond the *applicant's* control to the mediation program;
- 42.3. a hearing initiated by another party at which the *applicant's* attendance is necessary;
- 42.4. other unforeseen events beyond the *applicant's* control which have more than a minor financial impact on the amount of the *assistance*.

DRAFT

43. An increase in the maximum amount for a particular stage can not be authorised after that stage has been completed.

NATIVE TITLE PRACTITIONERS PANEL

44. Legal practitioners and other persons who are to provide services covered by a grant of *assistance* must be members of the Native Title Practitioners Panel established by the Department.
45. A legal practitioner or other service provider who wishes to be included on the Native Title Practitioners Panel must address the criteria determined by the Department. The criteria are published at **[insert]**.

Comment: Need to include URL

Assistance may be varied or terminated

46. The Department may vary *assistance* at any time.
47. The *Department* may terminate *assistance*, for good reason. Examples of good reason include:
- 47.1. misrepresentation (deliberate or otherwise) by the *applicant* or the *applicant's* advisers;
 - 47.2. failure to comply with the conditions on which *assistance* was authorised;
 - 47.3. failure to comply with directions or orders of the National Native Title Tribunal or with the rules, directions or orders of a court;
 - 47.4. failure to comply with a request by the *Department* to provide information;
 - 47.5. failure to act reasonably by not endeavouring to reach a reasonable agreement with a *claimant*;
 - 47.6. supervening events which make the *assistance* no longer appropriate. For example, the services in respect of which the *assistance* was authorised are no longer required or the purpose for which the *assistance* was authorised has changed.
48. Where consideration is being given to the variation or termination of *assistance* for misrepresentation, non-compliance or failure to act reasonably, the *applicant* must be asked to show cause why the authorisation of *assistance* should not be varied or terminated.
49. A grant may be terminated retrospectively in the event of omissions or conduct described in paragraphs 47.1 and 47.5. In such cases, money paid to the grant recipient or their legal representative becomes a debt owed to the Commonwealth.

PART VIII WHAT ASSISTANCE CAN BE AUTHORISED

ASSISTANCE TO A GROUP REPRESENTATIVE

50. *Assistance* may be authorised for a *group representative* to act as an agent for a party in a inquiry, mediation or proceeding, or in the negotiation of an *ILUA* or an agreement about rights of access for traditional activities.
51. *Assistance* may be authorised for a *group representative* to act as an agent for a party in any inquiry, mediation or proceeding in relation to *ILUA* or an agreement about rights of access for traditional activities, or in resolving a dispute about right conferred by subsection 44B(1) of the *Act*.
52. *Assistance* may be authorised for a *group representative* in respect of the costs of obtaining instructions and providing advice on resolving native title matters that affect persons who are or who intend to become parties to:
- 52.1. an inquiry, mediation or proceeding; or
- 52.2. an *ILUA* or an agreement about rights of access for traditional activities.
53. *Assistance* for expenses incurred in the printing, photocopying, telephone, facsimile, searches and postage may be authorised to a *group representative*. Such *assistance* is limited to the amount of the expense incurred. The expense is deemed to be \$0.25 per page in the case of photocopies and \$2.00 per page in the case of facsimiles.
54. *Assistance* may be authorised for executive or managerial staff of a *group representative* for work on native title matters for which *assistance* has been authorised. The maximum amount payable in respect of an executive or managerial staff is \$50 per hour up to \$400 per day. However, such *assistance* would be limited if *assistance* was authorised for the remuneration of a *Native Title Officer* engaged by the *group representative*.
55. With the objective of streamlining procedures and subject to paragraphs 93 to 96, the *Department* may make advance payment of the estimated costs of a stage, by way of a lump sum or of instalments, to the *group representative*.

Native Title Officer

56. Where a *group representative* engages a *Native Title Officer*, *assistance* with the remuneration of the *Native Title Officer* may be provided.

Costs of legal services

Solicitor

57. *Assistance* may only be authorised for the reasonable costs of a solicitor and the amount payable for those costs will be calculated:
- 57.1. by reference to the *Assessment of Costs* and either:

DRAFT

- 57.1.1. paid at 100% of the Federal Court scale, or
- 57.1.2. paid at 90% of the hourly rate under item 31 of the Federal Court Scale;
- 57.2. without any uplift for care skill and responsibility;
- 57.3. at a maximum hourly rate of \$25 per hour for administrative staff;
- 57.4. at a maximum hourly rate of \$45 per hour for paralegal, articled clerks or other native title practitioners who are not admitted to practice as a solicitor.

Counsel

- 58. *Assistance* in respect of counsel's fees is to be determined as follows:
 - 58.1. counsel will only be funded in matters where the case is judged to warrant the retainer of counsel;
 - 58.2. counsel's fees will be allowed in accordance with the following scale:
 - 58.2.1. an hourly rate of \$172 - \$227 per hour to a maximum of \$1,376 - \$1,816 for junior counsel;
 - 58.2.2. an hourly rate of \$227 - \$424 per hour to a maximum of \$1,816 - \$3,392 for senior counsel.
 - 58.3. in cases where the hearing or preparation is of lengthy duration, fees may be for a lump sum or at agreed rates which do not exceed the scale set out above;
 - 58.4. counsel's memorandum of fees must be provided with a solicitor's bill of costs.

TRAVEL COSTS

- 59. Travel costs of a legal practitioner and a *group representative*, including a *Native Title Officer*, may be authorised for the purpose of obtaining instructions or attending hearings.
- 60. The reasonable travel costs of an *applicant* and a witness may be authorised if the travel is necessary.
- 61. If travel by air has been approved, airfares are payable at economy rates. Other travel costs of a legal practitioner or a *group representative* will be reimbursed up to the maximum applicable to the Senior Executive Service of the *Department* at the time. Other travel costs of an *applicant* or a witness will be reimbursed at non-Senior Executive Service rates.
- 62. Payment for time spent travelling by a legal practitioner or a *group representative* may be authorised if the attendance was more than 50 km from their office. Payment for such attendance will be made at the rate of \$140 per hour for a solicitor and at \$25 per hour for any *group representative*, excluding a *Native Title Officer*.

DRAFT

63. Tax invoices and receipts for all travel costs must be provided with requests for reimbursement.

DISBURSEMENTS GENERALLY

64. Payment will not be advanced in anticipation of a disbursement unless the *Department* is satisfied that there are special circumstances warranting payment in advance.
65. Prior approval is required for the incurring of a cost exceeding \$500 for any one service or report. This requirement can not be avoided by having the service provider or author split the work over a number of invoices.
66. The maximum amounts payable in respect of an anthropologist's fee are \$100 per hour and \$600 per day.
67. Tax invoices and receipts must be provided for all disbursements over \$100.

Costs of an unrepresented applicant

68. If a legal representative is not engaged by the *applicant*, only reasonable disbursements can be authorised. *Assistance* does not cover the costs of an *applicant's* time, or loss of earnings, in preparing a case.

Costs which can not be paid

69. *Assistance* cannot be authorised for costs of any kind incurred in relation to the making of an *application* for *assistance*, or in relation to the review of a decision regarding *assistance*.
70. *Assistance* can not be authorised for any legal or other costs incurred between the date on which an *application* was made and the date on which a decision was made, by either the delegate or the authorised review officer, to refuse *assistance*.
71. *Assistance* can not be authorised for the cost of attendances on, and correspondence with, the *Department* in relation to the making of an *application* or to the terms of *assistance* or to reports to the *Department*.
72. *Assistance* does not cover the cost of preparation of invoices.
73. *Assistance* can not be authorised for the payment of any costs which an *applicant* is ordered to pay to another party.

PART IX CONDITIONS OF ASSISTANCE

general conditions

CONSENT TO THE OBTAINING AND DISCLOSURE OF INFORMATION

74. By making an *application*, the *applicant* acknowledges that the *Department* may obtain information from other government or industry bodies or from the *applicant's* solicitor regarding the *application* or *assistance*, and consents to the *Department* doing so. The information includes any legal opinion which has been obtained in respect of the matter for which an *application* is made.
75. By making an *application*, the *applicant* consents to the disclosure, by the *Department* to another *applicant* or to a *group representative*, of information in the *application* or information obtained from the *applicant* (other than any legal opinion) for the purpose of deciding whether to authorise *assistance* to the *applicant* who could otherwise be a member of a group.

AGREEMENT TO PAY CONTRIBUTION

76. By making an *application* and accepting *assistance*, the *applicant* agrees to pay the contribution (if any) determined by the *Department* in accordance with these *Guidelines*.

ACCEPTANCE OF INSTRUCTION BY THE *DEPARTMENT*

77. Approval to provide the legal services determined by the Attorney-General or his delegate to the *applicant* in this matter involves acceptance by the legal service provider that the Attorney-General or his delegate instructs the legal service provider as to the services to be provided and the terms and conditions applicable to those services.
78. In the exercise of these terms and conditions, the Attorney-General or his delegate will, in the grant of *assistance* or from time to time thereafter, specify the nature or ambit of the legal services the legal service provider is to provide to the *applicant* and/ or the terms on which those services are to be provided.

COMPLIANCE WITH GUIDELINES AND DEPARTMENTAL DIRECTIONS

79. The *Department* may issue a direction on any issue in relation to the authorisation of *assistance* provided that such a direction is not inconsistent with the *Act*, regulations made under the *Act* or these *Guidelines*.
80. An *applicant* and a *group representative* must comply with these *Guidelines* and any direction issued by the *Department*.

Legal practitioners prohibited from demanding payment from an applicant

81. Except with the prior written approval of the *Department*, a legal practitioner must not demand or receive payment other than a contribution determined in accordance with these *Guidelines*, from an *applicant* or from any person on behalf of an *applicant*, in respect of services for which *assistance* was authorised.

ACCOUNTABILITY REQUIREMENTS

Notice of changes

82. An *applicant* or *group representative* must notify the *Department*, within 14 days, of anything which could reasonably affect the grant of *assistance*. Examples of such things include a change in the *applicant's* financial circumstances; withdrawal or discontinuance by the *applicant* or any party; a significant reduction or increase in the services required; a change in the native title claim or a development in the law so that the *applicant's* interests are no longer significantly affected; or a change in the strategy for resolving the claim. A change in respect of any of other matters listed in paragraphs 19 and 22 could reasonably affect the grant of *assistance*.
83. An *applicant* who is not represented by a *group representative* must also notify the *Department* of any change in the *applicant's* financial circumstances which might be reasonably expected to affect the grant of *assistance*.

Reporting

84. By accepting *assistance*, the *applicant* agrees to disclose the terms of any settlement to the *Department*.
85. A report must be provided in the form requested by the *Department* at the conclusion of a stage, or upon settlement of the matter.
86. Reports at the conclusion of a stage must contain information as to:
 - 86.1. what has happened during that stage or since the last report;
 - 86.2. what is anticipated to happen in the next stage;
 - 86.3. what issues are still in contention, in a negotiation, and the reason why they are still in contention;
 - 86.4. how it is proposed to resolve those issues;
 - 86.5. whether agreement is likely in respect of those issues;
 - 86.6. what legal advice has been provided as to the prospects of reaching agreement on those issues.

Invoicing requirements

87. A solicitor is expected to invoice the *Department* at 3 monthly intervals, unless fees and disbursements exceed \$1000 or the matter or stage has concluded.
88. Before payment of a solicitor's invoice will be made, the solicitor must submit sufficient information for an assessment to be made as to the reasonableness of the fees.

DRAFT

89. Where a disbursement exceeds \$100, a copy of the tax invoice for the disbursement must be provided with the solicitor's invoice.
90. A solicitor may be requested to prepare a bill of costs or to have the bill of costs taxed.
91. The amount of the contribution to be made by the *applicant* (if any) will be deducted from the amount of an invoice prior to payment by the *Department*.

Provision of a legal practitioner's file

92. A legal practitioner must provide his or her file, in a matter for which *assistance* was authorised, to the *Department* if requested to do so.

Payment in advance to a group representative

93. Money paid in advance to a *group representative* must be deposited to an account with a financial institution maintained by the *group representative* solely for this purpose.
94. A *group representative* must account to the *Department* for any interest earned on money paid in advance.
95. Where payment is made by instalment, the payment of each instalment is subject to the *group representative* satisfying the reporting requirements in these *Guidelines*.
96. An extension can not be authorised unless any payment made in advance has been acquitted to the satisfaction of the *Department*.
97. Any money paid to a *group representative* which is not expended in payment of the costs for which *assistance* was authorised must be repaid to Commonwealth.

Repayment of assistance

Costs recovered must be paid to the Commonwealth

98. Where an *applicant* is paid costs (in respect of a matter for which *assistance* has been provided), the *applicant* must pay to the Commonwealth, within 60 days of receipt of payment of those costs, the lesser of the amount of costs received or *assistance* provided.
99. By acting for an *applicant* in a matter for which *assistance* has been authorised, a legal practitioner accepts that the Commonwealth is to be paid first from costs recovered from another party.

Settlement

100. Where a matter (in respect of which *assistance* has been provided) is settled by a payment to the *applicant*, the *applicant* must pay to the Commonwealth, within 60

DRAFT

days of receipt of payment of the settlement sum, the lesser of the amount received or *assistance* provided.

Misrepresentation

101. If *assistance* is terminated because of a misrepresentation, the amount which would not have been paid but for that misrepresentation must be repaid to the Commonwealth.

IRREVOCABLE LICENCE TO USE INTELLECTUAL PROPERTY

102. By accepting *assistance*, the *applicant* and the *applicant's* legal practitioner grant to the Commonwealth an irrevocable licence to use, adapt and exploit the intellectual property in any *ILUA* or agreement which was drafted or concluded pursuant to that *assistance*.

DRAFT

Special conditions

103. The *Department* may impose special conditions on *assistance* provided that the special conditions are not inconsistent with the *Act*, regulations made under the *Act* or these *Guidelines*.

PART X RIGHT OF REVIEW

INTERNAL REVIEW

104. Reasons must be provided to an *applicant* if an *application* for *assistance* is refused, varied, terminated or made subject to special conditions.

105. The *applicant* may seek an internal review of the following decisions:

- 105.1. a refusal to authorise *assistance*;
- 105.2. a decision to impose special conditions on *assistance*;
- 105.3. a decision to vary *assistance*;
- 105.4. a decision to terminate *assistance*;
- 105.5. a decision on payment under a grant.

106. A request for internal review must be received by the *Department* within 28 days after the date of the letter notifying the *applicant* of the reasons why *assistance* was refused, varied, terminated or made subject to special conditions.

107. The review must be conducted by an authorised officer other than the original decision maker.

INFORMATION REGARDING AVENUES FOR REDRESS

108. A letter from the *Department* advising an *applicant* of any decision in respect of an *application* must include information regarding the right to internal review under these *Guidelines*.

PART XI TRANSITIONAL ARRANGEMENTS

109. *Assistance* authorised before these *Guidelines* commenced is unaffected until completion of the stage or services for which *assistance* was authorised, with the exception of matters for which the authorised *assistance* exceeds the estimated costs in the next 6 to 12 month period. In such cases, the *applicant* must show that the *assistance* is still required and provide a schedule of the services to be provided.

110. If an *applicant's* interest is a scheduled interest, and therefore the *applicant's* interest could not have extinguished native title, *assistance* may only be authorised for the validation of future acts.

DRAFT

111. *Applications* which were received, but not determined, prior to the commencement of these *Guidelines* will be decided under the guidelines applicable at the date of their receipt.

PART XII FURTHER INFORMATION FOR APPLICANTS

Inquiries

112. Telephone inquiries should be directed to (02) 6250 6770. Written inquiries should be directed to:

Assistant Secretary
Legal Assistance Branch
Attorney-General's Department
National Circuit
BARTON ACT 2600.

* * * * *