Chapter 4
Changes to respondent funding

The Australian Government controls the native title process in a number of ways including:

- it determines and administers the legislative framework; and
- it funds many elements of the native title system – (the administrative framework, the National Native Title Tribunal, the Federal Court, and its own and other's participation in native title proceedings).

One part of the funding is the 'respondent funding scheme' operated by the Attorney-General's Department. Under this scheme the Attorney-General can grant legal or financial assistance to certain non-claimant parties to enable them to participate in native title proceedings.[1]

Native title claimants are not eligible for assistance under the respondent funding scheme. The parties that are eligible are often referred to as 'respondents' or 'non-claimants'. These terms are used interchangeably throughout this report. The scheme set up under Section 183 is often referred to as the respondent funding scheme. This expression is used throughout this report. The scheme is also sometime known as the non-claimant assistance scheme.

The number of parties to any legal proceeding will necessarily increase the complexity, length, and expense of proceedings for all parties involved. As a result, it is very important that participants have a real and significant legal interest in the proceedings.

Yet this is not always the case in native title proceedings. Various parties have standing to participate, and they may be funded by the Australian Government to participate in the proceedings under Section 183 of the *Native Title Act 1993* (Cth) (the Native Title Act).

> It seems that the sui generis [unique] nature of native title (whose identity as a common law proprietary interest is questioned) broadens the base of those who would normally have standing to challenge a claim for land: for respondents do not need to show an interest in land. Thus people who would not have standing in a common law claim relating to protection of their real interest, have standing in native title jurisdiction.[2]

The Australian Government through the respondent funding scheme funds respondent parties in native title proceedings. This funding has a real and direct impact on how proceedings unfold; and ultimately the ability of Indigenous peoples to have their native title rights and interests recognised. Clearly, the implementation

and operation of Section 183 of the Native Title Act must be carefully administered and monitored to ensure it operates in the most appropriate and effective way. This includes who will be assisted to participate, and what they are assisted to do.

Native Title Act: Section 183

Section 183 of the Native Title Act gives power to the Attorney-General to grant legal or financial assistance, to various parties, in proceedings related to native title. The aim is to enable parties to participate. Excluded from the scheme are those who are involved in claiming native title in some way.

The Native Title Act gives some guidance on what the assistance may be for, and who may apply. However, because the details of administering the scheme are not in the Native Title Act itself, Section 183(4) provides that the Attorney-General may determine guidelines to be applied in authorising the provision of assistance under the scheme.[3]

In 2005, the Attorney-General announced that operation of the Section 183 respondent funding scheme would be changed to encourage agreement-making rather than litigation.

The Australian Government considered that one reason for amending the scheme to focus on agreement-making was:[4]

> … because the fundamentals of native title are settled, it is not necessary for non-claimant parties to litigate all stages of a legal matter where the law is not in dispute or their interests are already protected under the Native Title Act.

and that[5]

> the current funding is still too costly and time consuming.

The policy change was therefore consistent with the Australian Government's overarching policy of preferring to resolve native title matters by negotiation rather than litigation.

Changes to the scheme were brought about by two methods:

- amending Section 183 of the Native Title Act with the purpose of 'amend[ing] the scope of the respondent funding scheme';[6] and
- changing the Attorney-General's guidelines[7] for administering the scheme (which are made under Section 183(4) of the Native Title Act).

Claims by whom and for what

Respondent parties to native title proceedings have historically included a wide range of groups and individuals such as recreationists, pastoralists, miners, local governments and industry bodies, many of whom derive their interest in the land from government. The new guidelines continue to allow the Attorney-General to grant assistance to individuals, a body politic, an incorporated or unincorporated body[8] in order to support their participation.

The following table gives a broad idea of who received assistance over the period of the scheme.

Respondent scheme grants[9]	
Pastoralists	469
Local government	375
Fishermen	319
Others	286
Miners	91
Recreational users	8
Non-claimants	7
No details available	15

Provisions in Section 183

Following is a broad outline of the provisions in Section 183 (prior to the amendments).

Assistance in relation to inquiries, mediations, or proceedings may be applied for:

- by 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. (Section 183(1))

Assistance in relation to agreements, and disputes may be applied for by:

- a person who is (or intends to become a party) to an Indigenous land use agreement (ILUA) or an agreement about certain rights, or who is in dispute about those rights (Section 183(2));
- a person who is (or intends to become a party) to develop or review a 'standard form agreement' to facilitate negotiation over a future act relating to mining rights. (Section 183(2A)). This was inserted in the Native Title Act by the amendments.

Attorney-General power to grant assistance

The Attorney-General may only grant assistance when satisfied that:

- the applicant is not eligible to receive assistance in relation to the matter concerned from any other source (including from a representative Aboriginal and Torres Strait Islander body); and
- the provision of assistance to the applicant in relation to the matter concerned is in accordance with the guidelines (if any) determined under subsection(4); and
- in all the circumstances, it is reasonable that the application be granted. (Section 183(3)).

Attorney-General may determine guidelines

The Attorney-General may, in writing, determine guidelines that are to be applied in authorising the provision of assistance under Section 183. (Section 183(4)).

Restriction on assistance

Assistance may not be granted to native title claimants, or to a minister of the Crown. (Section 183(5)).

Amendments to Section 183

Section 183 was amended in 2007 to include a new category of party[10] who may apply for assistance from the Attorney-General. These are certain parties who are involved in specific negotiations between a government (Commonwealth, state or territory) and a native title claimant or prescribed body corporate over a future act that concerns a right to mine. Assistance may now be granted for the development or improvement of a 'standard form agreement' to facilitate smoother negotiation.[11]

This amendment increases the scope for the Australian Government to assist respondent parties (but not for litigation).

New guidelines for providing assistance, made under Section 183(4) of the Native Title Act, do not provide any direction on how this new provision is to be administered. The only limitation to providing assistance is Section 183(3) which requires that the party is not eligible to receive assistance from another source, and that providing assistance is, in all the circumstances, 'reasonable'. Without guidance, this could be interpreted very broadly and could be a cause for concern if, for instance, a large corporation's financial resources are not taken into account.

Attorney-General's guidelines

The *Guidelines on the Provision of Financial Assistance by the Attorney-General* (the new guidelines) regulate the circumstances under which the Attorney-General will grant assistance to respondent parties.[12] They are issued under Section 183(4) of the Native Title Act. The old guidelines, called the *Provision of Financial Assistance by the Attorney-General in Native Title Cases* (the old guidelines) started in 1998.[13] The current new guidelines took effect on 1 January 2007.

It is important to remember that the Attorney-General is required to grant assistance, only when it is 'reasonable' to do so (see above in *Provisions in Section 183)*. How 'reasonable' is assessed is outlined in the new guidelines.

The old guidelines

The old guidelines provided for how 'reasonableness' was determined in granting assistance. However, they did not effectively limit the range of parties that could receive assistance. Consequently there were reports of native title proceedings being unnecessarily and substantially protracted and complicated by the participation of parties who had no real or substantive interest in the proceedings, or whose interest was already being represented by a government party.[14]

The old guidelines included a list of considerations that was not exhaustive, and there was no guidance on whether any consideration should be given more weight than another. The list included a large range of broadly-phrased and ill-defined considerations such as 'the benefits which the parties will gain' and 'the benefit the

general public will gain'. Consequently, interpretation of who it was 'reasonable' to fund could vary greatly.

Under the old guidelines, a wide variety of parties were being assisted to participate in native title proceedings – even those without a legal interest in the land being considered. The North Queensland Land Council gave an example where a person who walked their dog on the beach acted as a respondent party to a native title proceeding. Similarly, they referred to an Australian Court that stated that, even if fisherman were illegally fishing in the affected area, the fact that they had been doing so for a number of years would be sufficient to enable them to participate as respondent parties.[15]

The Australian National Audit Office found when it audited the respondent funding scheme in the 2006-2007 year[16] (under the old guidelines), there was a concerning lack of data about how the scheme is being administered and a resulting lack of analysis on its effectiveness and necessity.

The new guidelines

The new guidelines are an improvement on the old. They provide increased clarity on what considerations must be made by the Attorney-General when granting assistance, and provide stricter requirements for how that assistance will be given and on what conditions. The reporting requirements are more rigorous for parties receiving assistance.

The new guidelines also attempt to address some issues associated with the complex and resource-intense legal framework under which native title claims are determined. They do this by going some way towards limiting the involvement of respondent parties.

Two important issues stand out. These are:

- eligibility for assistance
- funding of litigation.

Eligibility for assistance

The number of parties involved in any native title proceedings adds to the complexity and time taken. Consequently there is an increase in the resources required by all parties in what is already a very lengthy and resource-intensive process. It is very important that the parties who are funded to participate have a legitimate interest in the land affected by native title. If parties are funded who have less substantial (and at times quite questionable) interests in the land, then the proceedings will suffer. The outcome may also be negatively effected.

■ **Eligibility** The new guidelines restrict who will be eligible to receive assistance. They do so by defining the factors the Attorney-General will take into account when considering whether 'in all the circumstances, it is reasonable that the application be granted'.[17]

There is a list of how 'reasonableness' will be determined[18] before assistance will be granted. Division 5.2 of the new guidelines provide that the Attorney-General must consider:[19]

(a) if the applicant is not represented by a group representative – whether the applicant has sufficient financial resources;[20]

(b) the nature of the applicant's interest in the inquiry, mediation or proceeding and the nature of the native title rights being claimed;

(c) if the applicant's interest does not extinguish native title as a matter of law[21] – whether the applicant's interest is likely to be adversely affected in a real and significant way if the native title claim were to be recognised;

(d) whether the applicant's interest is protected or capable of being protected under the regime for future acts in the Act;

(e) the number of claims that directly affect the applicant;

(f) the likely benefit to the applicant of participating in the inquiry, mediation or proceeding relative to the likely cost of assistance;

(g) whether a group representative is acting as an agent of a party in the inquiry, mediation or proceeding;

(h) whether the applicant's interest is appropriately protected having regard to the identity and interests of other parties to the inquiry, mediation or proceeding;

(i) if assistance is sought for legal services to participate in a trial or preliminary or interlocutory proceeding, whether:

(i) the applicant's case has reasonable prospects of success; or

(ii) the applicant's participation will enhance the prospect of a mediated outcome.

■ **Safeguards** The new guidelines provide greater safeguards to the native title process. In particular:

- there are requirements to consider the applicant's interest and whether it is affected in a real and significant way;
- there must be consideration of whether the interest is protected elsewhere (either through the law or by another party); and
- the broadly worded consideration of 'the benefit to the general public' has been removed.

These changes will go some way to ensure native title proceedings are not prolonged by the unnecessary inclusion of parties who are not substantively affected by the proceedings, or who already have their interests represented.

Nevertheless, the question still remains whether the guidelines go far enough to ensure support is only available to those with recognisable interests in the land and water.

A number of broadly-worded competing considerations may still be taken into account by the Attorney-General in determining the 'reasonableness' of assistance. It remains distinctly possible that some parties will continue to gain support for participating in native title proceedings where their interest is not clearly recognised by law. This arguably exploits the native title process, and can substantially add to the delays and resources involved in proceedings.

In the Attorney-General's consideration of whether the applicant has sufficient financial resources, it is not clear why only individual applicants are mentioned, and not representative bodies (such as peak organisations).

The North Queensland Land Council has expressed concern that the new guidelines don't go far enough to limit unnecessary participation of respondent parties. They have submitted that:

> in order to be a respondent party, the party should have a real and proprietary interest that is to be affected by a determination of native title, that is to say they should be a landholder, a leaseholder or a statutory organisation that may have a real interest that is potentially affected by a native title determination.[22]

The guidelines should go further to ensure taxpayers do not fund unnecessary participation by respondent parties.

Funding of litigation

The Australian Government said clearly that the main reason for amending the guidelines was to 'focus on resolution of native title issues through agreement making, in preference to litigation'. The new guidelines therefore introduce additional limitations on the circumstances in which funding will be provided for a party to participate in litigation.

The old guidelines provided that financial assistance would be provided for litigation, once the prospect of success was considered. If the party was responding to a native title claim, then this generally included a consideration of whether the party had a good case to argue or whether they would be likely to be able to protect their interests through mediation. If the party was actually applying for a respondent determination, this included a consideration of whether it was necessary to have a native title determination made. Additional considerations included the importance of the case and the question of law to be resolved by the case.[23]

The new guidelines now clearly start from the premise that assistance to participate in litigation will *not* be considered reasonable (and therefore not provided). Exceptions are where the party applying for assistance can show that either:[24]

- the proceedings raise a new and significant question of law directly relevant to the respondent's interest;
- the court requires the respondent's participation; or
- the proceedings will affect the respondent's interests in a real and significant way and mediation has failed for reasons beyond the applicant's control.

It is a positive move that the new guidelines reduce the scope for funding of parties to participate in native title litigation quite significantly, ensuring that the party must effectively prove that their participation is absolutely necessary.

The Section 183 assistance scheme now

It is necessary to consider how the respondent funding scheme (outlined in Section 183 of the Native Title Act) has in fact impacted on proceedings. Has it introduced inefficiencies or inequitably prevented Indigenous peoples from gaining recognition of their native title? Or has the scheme operated fairly to enable parties who have a real interest in the land, and who would not have otherwise been able to participate, to have their rights and interests represented?

Like any government policy, it is essential for the Australian Government to collect the information necessary to evaluate and monitor the necessity and effectiveness of the programme.

Beside anecdotal evidence (such as that given by the North Queensland Land Council[25]), the effect of the scheme is difficult, if not impossible, to ascertain.

The Australian National Audit Office (ANAO) found when it audited the funding scheme in the 2006-2007 (before the new guidelines):

- The parties that received assistance were effectively only required to report on expenditure once they received funding.[26]
- The parties that received funding were quite often not required to report on deliverables, and usually not in a regular and timely manner. This prevented the Attorney-General from being able to monitor whether any progress was being made in the proceeding or whether individual objectives were being met.[27]
- The Attorney-General's Department only considered the outputs of the scheme through the narrow quantifiable lens of the number of grants in progress, the number of grants finalised and the number of new applications.[28]
- The Attorney-General's Department was not comprehensively monitoring the progress of cases to consider whether assistance was still required.[29]
- The Attorney-General's Department was not comprehensively monitoring the type of proceeding or what stage the proceeding was at. This means that there is no benchmark information from which to analyse whether the new guidelines and legislative amendment will have any impact. Further, with no data it was difficult for the Attorney-General to look at the history of proceedings and the impact of different parties on the proceeding.[30]

The ANAO observed:[31]

> [Attorney-General's Department] is unable to evaluate either the effectiveness of the Respondents Scheme at either the individual grant level or the contribution the programme is making to the larger Native Title System outcome.

Some of these concerns have been addressed in the new guidelines – particularly those around regular and more thorough reporting. Some are being addressed through internal changes in the Attorney-General's Department itself.

However, the observations of the ANAO and the lack of data about the scheme are particularly relevant for a number of reasons.

- It is difficult for the government to assess the impact of participation, and whether parties should continue to be assisted.
- With no reflection on the behaviour of respondent parties, the contribution or impact they have, or the nature of the interest they hold, then it is very difficult to determine whether the policy is an efficient use of taxpayer's money. I must wonder if in fact the behaviour undermines Indigenous peoples native title rights and interests – and frustrates the intent of the law.
- Even before amendments were made to the system, the government did not know how much of the scheme was assisting mediation as opposed to litigation. Thus, I can't know whether these amendments have any real impact:[32]

  > The ANAO reviewed [the Attorney-General's Department's] existing and proposed measures and found that they did not allow for an assessment of the extent to which the [scheme] is meeting the Government's objective to promote agreement making rather than litigation.

The ANAO recommended that:

- the Attorney-General have more appropriate and relevant performance measures in order to evaluate the scheme; and
- performance indicators for the programme at least include reporting on the division of funds given to assist litigation and to mediation.

With these quite significant oversights in the monitoring and assessment of the scheme, the changes to the guidelines and administrative practices should go further.

Currently the perspective of Indigenous people is omitted altogether from the funding framework of native title, including this scheme. The Attorney-General's decision to grant assistance, in no way considers whether the scheme furthers the intent of the law as set out in the preamble to the Native Title Act. In the preamble it is stated that the Australian Parliament took into consideration, when passing the Native Title Act, that the people of Australia intend to rectify the consequences of past injustices by the special measures contained in the Native Title Act for securing 'adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders'. Further 'the people of Australia intend to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which their prior rights and interests … entitle them to aspire'.[33]

Yet, as one commentator has pointed out:[34]

> Nowhere in the guidelines is there any mention of recognition or protection of native title. There is no indication of any burden of proof on the applicant to establish an interest in the land claimed.

The Australian Government's decision to strengthen the native title respondent funding scheme to 'focus on resolution of native title issues through agreement making, in preference to litigation' has resulted in some positive changes to the guidelines.

Overall, the amendments to the new guidelines should prove to be beneficial to the operation of the native title system, somewhat refining the circumstances under which a respondent party can receive financial support for their involvement in native title proceedings.

However, the guidelines should be amended further to specifically deal with the primary concern – that some parties with unrecognised and insignificant interests can be funded to participate in native title proceedings. This can prolong the time it takes for Indigenous peoples to have their rights to land recognised, and make it more difficult and expensive for everyone involved. It may prevent Indigenous peoples from gaining recognition of their native title altogether.

Instead of tweaking around the question of who it is 'reasonable' to assist, there needs to be an assessment of the impact of respondent parties on the proceedings. Continuing to avoid effectively evaluating the scheme, guarantees that it can continue to contribute to the existing insurmountable procedural hurdles that Indigenous people face in having their native title rights and interests recognised.

Recommendations

4.1 That the Australian Government amend the Native Title Act and the Attorney-General's Guidelines (for provision of financial assistance pursuant to Section 183(4) of the Act), to ensure that funding is provided to assist only a party with a legal interest in proceedings where:

- the party's legal rights are not protected under the Native Title Act, or common law; and
- the party is not represented in the proceedings by a government party that is also party to the proceedings.

4.2 That the Attorney-General (as part of the department's annual reporting) monitor, assess, and report on the respondent funding scheme to determine the extent to which it meets the objects of the Native Title Act and how (if at all) it furthers the intent of the law as set out in the preamble. The reporting should consider:

- whether litigation or mediation is being supported by the scheme;
- the impact of the respondent party's participation in the proceeding itself and on the other parties involved;
- the types of interests the assisted party has in the proceeding;
- all parties' views of the contribution of the non-claimant party's participation; and
- an evaluation of the additional costs to all parties from having the non-claimant party participate.

1 *Native Title Act 1993* (Cth), s183.
2 Galloway, K., *Is Native Title Law Destroying Native Title?* Paper delivered as part of the Native Title Seminar Series for the Native Title Studies Centre, James Cook University, 26 April 2006.
3 Section 183(4) of the *Native Title Act 1993* (Cth) states that the Attorney-General may, in writing, determine guidelines that are to be applied in authorising the provision of assistance under this section.
4 Australian Government Attorney-General's Department, *Assistance to respondents in native title claims,* 6 August 2007, available online at: www.ag.gov.au, accessed 27 September 2007.
5 Ruddock, P., (Attorney-General) and Vanstone, A., (Minister for Immigration, Multicultural and Indigenous Affairs), *Delivering Better outcomes in native title – update on Government's plan for practical reform*, Press Release, 23 November 2005.
6 Australian Government Attorney-General's Department, *Native title reform*, 16 August 2007, available online at: www.ag.gov.au, accessed 27 September 2007.
7 *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993.*
8 See the definition of 'person' in Part 3 of the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*.
9 Australian National Audit Office, *Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007*, available online at: www.anao.gov.au, accessed September 2007, p69.
10 *Native Title Act 1993* (Cth), s183(2A).
11 That is, *Native Title Act 1993* (Cth), s83(2A) states that assistance can be granted if it will facilitate negotiation in good faith under s31(1)(b) of the *Native Title Act 1993* (Cth) or make it more likely that the Government will consider it an act attracting the expedited procedure for future act approval under s32(2) of the *Native Title Act 1993* (Cth).
12 *Native Title Act 1993* (Cth), s183.
13 The 1998 Attorney-General guidelines were called *Provision of Financial Assistance by the Attorney-General in Native Title Cases*.
14 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007. See also Calma, T., *Submission to the Native Title Respondent Funding Consultation*, January 2006.
15 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007.
16 Australian National Audit Office, Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007, available online at: www.anao.gov.au, accessed September 2007, pp19-21.
17 As required by *Native Title Act 1993* (Cth), s183(3).
18 The *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* provide for what will be considered 'reasonable' separately for assistance granted under the *Native Title Act 1993* (Cth), s183(1) or s183(2), through Division 5.2 and Division 5.3 of the Guidelines respectively. In order to keep this analysis simple, only Division 5.2 of the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* will be examined.
19 Separate but similar tests for reasonableness of providing assistance to a potential grantee party in relation to a future act are given in the Guidelines. See Division 5.3 of the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*.
20 The 1998 *Provision of Financial Assistance by the Attorney-General in Native Title Cases* guidelines did provide for a consideration of the applicant's financial circumstances 'where appropriate' when determining whether assistance will be granted. See Division 6.5 of the 1998 *Provision of Financial Assistance by the Attorney-General in Native Title Cases* guidelines.
21 Under Division 18 of the new *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* assistance will not be given to parties whose interest extinguished native title according to law.
22 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007.
23 *Provision of Financial Assistance by the Attorney-General in Native Title Cases*, Divisions 6.13 and 6.14. The prospect of success of the litigation formed part of whether the assistance would be considered 'reasonable'.
24 *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*, Division 19.
25 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007.
26 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No 1 2006-2007, p52, available online at: www.anao.gov.au, accessed September 2007.
27 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No 1 2006-2007, p126, available online at: www.anao.gov.au, accessed September 2007.
28 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No 1 2006-2007, p56, available online at: www.anao.gov.au, accessed September 2007.

29 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No.1 2006-2007, p126, available online at: www.anao.gov.au, accessed September 2007.
30 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No.1 2006-2007, p92, available online at: www.anao.gov.au, accessed September 2007.
31 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No.1 2006-2007, p133, available online at: www.anao.gov.au, accessed September 2007.
32 Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No.1 2006-2007, p64, available online at: www.anao.gov.au, accessed September 2007.
33 Preamble to the *Native Title Act 1993* (Cth).
34 Galloway, K., *Is Native Title Law Destroying Native Title?* Paper delivered as part of the Native Title Seminar Series for the Native Title Studies Centre, James Cook University, 26 April 2006.