

## **Policy: Facilitation and Assistance**

### **1 Introduction**

- 1.1 The Cape York Land Council (CYLC) performs the function of a Native Title Representative Body (NTRB) for the Cape York Region. The CYLC's legislative functions and powers are set out in section 203B to 203BK of the Native Title Act 1993 (Cth) (NTA).
- 1.2 The facilitation and assistance functions of the CYLC are set out in section 203BB of the NTA.
- 1.3 The facilitation and assistance functions of the CYLC as the NTRB are:
- (a) to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and
  - (b) to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:
    - (i) native title applications;
    - (ii) future acts;
    - (iii) Indigenous land use agreements or other agreements in relation to native title;
    - (iv) rights of access conferred under this Act or otherwise;
    - (v) any other matters relating to native title or to the operation of the NTA.
- 1.4 Under section 203BB(2) of the NTA, CYLC must not perform its facilitation and assistance functions unless it is asked to do so by the relevant native title group or native title holder.
- 1.5 CYLC may continue to perform its dispute resolution functions under section 203BF without being asked.

### **2 Policy Purpose**

- 2.1 The purpose of this Policy is to guide CYLC when making decisions to provide assistance to a group, individual or external body ('Assistance Applicant') in relation to a native title matter, including decisions in relation to:
- (a) whether or not to provide assistance to a native title group in relation to a matter;
  - (b) the type and extent of assistance to be provided to a native title group in relation to a matter; and
  - (c) what terms and conditions should apply to the grant of assistance.
- 2.1 This Policy does not derogate from the NTA. If this Policy is inconsistent with the NTA, the NTA prevails.



### **3 Resource Issues**

- 3.1 The CYLC receives funding from the National Indigenous Australians Agency (NIAA) under section 203FE(1) of the NTA to enable it to perform its functions. CYLC is bound by the terms of the funding agreement with NIAA and the provisions of the NTA.
- 3.2 The funding provided by NIAA to CYLC is not sufficient to allow CYLC to assist all native title groups to undertake the full range of activities for which groups may seek assistance.
- 3.3 CYLC must allocate the funds it receives from NIAA to facilitate native title matters in the Cape York region in a manner which:
- (a) advances the interests of native title groups in accordance with CYLC's Operational Plan;
  - (b) enables CYLC to manage the provision of assistance to native title groups effectively;
  - (c) accords with the principles of procedural fairness;
  - (d) complies with NIAA's funding terms and conditions;
  - (e) complies with the NTA; and
  - (f) takes into account CYLC's object of facilitating the return of traditional Aboriginal land to Aboriginal people from Cape York Peninsula and to obtain secure title to that land in a way that is respectful, inclusive of and culturally sensitive to the Aboriginal peoples of Cape York Peninsula.
- 3.4 CYLC is committed to ensuring that its structures and processes operate in a fair manner and will endeavour to ensure that decisions in relation to financial assistance are made in an independent and unbiased way, including by:
- (a) delegating responsibility for assessment and review of assistance to officers of CYLC or consultants who have no conflict of interest in relation to the relevant assistance; and
  - (b) where necessary, requiring that members of the Board who have an interest in the land or waters the subject of the application for assistance or review declare their interest and absent themselves from any meeting where the application or review is discussed.

### **4 Resolution of Disputes**

- 4.1 As the native title body recognised to perform the functions of an NTRB for the Cape York region, CYLC represents all Aboriginal people in the region and must impartially seek just outcomes to fulfil that role.
- 4.2 It is a general policy of CYLC that assistance for native title matters may not be made available in cases where there is an outstanding dispute between native title groups or native title holders.
- 4.3 Where there are outstanding disputes CYLC will offer to mediate the dispute prior to considering an offer of assistance. Assistance may be provided for the purpose of mediation and investigations to resolve disputes.
- 4.4 Participation in mediation may be a condition of the provision of assistance to resolve the dispute about native title matters.



## **APPLICATION PROCESS**

### **5 Application Process**

- 5.1 An Assistance Applicant may apply for assistance for one or more of the matters set out in clause 1.3 of this Policy.
- 5.2 The application must be in the form provided by CYLC.

### **6 Responsibilities of Assistance Applicants**

- 6.1 An Assistance Applicant has the following responsibilities:
- (a) to give honest and accurate information, that is not misleading, in an application and to a decision maker when required;
  - (b) to tell the decision maker if the circumstances of the Assistance Applicant change before the decision maker makes a decision on the Application, if the change may affect the application.
- 6.2 The decision maker may refuse to consider an application if:
- (a) The application contains dishonest, inaccurate or misleading information; or
  - (b) Where the Assistance Applicant's circumstances change in a way that may affect the application and the Assistance Applicant does not tell the decision maker.

### **7 Request for Further Information**

- 7.1 A decision maker may, by notice in writing, request that an Assistance Applicant provide any information, within the period specified in this notice, that the decision maker reasonably requires to enable the decision maker to decide the application.
- 7.2 If the information is not provided to the decision maker within the specified period, the decision maker may refuse the application without further consideration.

### **8 Consent to Use of Information**

- 8.1 By making an application, the Assistance Applicant consents to a decision maker disclosing information in the application to, or obtaining information from, any of person or organisation as reasonably required in order for the decision maker to make an informed decision for the purpose of performing functions relating to the provision of assistance in relation to the application.

### **9 The Decision Maker**

- 9.1 For the purpose of this Policy the decision maker ('Primary Assessor') shall be either:
- (a) the CEO; or
  - (b) such other person appointed by the CEO to be the Primary Assessor, being an employee of the CYLC or an external consultant or service provider.



- 9.2 The Primary Assessor may seek advice from the Manager of the Anthropology Unit or the Manager of the Native Title Unit.
- 9.3 Where the Primary Assessor is not the CEO, the Primary Assessor may have access to the material the CEO would have had access to if the CEO was the Primary Assessor, subject to:
- (a) appropriate confidentiality provisions; and
  - (b) the cost of ascertaining and copying the material not being prohibitive.

## **10 Making a Decision on an Application**

- 10.1 The Primary Assessor must decide whether or not to authorise the provision of assistance and what form that assistance will take.
- 10.2 The Primary Assessor must not authorise the provision of assistance unless the application is:
- (a) in writing in the form provided by CYLC; and
  - (b) addresses each question in the application form.
- 10.3 In deciding whether to authorise the provision of assistance, the Primary Assessor must have regard to the following in assessing applications for assistance:
- (a) whether it would be reasonable in all the circumstances;
  - (b) whether it would be consistent with priorities determined by CYLC under section 203B(4)(a) NTA to provide the assistance sought;
  - (c) whether CYLC will be carrying out its dispute resolution functions under section 203BF in relation to any dispute between the group applying for assistance and other group;
  - (d) If the assistance sought is in relation to an application for a native title claim:
    - (i) whether the provision of that assistance would promote an orderly, efficient and cost-effective process for making such applications;
    - (ii) in a case where one or more other applications have been made or are proposed to be made in relation to all or part of the land or waters covered by the application – whether the provision of the assistance sought would be reasonable given the need to minimise the number of claims;
  - (e) whether the Assistance Applicant’s interests are capable of being protected by other parties to the proceedings;
  - (f) whether the Assistance Applicant’s participation will enhance the prospects of a mediated outcome;
  - (g) the legal considerations, including but not limited to:
    - (i) the prospects of success of the legal action;
    - (ii) whether the parties have taken genuine steps to resolve the dispute before initiating proceedings; and



- (iii) whether the Assistance Applicant has been found by a court to be a vexatious litigant.
  - (h) disputes within the relevant native title group;
  - (i) whether it is likely that the Assistance Applicant will receive external assistance, for example from proponents of development;
  - (j) the extent of existing anthropological and other research held by CYLC and the anticipated costs of any further research;
  - (k) the extent to which the Application for assistance is consistent with existing anthropological and other research held by CYLC;
  - (l) the extent to which the application conforms with CYLC's current operational plan or whether it would require funds to be diverted from another group or project if the application were granted;
  - (m) the extent to which the assistance complies with court orders or court workplans.
  - (n) the extent to which the assistance request:
    - (i) can be supplied 'in-house' by employees of CYLC; or
    - (ii) can be supplied by way of 'in-kind' assistance (for example by providing a copy and mail out);
  - (o) the extent to which a grant of assistance would require the expenditure on external consultants or service providers;
  - (p) where external consultants or service providers are likely to be required, the likely timing of the availability of such consultants or service providers;
  - (q) the extent to which the group seeking assistance has previously received assistance from CYLC;
  - (r) the current and likely workload on CYLC staff should the application be approved;
  - (s) whether the group has not adhered to CYLC policies or accepted reasonable legal or anthropological advice in relation to a claim or other matter;
  - (t) the views of any other registered native title body corporate, native title holders or persons who may hold native title who are affected by the matter.
  - (u) whether a court requires the Assistance Applicant's participation; and
  - (v) any other matter relevant to the making of the decision.
- 10.4 The Primary Assessor may decide the weight that should be given to each matter relevant to the circumstances of the case.
- 10.5 In deciding whether to authorise the provision of assistance, the Primary Assessor may:
- (a) have regard to opinion from counsel or a solicitor; or



- (b) seek information on matters pertaining to the application from people or bodies outside the native title group if it considers that those persons or bodies may have information relevant to the consideration of the application.

## **11 Priority of Assistance**

11.1 In addition to the matters outlined in clause 10 Above, the Primary Assessor will give a higher priority to an application which satisfies a greater number of the

- (a) the areas are subject to development pressures;
- (b) the Assistance Applicant does not have secure land tenure to the land the subject of the application;
- (c) the claim raises test case issues (a test case that is a case that will decide and clarify issues that might affect other native title groups);
- (d) the Assistance Applicant includes people whose availability as witnesses is at risk as a result of their age or state of health;
- (e) there are legislative changes pending which may adversely affect the claim;
- (f) a substantial number of people will benefit from the successful outcome of the claim or negotiations;
- (g) the Assistance Applicant has negotiated in good faith with other people who assert native title interests in the area sought to be claimed by the Assistance Applicant;
- (h) disputes among the relevant group have been satisfactorily resolved;
- (i) the claim area does not overlap with any existing claim and the Assistance Applicant is already part of a larger claimant group for which assistance has been granted by the CYLC;
- (j) if assistance is not provided, there is little potential impact on native title rights and interests;
- (k) the likely outcome will promote or improve the relationship between Aboriginal groups and other interested parties;
- (l) the relevant area is subject to (or to be subject to) non-claimant application(s); and
- (m) there are other matters which the CYLC considers gives grounds for assigning priority to the application.

11.2 Where the request for assistance relates to a compensation application, a higher priority will be given to an application which satisfies a greater number of the following criteria:

- (a) the issue where valuation of native title rights and interests have been clarified;
- (b) there has already been a determination of native title for any or all of the area concerned;  
or
- (c) there is any other matter which the CYLC considers give grounds for assigning priority to the application.



## **12 Retrospective Costs**

- 12.1 The Primary Assessor must not authorise the provision of assistance for costs incurred before the date on which the decision maker receives an application, except in exceptional circumstances.

## **13 Notice of a Decision**

- 13.1 The Primary Assessor must give the Assistance Applicant written notice of the decision maker's decision within 28 days from the date on which the application was received.
- 13.2 The notice must include information about how the Assistance Applicant may seek a review of the decision.
- 13.3 If the decision is to provide assistance, the notice must include CYLC's terms and conditions.

## **14 Review of Decisions**

- 14.1 If the Primary Assessor decides not to provide assistance to the Assistance Applicant, then if requested, written reasons for the decision will be provided within 14 business days of the request for reasons.
- 14.2 An Assistance Applicant may in writing to the CEO seek an internal review of the decision not to provide assistance, subject to clause 14.3.
- 14.3 The request to review a decision must be:
- (a) made within 28 days of notification of the decision not to provide assistance; and
  - (b) include particulars of the grounds of review.
- 14.4 The review will be conducted by:
- (a) the CYLC board of directors; or
  - (b) if considered necessary, appropriate or convenient by the Chief Executive Officer, an independent lawyer.
- ('Reviewing Assessor')
- 14.5 The review will be conducted within 28 business days of receipt of the request for review.
- 14.6 In conducting the review, the Reviewing Assessor:
- (a) must make the decision in accordance with clauses 10 – 12 of this Policy as if the Reviewing Assessor was the Primary Assessor;
  - (b) may provide an opportunity for the Primary Assessor and representatives of the Assistance Applicant to be heard;
  - (c) may consider all documents considered when the original decision was made and any other relevant documents or information, provided that any other documents or information that are relied upon are, subject to 14.6(c), provided to the Assistance Applicant with an opportunity to comment;
  - (d) is not obliged to divulge information which:



- (i) under traditional law and custom ought not to be provided to the Assistance Applicant;
  - (ii) was supplied in confidence; or
  - (iii) would be deemed defamatory
- (e) may obtain independent legal or other professional advice.
- 14.7 Any decision re-made pursuant to clause 14.6 will be final.
- 14.8 The Assistance Applicant will be informed in writing of the following within 7 business days of the date of the review decision:
- (a) the review decision;
  - (b) reasons for the review decision;
  - (c) that rights to internal review are exhausted; and
  - (d) that the Assistance Applicant has the right to seek review of the decision under section 203FBB of the NTA.
- 14.9 The internal review process that must be followed is published on CYLC’s website in accordance with section 203BI of the NTA.
- 15 Right of CYLC to Review all Assistance Grants**
- 15.1 In order to ensure that CYLC is always utilising its resources efficiently, CYLC reserves the right to conduct a review of any or all grants of assistance at any time.
- 15.2 In conducting the review referred to in clause 15.1, CYLC will give written notice of its intention to conduct a review to the party receiving assistance (‘Assisted Party’) and shall invite the Assisted Party to make submissions in relation to the review.
- 15.3 Submissions in relation to a review must be provided to CYLC within 30 business days of receipt of the notice referred to in clause 15.2.
- 15.4 At the conclusion of the review, CYLC may decide that:
- (a) assistance to the group should be maintained at its existing level; or
  - (b) assistance should be varied or ceased.
- 15.5 Any review conducted by CYLC under this Policy should be carried out in the same manner in which new applications for assistance are assessed and determined under this Policy.

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