

ASSESSMENT OF COSTS IN NATIVE TITLE MATTERS

JANUARY 2007

1.1 Introduction

In authorising payment of costs claimed in invoices, the Attorney-General (or his delegate) must be satisfied that

- the costs claimed are in accordance with the *Guidelines for the Provision of Financial Assistance by the Attorney-General in Native Title Cases* (the *Guidelines*) determined by the Attorney-General pursuant to subsection 183(4) of the Native Title Act
- the costs claimed are within the terms of the grant, and
- the costs claimed are reasonable in the circumstances of the particular case.

This document does not state exhaustively all the terms and conditions of grants of financial assistance prescribed pursuant to the *Guidelines*, but is meant as a guide for practitioners when preparing invoices.

It is important that invoices and accounts submitted for payment by solicitors or peak bodies contain sufficient information to enable a determination of the reasonableness of the costs to be made by the Attorney-General or his delegate. The delegate may request further information. If the information is not provided within the timeframe requested, the delegate may proceed to make a determination on the basis of the available information.

This document clarifies a range of procedures, terms and conditions that are provided for under the *Guidelines* and the *Federal Court Scale* and contains a number of additional points relevant to invoices assessed after the commencement of the new *Guidelines* on 1 January 2007.

Native title Practitioners' Panel

Solicitors and counsel engaged under a grant of assistance must be members (or have applied to be a member) of the Department's Native Title Practitioners Panel.

Solicitors and counsel who are not members of the Native Title Practitioners Panel may work on native title matters provided their work is supervised, and signed off, by a solicitor who is a member (or has applied to be a member) of the Panel

1.2 Attorney-General may specify the nature and ambit of legal services

Approval to provide the legal services determined by the Attorney-General or his delegate to the applicant in a 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 application 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.

1.3 A-Z of SOLICITOR COSTS (non-Scale) and GROUP REPRESENTATIVE COSTS

1.3.1 Administrative and paralegal work

Administrative work is allowed at the rates specified in the *Guidelines* at section 59.

General administrative work will not be allowed without prior written approval from the Department. General administrative work includes but is not limited to file maintenance/management, attendances to organise meetings or travel, set up or maintenance of databases.

It is open to the delegate to form the view, in the circumstances of a particular case, that particular work can reasonably be undertaken by an administrative officer or a paralegal at the rates provided for such work under the *Guidelines*.

1.3.2 Agent's fees

Agent's fees and disbursements are only allowed if the Department provided prior written approval. Where the applicant's solicitors engage an agent, the agent's costs will be assessed in the same way as the grantee's solicitor's costs.

Agency costs must not duplicate costs of the solicitor with primary carriage of the matter. Refer to paragraph 1.4.10 "*One solicitor to work on a matter*".

1.3.3 Apportioning cost

Solicitors must provide accurate information regarding items that are apportioned across more than one matter. Solicitors must apportion costs equally across matters or provide specific statements as to why costs are not apportioned equally.

1.3.4 Daily cap and combined daily cap

Professional fees for solicitors and counsel are payable at the specified rates up to 8 hours per day. For solicitors, the allowable "daily cap" is equivalent to eight hours at the rate specified under Item 31.

The daily cap of 8 hours for professional fees applies where solicitors or counsel apportion costs across several matters.

It is open to the delegate to approve travel and professional costs up to the *combined* daily cap for solicitors and counsel who undertake approved travel. The *combined* daily cap refers to the maximum daily travel and professional fees claimable during a 24 hour period. The combined daily cap is equivalent to 8 hours at the rate under Items 31 and 4 hours at the travel rate specified in the *Guidelines*.

1.3.5 *Disbursements*

Properly incurred disbursements will be paid at cost. Receipts or invoices must be provided for all disbursements over \$100 (except for travel costs where all receipts are required, see below).

Items such as general office overheads (including office equipment) office maintenance, and account keeping fees, are not disbursements and are not claimable under the grant.

1.3.6 *Emails*

Preparation of emails must be claimed at the applicable rate for correspondence (see 1.5.5) with the following exceptions:

- Circular emails (sent to more than one correspondent) – not allowed.
- Emails dispatching correspondence prepared by the solicitor – not allowed.

1.3.7 *File notes*

The higher rates provided under Items 31 and 36 of the Federal Court scale cover the production of file notes, memoranda or reports associated with the particular attendance. Separate claims for preparing file notes in respect of such attendances will not ordinarily be allowed. An attendance for preparation of a file note, memoranda or report may only be claimed where the document is forwarded by way of report to a client.

1.3.8 *Group representative costs*

Costs for group representatives are payable in accordance with the *Guidelines* at sections 47-52.

1.3.9 *Internal communications (written or verbal) and reasonable supervision*

A practitioner who is appointed to the Panel is assumed to be able to work independently and require minimal or no supervision,

Costs for internal conferencing (communications between 2 or more solicitors/operatives of the same firm) may only be claimed where the conferencing amounts to reasonable supervision of a staff member who is not a member of the Panel by a person who is a member of the Panel (or has applied for membership).

1.3.10 *One solicitor to work on a matter*

One solicitor shall have primary conduct of a matter. In circumstances where this is not practicable, written approval must be obtained from the Department to have more than one solicitor to work on a matter. (refer also to para 1.4.2 “*Agent’s fees*”)

1.3.11 *Research*

Research relating to native title generally, or other areas of law, generally will not be allowed.

Some allowance may be made for research provided that solicitors demonstrate that the research is reasonable and necessary in the circumstances of a particular case.

1.3.12 Taxation of solicitors' bill

Where agreement in relation to the assessment of costs is not able to be reached, the solicitor may be requested to arrange to have the bill of costs taxed or arrange for independent costs assessors.

1.3.13 Telephone calls

Telephone calls are allowed at cost.

1.3.14 Telephone attendance to leave a message

Attendance to leave a message is not allowed.

1.3.15 Time units

Items of work must be claimed at 6 minute units (ie 1/10th hour) at the rates specified under the relevant *Scale* item. Solicitors must not charge on the basis of 15 minute units of time.

1.3.16 Training

Charges for attendance at native title seminars or conferences are not allowed.

It is expected that solicitors working on native title matters will, at their own cost, undertake the necessary training and research to maintain their native title expertise.

1.3.17 Typing

Typing of correspondence and other documents must be claimed at the clerical rate specified in the *Guidelines*, with the following exceptions:

- typing of covering emails attaching correspondence is not allowed
- typing of fax cover sheets is not allowed (see also 'Facsimile transmissions')
- typing of circular letters is not allowed

1.4 SOLICITORS' COSTS - FEDERAL COURT SCALE ITEMS

1.4.1 General

Solicitors' fees are generally paid at 100% of the Federal Court Scale, subject to any specific provisions in the *Guidelines* and any additional terms and conditions of the particular grant.

Rates specified in the *Guidelines* displace the Scale rates.

Solicitors must use applicable Scale items. It is open for the delegate to substitute applicable Scale items where appropriate.

Where there is no applicable Scale item relevant to the services provided, Solicitors' fees must be claimed at rates in accordance with Item 31 of the Scale at 6 minute units of time.

In accordance with section 54 of the *Guidelines*, the terms of the grant may provide for solicitors' costs to be payable at 90% of the flat rate under Scale Item 31. Solicitors must not charge at this rate except with prior written approval from the Department. If prior approval is not sought, it is open to the delegate to substitute the applicable Scale items on a bill of costs.

1.4.2 Item 1

Multiple claims under Item 1 in circumstances where a group representative is acting are not allowed. Item 1 will be allowed for the first client only.

The professional costs for subsequent clients are properly remunerated via the relevant charge for attendance on those clients, for example, the perusal of documents submitted in connection with a new client, and preparing and serving Forms 5 and 164.

1.4.3 Items 8 - 12

Items 8 to 12 of the Scale incorporate service amounts for all parties. Noting that it may be necessary to serve many parties in a native title matter, it is for this reason the Department may allow other costs associated with service in addition to Items 8 to 12, including photocopying, clerical attendances (for printing documents, typing and mail out) and postage.

1.4.4 Item 15 – Engrossing or Typing

Charges under Item 15 are not allowed. Typing is allowed at \$2.75 per page (incl GST).

1.4.5 Item 16 - Copies

Charges under Item 16 are not allowed. Photocopies are allowed at \$0.275 per page (incl GST).

1.4.6 Item 17

Perusal must be claimed at the rates specified under Item 17 for documents less than 30 folios.

Where a document comes with attachments, a single perusal charge for that set of documents must be charged.

Item 17 expressly provides for the taxing officer's discretion to be applied to a claim for perusal of more than 30 folios in respect of any document or documents. For documents greater than 30 folios, the hourly rate under Item 31 applies for time reasonably spent on the task.

1.4.7 Item 18 – Scanning

Scanning must be claimed at the rates specified under Item 18 for documents less than 10 pages.

Item 18 expressly provides for the taxing officer's discretion to be applied to a claim for scanning of more than 10 pages in respect of any document or documents. For documents greater than 10 pages, the hourly rate under Item 31 applies for time reasonably spent on the task.

1.4.8 Items 20-23 Letters

The Federal Court Scale draws a distinction between simple, ordinary and special letters. The tiered system is premised on levels of complexity.

Item 20 - Short letters of 3 folios or less (1 page), for example, confirming receipt of documents, cover letters enclosing documents (but not covering emails enclosing documents) and letters confirming appearances, chain emails.

Item 21 - Ordinary letters of more than 3 folios (1 page)

Item 22 - Circular letters, after the first letter up to 30, must be claimed at the rate available under Item 22. For large mail outs above 30 letters, the administrative rate of \$27.50 per hour applies for time reasonably spent on the task.

Item 23 - To claim for letters under either Item 23 or 31, a copy of the letter must be provided as well as details of the time spent on the task. If this information is not provided the letter will be allowed at the rate available under Item 21 for ordinary letters.

Special letters or letters including an opinion and involving more complex legal or factual issues will generally be allowed at the flat rate available under Item 23. Letters that simply repeat or report information will not ordinarily be allowed at the special letter rate under Item 23.

Special letters may be allowed under Item 31 of the Scale for the time reasonably spent on the task. In these circumstances, the delegate will have regard to all associated attendances for which a charge is made as well as the length of the letter and the complexity of the issues.

1.4.9 Item 24 – Facsimile transmissions

Charges under Item 24 are not allowed. Facsimile transmissions are allowed at \$2.20 per page (incl GST) up to a maximum of \$44.00 per transmission.

This amount is to cover the costs of preparing a facsimile cover sheet and transmitting a facsimile, including attendance to dispatch. Preparation of the document that is transmitted is claimable at the appropriate rate for correspondence.

1.4.10 Item 25

Claims for receiving and filing documents are not allowed.

1.4.11 Items 26 and 27 - Service

Separate claims for service of documents are not allowed where the original item is allowed under Scale Items 8 – 12.

1.4.12 Item 33 – Clerical attendance

An attendance by telephone to leave a message claimed under Item 33 is not allowed.

1.4.13 Item 40

Charges under Item 40 are not allowed. The specific provision in the *Guidelines* for travel rates displaces the application of the Scale.

1.4.14 Item 41

Charges under Item 41 are not allowed.

1.5 COUNSEL FEES

Counsel fees will only be allowed if the Department provided prior written approval.

Counsel fees are payable at the rates specified in the *Guidelines* (at section 55) or as determined from time to time by the Attorney-General.

1.6 ANTHROPOLOGIST AND OTHER EXPERT FEES

Anthropologists and other experts who are engaged under a grant of assistance must be members of the NNTPP.

Anthropologist and other expert fees will only be allowed if the Department provided prior written approval to engage the expert in accordance with the provisions set out in the *Guidelines* (at section 63).

1.7 TRAVEL

1.7.1 General

Travel may be authorised in accordance with the provisions set out in the *Guidelines* at sections 56-60. Travel time and travel costs incurred within the city of the place of business are not allowed.

All travel in relation to grants of assistance requires prior written approval from the Department.

Receipts or invoices must be provided to substantiate all travel related costs.

In relation to any proposed travel:

- If travel is specifically covered under the terms of the grant, including at least the specific destination and purpose of the travel, this will constitute prior written approval and no further notice is required to be given to the department
- A general allowance for travel under the terms of the grant will not be sufficient to constitute prior written approval

- If travel is not covered at all under the terms of the grant, or there are insufficient funds available under the grant, a formal request for an extension to the grant to cover such travel must be made
- If it is unclear whether the costs of the proposed travel are likely to be met under the existing terms of the grant, it would be advisable to seek specific prior written approval from the Department
- Travel requests must be submitted on the approved form (see **Attachment A**).
- Travel and meal allowances are approved for the person identified in the travel request and may not be used for the travel or meal expenses of other persons.
- If accommodation costs are not claimed then the funding that has been approved for those costs does not become available for other costs associated with the travel.

1.7.2 Accommodation, meals and incidentals

Accommodation and meals for legal and other representatives are allowed at SES rates (available from the Department on request).

Accommodation and meals for grant recipients and witnesses are allowed at non-SES rates.

Allowance for incidentals covers items that are incidental to the trip that would not be incurred at home – eg’ a newspaper, toothpaste etc.

1.7.3 Air travel

All air travel is paid at economy class rates. Discounted airfares should be used where possible.

1.7.4 Travel time

Travel time for solicitors and group representatives is payable in accordance with section 59 of the Guidelines.

1.7.5 Vehicle mileage rates

Mileage is claimable at the rate specified by the Australian Tax Office. Current rates are contained in Schedule 1 of the *Income Tax Assessment Regulations 1997*.

1.8 GST

GST is not met from grant funds.

Any accounts rendered to the Department must be in the form of, or accompanied by, a tax invoice to the ‘Attorney General’s Department’ that clearly identifies the GST component of the invoice.

GST components for each disbursement item and third party invoices must be indicated on the invoice. Where GST has not been incurred on a disbursement or an invoice from a third party (for example for title searches or transcript) the invoice should set out the disbursement cost plus 10% GST. You will need to remit GST to the Australian Taxation Office in the usual way.

TRAVEL APPROVAL APPLICATION

APPLICANT and AGD REFERENCE

TRAVEL REQUESTED BY (name, email and telephone)

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PERSON/S TRAVELLING:

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DATE/S OF TRAVEL (Inclusive):

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PURPOSE OF TRAVEL

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ITINERARY:

Origin/Destination
Departure/Arrival times

COST ESTIMATE

Airfare	\$ [^] Estimate [^]
Taxi	\$ [^] Estimate [^]
Parking	\$ [^] Estimate [^]
Accommodation	\$ [^] Estimate [^]
Mileage	\$ [^] Estimate [^]
Other (please specify)	\$

