



## CHANGES TO THE NATIVE TITLE RESPONDENT FUNDING SCHEME

By Alice Nagel and Samuel Stapleton

On 1 January 2013, changes to the Native Title Respondent Funding Scheme will come into force, with consequences for the level of funding available and the circumstances in which financial assistance will be granted. These changes are part of a broader move by the Attorney-General's Department to consolidate the administration of 26 Commonwealth financial assistance schemes, which took effect on 1 July 2012. In the consolidated framework, financial assistance will generally be limited to disbursements and only available for the cost of legal representation in exceptional circumstances.

The Native Title Respondent Funding Scheme is designed to assist parties whose interests may be affected by the recognition of native title to participate in native title proceedings. Financial assistance under section 213A of the *Native Title Act 1993* (Cth) is available to respondents involved in native title proceedings or disputes, parties to Indigenous land use agreement negotiations and grantee parties in future act matters. Native title claimants are not included in this scheme.

Under s 213A(4), the Attorney-General has discretion to grant financial

assistance if satisfied that an applicant is not eligible for assistance from any other source, that they fulfil the department's guidelines, and that the grant would be reasonable in the circumstances. As part of the 2011–12 budget process, the department announced that it would revise existing guidelines and develop a new interest test for respondents. The current funding guidelines will remain in place until 31 December 2012 and will be replaced by the new scheme on 1 January 2013.

The Attorney-General's Department has indicated that the new 'interest test' will introduce two tiers of eligibility. Generally, native title respondents will be eligible for disbursement funding only; however, legal representation costs will still be funded in exceptional circumstances. The Attorney-General's Department defines disbursements as the costs associated with legal action, such as the costs of obtaining court transcripts, but not the costs of legal representation fees.

Under the new revised interest test, applicants will have to satisfy the following requirements in order to qualify for disbursement funding:

- For native title inquiries, mediation or proceedings, the respondent must be joined as a party to the claim.
- In relation to the negotiation of Indigenous land use agreements (ILUAs), the applicant for funding must have identified a relevant party who is willing to negotiate an agreement. If they intend to seek assistance for dispute resolution, they must be joined as a party to an inquiry, mediation or proceeding.
- In the case of future acts, the grantee party must have identified a relevant party who is willing and able to negotiate an agreement.

Funding for legal representation will be restricted to exceptional circumstances, and in particular:

- Legal representation funding will no longer be available for future act grantee parties.
- For native title proceedings, mediations or inquiries, there must be a novel legal issue that is directly relevant to the respondent's interests or the court must require the respondent's participation beyond standard procedural processes.
- In relation to ILUA negotiations or disputes about access rights, the Attorney-General will consider a number of factors, including whether a template or a standard agreement exists, whether the native title party is willing and able to negotiate, whether there is a novel legal issue directly relevant to the respondent's interests, whether there is a need for the respondent to be involved in the specific stage of proceedings, and whether the court requires the respondent's participation in a substantial sense.

Under the new scheme, limits to financial assistance will be imposed. While there will be no overall cap placed upon disbursement grants, specific types of disbursements, such as photocopying costs, may be capped. Furthermore, financial assistance for legal representation will be capped at \$50,000. For disbursement funding, group respondents are not subject to

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Opposite page: Road to Jarlmadangah, Karajarri country, Kimberley WA.  
Credit: Jessica Weir.

This page: heritage survey, central Pilbara 2008. Credit: Cath McLeish

means testing, whereas individuals must undergo an assessment of their financial situation. Means testing may apply to both individuals and groups seeking legal representation assistance. Organisations will not be able to seek funding for native title officers or administrative costs.

The major drivers behind the funding reforms, as explained by the Attorney-General's Department, are budgetary cuts and the changing nature of native title proceedings. In 2011–12, financial assistance funding will be reduced by \$0.71 million through a stricter application of funding guidelines, and after 2012–13, when the consolidated scheme takes effect, by \$2.5 million. The Attorney-General's Department has stated that it considers it an opportune time to reassess the funding of native title respondents, given that many legal issues are now settled, the effect on existing rights is more certain and the resolution of claims has shifted away from adversarial litigation towards negotiation and mediation.

The new scheme will take account of findings by an independent review, conducted by Mr AC Neal SC in 2011. Mr Neal's report examined all aspects of the existing funding arrangements,

including the scheme's effectiveness and the circumstances in which funding should be granted to native title officers and legal representatives. It involved public consultation with 32 stakeholders across Australia and written submissions from 23 stakeholders. The government has stated its commitment to access to justice principles, greater support for pro bono work and an effective distribution of limited funds.

Several issues raised in Mr Neal's report are likely to attract continuing debate. The most contentious aspect of the government's proposal is the impact it could have on respondent organisations and whether current outcomes can be maintained in such a reduced funding environment. Submissions by respondent peak body organisations made the claim that if funding is reduced then the benefits that arise from respondent organisations linking with qualified native title lawyers will wane. Furthermore, if native title respondents began participating in claim proceedings without legal representation this would certainly lead to heightened stress being placed on the Federal Court and the National Native Title Tribunal's management processes.

However, Mr Neal considered that it was difficult to evaluate such negative implications when dealing with hypothetical situations and little empirical information. He noted that he was not persuaded by the argument that reducing Commonwealth funding will lead to the disappearance of native title lawyers acting on behalf of respondent organisations. He argued that there will always be incentives present for respondent organisations to allocate available funds to a representative agent to act in their interests when necessary.

In summary, the main change will be the introduction of a two-tiered system of native title respondent funding, with different eligibility requirements for disbursement funding and legal representation. Funding for legal representation costs will be limited to exceptional circumstances and will be part of a broader move by the Attorney-General's Department to consolidate legal assistance schemes. Overall, it is difficult to ascertain the implications of the new scheme, as it is yet to be implemented and the revised native title respondent funding guidelines are still to be finalised.