



South West Aboriginal  
Land & Sea Council

## REQUESTS FOR LEGAL ASSISTANCE

### PURPOSE

The purpose of the Requests for Legal Assistance Policy is to ensure that requests for all legal assistance in relation to the conduct of Native Title and related matters by the South West Aboriginal Land and Sea Council, either current or prospective, shall be provided according to the following policy.

### POLICY

#### Requests for Legal Assistance

1. In order to obtain legal assistance from the South West Aboriginal Land and Sea Council (SWALSC), all claimants must apply formally in writing by a letter, setting out the request for Legal Assistance, addressed to the Chief Executive Officer. This applies to both prospective and existing claimants, whether or not the SWALSC is currently the representative for a claim.
2. All requests for legal assistance in relation to a native title claim and related matter made to the SWALSC shall be assessed for determination of:
  - i) Legal Merit
  - ii) Priority; and
  - iii) Professional conflict

#### Legal Merit

3. Upon receipt of a request for legal assistance together with any information sought by the SWALSC in support of the request, investigation and assessment will be conducted in order to determine if there is legal merit in the matter for which assistance is sought. If upon preliminary assessment, there is a perception of bias identified, the application will be briefed out to obtain an independent assessment.
4. Investigation and assessment of the legal merit of a native title and related matter will include, but is not limited to, consideration of the matters referred to in Schedule 1.
5. Following such investigation and assessment, a decision will be made as to whether or not there is legal merit in the matter for which assistance is sought.
6. If it is determined that there is no legal merit in the matter for which assistance is sought, then the applicant will be advised of this as soon as possible. In such circumstances legal assistance in relation to options other than native title may, if appropriate, be provided.

## **Priority**

7. If it is determined that there is legal merit in a native title matter for which legal assistance is sought then, in order to ensure the most effective and equitable utilisation of SWALSC funding, the request for assistance will be assessed for priority with reference to the matters referred to in Schedule 2.

## **Mediation in the event of conflict**

8. If upon assessment of an application, it is found that the proposed claim covers an area that is already covered by an existing claim or application, and that all claims concerned have merit, the claimants from all these claims will be asked to meet and arrive at a mediated agreement which protects the native title rights of all concerned. This mediated agreement may be either:
  - i) that the claimants agree to lodge a joint claim over the area concerned; or
  - ii) that the claimants agree to recognise each other's rights in the area concerned and enter into a formal agreement stating that they will do so; or
  - iii) agree to inclusions as registered native title claimants or inclusions at A3 of the registration of the claim. That is, to establish those included as being among those who are claimed to hold native title.
9. In the case of existing matters being represented by the SWALSC where there is an overlap of claims or a conflict of interest, the claimants will be asked to enter into mediation to resolve the conflicts either by withdrawing their claims or entering into a formal agreement.
  - i) In the event that mediation does not resolve the conflict the SWALSC may, at its discretion,
    - a) Act for the claim it considers to have the most merit and withdraw aid from any conflicting claims;
    - b) Refuse aid for all claimants

## **Professional Conflict**

10. Where conflicts cannot be resolved through mediation, the SWALSC shall decline aid. The SWALSC shall not act in any situation that places it in a position of professional conflict.

## **Amendments to policy**

11. This policy may be amended from time to time by following consultation with the SWALSC Principal Legal Officer and Chief Executive Officer. Any amendments must be laid before the next meeting of the SWALSC Board. Amendments may be disallowed or altered by the SWALSC Board.

## **Procedure**

### **DETERMINATION OF REQUEST FOR LEGAL ASSISTANCE**

Following an assessment of legal merit and priority, a determination will be made as to:

1. Whether or not legal assistance will be provided; and
2. If so, whether any conditions shall be applied on the provision of such assistance
3. The Chief Executive Officer will determine the request for legal assistance, following the assessment. This decision will be tabled at the SWALSC Board meeting. The Chief Executive Officer will notify the applicant of its decision in writing.
4. In the event of an applicant being dissatisfied he or she may appeal the decision to the next meeting of the SWALSC Board by:
  - a. Giving notice of appeal in writing within 21 days of notification of the decision by the Chief Executive Officer;
  - b. Setting out in full the grounds of the appeal
5. The appeal shall be directed to the Chief Executive Officer.
6. The Chief Executive Officer will present the notice of appeal to the SWALSC Board.
7. The deadline of 21 days is final and no extensions will be allowed.
8. The SWALSC Board decision will be final without any further right to appeal.

## Schedule One:

### EVALUATION OF LEGAL MERIT

The evaluation criteria shall comprise the following in assessing the merit of the matter:

- Do the members of the applicant group constitute an identifiable culturally-based Aboriginal community or group?

*The assessment as to legal merit will include an assessment as to whether there is evidence that the proposed Native Title claim group can demonstrate a continuing connection in accordance with custom or tradition to the group who occupied the land when Europeans first came to the area.*

- An identification and description of the Aboriginal group who occupied the land at 1829 and/or first contact with the Europeans in the area.

*Consideration must be given as to whether the evidence points to any identification or description of the Aboriginal group or individuals who occupied the land when Europeans first came to the area.*

- A description of how the members of the applicant group are related-connected-descended from the original group who occupied the specified area. What evidence exists to establish that the group who occupied the land at 1829 and/or first contact with Europeans in the area are ancestors of the current applicant group?

*The evidence must indicate that the members of the Native Title claim group are related, connected or descended from the group or individuals who occupied the claim area when Europeans first came to the area.*

- If the applicant group is not descended from the same group who occupied the land at 1829 and/or first contact with the Europeans in the area then what is the nature of their connection to the subject land? Do they hold custodianship of the area under a system of Aboriginal law and culture and what evidence is available to support their assertion of custodianship?

*Consideration must be given to the extent to which the evidence reveals that the Native Title claim group continues to occupy and/or maintain a traditionally based connection with the claim area, including:*

- (i) Contemporary use and occupation*
- (ii) Historical use and occupation*
- (iii) The existence, significance and causes of any lapses in use and occupation*

*Consideration must be given as to whether the evidence reveals customs and traditions shared by all the members of the group which define and identify the nature of the claim groups.*

- Any other matters which SWALSC considers in the circumstances to be relevant.

## Schedule Two:

### PRIORITY

An assessment of the merit of a claim will also give consideration as to the priority of attention to be given to such claim in relation to other claims in the area. It will consider:

- The relative chances of legal success of the matter;
- Whether the claim raises issues which test undecided issues of law or may create valuable precedents;
- Whether native title rights and interests are under immediate threat;
- Whether there is a risk that the evidence of witnesses may not be available if the preservation of evidence is not given a high priority;
- Whether there is conflict in relation to the claim either within the claim group itself or with other Aboriginal people/groups. If so, an identification and description of the nature of the conflict, who the conflict is between and the steps, if any, which have been taken to attempt to resolve this conflict must also be addressed, and what prospects there are of resolving the conflict must be addressed;
- Availability of evidence in support of the elements relating to legal merit including identification of:
  - (i) Any relevant historical, anthropological, archaeological, and/or ethno-biological research.
  - (ii) Consultants in the fields of Aboriginal history, anthropology, archaeology, and/or ethno-biology who have worked within the claim area and/or with the applicant group.
- Knowledgeable Indigenous witness.
- The likely prejudice to the applicant should the matter not be proceeded with;
- The availability of SWALSC resources and expertise to proceed with the matter;
- The availability of alternative methods and solutions that would not require legal assistance;
- Whether the degree of benefit to be gained justifies the quantity of resources required to proceed with the matter;
- Whether proceeding with the matter would, in all the circumstances, be an effective use of the limited resources of the representative body;
- Whether any short term outcomes or immediate benefits can be achieved by pursuing a claim in a particular way;
- Whether benefits or outcomes can be achieved in relation to any part of the claim area which may not require attention to the whole of the claim area;
- Whether the lodging, continuing existence or registration of a claim may facilitate the obtaining of benefits by way of access to the Future Act regime or negotiation of agreements generally without providing assistance to progress a claim towards a Native Title determination;
- The financial means of the applicant;
- Any other relevant matters which SWALSC considers in the circumstances to be relevant.