

The Auditor-General  
Audit Report No.1 2006–07  
Performance Audit

# **Administration of the Native Title Respondents Funding Scheme**

**Attorney-General's Department**

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of Australia 2006

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**<http://www.ag.gov.au/cca>**



Canberra ACT  
30 August 2006

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit in the Attorney-General's Department in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit and the accompanying brochure. The report is titled *Administration of the Native Title Respondents Funding Scheme*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name.

Ian McPhee  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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# Abbreviations

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AGD	Attorney–General’s Department
ANAO	Australian National Audit Office
Tax Office	Australian Tax Office
BAS	Business activity statement
CEIs	Chief Executive Instructions
DAWGS	Data and Workflow Grants System
Finance	Department of Finance and Administration
FaCSIA	Department of Families, Community Services and Indigenous Affairs
FMA Act	Financial Management and Accountability Act
FMIS	Financial Management and Information System
GST	Goods and services tax
ILUA	Indigenous Land Use Agreement
JCPAA	Joint Committee of Public Accounts and Audit
LAB	Legal Assistance Branch
NNTT	National Native Title Tribunal
NTCF	Native Title Consultative Forum
NTCC	Native Title Coordination Committee
NTPP	Native Title Practitioners Panel
NTRBs	Native Title Representative Bodies

# Glossary

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Administered item	An administered item is an item controlled by the Australian Government and managed or overseen by entities on behalf of the Australian Government. Administered items are generally subject to set conditions and eligibility rules established by legislation or by Australian Government policy.
Commitment	The Attorney-General's Department defines commitment as it relates to the Respondents Scheme as: 'a decision by the Attorney-General or his/her delegate which fixes the upper limit on the amount that will be paid by the Australian Government for work undertaken pursuant to a grant of financial assistance, subject to compliance with the Attorney-General's Guidelines and the terms and conditions of the grant.'
DAWGS	The Data and Workflow Grants System (DAWGS) processes applications for financial assistance and payments.
Decommitment	Decommitment involves recalling outstanding grant funds to the Attorney-General's Department once the time period for a grant has lapsed or a grant becomes inactive.
Federal Court of Australia	Under the <i>Native Title Act 1993</i> , the Federal Court is responsible for the management and determination of all applications relating to native title in Australia.
Federal Court Scale of Costs	The Federal Court Scale of Costs sets out a schedule for solicitors' fees and related clerical support items such as typing and photocopying.



FMA Regulation 10	Regulation 10 of the <i>Financial Management and Accountability Regulations 1997</i> requires prior approval by the Finance Minister or his delegate for a spending proposal which extends beyond a financial year.
Grant	A grant is a sum of money given to organisations or individuals for a specified purpose directed at achieving goals and objectives consistent with Government policy. The term is generally used to include any funding arrangement where the recipient is selected on merit against a set of criteria. In a strict sense, a grant is a 'gift' from the Crown which may, or may not, be subject to unilaterally imposed conditions.
Guidelines	The <i>Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines</i> (the Guidelines) provide the framework for determining whether applications for legal assistance should be authorised under s.183 of the <i>Native Title Act 1993</i> .
Indigenous Land Use Agreements (ILUAs)	The <i>Native Title Act 1993</i> provides a mechanism for formal agreements to be reached between native title holders, native title claimants and others such as pastoralists or graziers. These agreements are known as Indigenous Land Use Agreements (ILUAs).
National Native Title Tribunal	The National Native Title Tribunal is established under the <i>Native Title Act 1993</i> to mediate native title claims under the direction of the Federal Court and to assist parties engaged in the process of native title agreement making.
Native Title Consultative Forum	The Native Title Consultative Forum brings together Governments and other participants in the Native Title System to hear and understand the needs, interests and responsibilities of the other parties.

Native Title Coordination Committee	The Native Title Coordination Committee monitors, reviews and advises the Government on the Native Title System.
Native Title Officers	The Attorney-General's Department funds the employment of Native Title Officers within peak organisations to build capacity within the Native Title System.
Native Title Practitioners Panel	The Native Title Practitioners Panel was established by the Attorney-General as an identified group which understands the unique nature of native title casework and which will undertake the work in accordance with the Attorney-General's Guidelines.
Native Title System	The Native Title System includes the structures and processes established by the <i>Native Title Act 1993</i> and the programmes funded by the Australian Government for the administration and management of native title.
Peak organisation	Under the Guidelines, a peak organisation is a constituent industry body which represents the interest of its members in native title matters.
Reconciliation of financial records	Reconciliation involves the comparison of all paper documents evidencing transactions against the electronic data held on the Department's financial management system, its payments database and DAWGS. It also involves a comparison with records kept by legal firms or peak organisations where a trust account holds grant funds.
Respondents Scheme	Under the Respondents Scheme financial assistance is made available to respondents to native title matters in accordance with the Attorney-General's Guidelines.

SAPPHIRE (SAP)	SAPPHIRE (SAP) is a business application combining Systems, Applications and Products in data processing. SAP financial management software is commonly used by Australian Government agencies to increase accounting accuracy and support business processes.
Trust advances	A trust advance refers to grant funds advanced by the Attorney-General's Department to either legal firms or peak organisations.



# Summary and Recommendations



# Summary

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## Background

1. The *Native Title Act 1993* (the Act) provides for the recognition and protection, within Australian common law, of the native title rights and interests of Indigenous Australians. The Act created the legal settings for the Native Title System<sup>1</sup>, which involves a range of Government and non-government parties<sup>2</sup> in native title litigation and/or mediation to reach agreement on a consent determination and other types of agreement making.
2. Section 183 of the Act establishes the Native Title Respondents Funding Scheme (the Respondents Scheme) and provides for the Attorney-General to formulate Guidelines<sup>3</sup> which set out criteria for grants of financial assistance to respondents in native title matters. Respondents to native title matters include pastoralists, miners, fishers and local government councils.
3. Appendix 1 provides information on the participants in the Native Title System. Respondent activity is driven to a large degree by the actions of native title claimants and State and Territory Governments who act as primary respondents in native title cases.

## Objects of the Native Title Act

4. The main purposes of the Native Title Act are to:
  - recognise and protect native title;
  - validate existing Commonwealth land titles where they may be invalid due to the existence of native title, and to allow States and Territories to validate their own titles;
  - establish procedures for determining claims to native title; and

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<sup>1</sup> The Native Title System includes the structures and processes established by the *Native Title Act 1993* and the programmes funded by the Australian Government for the administration and management of native title.

<sup>2</sup> Australian Government parties include the Attorney-General's Department, the National Native Title Tribunal, the Division of the Federal Court of Australia responsible for native title matters and the Department of Families, Community Services and Indigenous Affairs (FaCSIA) which administers the Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate. State and Territory and local government bodies also play a significant role in the resolution of native title issues. Non-government parties include Indigenous Australians, who are generally represented in the process by the NTRBs and respondent parties, for example pastoralists, miners and fishing interests who may be eligible for Australian Government financial assistance to participate in the process.

<sup>3</sup> The Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines.

- establish procedures for dealing with native title land.<sup>4</sup>

5. The Act was substantially amended in 1998. When presenting the Native Title Amendment Bill 1997 for the second time, the Attorney-General stated:

Currently, the Act provides for an essential 'claims driven' regime for dealing with native title issues. In the Government's view, insufficient support is given to resolving native title issues by agreement—often the speediest, lowest cost and least divisive mechanism. The Bill therefore sets out a comprehensive framework for reaching consensual arrangements between the parties.<sup>5</sup>

6. The Financial Impact Statement relating to the 1998 amendments noted:

Removing the 'hardship' test for the provision of financial assistance to native title respondents under section 183 of the Act is likely to result in more grants to respondents. In particular, additional funding will be made available to put pastoral respondents on an equal footing with claimants in relation to financial assistance. There will be more demand for financial assistance as a result of the wider measures that the new Act proposes—such as Indigenous Land Use Agreements and statutory access agreements.

7. Among the benefits of the Bill cited by the Attorney-General was: 'much improved certainty for agricultural and pastoral lessees. Lessees will have security that their rights continue to prevail over those of native title holders. Legal aid will be more readily available to pastoralists and other persons responding to native title claims.'<sup>6</sup>

8. Between 1998 and 2005, the Government expressed its preference for resolving native title matters by negotiation rather than litigation, on a number of occasions.<sup>7</sup> In September 2005, the Australian Government restated its objective for the Native Title System as a whole: 'to promote the resolution of native title issues through agreement making wherever possible, in preference to litigation.'<sup>8</sup> To support this system-wide objective, the Attorney-General

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<sup>4</sup> <[http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=3335&TABLE=BILLS&TARGET=](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=3335&TABLE=BILLS&TARGET=)

<sup>5</sup> Attorney-General, 4 September 1997, *Second reading of the Native Title Amendment Bill 1997*, Hansard.

<sup>6</sup> Ibid.

<sup>7</sup> Attorney-General, 22 May 2001, *News Release—More Money for Native Title*.

Attorney-General, September 2002, *Native Title: The Next 10 Years—Moving forward by Agreement*, and

Attorney-General, June 2004, *The Government's Approach to Native Title*.

<sup>8</sup> Attorney-General, September 2005, *Practical Reforms to deliver better outcomes in Native Title*.



announced a package of reforms to deliver better outcomes in native title, including: ‘the Government will consider how the guidelines for Australian Government funding to respondents in native title claims can be focussed more strongly on agreement making over litigation’.

9. At October 2005, the Federal Court had made 45 consent determinations and the National Native Title Tribunal had 215 Indigenous Land Use Agreements (ILUAs) registered on its database, binding all native title holders in the area covered by the agreement.<sup>9</sup> In addition, it was estimated that, at October 2005, over 6 000 unregistered agreements had been negotiated.

### **Administration of the Native Title System**

10. Administration of the Native Title System is shared across a number of government agencies including the Attorney-General’s Department (AGD), with separate components of the System identified and funded within each agency’s Outcomes and Outputs framework. The Respondents Scheme is an administered item within AGD’s Outcome 1—‘An equitable and accessible system of federal civil justice’.

11. AGD’s internal budget for the management of the Respondents Scheme was set at \$8 million for 2005–06.

### **Grants to respondents**

12. Section 183 of the Act establishes the legislative basis for the Respondents Scheme. Subsection 183 (3) of the Act provides that the Attorney-General *may grant assistance* if satisfied that:

- the applicant is not eligible to receive assistance from any other source;
- the provision of assistance is in accordance with the Guidelines established under subsection (4); and
- it is reasonable that the application be granted.

13. Subsection 183 (4) of the Act provides that the Attorney-General may determine Guidelines that are to be applied in authorising assistance under section 183. The current Guidelines—*Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines* (the Guidelines)—came into

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<sup>9</sup> The agreements provision offers a flexible alternative to other processes under the Native Title Act. It allows parties to agree on procedures that are tailored to meet their particular needs, in place of the Native Title Act procedures.

effect on 30 November 1998 following amendments to the Act. Financial assistance is made available to respondent parties in accordance with these Guidelines.

14. Financial assistance is available for individuals, partnerships, small businesses, local government bodies, incorporated and unincorporated groups (including amateur associations) and peak industry organisations to:

- become a party to an inquiry, mediation or native title proceeding;
- negotiate an Indigenous Land Use Agreement (ILUA); and
- negotiate an agreement about rights conferred under subsection 44B (1) or resolving a dispute about rights conferred under subsection 44B (1).<sup>10</sup>

15. Financial assistance may cover some or all of the following: professional legal and other costs; counsel's fees; court fees; the use of expert advice such as anthropological or historical consultants; and other reasonable accommodation and travelling expenses.<sup>11</sup>

16. In September 2005, the Attorney-General proposed a broad ranging package of reform measures for the Native Title System, including amending the Guidelines for the Respondents Scheme to encourage agreement making rather than litigation. When announcing the reforms the Attorney-General stated:

a wide range of non-claimant parties (e.g. pastoralist, miners, local government and peak industry bodies) participate extensively in native title claims. However, given that 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.<sup>12</sup>

## Audit objective and scope

17. The objective of the audit was to assess the effectiveness of AGD's administration of grants provided under the Respondents Scheme.

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<sup>10</sup> These rights refer to the right of access for traditional activities.

<sup>11</sup> AGD, 1998, *Provision of Financial Assistance by the Attorney-General in Native Title Cases*, para 5.6.

<sup>12</sup> Attorney-General, September 2005, *Practical Reforms to deliver better outcomes in Native Title*.

18. The audit considered the context within which the Respondents Scheme operates and focused on assessing the administration of the scheme including its financial management within AGD.

## Overall Conclusion

19. The Australian Government's objective for the Native Title System as a whole is 'to promote the resolution of native title issues through agreement making wherever possible, in preference to litigation.' The Native Title Respondents Funding Scheme is one element of the Native Title System. The grants provided through the respondents scheme support the participation of non-claimant parties in native title proceedings—litigation, mediation and agreement making. At 24 August 2005, 1 570 individual grants had been made with a total commitment of \$77 million since the commencement of the Scheme.

20. The ANAO concluded that, overall, AGD effectively manages the administration of grants under the Native Title Respondents Funding Scheme. However, the ANAO identified key areas of AGD's administration of the Scheme that could be strengthened. In particular, clearer specification of performance measures; closer monitoring of grant commitment (individually and in total); and enhancements to AGD's Data and Workflow Grants System (DAWGS).

21. The development of accurate and relevant performance indicators for the Respondents Scheme would help stakeholders to gauge the success or otherwise of the Scheme's contribution to the Government's broader native title outcome and would allow AGD managers to better assess the ongoing performance of the Scheme. Improved performance information at the individual grant level would help AGD's grant monitoring and acquittal arrangements and provide assurance that grant funds are being expended in line with specific grant objectives.

22. As Respondents Scheme grants are largely open ended and do not specify financial assistance in stages, it is difficult for AGD to accurately predict actual annual expenditure associated with respondents participation in native title claims proceedings. In any one year, AGD may commit to spending proposals that span several years. This means that future year budgets are liable for these expenses of some \$12.9 million.<sup>13</sup>

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<sup>13</sup> At 12 October 2005.

23. While AGD has undertaken a range of risks treatments, as part of its Respondents Scheme planning process, it would be useful for AGD to also formally document its risk management arrangements. Such an approach would provide greater assurance that the specific risks, including financial risks, faced in administering the Respondents Scheme have been identified and managed.

24. The ANAO acknowledges that delays in one part of the Native Title System can affect the efficient functioning of the Respondents Scheme and that these external influences present challenges for the administration of the programme. The resolution of claims in the National Native Title Tribunal<sup>14</sup> and the Federal Court<sup>15</sup> can be protracted making it difficult to predict when and how much of a recipient's grant will be expended in any one financial year. This environment requires AGD to more closely monitor its grant commitment, individually and in total. This financial monitoring is especially important because of issues within the Native Title System that may affect the timely resolution of native title matters and the participation of respondent parties.

25. The Attorney-General's Guidelines, which provide the framework for authorising financial assistance for respondent parties, are being revised as part of the Native Title System reform process. The ANAO notes that the draft of the revised Guidelines includes the provision of financial assistance in stages to funded respondents. This will help AGD to better manage its financial assistance commitment in the outer years. It will also provide a more transparent view of how individual grant expenditure links to achievements specified in grant stages and the overall goals of the programme.

26. AGD requires a more robust financial monitoring and reporting system to better manage the financial risks associated with the Respondents Scheme. The ANAO found that AGD's ability to accurately identify and report Respondents Scheme expenditure to Parliament and other stakeholders was compromised by the reporting functionality of DAWGS. The current system has limited reporting capabilities, which impedes AGD's ability to accurately identify its unfunded forward commitment and to accurately identify and report total Respondents Scheme expenditure to Parliament and other

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<sup>14</sup> The National Native Title Tribunal mediates native title claims under the direction of the Federal Court and assists the parties engaged in the process of native title agreement making.

<sup>15</sup> Under the *Native Title Act 1993*, the Federal Court of Australia is responsible for the management and determination of all applications relating to native title in Australia.

stakeholders. AGD is aware of the situation and is taking steps to rectify it through a range of measures including improving the quality of DAWGS data. AGD has also secured additional funding in the 2006–07 Budget to refine and enhance DAWGS, including its reporting functionality.

27. The ANAO notes AGD's positive response to the audit findings by establishing a project team to coordinate the implementation of the report recommendations.

# Key Findings

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## Respondents Scheme planning (Chapter Two)

28. Planning is an activity that allows programme objectives to be elaborated, performance measures and targets to be agreed upon to track progress in delivering results, and risks to be identified and treated.

29. Section 183 of the Act establishes the legislative basis for the Native Title Respondents Funding Scheme. A significant amendment to the Act in 1998 enhanced respondent parties' participation in the voluntary agreement making process by making available financial assistance to non-claimant parties under the Respondents Scheme at s.183 (2) of the Act. This provision supported the Government's desire to provide parties with 'a legally certain, procedurally straight forward and comprehensive agreements framework'.<sup>16</sup>

30. Between 1998 and 2005, the Government expressed its preference for resolving native title matters by negotiation rather than litigation.<sup>17</sup> In September 2005, the Australian Government restated its objective for the Native Title System as a whole: 'to promote the resolution of native title issues through agreement making wherever possible, in preference to litigation.'<sup>18</sup>

31. A finding of this audit was that DAWGS does not distinguish between grants which are funded for mediation and those for litigation. AGD advised that individual case officers are aware of the few matters funded for litigation and DAWGS functionality will be upgraded, as part of the 2006–07 Budget enhancements, to enable it to distinguish between mediation and litigation for reporting purposes. It should be noted that the status of a matter can move from mediation to a litigation phase and then return to mediation and continue to change status over a number of years. AGD has advised the ANAO that it will contribute to enhanced data collection by the Native Title Coordination Committee to inform the Committee's advice to Government on the operation of the Native Title System, including the identification of trends.

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<sup>16</sup> Attorney-General, 9 March 1998, *Second Reading Speech—Native Title Amendment Bill 1997*.

<sup>17</sup> Attorney-General, 22 May 2001, *News Release—More Money for Native Title*.

Attorney-General, September 2002, *Native Title: The Next 10 Years—Moving forward by Agreement*; and

Attorney-General, June 2004, *The Government's Approach to Native Title*.

<sup>18</sup> Attorney-General, September 2005, *Practical Reforms to deliver better outcomes in Native Title*.

32. AGD's ability to report on the performance of the Respondents Scheme would be improved by the use of more appropriate and relevant performance measures. The ANAO reviewed AGD's existing and proposed measures and found that they did not allow for an assessment of the extent to which the Respondents Scheme is meeting the Government's objective to promote agreement making rather than litigation. Subsequently, AGD has proposed a new performance indicator to apply solely to the Respondents Scheme enabling the quantification of grants for mediation/agreement making purposes as a proportion of total grants.

33. By adopting a disciplined and structured approach to risk management, agencies are able to identify, assess and mitigate risks, including fraud and financial risks. While AGD had undertaken a range of risks treatments, as part of its Respondents Scheme planning process, AGD had not formally documented its risk management arrangements for the Scheme.

34. There are factors within the Native Title System which affect AGD's ability to accurately predict when its grant recipients will expend the funds committed under the Respondents Scheme. This increases the importance of AGD's identification of the specific risks associated with the Respondents Scheme and to develop robust financial controls to manage these risks.

35. In any one year, AGD may commit to spending proposals that span several years. This means that future year budgets are liable for these expenses of some \$12.9 million.<sup>19</sup> The ANAO found that while AGD's Data and Workflow Grants System produces standardised internal reports, it is not able to automatically report on the Scheme's financial status, including the total amount of grant funds committed in future years. AGD relies on a manual process to produce reports on the Scheme's financial status. This approach introduces additional risks, particularly the consistency of the manual reporting process. AGD has secured additional funding in the 2006–07 Budget to refine and enhance DAWGS including its reporting functionality.

36. While the legislative Guidelines provide the overall framework for AGD decision-making concerning grants of assistance for respondents to native title claims, clearer articulation of the programme's financial and performance management arrangements would help AGD to better monitor and evaluate the programme.

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<sup>19</sup> At 12 October 2005.

## Financial management of the Respondents Scheme (Chapter Three)

37. The ANAO found that AGD had appropriate delegations in place to approve the expenditure of individual grant funds. However, Respondents Scheme funding agreements with grant recipients lead to payments in both current and future years. FMA Act Regulation 10 authorisation by the Finance Minister or his delegate is required prior to approval of a spending proposal, where the period of the spending proposal extends beyond a financial year.<sup>20</sup> The ANAO found that AGD was not meeting Regulation 10 requirements. However, during the audit, AGD initiated discussions with the Department of Finance and Administration (Finance) to ensure compliance with this Regulation going forward.

38. The Respondents Scheme has had a number of funding strategies and payment systems since its commencement. These included:

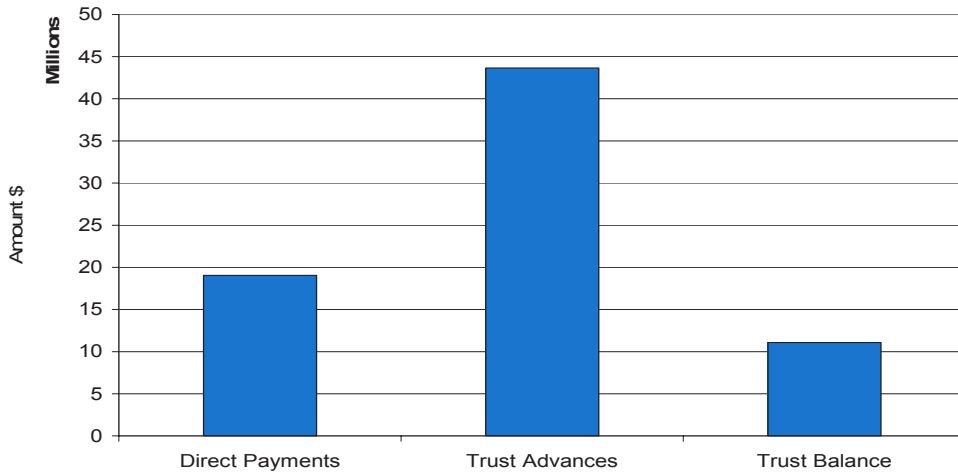
- advancing funds to solicitors' trust accounts;
- advancing funds to peak organisations' accounts; and
- direct payments to grant recipients on the presentation of an invoice.

39. The ANAO analysed data held in AGD's DAWGS to identify the total amount of grant funds directed to these funding strategies. This information is presented in Figure 1.

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<sup>20</sup> FMA Regulation 10 'Approval of future spending proposals' provides that: If any of the expenditure under a spending proposal is expenditure for which an appropriation of money is not authorised by the provisions of an existing law or a proposed law that is before the Parliament, an approver must not approve the proposal unless the Finance Minister has given written authorisation for the approval.



**Figure 1****Respondents Scheme funding strategies since its commencement in 1993**

Source: ANAO analysis of DAWGS data.

Note: Trust advances refer to grant funds held by legal firms and peak organisations. Trust balances are trust advances minus the drawdowns approved by AGD.

**40.** AGD has increasingly adopted the practice of making grants to peak organisations to pay the salary of Native Title Officers. This process simplifies the management and payment of grants for peak organisations and provides administrative efficiencies for both AGD and the peak organisation concerned. To aid transparency and accountability, AGD should require peak organisations to provide regular financial reporting on their management of Respondents Scheme grant funds.

**41.** The ANAO found divergent practices amongst peak organisations in the way they used interest earned on grant funds advanced to them. The ANAO is aware that AGD obtained legal advice regarding the interest earned on funds advanced to funded respondents which stated that they are accountable to the Commonwealth for any interest earned and should not use this interest for their own purposes. There would be benefit in more closely aligning Respondents Scheme funding agreements with legal advice received by AGD.

## Respondents Scheme decision-making (Chapter Four)

42. In assessing support for decision-making, the ANAO found:
- the 'reasons for a decision' note to be a transparent and effective method of capturing the reasoning behind the decision-making process;
  - grant recipients—including legal firms and peak organisations—noted the time-consuming nature of AGD's invoicing requirements. AGD requires items of work to be based on time units of no greater than six minutes and aligned to the rates specified under the relevant scale item in the Federal Court Scale of Costs.<sup>21</sup> In a number of instances, peak organisations commented that they do not have the record keeping systems to help in preparing invoices with the level of detail required by AGD. AGD advised that it simplified peak organisations' management of grant funds through the practice of making grants to them to pay the salary of Native Title Officers;
  - AGD's *Native Title – Grant Administration: Policies and Procedures Manual* is an assemblage of emails between legal officers and delegates discussing various issues related to grant administration, including the treatment of the goods and services tax (GST), specific Federal Court Scale items, travel and accommodation rates;
  - AGD's audit committee recommended that: 'formal sign offs on decision notes by a secondary staff member would provide an additional safeguard against inappropriate decisions and therefore inappropriate payments being made.'<sup>22</sup> The ANAO analysed DAWGS data concerning the separation of duties in the approval process and found that of the 174 payments recorded post-DAWGS implementation, 62 records were found where the legal officer and the delegate approving the payment were recorded as the same person. In

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<sup>21</sup> The Federal Court Scale of Costs sets out a schedule for solicitors' fees and related clerical support items such as typing and photocopying. The Attorney-General's Guidelines—*Provision of Assistance by the Attorney-General in Native Title Cases* requires the use of the Federal Court Scale to cost solicitors' fees and these related matters.

<sup>22</sup> AGD, April 2005, *Follow up Review of Financial Assistance Grant Administration—Legal Assistance Branch*, p. 16.

addition, a further 27 records were found to have a blank field for administrative officer, legal officer or delegate<sup>23</sup>;

- the native title claim ‘proceeding type’<sup>24</sup> is one of the fields in the native title claims table in DAWGS. The ANAO analysed records held in the table and found that of 359 records, the ‘proceeding type’ for 173 records in the native title table was blank. Of the balance, 176 were recorded as proceeding with litigation/mediation and eight were proceeding with an ILUA; and
- AGD has developed a draft document—*Identification of Key Performance Indicators*, 26 June 2000, which identified goals and key performance indicators for grant processing. The ANAO was advised that the document has not been implemented yet.

43. The ANAO found that the processing time of Respondents Scheme’s applications, extensions, invoices and internal reviews of decisions had improved with invoices now being processed within the standard 30 day turnaround. However, while performance indicators were in place for the processing of invoices, no indicators had been established for the other assessment processes noted above. As well, the ANAO found that AGD does not have any measures in place to monitor consistency within its decision-making processes.

## The management, monitoring and acquittal of the Respondents Scheme funding agreements (Chapter Five)

44. The ANAO found Respondents Scheme funding agreements did not:

- specify precisely the deliverables required through the funding arrangements; and
- include a timely review clause to alert AGD to situations where little or no progress was being made to achieve individual grant objectives.

45. AGD’s funding agreements contain terms and conditions additional to those set out in the Attorney-General’s Guidelines. The ANAO reviewed the additional terms and conditions and found they were not based on an assessment of the programme’s risks.

<sup>23</sup> AGD has advised that these results were input errors and a function to eliminate such input errors will be considered as part of the DAWGS enhancement programme.

<sup>24</sup> Proceeding type refers to whether the matter is being handled by the National Native Title Tribunal or by the Federal Court.

46. While AGD had introduced monitoring arrangements in its funding agreements for new initiatives such as the Native Title Officer positions, there was variability in these arrangements between organisations where Native Title Officers were funded. The ANAO found a lack of consistent and timely monitoring arrangements in the other types of grant arrangements for the Respondents Scheme—for example grants made to respondents to participate in native title proceedings in the Federal Court.

47. DAWGS helps AGD staff monitor individual grants by calculating the remaining funds that should be held in trust every time authorisation is given for trust drawdowns. However, the ANAO found that AGD did not have systematic procedures to monitor individual grant progress to determine whether or not grant funds were still required. Subsequent to ANAO fieldwork, AGD advised that individual delegates have initiated the retrieval of reports from DAWGS on matters which have been inactive for 18 or more months for review and possible decommitment.

48. While AGD sets out budgets for anticipated work in its funding agreements, the ANAO found there were no monitoring arrangements in place to enable an assessment of whether or not activities undertaken were achieving the required results. AGD's own internal review (see paragraph 6.8) supports this finding. The review found that the frequency and content of reports to the department varied significantly between grants and that a picture of significant events, dates and issues in a claim was not revealed until all grants related to the claim were examined.

49. There were delays with AGD's reconciliation process that impeded the approval of grants and the accurate reporting of the Respondents Scheme's financial status. AGD has secured additional funding in the 2006–07 Budget process to refine and enhance DAWGS including its reporting functionality. The ANAO considers that DAWGS enhancement is essential to enable AGD to accurately and reliably report on commitment as a precursor to developing a strategy with the Department of Finance and Administration to manage its unfunded forward commitment.

50. AGD's decommitment project, which aims to identify inactive grants and recall outstanding grant monies, is dependent on timely reconciliation of AGD grants. While DAWGS has the facility to record decommitted amounts, AGD has experienced difficulties with this part of the workflow and has recently begun to manually record the amount of money decommitted. AGD

advised that the process of decommitment and the facility to report on decommitments will form part of the proposed enhancement of DAWGS.

51. The ANAO found that there is no process to reconcile records between DAWGS and AGD's financial management system (SAP).

52. AGD has acquittal procedures in place to ensure proper accountability for the funds made available to grant recipients. Current acquittal procedures are such that there can be no loss of Commonwealth funds as grant funds are no longer paid into trust accounts. However, the ANAO found that the specification of 'deliverables' in funding agreements with grant recipients was clear in some agreements but very broad in others. In addition to checking that funds have been expended appropriately, AGD should assure itself that funds have been expended to achieve Respondents Scheme objectives.

53. The funding agreement template did not provide sufficient instructions to the grant recipient as to what AGD would regard as suitable assurance that grant recipients had, in fact, acquitted the grant in line with the grant's objective.

## **Respondents Scheme review and evaluation (Chapter Six)**

54. The Native Title Coordination Committee monitors, reviews and advises the Government on the Native Title System as a whole. The ANAO considers that the committee's reviews provide useful comment on the operation of the Respondents Scheme as part of the overall Native Title System. It is appropriate that an ongoing external process of review of the System assesses the effectiveness of its component elements, including the Respondents Scheme.

55. The ANAO considers that AGD's ability to evaluate the effectiveness of the Respondents Scheme at the individual grant level and at the programme level would be enhanced by the specification of performance information at both levels.

## **AGD summary response**

56. The Attorney-General's Department welcomes the Report on the Administration of the Native Title Respondents Funding Scheme. AGD has in place a range of procedures to ensure quality decision-making to achieve Scheme objectives and accountability for Scheme funds. AGD will continue to review processes to ensure ongoing effective and efficient delivery of Scheme

outcomes. The Australian Government announced a package of complementary reforms to the Native Title System in 2005, including a review of the Respondents Scheme Guidelines. The draft Guidelines incorporate features that will further enhance AGD's ability to ensure that funded respondents contribute positively to native title outcomes in accordance with the Australian Government's objectives.

57. The full text of AGD's response is at Appendix 5.

# Recommendations

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## Recommendation

### No.1

#### Para. 2.79

The ANAO recommends that AGD:

- develops programme performance indicators that can measure and track, over time, the Respondents Scheme's contribution to the Government's objectives for the Native Title System; and
- carries out a structured risk assessment to assure itself that all of the risks specific to the Respondents Scheme are identified and treated.

*AGD response:* Agree.

## Recommendation

### No.2

#### Para. 3.54

To promote the efficient, effective and ethical use of Australian Government resources, the ANAO recommends that AGD ensures that the design of Respondents Scheme funding strategies includes the appropriate management of interest earned on funds advanced to grant recipients.

*AGD response:* Agree.

## Recommendation

### No.3

#### Para. 4.45

To ensure AGD staff have access to high quality data, the ANAO recommends that AGD evaluates, on a periodic basis, the data held in its Data and Workflow Grants System (DAWGS) tables to:

- determine which data are essential for business purposes; and
- ensure that the quality of these data is sufficient to support business purposes, for example performance and financial reporting.

*AGD response:* Agree.

**Recommendation  
No.4  
Para. 4.89**

To ensure that AGD decision-making is consistent and of a high quality, the ANAO recommends that AGD introduce:

- a periodic quality review of application/invoice processing arrangements;
- a review of the sufficiency of the tools available to support quality decision-making, including the grant administration policies and procedures manual, DAWGS processing and formal training for new legal officers; and
- performance indicators to monitor the grant application and review process.

*AGD response:* Agree.

**Recommendation  
No.5  
Para. 5.98**

The ANAO recommends that AGD:

- finalise its reconciliation project to facilitate more accurate reporting of Respondents Scheme commitment totals and expenditure;
- enhance DAWGS financial reporting capabilities; and
- reconcile DAWGS to its financial management system (SAP) on a periodic basis and promptly report any discrepancies to senior management for follow up.

*AGD response:* Agree.



**Recommendation  
No.6  
Para. 5.121**

To complement AGD's existing financial monitoring and acquittal of Respondents Scheme grants, the ANAO recommends that AGD incorporates additional information on what is to be delivered into Respondents Scheme funding agreements. This will allow AGD to better assess whether grant funds have been expended to achieve grant objectives.

*AGD response:* Agree.



# **Audit Findings and Conclusions**



# 1. The Native Title Respondents Funding Scheme

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*This chapter provides background on the Native Title System within Australia. A component of the System is the Native Title Respondents Funding Scheme—the audit topic (also referred to as the Respondents Scheme). The Respondents Scheme is legislated under the Native Title Act 1993 and is administered as a grants programme by the federal Attorney–General’s Department (AGD). The broad administrative settings of the programme are introduced in this chapter and the audit objective and scope, conduct of the audit and the report structure are also presented.*

## The Native Title System

**1.1** The *Native Title Act 1993* (the Act) was enacted in response to the High Court’s landmark decision in *Mabo v Queensland [No 2]* (1992). This decision provided for the recognition and protection, within Australian common law, of the native title rights and interests of Indigenous Australians—under a communal native title sourced in their pre-sovereign laws and customs.<sup>25</sup>

**1.2** Native title is defined in the Act, at subsection 223(1) as:

The communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests possessed under the traditional laws are acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

**1.3** Division 2B of the Act—‘confirmation of past extinguishment of native title by certain valid or validated acts’—provides that certain acts by the Commonwealth that were done on or before 23 December 1996 have completely or partially extinguished native title. Previous exclusion possession acts—including the grant or vesting of such things as freehold estates, or leases that conferred exclusive possession, or the construction or establishment of public works—have completely extinguished native title. Previous

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<sup>25</sup> Perry, M and Lloyd, S 2003, *Australian Native Title Law*, Lawbook Co., p. 8.

non-exclusive possession acts—involving the grant of non-exclusive agricultural leases or non-exclusive pastoral leases—have extinguished native title to the extent of any inconsistency. Division 2B also allows States and Territories to legislate in respect of certain acts by them to extinguish native title, as it is done under this Division for the Commonwealth.

**1.4** Schedule 1 of the Act includes a list of tenures, which have resulted in the full extinguishment of native title rights. The Schedule lists a range of leases which are largely residential, commercial, community purpose and agricultural and which were considered to confer a right of exclusive possession on the grantee.<sup>26</sup>

**1.5** In such situations, there cannot be a claim for native title, even though Indigenous Australians may still have a connection with their traditional land. In these cases, native title is said to be ‘extinguished’.<sup>27</sup>

**1.6** These provisions under the Act were confirmed by the Full Federal Court on appeal in *State of Western Australia v Ben Ward & Others* [2000] FCA 191 (Cth) which held that the native title claims of the Miriuwung and Gajerrong families had been extinguished. That is, non-Indigenous interests granted before 1996 prevailed over native title rights and resulted in the complete or partial extinguishment of these rights.

**1.7** However, in certain circumstances native title may be a co-existing right. In these situations it may be necessary to support tenure holders’ engagement and negotiation with native title claimants/holders over the use of land—for example, by negotiating an agreement to establish the framework for native title holders’ access to pastoral properties.<sup>28</sup> The Act provides a mechanism for formal agreements to be reached between native title holders, native title claimants and others, such as pastoralists and graziers. These agreements are known as Indigenous Land Use Agreements (ILUAs).

## **Parties in the Native Title System**

**1.8** The Native Title System involves a range of Government and non-government parties participating in native title litigation, mediation and agreement making. Each element of the System is interconnected, relying on

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<sup>26</sup> *ibid*, p.148.

<sup>27</sup> The National Native Title Tribunal, June 2030, *Short Guide to Agreement making*, p.11.

<sup>28</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, 13 October 2005, *submission to the ANAO*, p.2.

the efficient functioning of the other elements to ensure the continued viability of the System. Appendix 1 provides more detail on the Native Title System and System outcomes.

**1.9** Figure 1.1 below presents the connections between the key parties in the Native Title System. These include:

- Native Title Representative Bodies—which represent native title claimants in the process and which are administered by the Department of Families, Community Services and Indigenous Affairs (FaCSIA);
- Prescribed Bodies Corporate—which either hold native title rights and interests on trust for native title holders or act as their agents in relation to native title and which are administered by FaCSIA;
- the Attorney-General’s Department (AGD)—which has overall responsibility for the administration of the Act and oversees Australian Government involvement in litigation, mediation and agreement making processes (the Native Title Unit). AGD also manages the Respondents Scheme (the Legal Assistance Branch). These functions are managed in separate divisions within the department to avoid any potential conflict;
- the Federal Court—which determines whether native title exists or not; and
- the National Native Title Tribunal (NNTT)—which mediates native title claims under the direction of the Federal Court and assists parties engaged in the process of native title agreement making.

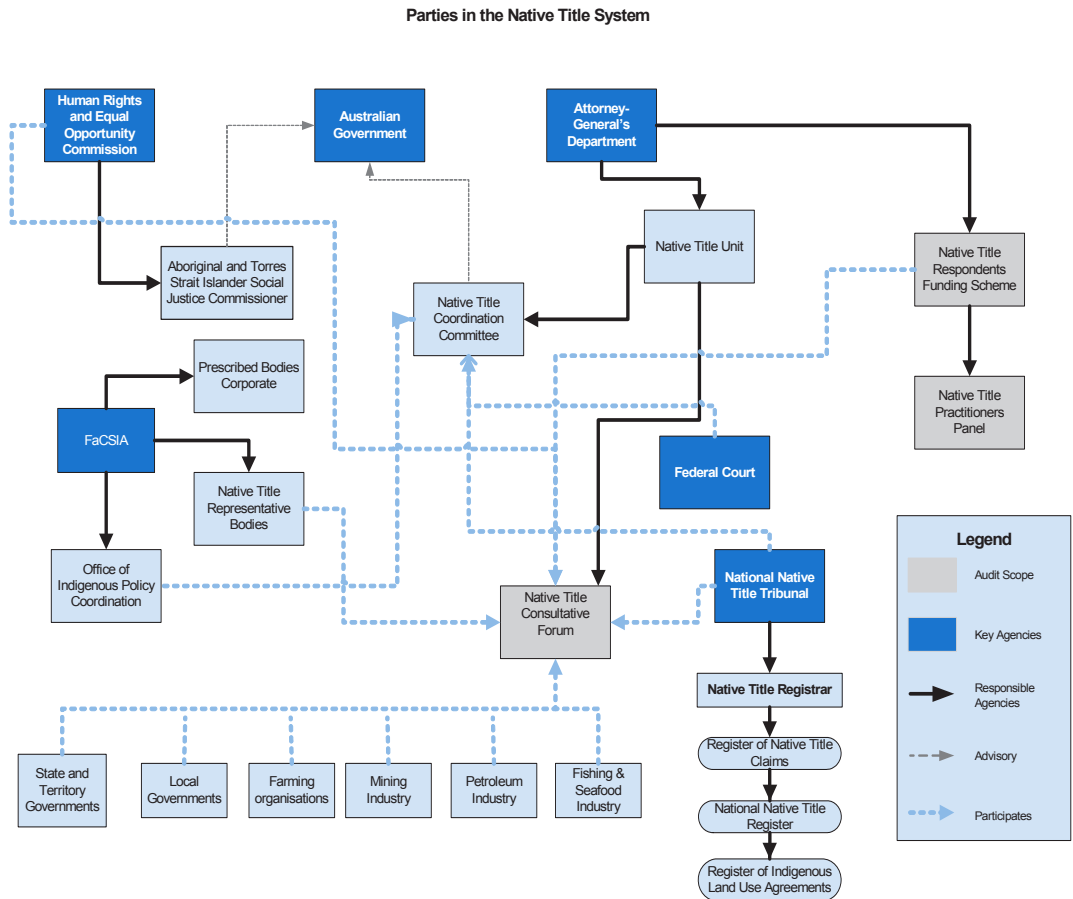
**1.10** As part of the reforms to deliver better outcomes in native title, announced in September 2005, the Attorney-General stated:

- A wide range of non-claimant parties (e.g. pastoralists, miners, local Government and industry peak bodies) participate extensively in native title claims. However, given that 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.
- The Government will consider how the guidelines for Australian Government funding to respondents in native title claims can be focussed more strongly on agreement making over litigation.

- As with the other elements [in the system], any reforms to the existing arrangements for assistance to respondents in native title claims will be directed towards securing improved performance from all elements of the system, and promoting agreement making wherever possible.<sup>29</sup>

**Figure 1.1**

**Parties in the Native Title System**



Source: ANAO, based on AGD information.

<sup>29</sup> AGD, September 2005, *Practical reforms to deliver better outcomes in Native Title*, p. 2.



## The administration of the Native Title Respondents Funding Scheme (the Respondents Scheme)

### Grants of assistance under s.183

**1.11** Financial assistance provision for respondents to native title claims is set out at s.183 of the Act. The Legal Assistance Branch (LAB) within the Indigenous Justice and Legal Assistance Division of AGD administers the scheme under delegations made pursuant to subsection 183 (7) of the Act.

**1.12** Financial assistance is made available to respondents in accordance with the *Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines* (the Guidelines). Subsection 183 (4) of the Act provides that the Attorney-General may determine Guidelines that are to be applied in authorising the provision of assistance under section 183. The current Guidelines came into effect on 30 November 1998, following amendments to the Act.

**1.13** Under the Guidelines, financial assistance is available for individuals, partnerships, small businesses, local government bodies, incorporated and unincorporated groups (including amateur associations) and peak bodies or organisations to:

- become a party to an inquiry, mediation or native title proceeding;
- negotiate an ILUA; and
- negotiate an agreement about rights conferred under subsection 44B (1) or resolving a dispute about rights conferred under subsection 44B (1).<sup>30</sup>

**1.14** Peak body or group representation is encouraged where the rights and interests of individuals/groups are essentially identical.<sup>31</sup> However, where assistance is approved to a group and individuals choose not to be represented within the group, even where their interests are identical, these individual applications may be funded subject to evaluation.<sup>32</sup>

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<sup>30</sup> These rights refer to the right of access for traditional activities.

<sup>31</sup> Attorney-General, 1998, *Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines*, para 6.6.

<sup>32</sup> *ibid.*, para 6.11.

**1.15** Assistance may cover legal and other professional costs; counsel's fees; expert fees, (e.g. anthropological); reasonable accommodation and travelling expenses; and other reasonable disbursement.<sup>33</sup>

**1.16** Legal and expert costs are set by the Attorney-General and practitioners must be a member of the Native Title Practitioners Panel established by the Attorney-General.<sup>34</sup>

**1.17** The Guidelines also allows funding of non-claimant applications to prove that native title does not exist. These applications are funded if it is considered necessary to have a determination of this kind made.<sup>35</sup>

**1.18** Funding is also available under two non-statutory schemes:

- the *Special Circumstances (Native Title) Scheme* funds persons involved in native title that does not come within the scope of s.183 and where it is considered reasonable to fund the applicant's participation; and
- the *Common Law (Native Title) Scheme* can also fund applications for grants of financial assistance and has regard to s.183 requirements. Assistance is available under this scheme where landowners claim that additional titles should be included in Schedule 1 of the Act (discussed above) and they have legal opinion to support their case.<sup>36</sup>

**1.19** Terms and conditions of grants of assistance as well as reporting requirements are set out in these Guidelines. These Guidelines form the key decision-making reference point for authorised delegates within AGD.

## **Data and Workflow Grants System (DAWGS)**

**1.20** AGD developed the Data and Workflow Grants System (DAWGS) to facilitate and streamline the process of handling claims. DAWGS also addresses processing problems identified in various AGD internal audit reports.<sup>37</sup>

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<sup>33</sup> *ibid*, para 5.6.

<sup>34</sup> *ibid*, para 7.10.

<sup>35</sup> *ibid*, para 6.13.

<sup>36</sup> *ibid*, para 6.24.

<sup>37</sup> AGD, October 2002, *Review of Grants administered by the Family Law and Legal Assistance Division*; AGD, May 2004, *Follow up Review of Grant Administration—Family Law and Legal Assistance Division*; and AGD, April 2005, *Follow up Review of Financial Assistance Grant Administration—Legal Assistance Branch*.

### *Migration of data to DAWGS*

**1.21** The previous database did not have the capacity to hold the same level of detail that is possible to be recorded in DAWGS. As a result, the records migrated to DAWGS cannot be analysed to the same extent as post DAWGS records.

**1.22** AGD has employed contractors since October 2003 to help to reconcile pre DAWGS financial records. The reconciliation process is still ongoing and is discussed in Chapter Five.

#### Summary data

**1.23** The ANAO interrogated DAWGS data using an audit tool that allows the extraction, sampling and manipulation of data in order to identify errors, problems, specific issues and trends. A download of DAWGS data, as at 24 August 2005, was analysed by the ANAO.

**1.24** Tables of summary data are provided in the body of the report and more detailed analysis is presented where relevant.

## **Audit objective and scope**

### **Audit objective**

**1.25** The objective of the audit was to assess the effectiveness of AGD's administration of grants provided under the Respondents Scheme.

### **Audit scope**

**1.26** The audit considered the context within which the Respondents Scheme operates and focussed on assessing the administration of the scheme including its financial management. The audit topic is presented in Figure 1.2 below. The ANAO's *Administration of Grants—Better Practice Guide*, May 2002, was used to formulate audit criteria.

### **Audit methodology and approach**

**1.27** The ANAO conducted audit fieldwork in the Legal Assistance Branch within the Attorney-General's Department, Canberra. This included interviewing key personnel and conducting file analysis; examining core scheme documents and decision-making processes; and obtaining a download of scheme data from the department's Data and Workflow Grants System (DAWGS) for further analysis. The ANAO also held structured interviews

with a selection of AGD's nominated key stakeholders in receipt of grants under the scheme and members of its Native Title Practitioners Panel.

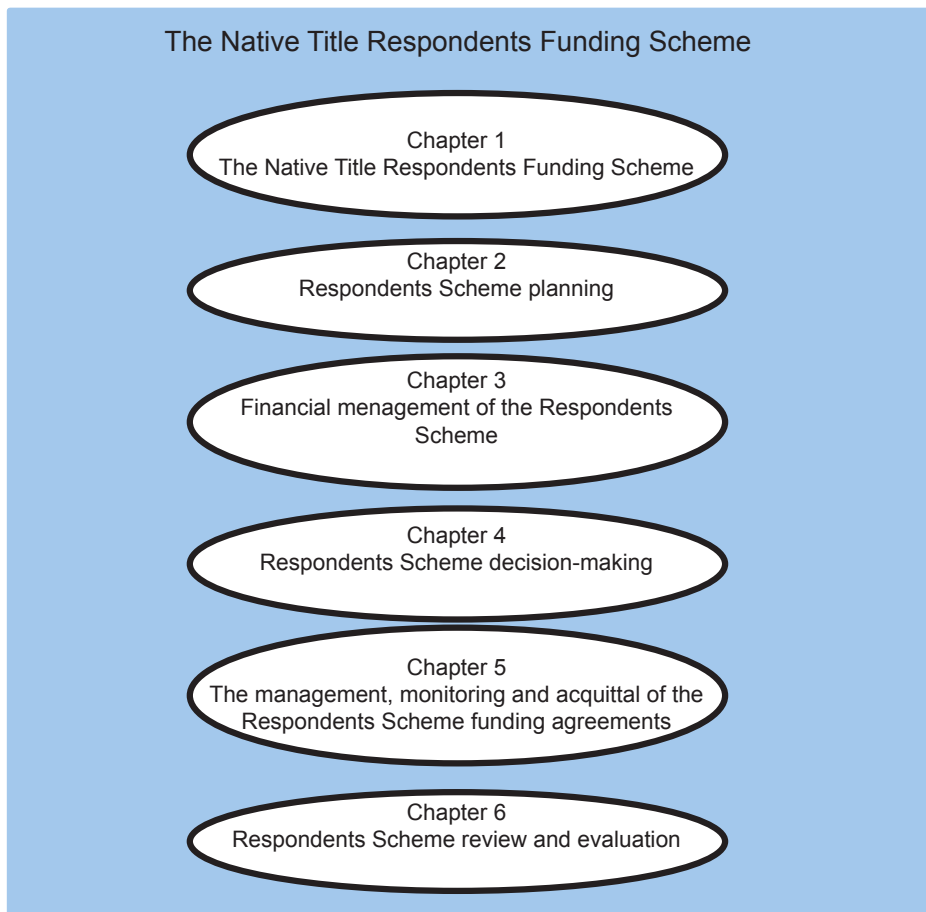
1.28 The audit was conducted in accordance with ANAO auditing standards and at a cost of \$294 412.

## Report structure

1.29 Figure 1.2 represents the audit report structure.

**Figure 1.2**

### Audit Report Structure



Source: ANAO.

## 2. Respondents Scheme planning

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*This chapter examines the Attorney-General's Department's (AGDs) approach to Respondents Scheme planning including whether appropriate accountability requirements were considered in the planning process and subsequently put in place. It also assesses AGD's management of the specific risks associated with the Respondents Scheme.*

### Introduction

**2.1** Sound planning is a critical feature of good governance as it facilitates the efficient and effective administration of government policy and programme objectives. An accountability framework supports business planning, enabling the identification of Government outcomes as well as departmental inputs and outputs. It also determines relevant milestones and targets and establishes mechanisms to enable administrators to assess and report the extent to which the programme is meeting its objectives.<sup>38</sup>

**2.2** Business planning sets out the necessary steps and processes, identifies what resources are needed and how they will be used. Typically, business plans are developed having regard to an assessment of the risks associated with the programme.

### The legislative basis for the Native Title Respondents Funding Scheme

**2.3** Section 183 of the *Native Title Act 1993* (the Act) establishes the legislative basis for the Native Title Respondents Funding Scheme (the Respondents Scheme). Relevant subsections of s.183 include the following:

- s. 183 (1) provides that 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 may apply to the Attorney-General for the provision of assistance under this section in relation to the inquiry, mediation or proceeding;
- s. 183 (2) provides that a 'person' who is or intends to become a party to an Indigenous Land Use Agreement or an agreement about rights of access for traditional activities or is in dispute with any other person about rights of access for traditional activities; may apply to the

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<sup>38</sup> ANAO, May 2002, *Administration of Grants—Better Practice Guide*, pps. 5 and 20.

Attorney-General for the provision of assistance under this section in relation to:

- negotiating the agreement; any inquiry, mediation or proceeding in relation to the agreement; or resolving the dispute;
- s. 183 (3) provides that the Attorney-General or a delegate *may grant financial assistance* if satisfied that the applicant is not eligible to receive assistance from any other source; the provision of assistance to the applicant is in accordance with the guidelines (if any) determined under subsection 183 (4); and in all the circumstances, it is reasonable that the application be granted;
- s. 183 (4) provides that the Attorney-General may determine guidelines that are to be applied in authorising the provision of assistance under section 183.<sup>39</sup>

**2.4** One of the main objectives of the Act is: 'to establish a mechanism for determining claims to native title.' One such mechanism is a consent determination which is a Court assisted mediation process enabling the parties to reach an agreement about native title. If consent is successfully reached between all the parties to a native title claim on the extent and nature of native title rights and interests, the Federal Court can make a consent determination. As at October 2005, the Federal Court had made 45 consent determinations—Appendix 1 provides more detail on consent determinations. Funding is available under the Respondents Scheme to help respondent parties to participate in this type of agreement making.

**2.5** Amendments to the Act were introduced to the Australian Parliament in two tranches in 1997 and 1998. In the second reading speech for the first tranche of amendments in 1997 the Attorney-General stated:

- Currently, the Act provides for an essential 'claims driven' regime for dealing with native title issues. In the Government's view, insufficient support is given to resolving native title issues by agreement—often the speediest, lowest cost and least divisive mechanism. The Bill therefore sets out a comprehensive framework for reaching consensual arrangements between the parties; and
- This Bill provides much improved certainty for agricultural and pastoral lessees. Lessees will have security that their rights continue to prevail over those of native title holders. Legal aid will be more

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<sup>39</sup> Attorney-General, 1998, *Guidelines*, para 2.1–2.4.

readily available to pastoralists and other persons responding to native title claims.<sup>40</sup>

**2.6** Following extensive community consultation, the Bill was reintroduced to Parliament and passed in 1998. A significant amendment enhanced respondent parties' participation in the voluntary agreement making process by making available financial assistance under the Respondents Scheme at s.183 (2) of the Act. This provision supported the Government's desire to provide parties with 'a legally certain, procedurally straight forward and comprehensive agreements framework'.<sup>41</sup>

**2.7** Between 1998 and 2005, the Government expressed its preference for resolving native title matters by negotiation rather than litigation, on a number of occasions.<sup>42</sup> In September 2005, the Australian Government restated its objective for the Native Title System as a whole: 'to promote the resolution of native title issues through agreement making wherever possible, in preference to litigation.'<sup>43</sup> To support this system-wide objective, the Attorney-General announced a package of reforms to deliver better outcomes in native title, including: 'the Government will consider how the guidelines for Australian Government funding to respondents in native title claims can be focussed more strongly on agreement making over litigation'.

## Planning processes

**2.8** The ANAO considered AGD's approach to planning for an effective and efficient grant<sup>44</sup> programme to meet government policy and programme objectives. Key aspects of planning were assessed, including whether AGD had:

- an accountability framework enabling the specification of:

<sup>40</sup> Attorney-General, 4 September 1997, *Second reading of the Native Title Amendment Bill 1997*, Hansard.

<sup>41</sup> Attorney-General, 9 March 1998, *Second Reading Speech—Native Title Amendment Bill 1997*.

<sup>42</sup> Attorney-General, 22 May 2001, *News Release—More Money for Native Title*.

Attorney-General, September 2002, *Native Title: The Next 10 Years—Moving forward by Agreement*; and

Attorney-General, June 2004, *The Government's Approach to Native Title*.

<sup>43</sup> Attorney-General, September 2005, *Practical Reforms to deliver better outcomes in Native Title*.

<sup>44</sup> A grant is a sum of money given to organisations or individuals for a specified purpose directed at achieving goals and objectives consistent with Government policy. The term is generally used to include any funding arrangement where the recipient is selected on merit against a set of criteria. In a strict sense, a grant is a 'gift' from the Crown which may, or may not, be subject to unilaterally imposed conditions.

- programme objectives (linked with broader Government outcomes) as well as programme inputs and outputs,
- related performance information, and
- appropriate accountability reporting;
- assessed risks (including fraud exposures) associated with the programme; and
- a detailed, well-documented plan for delivering, monitoring and evaluating the programme (e.g. programme guidelines).

## **An accountability framework**

**2.9** The following extract from the Joint Committee of Public Accounts and Audit Report 388 describes the Government's accountability framework:

All Commonwealth agencies operate on the basis of an outcomes and outputs framework that was introduced by the Government in 1999–2000. The Government delivers benefits to the Australian community (outcomes) primarily through administered items and agencies' goods and services (outputs) which are delivered against specific performance benchmarks or targets (indicators).

The framework operates in the following way:

- the Government specifies, via outcome statements, the outcomes it is seeking to achieve in given areas;
- these outcomes are specified in terms of the impact the Government is aiming to have on some aspect of society;
- Parliament appropriates funds, on a full accrual basis, to allow the Government to achieve these outcomes through administered items and departmental outputs;
- items such as grants, transfers and benefit payments are administered on the Government's behalf by agencies, with a view to maximising their contribution to the specified outcomes;
- agencies specify the nature and full accrual price of their outputs and manage them to maximise their contribution to the achievement of the Government's desired outcomes;



- performance indicators are developed to allow for scrutiny of effectiveness (i.e. the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs); and
- agencies discuss in their annual reports their performance against their performance indicators.<sup>45</sup>

**2.10** The ANAO assessed the Respondents Scheme accountability requirements against this framework. This assessment focused on:

- the development of programme objectives aligned with broader Government outcomes;
- related performance information; and
- appropriate accountability reporting.

#### *Shared outcomes*

**2.11** The Joint Committee of Public Accounts and Audit (JCPAA) report commented that:

While agencies may experience difficulty in measuring and assessing performance in achieving Government outcomes, problems are much greater where an outcome is so broad as to encompass the activities of one or a number of other agencies. In such situations it is difficult to determine whether progress towards achieving the outcome results from the activities of all or only some of the agencies involved.<sup>46</sup>

**2.12** The Respondents Scheme is a single, yet important element of the larger Native Title System. Administration of the Native Title System is shared across a number of government agencies including AGD, with separate components of the System identified and funded within each agency's Outcomes and Outputs framework.

#### Respondents Scheme objectives

**2.13** As discussed previously, the Act sets out the legislative objectives for the Respondents Scheme including that financial assistance may be provided, where it is reasonable, to non-claimants who are, or intend to be, parties to

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<sup>45</sup> Joint Committee of Public Accounts and Audit (JCPAA), June 2002, *Report 388—Review of the Accrual Budget Documentation*, pps. 4–5.

<sup>46</sup> *Ibid.*, p.16.

inquiries, mediation or proceedings under the Act or to Indigenous Land Use Agreements (ILUAs) or subsection 44B(1) agreements.<sup>47</sup>

**2.14** When introducing amendments to the Act, the Attorney-General in the 1998 second reading speech pointed to agreement making representing the way forward.<sup>48</sup>

**2.15** Table 2.1 below provides details of expenditure for the Native Title System and identifies Respondents Scheme expenditure. AGD provided these data to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on 29 November 2005. The reliability of data concerning Respondents Scheme expenditure is assessed in Chapter Five.

**Table 2.1**

**Respondents Scheme expenditure as a component of Native Title System expenditure**

Year	Native Title System expenditure \$	Respondents Scheme expenditure \$	% of total expenditure
2001-02	100.10m	6.00m	6.0%
2002-03	106.45m	8.05m	7.6%
2003-04	112.24m	9.89m	8.8%
2004-05	110.09m	6.99m	6.3%

Source: AGD.

**2.16** The grants provided through the Respondents Scheme support the participation of non-claimant parties in native title litigation, mediation to reach agreement on a consent determination and other types of agreement making.

Link with broader native title objectives

**2.17** In September 2005, the Australian Government restated its objective for the Native Title System as a whole to promote the resolution of native title issues through agreement making wherever possible, in preference to litigation.

<sup>47</sup> Subsection 44B (1) agreements refer to the making of agreements about rights of access for traditional activities or to resolve disputes concerning these rights.

<sup>48</sup> Hon Darryl Williams, 9 March 1998, *Second Reading Speech–Native Title Amendment Bill 1997*.

**2.18** The ANAO notes the Attorney–General’s announcement to amend the Guidelines of the Respondents Scheme to further encourage agreement making rather than litigation.<sup>49</sup>

**2.19** The ANAO considers that it would be useful for AGD to develop programme objectives for the Respondents Scheme enabling it to report on the Respondents Scheme’s contribution to the Government’s objective for the Native Title System.

**2.20** By developing objectives in terms of the Scheme’s contribution to the Government’s higher level outcome, Respondents Scheme grant administrators would then be able to determine what performance information was required to assess the successful achievement of these objectives. They could then align this information with individual grant reporting requirements enabling AGD to assess the contribution of the Respondents Scheme to the Government’s higher level outcome.

### *Respondents Scheme performance information*

**2.21** Performance information is essentially information that is collected by agencies and used systematically for a number of purposes, including:

- external reporting which focuses on predicting performance for a particular year through Portfolio Budget Statements and reporting on actual performance through Annual Reports; and
- internal reporting which is more frequent and focuses on providing timely feedback on the performance of output and administered items so that action can be taken during the course of the budget year to ensure that the expectations of Government and the agency can be met.<sup>50</sup>

**2.22** Performance information is an important tool for effective programme management and performance improvement. As well as providing a basis for informed decision–making, it also provides managers with an early warning signal that preventative action is required.

**2.23** The ANAO assessed the extent to which AGD incorporated the development of performance information into the planning of the Respondents Scheme grants programme.

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<sup>49</sup> Attorney–General, September 2005, *Practical Reforms to deliver better outcomes in Native Title*.

<sup>50</sup> Department of Finance and Administration, 2003, *Performance Reporting under Outcomes and Outputs*, p. 1.

**2.24** The ANAO reviewed relevant key documents supporting the Respondents Scheme and found that, in general, performance information required from grant recipients largely related to grant expenditure. While this is an important requirement, programme expenditure should be complemented with a reporting element devoted to assessing the achievement of programme objectives.<sup>51</sup> As a general rule, the ANAO found this not to be the case with the majority of Respondents Scheme grants. Exceptions to this were noted with the introduction of new programme elements in the Respondents Scheme such as the Native Title Officer innovation. Further information on this innovation is in Appendix 2.

### *Appropriate accountability reporting*

**2.25** Agencies report regularly to the Government and Parliament on the use of public funds, generally in the context of the outcomes and outputs framework. Internal management reports on the performance of programmes generally form the basis for these external reports.

#### Administered items

**2.26** The Respondents Scheme is an administered item within AGD's Outcome 1—'an equitable and accessible system of federal civil justice'. An administered item is defined as:

Those items controlled by the Australian Government and managed or overseen by entities on behalf of the Australian Government. They are generally subject to set conditions and eligibility rules established by legislation or Australian Government policy.<sup>52</sup>

**2.27** AGD's Appropriation Bill 1 2005–06 included, under administered appropriations, a line item 'Financial assistance towards legal costs and related expenses'. This line item had a budget estimate of \$21 752 and included funding for the Respondents Scheme. AGD's internal budget for the Respondents Scheme was set at \$8 million for 2005–06.

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<sup>51</sup> ANAO, May 2002, op cit, p.27.

<sup>52</sup> Finance Minister's Orders, 2003–2004 onwards, *Requirements and Guidance for the preparation of Financial Statements*, p. 28.

## External reporting

**2.28** Department of Finance and Administration (Finance) guidelines on the preparation of Portfolio Budget Statements and Annual Reports set out minimum requirements with regards to administered items:

...those aspects of administered items that are important for policy efficacy and/or public accountability must be identified and reported on, especially in Portfolio Budget Statements and Annual Reports. Administered items are also included in assessments of the effectiveness of Government actions in achieving specified outcomes;

...Indicators of effectiveness (i.e. measures indicating administered items' contributions to the specified outcomes) should be attached to the relevant outcome. They generally reflect the combined contributions of the output(s) and administered item(s) targeting the outcome.<sup>53</sup>

**2.29** Performance information for Outcome 1 administered items is found in AGD's Portfolio Budget Statements: 'Financial assistance towards legal costs and related expenses' with a corresponding performance measure:

- funds provided in accordance with legislation or relevant guidelines.<sup>54</sup>

**2.30** AGD's Annual Reports, as a rule, provide performance information relating to the number of current grants of financial assistance under the Respondents Scheme.

**2.31** When grants are made, information is provided on the current status of the matter. AGD uses this information to inform its consideration of the budget of anticipated work for legal costs which accompanies the application. AGD has access to data on the use of its grants by respondent parties through the National Native Title Tribunal website which provides details on the application name, application date and application status amongst others. However, AGD's Data and Workflow Grants System (DAWGS) does not distinguish between grants which are funded for mediation and those for litigation. AGD advised that individual case officers are aware of the few matters funded for litigation and DAWGS functionality will be upgraded, as part of the 2006–07 Budget enhancements, to enable it to distinguish between mediation and litigation for reporting purposes.<sup>55</sup> These improvements should

<sup>53</sup> Department of Finance and Administration, November 2000, *Specification of Outcomes and Outputs*, p.16.

<sup>54</sup> Attorney-General's Department, 2005–06, *Portfolio Budget Statements*, p. 42.

<sup>55</sup> It should be noted that the status of a matter can move from mediation to a litigation phase and then return to mediation and continue to change status over a number of years.

allow AGD to report that the majority of grants made under the Respondents Scheme are made to respondent parties for mediation to reach agreement on a consent determination and to engage in other forms of agreement making.

**2.32** AGD has advised the ANAO that it will contribute to enhanced data collection by the Native Title Coordination Committee to inform the Committee's advice to Government on the operation of the Native Title System, including the identification of trends.

**2.33** There would be value in AGD reporting this information to Parliament and other stakeholders as it would enable AGD to demonstrate that the majority of grants made under the Respondents Scheme are made to respondent parties for agreement making purposes including mediation to reach agreement through a consent determination.

**2.34** The ANAO considers that AGD could provide more comprehensive information to external stakeholders on the performance of the Respondents Scheme, as an administered item managed by AGD. This would enhance AGD's public accountability concerning its administration of the Respondents Scheme. Developing appropriate effectiveness performance measures and reporting against these measures would assist AGD in this regard.

#### AGD's revised performance measures

**2.35** Because of the link between the Government's intentions for the Native Title System as a whole and the development of relevant and specific performance information for the Respondents' Scheme, the ANAO considers AGD should clearly communicate what it intends the Respondents Scheme to achieve and how this will be measured and assessed.

**2.36** The ANAO found that AGD's lack of appropriate and relevant performance measures limited its ability to report on the performance of the Respondents Scheme. During the course of the audit, AGD advised that new performance indicators had been approved as part of a department-wide review of all performance indicators in the Portfolio Budget Statements for 2006–07.

**2.37** The administered line item set out in AGD's Portfolio Budget Statements 2006–07: 'Financial assistance towards legal costs and related expenditure. Assistance is provided in accordance with relevant legislation and in compliance with the terms of individual grants for a range of schemes for legal assistance' applies to the 25 separate financial assistance schemes that AGD administers. One of these is the Respondents Scheme and it receives the

bulk of the appropriated funding. For 2006–07, AGD has developed a set of new performance indicators for the line item:

- number of grants the subject of adverse Ombudsman reports (or grants not challenged) as a percentage of number of current grants for each scheme in the financial year;
- number of judicial review decisions upheld (or not challenged) as a percentage of number of decisions made for each scheme in the financial year;
- amount approved for payment in financial year against each scheme; and
- number of matters with current grants during a financial year including grants finalised in a reporting year.

**2.38** While these performance indicators are appropriate at the output level, namely measuring the goods and services provided for AGD’s financial assistance schemes, they do not allow for an assessment of the extent to which the Respondents Scheme is meeting the Government’s objective to promote agreement making rather than litigation. AGD has proposed a new performance indicator to apply solely to the Respondents Scheme:

- funding for matters involving mediation/agreement making as a percentage of the current grants under the Respondents Scheme.

#### Secretary’s reports

**2.39** The sound monitoring of grants programmes requires effective financial and progress reporting. This is important to inform senior management that the grants programme is on track and is achieving its stated objectives.

**2.40** The ANAO assessed AGD’s Data and Workflow Grants System (DAWGS)<sup>56</sup> reporting capabilities in this context.

**2.41** AGD reports to its Secretary on a monthly basis on the progress of Respondents Scheme grants administered by AGD. The Legal Assistance Branch reports against four workload indicators: the number of applications, extensions, reviews and invoices that have been received, processed or are pending for the month under review. Data were migrated to DAWGS from the

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<sup>56</sup> AGD developed the Data and Workflow Grants System (DAWGS) to facilitate the streamlining and handling of claims under its various financial assistance grants, including the Respondents Scheme.

pre-existing database to ensure that trend data were available for analytical and reporting purposes.

**2.42** DAWGS automatically develops reports against the four workload indicators. However, the Legal Assistance Branch's standardised reporting to the Secretary does not include regular reporting of the scheme's financial status, in particular its forward commitment. To moderate this risk and provide the Secretary with this additional financial information, administrative staff within the Legal Assistance Branch are required to develop and run specific reports on an ad hoc basis.

#### Outputs

**2.43** Outputs are agencies' goods and services and are delivered against the programme's specific performance benchmarks or targets (indicators).<sup>57</sup> In the case of the Respondents Scheme, outputs could include the number of grants in progress, the number of grants finalised and the number of new grant applicants. The ANAO interrogated DAWGS data, at 24 August 2005, and found that AGD has made 1 570 grants of financial assistance through the Respondents Scheme. These 1 570 grants included 1 451 made under s.183 of the Act; 118 made under the non-statutory Special Circumstances (Native Title) Scheme; and 1 made under the non-statutory Common Law (Native Title) Scheme.

#### Inputs

**2.44** Inputs are the cash and resources consumed by the programme. At 24 August 2005, the ANAO found that AGD had committed<sup>58</sup> \$77 million to the Respondents Scheme, since its inception.

**2.45** The ANAO considers that the monthly reports to the Secretary on the Respondents Scheme could be enhanced with further budget and financial analysis concerned with the Respondents Scheme's outputs and inputs. Improvements in DAWGS reporting capabilities are required to do this cost effectively.

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<sup>57</sup> JCPAA, June 2002, op cit, p. 2.

<sup>58</sup> AGD's definition of commitment as it relates to the Respondents Scheme is: 'A commitment is a decision by the Attorney-General or his/her delegate fixing the upper limit on the amount that will be paid by the Commonwealth for work undertaken pursuant to a grant of financial assistance, subject to compliance with the Attorney-General's Guidelines and the terms and conditions of the grant.'



## **An assessment of risks associated with the Respondents Scheme**

**2.46** Risk management identifies real and potential risks as well as any treatment strategies required. Such an approach enables an agency to focus on maximising the value for money of expenditure by limiting any adverse impacts. In the absence of a structured risk assessment linked to organisation business plans, performance information and related review processes, it is difficult for grant administrators to make fully informed decisions about the most efficient and effective deployment of resources.<sup>59</sup>

**2.47** By adopting a disciplined and structured approach to risk management, agencies are able to identify, assess and treat risks, including financial and fraud risks. The ANAO sought to determine whether AGD had developed such an approach to help identify the particular risks associated with the Respondents Scheme and whether it had analysed these risks, implemented treatments and monitored and reviewed the success of its controls.

**2.48** AGD promulgated to line areas an organisation-wide Risk management plan in February 2005. The plan includes a risk analysis matrix, which rates risks against the likelihood that they would occur and the consequences of that occurrence. Such an approach facilitates the development of risk treatment plans consistent with the assessed level of risk.<sup>60</sup>

**2.49** The AGD plan identified a risk category of ineffective resource management, including the ineffective administering or mismanagement of grant funds. The risk rating assigned to this category was designated as high.<sup>61</sup>

**2.50** The ANAO was advised by the Financial Management Branch within AGD that they rely on their line areas, including the Division where the Respondents Scheme is located, to apply the departmental Risk management plan to their activities to help identify and manage the risks that emerge in their areas.

**2.51** The AGD line area responsible for managing the Respondents Scheme has developed a number of risk treatments including:

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<sup>59</sup> ANAO, May 2002, op cit, p. 11.

<sup>60</sup> Attorney-General's Department, March 2005, *Risk Management Plan*, p.13.

<sup>61</sup> *ibid.*

- the development of its Data and Workflow Grants Management System (DAWGS) to help with the management of grants including recording decisions and tracking payments and grant balances;
- high-level scrutiny of legal costs by assessing invoices submitted by legal firms to ensure legal work is reasonable, necessary and accords with the purpose of the grant (including by reference to budgets of anticipated work settled by AGD); and
- the practice of requesting information and documents to monitor the progress of a matter or to assess the reasonableness of charges (such requests are routinely made upon approval of new grants, the assessment of invoices, and during the life of a grant).

### *AGD's Fraud Control Plan*

**2.52** AGD has developed an internal Fraud control plan as required by the Commonwealth Fraud Control Guidelines and has identified under the Indigenous Justice and Legal Assistance Division, the following potential fraud risk:

Misrepresentations and/or false information provided by applicants in support of applications for legal aid and financial assistance.<sup>62</sup>

**2.53** In 2003, AGD's Legal Assistance Branch employed a commercial legal firm to examine costs included in accounts presented by a number of its legal clients. The errors and anomalies found in invoices submitted by legal firms related largely to the incorrect use of the Federal Court Scale of Costs as required by the Guidelines.

**2.54** AGD advised the ANAO that the experience of the Legal Assistance Branch in this regard prompted the development and circulation of the *Assessments of Costs in Native Title matters* document in August 2003. The Attorney-General's Guidelines set solicitors' costs at 100 per cent of the Federal Court Scale, including rates set for related items such as the perusal of documents, receiving and filing of documents, typing, photocopying and other professional and clerical duties. Clarification on the application of the Federal Court Scale is set out in the *Assessments of Costs in Native Title matters* document and is a key decision-making support tool to moderate the risk of fraud. It is against the Federal Court Scale contained within the *Assessments of Costs in*

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<sup>62</sup> Attorney-General's Department, February 2005, *Fraud Control Plan 2004-06*, p. 40.

*Native Title matters* document that legal officers assess invoices from all grant recipients—solicitors and peak organisations.

**2.55** The ANAO found that the Legal Assistance Branch has adopted the same methodology in moderating the risk of fraud in the initial application process, which was identified in the department-wide Fraud control plan. The application of these controls is discussed further in Chapter Four.

### *Financial risks*

**2.56** As well as the usual risks associated with a grants programme, such as fraud, a number of significant risks arise from the legal environment in which the Respondents Scheme operates. These include financial risks associated with uncertainty about when grants become payable.

**2.57** The ANAO assessed AGD's management of the specific financial risks associated with the Respondents Scheme arising from its legal environment and whether they had been taken into account during planning processes.

**2.58** The ANAO acknowledges that there are a number of factors, which affect the ability of AGD to accurately predict when its grant recipients will actually expend the funds that are committed by AGD for the purposes of the grant. These factors include the fact that the Native Title Act does not impose a time limit on native title mediation processes. This can result in delays within the National Native Title Tribunal or the Federal Court and which are outside the scope of these agencies to influence. In this environment, it is important that AGD is able to identify and monitor its grant commitment and track the status of the related native title matter within the jurisdiction of the Court or Tribunal to help determine when grant funds may be expended within a fiscal year.

**2.59** While AGD has undertaken a range of risks treatments, as part of its Respondents Scheme planning process, it would be useful for AGD to also formally document its risk management arrangements. Such an approach would provide greater assurance that the specific risks, including financial risks, faced in administering the Respondents Scheme have been identified and managed.

**2.60** Owing to difficulties associated with the progress of a native title claim through the system AGD may commit, in any one year, to spending proposals with respondent parties which span several future financial years. This means that future year budgets are liable for these expenses of some \$12.9 million.<sup>63</sup>

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<sup>63</sup> At 12 October 2005.

The ANAO found that while AGD's Data and Workflow Grants System produces standardised internal reports, it is not able to automatically report on the Scheme's financial status, including the total amount of grant funds committed in future years. AGD relies on a manual process to produce reports on the Scheme's financial status. This approach introduces additional risks, particularly the consistency of the manual reporting process.

**2.61** The ANAO considers that more could be done to identify and treat the specific financial risks associated with the Respondents Scheme in a structured way and provide for their management in its planning processes.

### **Programme guidelines**

**2.62** In the absence of a programme plan, programme guidelines can be used to set out the administrative procedures that are to be followed consistently by staff when assessing an application for financial assistance. These administrative procedures include eligibility criteria and assessment procedures. Rules attached to the programme should be clear, easily understood, contain necessary financial and internal controls and be consistent with programme objectives. The ANAO assessed the current legislative Guidelines in this regard. The ANAO noted the release of a consultation draft of proposed revised Guidelines.

#### *Eligibility criteria and assessment procedures in the legislative Guidelines*

**2.63** Rules of eligibility enable the selection of appropriate applicants in line with programme objectives. Criteria for applications are specified at s.183 (3) of the Act. The criteria and the tests which AGD applies (which are based on the legislation) are presented in Table 2.2.

**Table 2.2**

**Criteria and considerations of the Guidelines**

Criteria	AGD considerations
1. the availability of assistance from any other source	whether applicants have access to assistance from another source and if so application is to be made to that other source.
2. whether the provision of assistance is in accordance with these Guidelines	<p><i>prospects of success</i>—that is whether the respondents have a good case to argue or are likely to protect their interests;</p> <p><i>advice from other agencies</i>—AGD routinely seeks general information from the Federal Court or the National Native Title Tribunal about what matters are proceeding as priority matters, timetables and scheduling dates. Information is also sought about the length of time taken for hearings, meetings, callovers and directions hearings;</p> <p><i>grouping of applications</i>—AGD would seek information from a peak organisation<sup>64</sup> to see if it were considering an application from an individual who might have a like interest to the membership of the peak organisation.</p>
3. whether it is reasonable that the application be granted	<p>(a) the severity and extent of the implications of the native title claim for the applicant for financial assistance, for example, the interests of the party which are claimed to be affected by the native title claim, as well as what is being claimed by the native title claimants and the extent of their claim;</p> <p>(b) the number of claims which directly affect the applicant for financial assistance;</p> <p>(c) does the applicant have a role or a genuine interest in the claim process and what would happen if the person/group did not have the opportunity to put forward their views;</p> <p>(d) is the benefit to the applicant worth the financial costs;</p> <p>(e) the benefit which the parties will gain from an agreement or a mediated outcome;</p> <p>(f) the novelty or legal importance of the issues raised; and</p> <p>(g) the benefit to the general public from obtaining a decision in the matter.</p>

Source: AGD, November 1998, *The Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines*, 6.5.

<sup>64</sup> Under the Guidelines, a peak organisation is a constituent industry body which represents the interests of its members in native title matters.

**2.64** The current Guidelines specify that a decision to grant or refuse assistance is to be based on a global assessment giving appropriate weight to all the considerations according to the circumstances of the case, including the aforementioned criteria. Discretion can be exercised by the decision-maker to ensure that the aforementioned criteria, amongst others, are taken into account.

**2.65** The ANAO considers that the legislative Guidelines provide the framework for AGD decision-making in determining grants of financial assistance.

*Rules are clear, easily understood, and contain necessary financial and internal controls*

**2.66** The current Guidelines provide specific guidance on rule application, for example, financial assistance cannot be granted retrospectively. Not granting money retrospectively is an important cash management principle and is consistent with broader Government budgetary objectives on managing cash in the Commonwealth.

**2.67** There are a range of participants in the Native Title System (see Appendix 1). Respondent activity is driven to a large degree by the actions of native title claimants and State and Territory Governments who act as primary respondents in native title cases. In such an environment, it is difficult to identify stages in grants to respondents. However, without the specification of stages, grant recipients cannot readily identify what they are expected to deliver and in what time frame. The ANAO notes that stages of grant assistance are more clearly defined in AGD's draft revised Guidelines. The specification of time frames for grants and the activities to be undertaken within those time frames will help AGD to more effectively manage the Respondents Scheme.<sup>65</sup>

**2.68** The establishment of rules concerning what constitutes a stage of assistance will also provide applicants with greater clarity and understanding when applying for grants of assistance. This will help AGD to efficiently deliver the Respondents Scheme and effectively manage its cash flow.

**2.69** While the legislative Guidelines provide the overall framework for AGD decision-making concerning grants of assistance for respondents to

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<sup>65</sup> The ANAO interrogated DAWGS data and found that the lack of specification in the length of grants of assistance had led to a large number of historical grants being open-ended. The ANAO profiled the age of Respondents Scheme grants—see Chapter Five for results.

native title claims, clearer articulation of the programme's financial and performance management arrangements would help AGD to better monitor and evaluate the programme.

## Conclusion

**2.70** Planning is an activity that allows programme objectives to be elaborated, performance measures and targets to be agreed upon to track progress in delivering results, and risks to be identified and treated.

**2.71** Section 183 of the Act establishes the legislative basis for the Native Title Respondents Funding Scheme. A significant amendment to the Act in 1998 enhanced respondent parties' participation in the voluntary agreement making process by making available financial assistance to non-claimant parties under the Respondents Scheme at s.183 (2) of the Act. This provision supported the Government's desire to provide parties with 'a legally certain, procedurally straight forward and comprehensive agreements framework'.<sup>66</sup>

**2.72** Between 1998 and 2005, the Government expressed its preference for resolving native title matters by negotiation rather than litigation.<sup>67</sup> In September 2005, the Australian Government restated its objective for the Native Title System as a whole: 'to promote the resolution of native title issues through agreement making wherever possible, in preference to litigation.'<sup>68</sup>

**2.73** A finding of this audit was that DAWGS does not distinguish between grants which are funded for mediation and those for litigation. AGD advised that individual case officers are aware of the few matters funded for litigation and DAWGS functionality will be upgraded, as part of the 2006–07 Budget enhancements, to enable it to distinguish between mediation and litigation for reporting purposes. It should be noted that the status of a matter can move from mediation to a litigation phrase and then return to mediation and continue to change status over a number of years. AGD has advised the ANAO that it will contribute to enhanced data collection by the Native Title Coordination Committee to inform the Committee's advice to Government on the operation of the Native Title System, including the identification of trends.

<sup>66</sup> Attorney-General, 9 March 1998, *Second Reading Speech—Native Title Amendment Bill 1997*.

<sup>67</sup> Attorney-General, 22 May 2001, *News Release—More Money for Native Title*.

Attorney-General, September 2002, *Native Title: The Next 10 Years—Moving forward by Agreement*; and

Attorney-General, June 2004, *The Government's Approach to Native Title*.

<sup>68</sup> Attorney-General, September 2005, *Practical Reforms to deliver better outcomes in Native Title*.

**2.74** AGD's ability to report on the performance of the Respondents Scheme would be improved by the use of more appropriate and relevant performance measures. The ANAO reviewed AGD's existing and proposed measures and found that they did not allow for an assessment of the extent to which the Respondents Scheme is meeting the Government's objective to promote agreement making rather than litigation. Subsequently, AGD has proposed a new performance indicator to apply solely to the Respondents Scheme enabling the quantification of grants for mediation/agreement making purposes as a proportion of total grants.

**2.75** By adopting a disciplined and structured approach to risk management, agencies are able to identify, assess and mitigate risks, including fraud and financial risks. While AGD had undertaken a range of risks treatments, as part of its Respondents Scheme planning process, AGD had not formally documented its risk management arrangements for the Scheme.

**2.76** There are factors within the Native Title System which affect AGD's ability to accurately predict when its grant recipients will expend the funds committed under the Respondents Scheme. This increases the importance of AGD's identification of the specific risks associated with the Respondents Scheme and to develop robust financial controls to manage these risks.

**2.77** In any one year, AGD may commit to spending proposals that span several years. This means that future year budgets are liable for these expenses of some \$12.9 million.<sup>69</sup> The ANAO found that while AGD's Data and Workflow Grants System produces standardised internal reports, it is not able to automatically report on the Scheme's financial status, including the total amount of grant funds committed in future years. AGD relies on a manual process to produce reports on the Scheme's financial status. This approach introduces additional risks, particularly the consistency of the manual reporting process. AGD has secured additional funding in the 2006–07 Budget to refine and enhance DAWGS including its reporting functionality.

**2.78** While the legislative Guidelines provide the overall framework for AGD decision-making concerning grants of assistance for respondents to native title claims, clearer articulation of the programme's financial and performance management arrangements would help AGD to better monitor and evaluate the programme.

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<sup>69</sup> At 12 October 2005.



## Recommendation No. 1

2.79 The ANAO recommends that AGD:

- develops programme performance indicators that can measure and track, over time, the Respondents Scheme's contribution to the Government's objectives for the Native Title System; and
- carries out a structured risk assessment to assure itself that all of the risks specific to the Respondents Scheme are identified and treated.

2.80 **AGD response:** *Agree.*

### *Programme performance indicators*

2.81 *Agree.* As noted in the Report at paragraph 2.37, new performance indicators have been specified as part of a Department-wide review of all performance indicators, and are shown in the Portfolio Budget Statements for 2006–07. As noted in paragraph 2.38, a further indicator has been proposed which will apply solely to the Respondents Scheme—funding for matters involving mediation/agreement making as a percentage of current grants.

### *Risk assessment*

2.82 *Agree.* AGD notes that the Report acknowledges at paragraph 23 that AGD has undertaken a range of risk treatments as part of the Respondents Scheme planning process. Noting that financial risk assessment and management are fundamental aspects directing the Scheme and informing programme management, AGD will formally document these risk management arrangements where it has not already done so.

## 3. Financial Management of the Respondents Scheme

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*This chapter assesses the design of the Respondents Scheme to take account of Australian Government financial management requirements and where value for money is a consideration.*

### Introduction

**3.1** It is important to ensure that a grants programme has design features that facilitate accountability and conform to the requirements of the *Financial Management and Accountability Act 1997* (the FMA Act) and Regulations and Finance Minister's Orders. It is also important that it is designed in such a way as to maximise value for money.<sup>70</sup>

**3.2** In this chapter, the ANAO assessed the degree to which the Respondents Scheme was designed to:

- comply with the FMA Act and Regulations; and
- ensure value for money in Respondents Scheme funding strategies.

### Compliance with the FMA Act

**3.3** Section 44 of the FMA Act requires Chief Executives to manage the affairs of their agency in a way that promotes the proper use of Australian Government resources, where proper use is defined as efficient, effective and ethical use.

### Authorisations and delegations

**3.4** Subsection 183 (7) of the Act provides that the Attorney-General may delegate any or all of his or her powers under subsection 183 (3). These powers include the provision of legal and financial assistance to respondents in native title matters. The AGD *Chief Executive's Instructions* (CEIs) were reissued in March 2005 for approvers of proposals to spend public money, replacing previous authorisations and delegations. In respect of the Respondents Scheme, the CEIs provide the First Assistant Secretary of the Indigenous Justice and Legal Assistance Division, the Assistant Secretary of the Legal Assistance Branch and principal legal officers and senior legal officers within

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<sup>70</sup> ANAO, May 2002, op cit, p. 6.

the branch with the authorisation to approve proposals for financial assistance and account payments with transaction limits<sup>71</sup> specified for the designated position.

3.5 The ANAO assessed controls<sup>72</sup> over delegated transaction limits and found that delegates were approving transactions within their designated limits.

## Compliance with Regulation 10

3.6 Regulation 10 of the *Financial Management and Accountability Regulations 1997* (FMA Regulations) requires that where agencies do not have the appropriation to meet the total costs of a commitment within the appropriation period, the authorisation of the Finance Minister is required.

3.7 Funding for the Respondents Scheme comes from an administered appropriation.<sup>73</sup> FMA Regulation 10 authorisation by the Finance Minister or his delegate is required for an administered spending proposal where the period of the spending proposal extends beyond a financial year. The purpose of FMA Regulation 10 is to primarily maintain flexibility for future budgets and avoid inappropriate budget 'lock-in'.<sup>74</sup>

3.8 The ANAO found that at 24 August 2005, AGD had committed \$77 million to financial assistance under the Respondents Scheme, since its inception. The monthly reports to AGD's Secretary, which are based on DAWGS data, do not include regular reporting of the Respondents Scheme commitment.

3.9 The ANAO acknowledges that there are a number of factors which affect the ability of AGD to accurately predict when grant recipients will actually expend the funds that are committed by AGD for the purposes of the grant. These factors include delays which may occur within the National Native Title Tribunal and the Federal Court and which are outside the scope of these agencies to influence.

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<sup>71</sup> These limits are: First Assistant Secretary—\$8 million; Assistant Secretary—\$250 000; Principal Legal Officer—\$100 000; and Senior Legal Officer—\$10 000.

<sup>72</sup> The ANAO interrogated records in DAWGS concerning the approvers of transactions.

<sup>73</sup> The Department of Finance and Administration defines an administered appropriation as funds which are controlled by the Australian Government and managed or overseen by entities on behalf of the Australian Government.

<sup>74</sup> Department of Finance and Administration, *Finance Circular 2004/10*, pps. 4/5.

**3.10** Against this background, the ANAO assessed AGD compliance with Regulation 10 of the *Financial Management and Accountability Regulations 1997* (FMA Regulations).

**3.11** Every time a funding agreement is signed that goes beyond the current appropriation period, there must be Regulation 10 approval by the Minister for Finance and Administration or the delegate, in this case the Secretary of the Attorney-General's Department.

**3.12** The ANAO found that as AGD did not have the requisite authorisation under Regulation 10 enabling relevant officials of AGD to approve administered spending proposals beyond the current annual appropriation, AGD was not meeting Regulation 10 requirements. However, in December 2005, the ANAO was provided with draft correspondence from the Attorney-General to the Minister for Finance and Administration seeking authorisation under Regulation 10 for appropriately delegated officials within AGD to consider approving administered spending proposals, including those related to the Respondents Scheme.

## Value for money considerations

**3.13** Value for money should be an integral part of any grant programme that involves the expenditure of public money.<sup>75</sup> Value for money in native title requires that the resources available to the Australian Government are used in the most efficient and effective manner to achieve the desired outcome.

**3.14** Key aspects that assist the efficient and effective distribution of Respondents Scheme funds include the adequacy of programme guidelines and the design of funding strategies.

**3.15** The ANAO assessed the extent to which AGD incorporated value for money in the design of the Respondents Scheme in:

- scheme Guidelines
  - enabling the grouping of respondents,
  - establishing the Native Title Practitioners Panel; and
- scheme funding strategies that address key risks.

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<sup>75</sup> ANAO, May 2002, op cit, p. 13.

## Scheme Guidelines

### Grouping of respondents

**3.16** The Respondents Scheme Guidelines, discussed in Chapter Two, encourage group applications where the interests, rights, and obligations of individuals in a particular group are essentially identical.<sup>76</sup> AGD provides financial assistance to peak organisations who act as agents for their members, including farming, mining and fishing organisations, and local government. This potentially reduces the number of respondents being individually funded.

**3.17** AGD can refuse assistance to individual applicants when a group of respondents with the same interests is being funded unless the applicant can demonstrate good reason for requiring separate representation.<sup>77</sup>

**3.18** The ANAO analysed DAWGS client applicant type data. The results are presented in Table 3.1 below.

**Table 3.1**

#### Numbers of Respondents Scheme grants by client applicant type

Client applicant type	Numbers of grants of financial assistance
Pastoralists	469
Local government	375
Fishers	319
Others	286
Miners	91
Recreational users	8
Non-claimants	7
No client applicant details available	15

Source: ANAO analysis of DAWGS data.

**3.19** The data presented in Table 3.1 reflects the number of grants of financial assistance. DAWGS data do not enable the identification of whether the grant of assistance was awarded to an individual or a group, or identify the number of respondent parties in a group.

<sup>76</sup> AGD 1998, *Guidelines for the provision of financial assistance by the Attorney General in native title cases*, Para 6.17.

<sup>77</sup> *ibid.*

**3.20** The grouping of respondents should create potential cost savings for AGD. However, as DAWGS is not able to identify how many interested parties were represented by peak organisations in the native title claim process, AGD is not able to quantify and report these savings.

**3.21** The ANAO suggests that AGD consider enhancing DAWGS to enable more effective reporting on the grouping of respondents as a value for money measure.

### **Native Title Practitioners Panel (NTPP)**

**3.22** Following the 1998 legislative amendments, the Respondents Scheme's Guidelines were revised. As part of the revision, the Native Title Practitioners Panel (NTPP) was introduced.<sup>78</sup> The intention was to establish a panel of practitioners as an identified group which understands the unique nature of native title casework and which will undertake the work in accordance with the Guidelines.<sup>79</sup> Practitioners cannot receive funding from AGD unless they are on the panel and grant recipients can only use representation from the NTPP. AGD documentation concerning the operation of the NTPP cites 21 performance standards and reporting and record keeping requirements for members of the NTPP.

**3.23** To ensure that the Respondents Scheme provides value for money, effective management of the NTPP is essential. This includes ensuring that:

- members of the NTPP are subject to a common scale of fees;
- that there is regular monitoring of panel members against performance standards and reporting and record keeping requirements; and
- that the panel membership is reviewed on a regular basis to ensure that the NTPP provides sufficient representation for grant recipients.

**3.24** AGD advised that by linking rates of reimbursement for legal costs to the Federal Court Scale rather than to ordinary commercial rates, there is a moderating effect upon the cost of legal services that are incurred by grant recipients. The ANAO considers this to be an effective value for money measure.

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<sup>78</sup> The Guidelines establish the panel of practitioners (both legal and non-legal) at para 7.10.

<sup>79</sup> The Hon Darryl Williams, 13 February 1998, *Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters*.

**3.25** During the audit, AGD informed the ANAO it had commenced a review of panel membership to remove practitioners from the panel who were no longer practicing native title law.

**3.26** The ANAO notes AGD efforts to improve the performance of the NTPP and suggests that future management of panel arrangements include:

- increased attention to monitoring the performance of panel members against performance standards and reporting and record keeping requirements;
- an assessment of practitioners on the panel to determine whether the panel contains sufficient and appropriately skilled legal practitioners; and
- promulgation of the panel to respondents to help them in selecting practitioners.

## Funding strategies

**3.27** Grants programmes administered by the Commonwealth have the option of a range of funding methods. It is important that a grant scheme's funding strategy is designed in such a way to ensure money is expended appropriately including that key budgetary risks are identified and treated.<sup>80</sup>

**3.28** The ANAO assessed AGD's funding strategies for the Respondents Scheme.

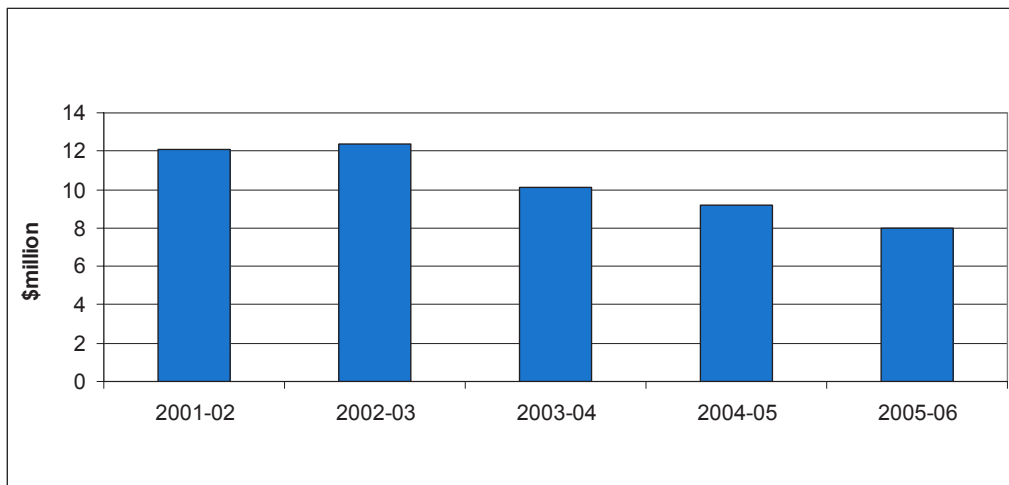
**3.29** Figure 3.1 presents amounts set aside within AGD from the administered appropriation 'financial assistance towards legal costs and related expenses' for the statutory and the two non-statutory schemes of financial assistance for respondents in native title matters.

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<sup>80</sup> ANAO, May 2002, op cit, p.31.

**Figure 3.1**

**AGD's annual budget for the Respondents Scheme**



Source: ANAO, based on AGD advice.

**AGD funding strategies for the Respondents Scheme**

**3.30** It is important that grant funding strategies are developed in light of grant annual budgets to ensure that grant funds are expended appropriately.

**3.31** A funding strategy is the process of making a grant of financial assistance which sets out the terms and conditions of the grants, including how payments are to be made. The Respondents Scheme has had a number of funding strategies and payment systems since it commenced operation. These have included:

- advancing funds to solicitors' trust accounts;
- advancing funds to peak organisations' accounts; and
- direct payments to grant recipients on the presentation of an invoice.

**3.32** In all cases where a grant is made, no payment is authorised until a complying invoice is received by AGD and other applicable grant terms are met.

**3.33** AGD has developed a third funding strategy which is set out in Appendix 3.

*Advances to solicitors' trust accounts and peak organisations' accounts*

**3.34** The first funding strategy involved AGD advancing grant funds to solicitors' trust accounts and peak organisations' accounts to be held in trust



for the Commonwealth. AGD authorised drawdowns from these accounts once invoices had been approved. AGD advised the ANAO that this practice began on a significant scale in 1997–1998 with thirty two separate transactions, and continued until the practice ceased, other than in exceptional circumstances, in early 2004.<sup>81</sup> However, significant sums of money remain within these accounts. Table 3.2 shows the amount of funds advanced to trust and other accounts over the last five years, as advised by AGD.

**Table 3.2**

**Transactions through trust accounts over the past five years**

Year	Total advanced to trust	Total authorised for draw down	Overall increase/decrease during year
2000–01	\$5 077 370	\$1 765 939	+\$3 311 431
2001–02	\$8 424 657	\$3 665 592	+\$4 759 065
2002–03	\$8 923 607	\$7 043 522	+\$1 880 085
2003–04	\$4 000 829	\$7 786 653	-\$3 785 824
2004–05	\$ 431 137.69	\$3 252 265	-\$2 821 127.31
2005–06	Nil	\$ 355 897	-\$ 355 897

Source: Financial Assistance Section, LAB, AGD, *Report to the Secretary on the outstanding work in the Financial Assistance Section as at COB 30 September 2005*, p.2.

**3.35** The ANAO interrogated DAWGS data and found that, at 24 August 2005, more than \$43 657 million had been advanced to trust and other accounts since the commencement of the scheme.

**3.36** AGD advised that the global amount remaining in trust advance as at 30 September 2005, across all native title respondent grants, was \$10 843 632. ANAO analysis confirmed this.

*Direct payments*

**3.37** A second funding strategy commenced operation in early 2004 and, while still making a global commitment in its funding agreements with respondents, money was only expended on the completion of a piece of work that represented a milestone in the funding agreement and after a complying invoice was submitted and assessed by AGD for payment. This strategy of direct payments provided a greater degree of control over the respondents'

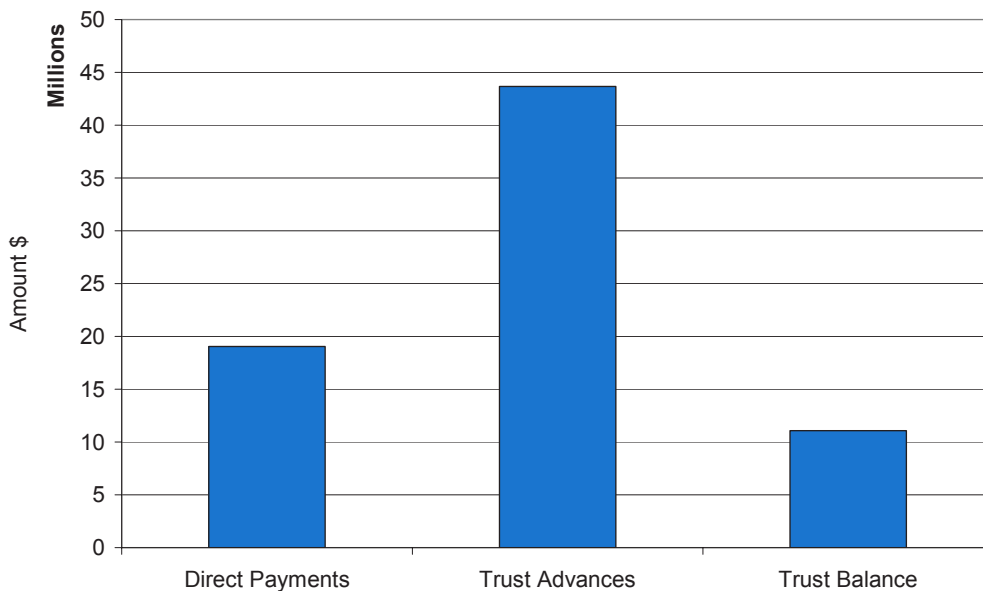
<sup>81</sup> AGD email, 13 September 2005.

and their solicitors' expenditure of grant funds and is in accord with the ANAO's *Administration of Grants—better practice guide*.<sup>82</sup>

3.38 ANAO analysis of DAWGS data identified the total cumulative amount of grant funds directed to each of AGD's funding strategies, since the commencement of the scheme. These data are presented in Figure 3.2 below.

**Figure 3.2**

**Respondents Scheme funding strategies since its commencement in 1993**



Source: ANAO analysis of DAWGS data.

Note: Trust advances refer to scheme funds held by legal firms and peak organisations. Trust balances are trust advances minus the drawdowns approved by AGD.

### Are key risks identified and treated?

3.39 The ANAO assessed the design of the Respondents Scheme's funding strategies to form a view as to whether key risks were addressed, including:

- the lack of financial monitoring arrangements for advanced grant funds;
- the treatment of interest earned; and
- the management of GST.

<sup>82</sup> ANAO, May 2002, op cit, p.34.

### *The lack of financial monitoring arrangements for advanced grant funds*

**3.40** The ANAO *Better Practice Guide to Cash Management in the Commonwealth Public Sector* recommends that:

Large amounts should not be paid in advance because of the risk of non-performance of obligations, or non-compliance with the terms of a grant.<sup>83</sup>

**3.41** ANAO analysis of DAWGS payment data identified the split between professional legal costs and other peak organisation costs. Table 3.3 below indicates where Respondents Scheme funding has been directed. These data illustrate that scheme funding is predominantly going on legal costs associated with representing the interests of respondent parties in native title matters.

**Table 3.3**

#### **The split of payments between professional legal and other costs**

Payment split	Direct payment \$	Trust drawdown \$	TOTAL \$
Legal costs	\$17 027 780	\$24 209 995	\$41 237 775
Other	\$ 2 024 431	\$ 8 280 705	\$10 305 136
TOTAL	\$19 052 211	\$32 490 700	\$51 542 911

Source: ANAO analysis of DAWGS payment data.

Note: Professional legal costs may include other professional costs such as the purchase of anthropological or other reports. DAWGS does not identify these as separate payments as they are managed by the legal firms representing the respondent. Other costs are typically those paid to peak organisations such as farmer associations or seafood industry peak organisations that play a role in representing the interests of their constituencies in native title matters.

#### AGD's practice of settling budgets

**3.42** AGD's practice of settling budgets of anticipated work with grant recipients takes place in the context of a decision to approve a grant of financial assistance. Over the last two years AGD has approved budgets and monitored work tied to claim events such as Directions Hearings. Over the same period of time, grants have not been approved for in excess of a 12 month period.

#### Solicitors' trust accounts

**3.43** Relevant state-based legislation governs solicitors and the operation of trust accounts. This control applies to the management of Respondents Scheme grant funds held in solicitors' trust accounts. In addition, AGD has in place a

<sup>83</sup> ANAO, March 1999, *Better Practice Guide to Cash Management in the Commonwealth Public Sector*, p. 10.

further control in the funding agreement which requires that all drawdowns must first be approved by the Legal Assistance Branch before solicitors can withdraw funds from these accounts for services performed.

#### Peak organisations' accounts

**3.44** AGD has increasingly adopted the practice of making grants for peak organisations to pay the salary of Native Title Officers. This process simplifies the management and payment of grants for peak organisations and provides administrative efficiencies for both AGD and the peak organisation concerned.

**3.45** Funding agreements with peak organisations also include the control concerning the submission of an invoice and AGD approval before money can be withdrawn from grant funds advanced to them.

**3.46** The ANAO considers that to aid transparency and accountability, AGD should require peak organisations to provide regular financial reporting on their management of advanced Respondents Scheme grant funds.

#### *The treatment of interest earned*

**3.47** Where grant payments are made in advance, sound practice indicates that there should be a net benefit in doing so.

**3.48** A general trust account—set up by a solicitor for Respondents Scheme funds—does not accrue interest. However, general accounts—set up by peak organisations that hold money advanced by AGD—may earn interest.

**3.49** AGD sought legal advice on whether the recipients of grants under section 183 of the Act are accountable to the Commonwealth for the use of the interest on the grant amounts received. The advice received was that:

the recipients should not place this financial assistance in an investment account and that they remain accountable to the Commonwealth for any interest earned on the financial assistance provided. This also means they should not use this interest for their own purposes.<sup>84</sup>

**3.50** The ANAO found that AGD had not incorporated this legal advice in its funding agreements with grant recipients. As a result the ANAO found divergent practices amongst the peak organisations it consulted as to how interest earned on monies advanced to them was used.

**3.51** One peak organisation had established its own governance framework setting out its policy and principles and business rules to guide and report on

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<sup>84</sup> Legal advice, 25 July 2003.

its operations concerned with native title matters and the funding it received from AGD. This included that:

- grant funds be invested in medium term deposits to ensure that a reasonable interest rate is paid; and
- interest earned on deposits of AGD funding grants will be applied—with the approval of AGD on a case by case basis—to overruns in budget items for budgets approved by AGD or consistent with the purpose of the Respondents Scheme.

**3.52** In another instance, the grant recipient was informed by AGD that: 'there were no conditions attaching to the interest earned on advance payments.'<sup>85</sup> This left to the recipient organisation the decision as to how the accrued interest was to be used and for what purposes. The ANAO was advised during audit fieldwork that this practice was still in place.

**3.53** The ANAO considers there would be benefit in more closely aligning AGD's legal advice with the Respondents Scheme's funding arrangements. This would help to ensure the consistent and equitable treatment of interest earned on monies advanced across Respondents Scheme grants and conform to AGD's legal advice.

## Recommendation No.2

**3.54** To promote the efficient, effective and ethical use of Australian Government resources, the ANAO recommends that AGD ensures that the design of Respondents Scheme funding strategies includes the appropriate management of interest earned on funds advanced to grant recipients.

**3.55** **AGD response:** *Agree.*

**3.56** AGD is developing a protocol for the management of interest earned in relation to funds currently held by grant recipients. AGD notes that funds are no longer advanced to grant recipients or their legal representatives (other than funds provided to peak organisations for Native Title Officer positions).

### *Effective treatment of the goods and services tax*

**3.57** The point at which the goods and services tax (GST) is payable on grants should be determined on a case-by-case basis. AGD's decision to change the practice of advancing money to respondents trust and general

<sup>85</sup> AGD correspondence, February 2000.

accounts was influenced by consideration of the GST implications applying to trust advances.

3.58 AGD practice concerning the payment of GST is presented in Table 3.4.

**Table 3.4**

**Grants payment process and GST treatment**

Payment process	GST
Financial assistance application submitted including cost estimate	Identified and included in cost estimate
Itemised invoice submitted	Separated from overall cost
Solicitor authorised to drawdown GST exclusive component from trust account	Separate GST component forwarded by AGD as direct payment

Source: ANAO based on AGD advice.

3.59 This process enables AGD to claim the input tax credits on the grant payments.

3.60 In 2003, the Australian Taxation Office (Tax Office) expressed doubt about the private ruling<sup>86</sup> relating to the entitlement of AGD to claim an input tax credit in respect of the legal and related costs funded under its various financial assistance schemes, including the Respondents Scheme. In part, this concern turned on the point at which GST should appropriately be paid—when the trust advance is made or when funds are approved for draw down.

3.61 The dialogue between AGD and the Tax Office concluded in August 2005 and the Tax Office is satisfied about AGD's entitlement to claim input tax credits. AGD decided to cease making trust advances consistent with this ruling.

3.62 Further, the Tax Office advised AGD in 2005, to include in its funding agreement letter to legal service providers the following clauses:

Approval to provide legal services determined by the Attorney-General or his delegate to the applicant in this matter involve 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 exercise of those terms and conditions, the Attorney-General or his delegate will, in the grant of assistance or from time to time thereafter, specify

<sup>86</sup> GST Private Ruling correspondence, 5 April 2001, from Acting Deputy Commissioner of Taxation, Goods and Services Tax, to GST Co-ordinator, AGD.

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.<sup>87</sup>

**3.63** The advice also states—that by including these clauses in the funding agreement—a sufficient level of control is exerted and instruction given by AGD over the legal services to be provided. That control reveals that the services are in fact supplied to AGD under contract and when AGD pays for those services it will be entitled to claim the input tax credits for the GST paid to the legal service providers.<sup>88</sup>

**3.64** The ANAO notes the inclusion of the clauses in AGD’s template funding agreement and concludes that AGD’s funding strategies for the Respondents Scheme now include a design component which ensures the effective treatment of the GST.

#### AGD’s accounting for GST

**3.65** AGD has prepared a *GST Reference Guide* for use by its line areas including in respect of grants of financial assistance managed by the Legal Assistance Branch.

**3.66** The Reference Guide notes that: ‘business entities registered for GST need to lodge business activity statements (BAS) with the Tax Office. The BAS is used to report AGD GST liability.’<sup>89</sup>

**3.67** The establishment of the Native Title Practitioners Panel is an important control as AGD advises that solicitors, who are on the Panel and supply legal services to respondents in native title matters, are registered for the purposes of GST.

**3.68** AGD has implemented accounting procedures to ensure the separation of the actual service fee and the GST amounts for any payment. The GST component of a payment is posted to a specific GST account in the Financial Management Information System (FMIS), while the GST excluded component of the payment is posted to the business area’s Fund Centre. The information contained in the GST account is the GST expenditure incurred. This information is required for completion of the BAS as it indicates the amount of input tax credit to which AGD is entitled.<sup>90</sup>

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<sup>87</sup> Tax Office, 24 August 2005, correspondence to Secretary—AGD.

<sup>88</sup> *ibid.*

<sup>89</sup> AGD, 2003, *GST Reference Guide*, p. 24.

<sup>90</sup> *ibid.*, p. 25.

**3.69** AGD's funding agreement with grant recipients under the Respondents Scheme includes an additional condition that: 'grants do not cover the payment of GST; grant funds held in trust should not be used to meet any GST.' The ANAO considers this meets AGD's general GST accounting requirements. The additional terms and conditions attached to Respondents Scheme funding agreements are examined in Chapter Five.

## Conclusion

**3.70** The ANAO found that AGD had appropriate delegations in place to approve the expenditure of individual grant funds. However, Respondents Scheme funding agreements with grant recipients lead to payments in both current and future years. FMA Act Regulation 10 authorisation by the Finance Minister or his delegate is required prior to approval of a spending proposal, where the period of the spending proposal extends beyond a financial year.<sup>91</sup> The ANAO found that AGD was not meeting Regulation 10 requirements. However, during the audit, AGD initiated discussions with the Department of Finance and Administration to ensure compliance with this Regulation going forward.

**3.71** The Respondents Scheme has had a number of funding strategies and payment systems since its commencement. These have included:

- advancing funds to solicitors' trust accounts;
- advancing funds to peak organisations' accounts; and
- direct payments to grant recipients on the presentation of an invoice.

**3.72** AGD has increasingly adopted the practice of making grants for peak organisations to pay the salary of Native Title Officers. This process simplifies the management and payment of grants for peak organisations and provides administrative efficiencies for both AGD and the peak organisation concerned. To aid transparency and accountability, AGD should require peak organisations to provide regular financial reporting on their management of Respondents Scheme grant funds.

**3.73** The ANAO found divergent practices amongst peak organisations in the way they used the interest earned on grant funds advanced to them. The

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<sup>91</sup> FMA Regulation 10 'Approval of future spending proposals' provides that: If any of the expenditure under a spending proposal is expenditure for which an appropriation of money is not authorised by the provisions of an existing law or a proposed law that is before the Parliament, an approver must not approve the proposal unless the Finance Minister has given written authorisation for the approval.



ANAO is aware that AGD obtained legal advice regarding the interest earned on funds advanced to funded respondents which stated that they are accountable to the Commonwealth for any interest earned and should not use this interest for their own purposes. There would be benefit in more closely aligning Respondents Scheme funding agreements with legal advice received by AGD.

## 4. Respondents Scheme decision-making

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*This chapter examines the decision-making process that AGD undertakes during the selection of grants and the assessment of invoices. It also considers AGD's internal process to review Respondents Scheme decisions.*

### Introduction

4.1 In this chapter, the ANAO examined:

- AGD support for Respondents Scheme decision-making;
- the processing of grant applications, extensions and payments in a timeframe consistent with normal business practices<sup>92</sup>; and
- AGD's internal review process.

### Support for decision-making

4.2 The quality of an appraisal process is dependent on the time and resources that are dedicated to carrying it out efficiently. Risk assessment can help agencies to target their use of scarce resources. In the context of AGD support for the assessment process, the ANAO examined:

- AGD's decision-making and workflow tools; and
- Legal Assistance Branch training.

### The grant assessment process

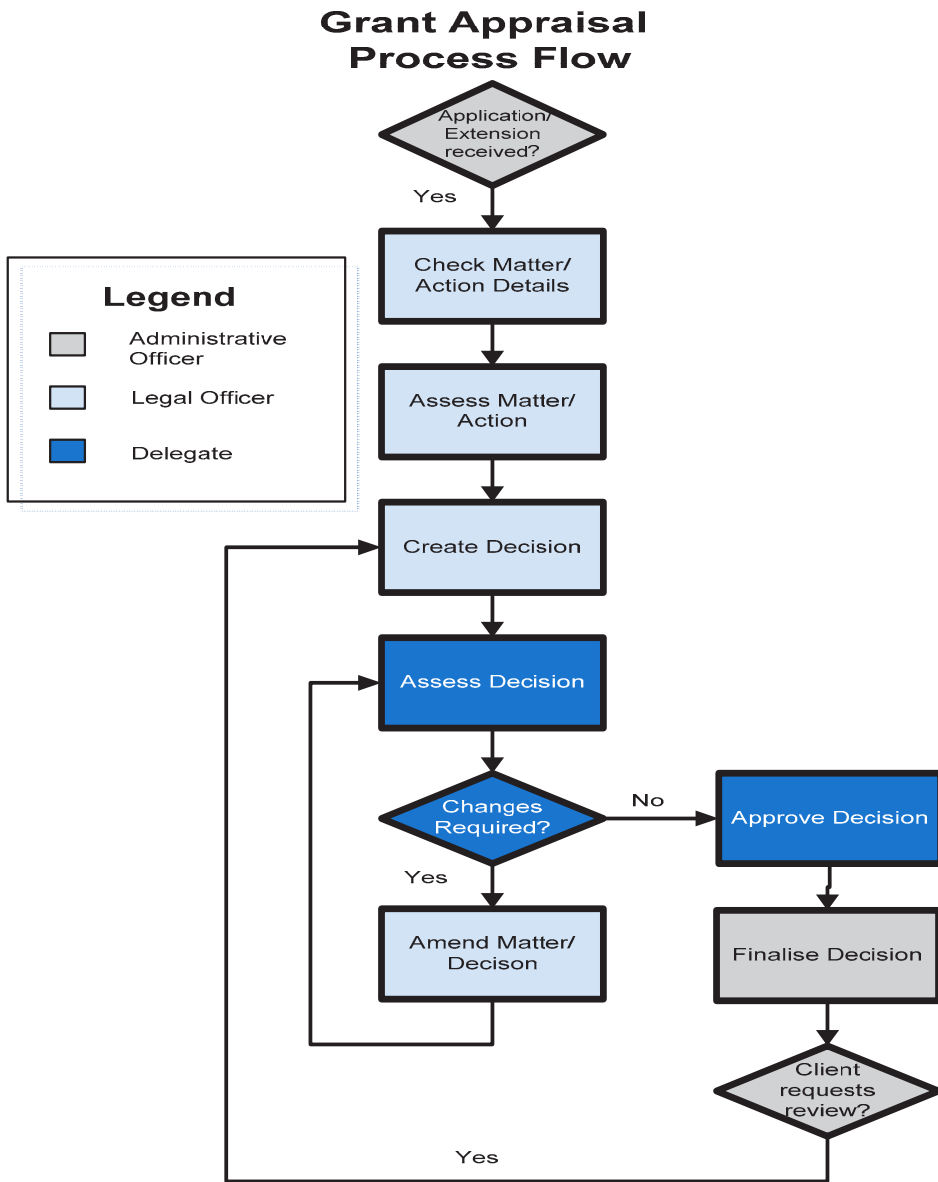
4.3 With the introduction of the Data and Workflow Grants System (DAWGS) in August 2004 the process of appraising grants was streamlined between administrative officers, legal officers, and delegates. Figures 4.1 and 4.2 below are the process flows for an application or an extension of a grant of financial assistance and for the assessment of invoices. In summary, the application/invoice is received by an administrative officer, and then a legal officer assesses the application/invoice and prepares a submission for the consideration of the delegate. Finally, the delegate approves the decision.

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<sup>92</sup> The ANAO's *Better Practice Guide on Cash Management* suggests that 30 days is the normal turn around timeframe for the payment of an invoice. The Attorney-General in 2003 considered that 4-6 weeks was an appropriate turnaround for invoice payment as well as assessment of an application. AGD's DAWGS has time frames for the completion of processing tasks.

Figure 4.1

The Grant Appraisal Process Flow

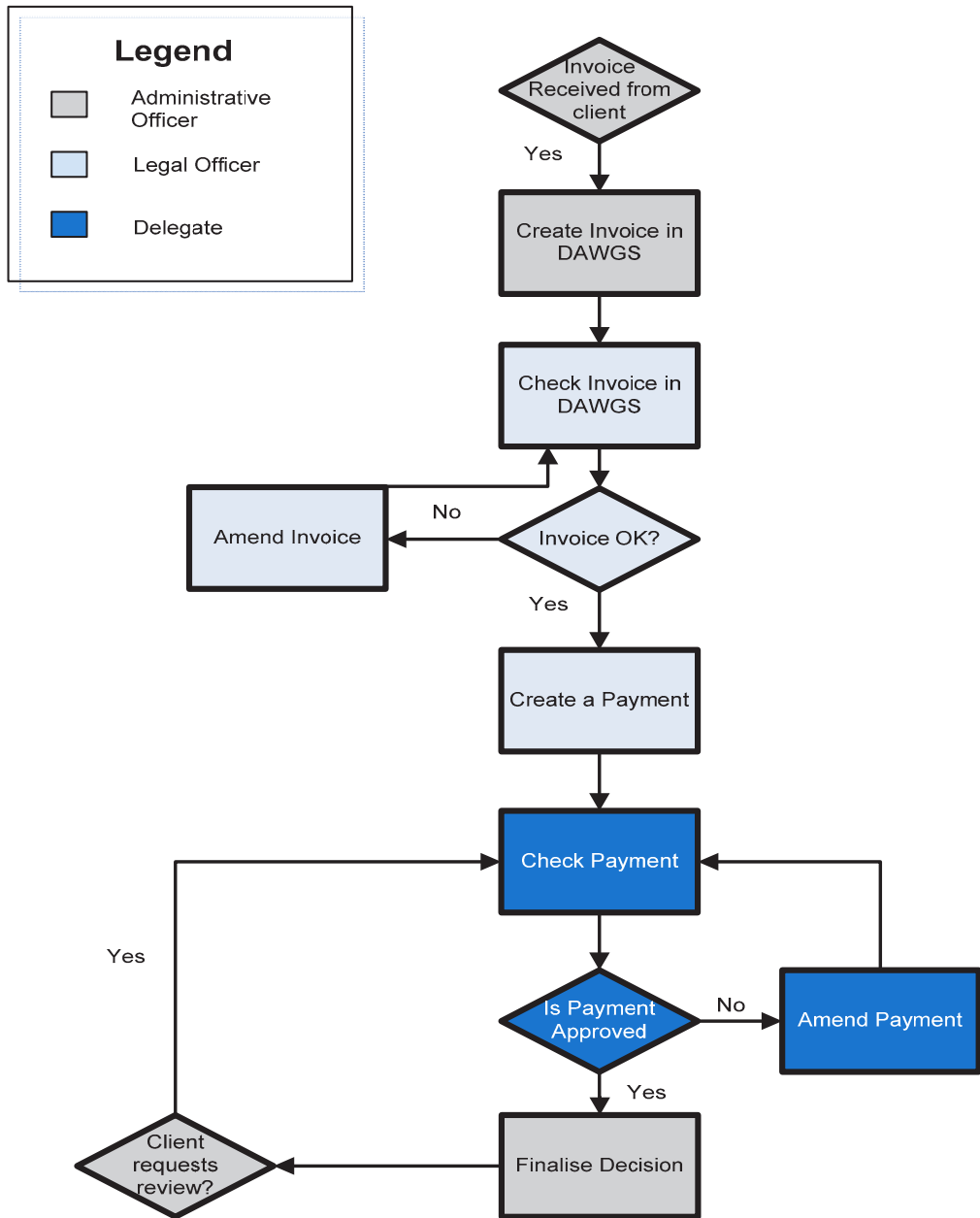


Source: ANAO, based on DAWGS processes.

Figure 4.2

The Grant Invoice Process Flow

### Grant Invoice Process Flow



Source: ANAO, based on DAWGS processes.

## Decision-making and workflow tools

4.4 Legal officers and delegates are responsible for the appraisal of grant applications, extensions and invoices and require tools and training to assess grants equitably and consistently. AGD has a range of tools to assist in the appraisal process. The ANAO examined the following AGD's decision-making tools:

- the Attorney-General's Guidelines;
- AGD's *Assessment of Costs in native title matters*;
- AGD's *Native Title – Grant Administration: Policies and Procedures Manual*; and
- AGD's workflow tool—the Data and Workflow Grants System (DAWGS).

### *The Attorney-General's Guidelines*

4.5 The Attorney-General's Guidelines are the primary reference used by legal officers and delegates to assist with the appraisal of grants. The Guidelines refer to the relevant provisions of the Act and assessment criteria—presented in Chapter Two, Table 2.2.

### Reasons for a decision

4.6 Sound practice requires that the appraisal process should be documented in adequate detail. Decision-makers and their staff should retain working papers and notes taken at the time decisions are made. The retention and availability of these records protect all those involved in the selection process against any suggestion the projects have not been selected on their merits.<sup>93</sup>

4.7 A good decision is based on reasons that explain and justify it. A key objective of public administration and administrative law is that people are able to obtain the reasons for decisions that affect them.<sup>94</sup> Making the reasons for decisions of successful grants decisions available enhances the accountability and transparency of grant programmes. Reasons for not selecting unsuccessful applications should also be made available to the relevant applicants as this would help them prepare any future application.

<sup>93</sup> ANAO, May 2002, op cit, p. 47.

<sup>94</sup> Clayton Utz, 2003, *Good decision-making for government: reasons for decision*.

**4.8** A ‘reasons for a decision note’ is generated by DAWGS to accompany all Respondents Scheme decisions. This decision note contains information on AGD’s assessment against the Guidelines. An assessment of estimated legal costs is included, as well as any other factors that AGD considers relevant in reaching a conclusion.

**4.9** The ANAO considers the ‘reasons for a decision note’ to be a transparent and effective method of capturing the reasoning behind the decision-making process and making this information available to the grant applicant.

**4.10** To examine AGD’s assessment procedures in relation to the application of the Guidelines, the ANAO analysed a random sample of 15 decision notes.<sup>95</sup>

**4.11** The Guidelines state to assess ‘reasonableness’ consideration is given to a range of factors, including the following criteria:

(a) the severity and extent of the implications of the native title claim for the applicant for financial assistance, for example, the interests of the party which are claimed to be affected by the native title claim, as well as what is being claimed by the native title claimants and the extent of their claim;

(b) the number of claims which directly affect the applicant and in respect of which that person is a registered party;

(c) does the applicant really have a role or a genuine interest in the claim process. What will happen if the person/group does not have the opportunity to put forward its views;

(d) whether the benefit to the applicant is worth the costs of the case;

(e) the benefit which the parties will gain from an agreement or a mediated outcome;

(f) the novelty or legal importance of the issues raised; and

(g) the benefit which the general public will gain from obtaining a decision in the matter.

**4.12** AGD advised that when assessing a grant application or an extension, it does not treat the Guidelines as a check list. This is in accord with a decision of the Federal Court—*Applicant S214 v Attorney-General of Australia [2004]*, FCA 1635—where the Court decided that programme guidelines were not to be used as a checklist of conditions. In the context of the Respondents Scheme, developments in native title law and amendments to native title applications impact on the threshold question of sufficiency of interest in a native title application (see criterion C). As a consequence, while legal officers have

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<sup>95</sup> Relevant files were obtained from the three senior legal officers within the Legal Assistance Branch to provide a geographic and industry coverage and also to cover the different types of decisions—the approval, rejection and review of commitments and extensions.

reference to the Guidelines in totality when assessing an application, the issues that are relevant to each decision are addressed and appropriate weight is given in each instance.

**4.13** Where further grants are made to an applicant (i.e. an extension), it is usual to confirm that the applicant retains the same interest in the proceeding (e.g. they are the holder of a pastoral lease) without detailed analysis being necessary.

**4.14** The ANAO analysis of AGD's assessment against the reasonableness criteria found that not each criterion was assessed in each instance and some were assessed in more detail than others. This supported AGD's premise that the Guidelines were not to be treated as a checklist for decision-making purposes.

#### *Assessment of Costs in native title matters*

**4.15** In 2003, AGD made a number of changes to its procedures for dealing with applications for, and grants of, financial assistance to respondents. These changes were made to:

- improve future administration of grants and ensure that the funds available for this financial assistance are distributed and used efficiently and effectively; and
- bring about consistency in the interpretation and application of the guidelines when assessing accounts and making grants.

**4.16** The Guidelines refer to the Federal Court Scale of Costs and set out a policy in relation to solicitors' accounts: 'solicitors should submit an itemised invoice of their work sufficient to enable a determination as to the reasonableness of their costs.'<sup>96</sup> Part of the 2003 changes sought to reinforce the requirement that solicitors should submit itemised accounts with enough detail for AGD to determine the reasonableness of costs.

Itemised accounts must set out, on a day-to-day basis:

- the date of the work;
- the specific nature of the main activity or task undertaken;
- the person or persons who undertook the work;
- the applicable item under the Federal Court Scale;

<sup>96</sup> Attorney-General's Guidelines, para 7.14 and 7.15.

- the time involved, on each day, in undertaking the work or other basis for calculating the cost of the item (e.g. the number of pages for photocopying);
- the unit cost per item (e.g. 25 cents per page for photocopying); and
- the total cost of the item.<sup>97</sup>

**4.17** To ensure that AGD's process of invoice assessment was as open and transparent as possible for legal practitioners, AGD prepared the *Assessment of Costs in native title matters–August 2003* document as part of the changes to its administrative procedures. It is included in the package of information that is forwarded to applicants to help them to prepare applications. *Assessment of Costs in native title matters–August 2003* requires items of work to be based on time units of no greater than six minutes and aligned to the rates specified under the relevant scale item in the Federal Court Scale.<sup>98</sup>

**4.18** The detail required by the *Assessment of Costs in native title matters–August 2003* results in large and detailed invoices. For example, an invoice dated 21 May 2005 for \$11 658.86, comprised seven pages with 103 line items.<sup>99</sup> The ANAO was advised that these invoices are scrutinised thoroughly on a line-by-line basis by both the legal officer and the delegate.

**4.19** Grant recipients—including legal firms and peak organisations—have noted the time consuming nature of these invoicing requirements. The ANAO was advised by legal firms during fieldwork that conventional legal billing software does not accommodate AGD's invoicing standards. Grant recipients considered that reporting against each individual item and providing the supporting documentation required by AGD was time consuming and costly. In a number of instances, peak organisations commented that they do not have the recordkeeping systems to help prepare invoices with the level of detail required by AGD. AGD advised that it simplified peak organisations' management of grant funds through the practice of making grants to them to pay the salary of Native Title Officers.

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<sup>97</sup> AGD letter 1 July 2003, *Financial Assistance for native title matters –Departmental procedures*.

<sup>98</sup> The Federal Court Scale of Costs typically sets out a schedule for solicitors' fees and related clerical support items such as typing and photocopying. The Attorney-General's Guidelines requires the use of the Federal Court Scale to cost solicitors' fees and these related items.

<sup>99</sup> A line item has the date, a short description of the work involved, time, Federal Court Scale item and the amount.



**4.20** It would be appropriate to review the usefulness of the procedural requirements contained in AGD's *Assessment of Costs in native title matters—August 2003* in the context of the implementation of the Government's measures to reform the Native Title System. This review could ascertain stakeholders' views as to the adequacy of AGD's current invoicing arrangements in light of stakeholders' invoice preparation systems.

*Native Title—Grant Administration: Policies and Procedures Manual*

**4.21** Typically, government agencies involved in grant administration use a Policy and Procedures manual to assist in decision-making. By using such a manual a level of assurance is obtained that decisions are made against a set of standards or norms.

**4.22** The Native Title—Grants Administration Policies and Procedures Manual was released in March 2005. The document is an assemblage of emails between legal officers and delegates discussing various issues related to grant administration, including the treatment of GST, specific Federal Court Scale items and travel and accommodation rates.

**4.23** The stated purpose of the document is to collate, from a number of sources, statements on the policies and procedures for the administration of Respondents Scheme grants. It also refers to other information sources such as DAWGS and AGD's information management system and written legal advices.

**4.24** The manual acknowledges that: 'some policy/procedure statements have been attributed to "corporate knowledge". This is because although these are settled, a written statement could not be located.'

**4.25** The ANAO considers that the current manual could be improved. There would also be merit in maintaining the manual as a web-based reference document so that it can be updated as the need arises and aligned with the Respondents Scheme's other corporate documents.

*Data and Workflow Grants System (DAWGS)*

System controls

**4.26** AGD's DAWGS is a workflow tool that records decisions, payments and grant balances. As such, it is fundamental to the processing of grant claims. Once matters are entered in DAWGS, the case is assigned to the relevant action officer. Allotted tasks have time frames for completion and appear as overdue after the time period has elapsed.

**4.27** The ANAO examined DAWGS workflow process in the following areas:

- separation of duties in the approval process; and
- quality of post DAWGS implementation data.

#### Separation of duties in the approval process

**4.28** Good internal control requires that no single officer should appraise an application for funding assistance, give financial approval for the expenditure and make the offer to the applicant. Such an arrangement involves an unacceptable risk of collusion with the applicant and the possibility of fraud. The separation of duties is a fundamental internal control. The responsibility lies with agencies to ensure that identified risks are mitigated.<sup>100</sup>

**4.29** The 2005 internal audit report into AGD's financial assistance schemes commented on probity concerns with the decision-making process:

If two staff members are not required to sign off on decisions, staff may make decisions on their own and important considerations regarding the grant may not be assessed which may lead to additional internal reviews being sought by grant applicants. In addition, the involvement of only one staff member increases the risk that collusion may occur between staff and grant recipients, and inappropriate grants may be approved.<sup>101</sup>

**4.30** The internal audit committee report recommended that: 'formal sign offs on decision notes by a secondary staff member would provide an additional safeguard against inappropriate decisions and therefore inappropriate payments being made.'<sup>102</sup>

**4.31** AGD's response was:

AGD believes that it would be burdensome and inefficient to require that two staff members be involved in each and every decision. At present, all delegates, including the branch head, handle matters as action officer.<sup>103</sup>

**4.32** The ANAO interrogated DAWGS data concerning the separation of duties in the approval process and found that of the 174 payments recorded post-DAWGS implementation, 62 records were found where the legal officer

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<sup>100</sup> ANAO, May 2002, op cit, pps. 46/47.

<sup>101</sup> AGD, April 2005, *Follow up Review of Financial Assistance Grant Administration–Legal Assistance Branch*, p. 15.

<sup>102</sup> AGD, April 2005, *ibid*, p. 16.

<sup>103</sup> AGD, April 2005, *ibid*, p. 17.

and the delegate approving the payment were recorded as the same person. In addition, a further 27 records were found to have a blank field for administrative officer, legal officer or delegate.<sup>104</sup>

**4.33** The ANAO considers that AGD should implement controls to ensure the DAWGS approval processing requires a recommendation ‘sign off’ by a legal officer with a final decision ‘sign off’ by a delegate and that a complete record of decision-making is maintained in DAWGS.

#### *Quality of DAWGS post implementation data*

##### Client information

**4.34** DAWGS has a client information table that contains a list of all clients and their contact details. Every client is assigned a unique identification number.

**4.35** An ANAO analysis of DAWGS data on the client information table found clients with multiple client identification numbers and, in some cases, up to four unique identification numbers. In most instances, the only difference in the client details attached to the identification numbers was the use of upper or lower case for the first letter in a client’s name.

**4.36** When multiple client ID numbers are recorded there is a very high probability that an action officer may create a new client ID, being unaware that one already exists. The pre-existing client ID may have only a minor variation in the client details. This impedes the action officer from searching DAWGS for additional grants of assistance held by the same client and as a result the ability of legal officers to effectively assess grant applications is compromised.

**4.37** The ANAO considers that multiple client identification numbers affects the ability of AGD to track and monitor multiple grant applications from the same client.

**4.38** The ANAO interrogated the client, legal firm, and vendor tables within DAWGS and found:

- of the 5 183 records in the vendor table, 2 936 addresses were blank;
- of the 2 205 records in the client table, 1 642 addresses were blank; and
- client information in other fields was found to have similar blank fields.

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<sup>104</sup> AGD has advised that these results were input errors and a function to eliminate such input errors will be considered as part of the DAWGS enhancement programme.

**4.39** AGD advised that where data fields in DAWGS are incomplete and those fields are required to improve processing, they will be updated.

#### Native title claims

**4.40** A fair and consistent assessment of grant applications requires current and correct information about native title claim particulars. It is essential that AGD assess grant applications using current and correct native title claim details.

**4.41** The process to update native title claim details is outlined in the DAWGS reference manual.<sup>105</sup>

**4.42** The native title claim 'proceeding type'<sup>106</sup> is one of the fields in the native title claims table. The ANAO analysed records held in the table and found that of 359 records, the proceeding type for 175 records in the native title table was blank. In addition DAWGS does not have the ability to distinguish between mediation and litigation. Of the proceeding type fields that were not blank, 176 were recorded as proceeding with litigation/mediation and eight were proceeding with an ILUA in the National Native Title Tribunal.

**4.43** Creating and amending native title claims is the responsibility of AGD administrative officers.<sup>107</sup>

**4.44** Legal officers regularly access the websites of both the Federal Court and the National Native Title Tribunal to check on the status of native title proceedings where funded respondents are involved. However, the ANAO found that administrative officers do not update the native title claims table in DAWGS on a regular basis. AGD's ability to report on the types of native title proceedings where respondents receive grant funds could be hampered by the irregular update of the native title claims table. In addition, this could make it difficult for AGD to develop a history of how different respondent organisations and their legal representatives have approached native title claim matters.

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<sup>105</sup> DAWGS reference manual, para 9.5.

<sup>106</sup> Proceeding type refers to whether the matter is being handled by the National Native Title Tribunal or by the Federal Court.

<sup>107</sup> DAWGS reference manual, para 9.3.

## Recommendation No.3

4.45 To ensure AGD staff have access to high quality data, the ANAO recommends that AGD evaluates, on a periodic basis, the data held in its Data and Workflow Grants System (DAWGS) tables to:

- determine which data are essential for business purposes; and
- ensure that the quality of these data is sufficient to support business purposes, for example performance and financial reporting.

4.46 **AGD response:** *Agree.*

4.47 AGD notes that the Data and Workflow of Grants System (DAWGS) programme is a workflow tool that records decisions, payments and grant balances. Information on the status of a native title claim is readily available on each individual native title claim file, although recording of the information on DAWGS provides a useful central access point.

### Legal Assistance Branch training

4.48 In addition to having sufficient tools to assist in decision-making, consistency in grant decision-making would be enhanced by regular training for new employees as well as updates for current legal officers.

4.49 DAWGS has both a training manual and an e-learning package which is available to all staff members within the Legal Assistance Branch. AGD informed the ANAO that legal officers hold regular meetings to discuss emerging issues and to exchange information on how particular issues are dealt with. The ANAO considers that this level of informal exchange of ‘corporate knowledge’ is useful and supportive.

4.50 To moderate the risk of inconsistencies in assessment procedures and the potential for flawed decision-making, the ANAO suggests that AGD’s informal working environment of information exchange could be supported by a quality training and mentoring programme.

## Respondents Scheme processing

4.51 The ANAO examined the process undertaken by AGD in processing applications, extensions and invoices. This included an examination of:

- applications, extensions, invoices and review processing arrangements; and
- issues to do with consistency of approach between decision-makers.

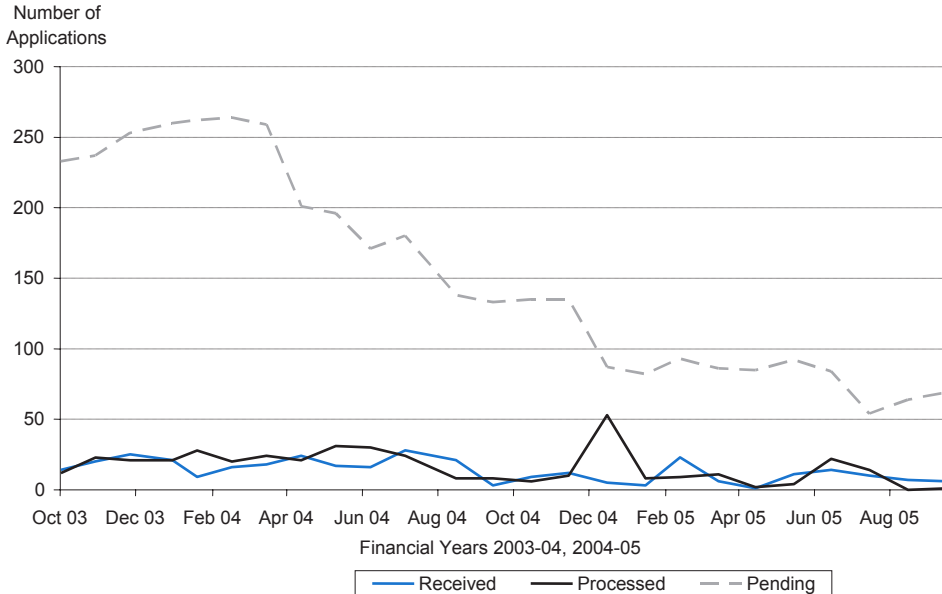
**4.52** AGD advised the ANAO that the Respondents Scheme has emerged from a period where there were serious delays in the processing of applications, extensions and invoices. AGD had a substantial backlog of applications, extensions, invoices and reviews. AGD records were poor and reconciliation of their electronic and paper records was problematic. The backlog prevented payments being assessed and approved in a timely manner. Some grant recipients experienced a two-year delay before payment of accounts.

### **Applications and extensions processing**

**4.53** AGD's Legal Assistance Branch reports, on a monthly basis, to the Secretary on the progress of native title grants administered by AGD—see Chapter Two. The Secretary's report includes the number of applications, extensions, reviews and invoices that have been received, processed or are pending. The ANAO has used these data for trend analysis on the processing of applications and extensions.

**4.54** Targets for the processing of applications and invoices are not formally documented. However, a grant recipient was advised in 2003, that, consistent with normal business dealings, AGD was working progressively towards being able to provide a guaranteed turnaround of between four to six weeks for accounts as well as applications for assistance.

**4.55** Figure 4.3 below tracks the number of applications received, processed and pending over two years.

**Figure 4.3****Respondents Scheme applications October 2003 to September 2005**

Source: ANAO, based on Financial Assistance Section, LAB, AGD, sequential reports to the Secretary on the outstanding work of the Financial Assistance Branch, October 2003–September 2005.

**4.56** There has been a gradual but marked reduction in the number of pending applications. In the four months to September 2005, AGD had an average of 67.75 applications pending per month. AGD processed an average of 9.25 applications per month and the average number of applications received was 9.25.<sup>108</sup> The ANAO estimates that at the four month average processing rate of 9.25 applications per month, it would take over seven months to process all pending applications if they received priority over any new applications.

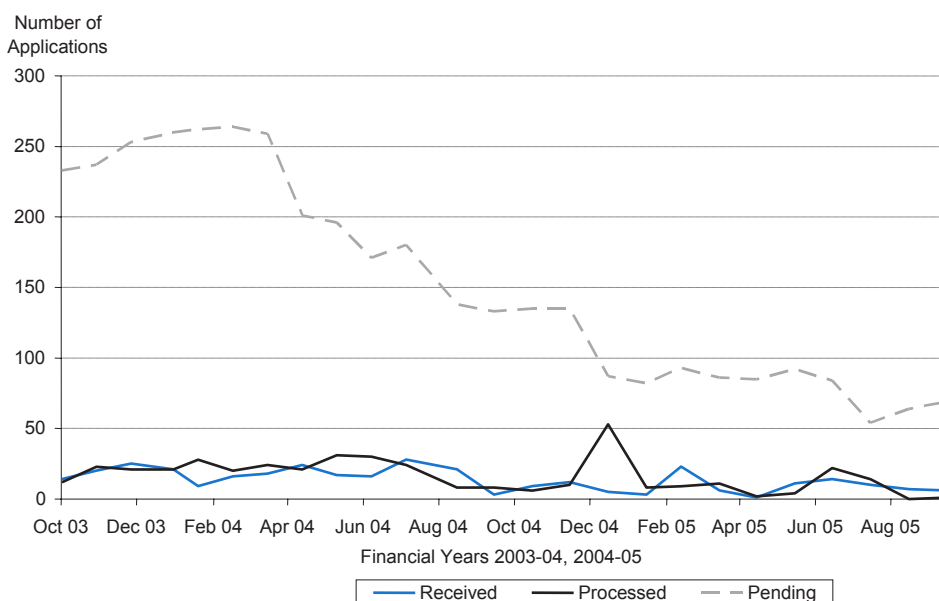
**4.57** This indicates that the processing time of applications continues to be outside the advice provided to an AGD client in 2003.

**4.58** Figure 4.4 below illustrates AGD's processing of extensions over the same time frame.

<sup>108</sup> Secretary's Report, 30 September 2005.

**Figure 4.4**

**Respondents Scheme extensions October 2003 to September 2005**



Source: ANAO, based on Financial Assistance Section, LAB, AGD, sequential reports to the Secretary on the outstanding work of the Financial Assistance Branch, October 2003–September 2005.

**4.59** There has been a gradual but marked reduction in the number of pending extension applications. In the four months to September 2005, AGD had an average of 94.75 extensions pending per month. AGD processed an average of 14.25 extensions per month and the average number of extensions received was 22.5.<sup>109</sup> The ANAO estimates that at the four month average processing rate of 14.25 extensions per month, it would take over six months to process all pending applications if they received priority over any new applications for extensions.

**4.60** This indicates that the processing time of extensions continues to be outside the advice provided to an AGD client in 2003.

**4.61** AGD has informed the ANAO that it has not set targets for applications or extensions processing.

The turnaround of applications varies enormously, because it is very common that we need to ask the applicant for further information before we can make a

<sup>109</sup> Secretary's Report, 30 September 2005.



decision. We don't have a target for finalising applications for the same reason.<sup>110</sup>

**4.62** Without measurable targets, AGD is unable to monitor and report its performance in assessing applications and extensions.

**4.63** AGD has developed a draft document—*Identification of Key Performance Indicators*, 26 June 2000, which identified goals and key performance indicators for grant processing. The ANAO was advised that the document was not yet implemented.

**4.64** The draft document contained valuable insight into the setting of performance targets. The goal for the Financial Assistance Section for application processing was:

- Goal 1—decide financial assistance applications in a timely manner; Key Performance Indicators:
  - % of all applications not requiring further information decided within one month of receipt – 100% being the target;
  - % of requests for further information regarding applications to be despatched within two weeks of the application being received – 100% being the target; and
  - % of applications requiring further information decided within one month of information being provided – 100% being the target.

**4.65** The ANAO suggests that AGD revisits its draft June 2000 *Identification of Key Performance Indicators* document with a view to introducing performance indicators for its application and extension processing.

### **Consistency**

**4.66** Consistency in Respondents Scheme decision-making by AGD has been an issue for a number of years.

**4.67** In addition, a very large proportion of applications are refused or partially refused.

A total of 60 applications for assistance under the respondents funding programme were refused in 2004–05. This is in addition to the very large (but

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<sup>110</sup> AGD email, 26 October 2005.

unquantifiable) number of applications that were refused in part through write downs of the amount of assistance sought in the application.<sup>111</sup>

**4.68** According to the Secretary's reports, in 2004–2005 there were a total of 136 applications.<sup>112</sup> Of these, 60 were refused. This represents a refusal rate of around 45 per cent. As well, AGD is unable to identify the number of applications that were refused in part.

**4.69** *The Identification of Key Performance Indicators* draft document identifies indicators to measure the consistency of decisions:

Possible measurable outcomes might therefore include:

- number and percentage of decisions reviewed;
- number and percentage of decisions overturned on review;
- percentage of decisions reviewed that result in an altered decision;
- number and percentage of decisions the subject of an investigation by the Commonwealth's Ombudsman's Office;
- number and percentage of decisions the subject of an investigation by the Commonwealth Ombudsman Office resulting in a report favourable to the applicant;
- percentage of all such investigations that result in a report favourable to the applicant;
- number of complaints received by way of ministerial or other correspondence; and
- amounts committed compared to scheme grant averages.<sup>113</sup>

**4.70** However, AGD does not currently have any measures in place to monitor this. The ANAO suggests that AGD implement measures to periodically monitor and report on its consistency in decision-making.

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<sup>111</sup> AGD email, 27 October 2005.

<sup>112</sup> Secretary's report, September 2005.

<sup>113</sup> Financial Assistance Section, AGD, *Identification of Key Performance Indicators*, final draft, p. 6.

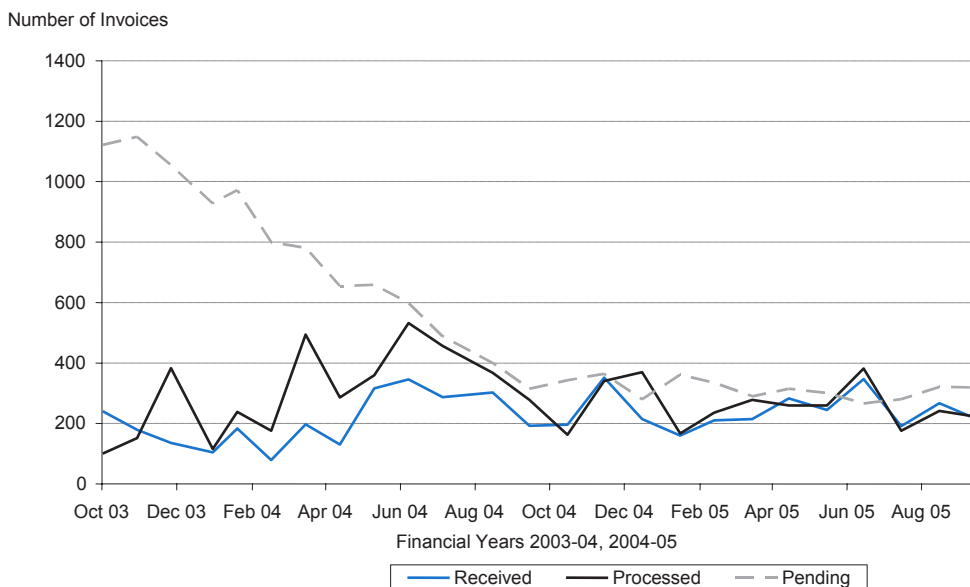
## Invoice processing

4.71 It is Australian Government policy to pay accounts on the date specified in the agreement for payment with the supplier. This is normally 30 days from the date of acceptance of goods or services and the receipt of a correctly rendered invoice.<sup>114</sup>

4.72 Figure 4.5 below demonstrates improvements in processing times for the payment of invoices. AGD has now reached a stage where it processes about the same number of invoices it receives each month.

**Figure 4.5**

### Respondents Scheme invoices October 2003 to September 2005



Source: ANAO, based on Financial Assistance Section, LAB, AGD, sequential reports to the Secretary on the outstanding work of the Financial Assistance Branch, October 2003–September 2005.

4.73 AGD has a goal to have a 30 day turnaround for processing of invoices:

Our immediate target is to eliminate all pre-1 July invoices by 30 November and, once that has been achieved, to reach a situation where all pending invoices are within current terms (i.e. not more than 30 days).<sup>115</sup>

<sup>114</sup> ANAO, March 1999, *Cash Management in the Commonwealth Public Sector*, p.5.

<sup>115</sup> AGD email, 6 October 2005.

4.74 The ANAO considers AGD's processing of invoices conforms to Australian Government sound practice.

## Review Processing

4.75 *The Provision of Financial Assistance by the Attorney-General in Native Title Cases Guidelines* provides an internal process to review administrative decisions.

4.76 The ANAO examined:

- individual instances where applicants requested a review of an initial application decision—in part or in full;
- support for review processing; and
- trend data concerning reviews.

### Individual applications and invoices

4.77 The review process involves a re-examination of the reasons supporting the original decision. In so doing, the process takes into account the reasons put forward by the applicant plus reference to the Attorney-General's Guidelines and the departmental *Assessment of Costs in native title matters—August 2003* document.

4.78 The review process provides an opportunity for the applicant to comment on or refute the views formed by the original decision-maker.

### System support for review processing

4.79 DAWGS workflow sets out the processing steps for the review of a decision including selecting a delegate who cannot be the delegate who originally approved the decision.<sup>116</sup> ANAO analysis of DAWGS data found the 'review delegate ID' field in the payments table empty. To assure itself that the transparency of the review process is supported by its workflow system, the ANAO suggests that AGD should enhance DAWGS to ensure that the input of the ID of the review officer in the relevant tables is enforced.

### Trend data

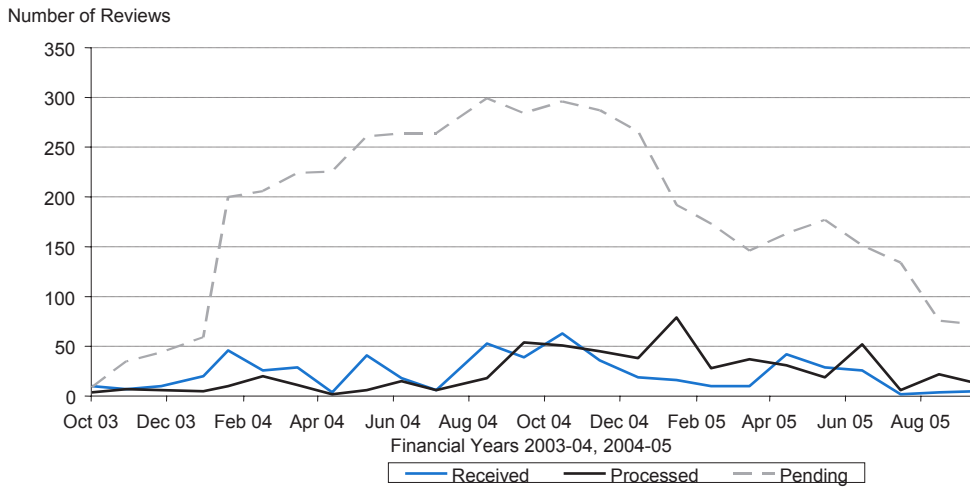
4.80 The following figure 4.6 indicates the status of reviews over a two year period.

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<sup>116</sup> AGD, *Reference Manual for DAWGS*, 2004, 6.76.

**Figure 4.6**

**Respondents Scheme reviews from October 2003 to September 2005**



Source: ANAO, based on Financial Assistance Section, LAB, AGD, sequential reports to the Secretary on the outstanding work of the Financial Assistance Branch, October 2003–September 2005.

**4.81** These data indicate that AGD’s Financial Assistance Section has been able to significantly reduce the number of reviews that were outstanding for most of calendar year 2004.

**4.82** In the four months to September 2005, AGD had an average of 108.25 reviews pending per month. AGD processed an average of 23.25 reviews per month and received an average of 9.25 reviews.<sup>117</sup> The ANAO estimates that at the four month average processing rate of 23.25 reviews per month it would take over four months to process all pending reviews if they received priority over any new reviews received. This estimate indicates that there are still considerable waiting times for the processing of reviews.

**4.83** The 2000 draft *Identification of Key Performance Indicators* document included a goal to: ‘ensure sound and consistent decision-making occurs.’ The draft key performance indicators relating to this goal are the number of review decisions sought; and the number of reviews overturning a decision of the Section.

<sup>117</sup> Secretary’s Report, 30 September 2005.

4.84 AGD advised that:

- they doubted that they could provide data on average turnaround times in any meaningful way for reviews, because it is very common that we need to ask the applicant for further information before we can make a decision. DAWGS does not distinguish those reviews pending with us from those that are on hold while we await further information; and
- we don't have a target for finalising reviews for the same reason.<sup>118</sup>

4.85 The ANAO recognises that there are constraints where insufficient documentation has been provided by applicants to enable the review to be completed in a timely manner. However, the ANAO considers it would be useful to develop a performance indicator for the completion of reviews where such a constraint does not apply.

4.86 The ANAO suggests that AGD's management of the review process could be improved by developing a performance indicator for the review process where no additional documentation is required.

## Conclusion

4.87 In assessing support for decision-making, the ANAO found:

- the 'reasons for a decision' note to be a transparent and effective method of capturing the reasoning behind the decision-making process;
- grant recipients—including legal firms and peak organisations—noted the time consuming nature of AGD's invoicing requirements. AGD requires items of work to be based on time units of no greater than six minutes and aligned to the rates specified under the relevant scale item in the Federal Court Scale of Costs. In a number of instances, peak organisations commented that they do not have the record keeping systems to help prepare invoices with the level of detail required by AGD. AGD advised that it simplified peak organisations' management of grant funds through the practice of making grants to them to pay the salary of Native Title Officers;
- AGD's *Native Title – Grant Administration: Policies and Procedures Manual* is an assemblage of emails between legal officers and delegates

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<sup>118</sup> AGD email, 26 October 2005.

discussing various issues related to grant administration, including the treatment of the goods and services tax (GST), specific Federal Court Scale items, travel and accommodation rates;

- AGD's audit committee recommended that: 'formal sign offs on decision notes by a secondary staff member would provide an additional safeguard against inappropriate decisions and therefore inappropriate payments being made.' The ANAO analysed DAWGS data concerning the separation of duties in the approval process and found that of the 174 payments recorded post-DAWGS implementation, 62 records were found where the legal officer and the delegate approving the payment were recorded as the same person. In addition, a further 27 records were found to have a blank field for administrative officer, legal officer or delegate<sup>119</sup>;
- the native title claim 'proceeding type' is one of the fields in the native title claims table in DAWGS. The ANAO analysed records held in the table and found that of 359 records, the proceeding type for 173 records in the native title table was blank. Of the balance, 176 were recorded as proceeding with litigation/mediation and eight were proceeding with an ILUA; and
- AGD has developed a draft document—*Identification of Key Performance Indicators*, 26 June 2000, which identified goals and key performance indicators for grant processing. The ANAO was advised that the document has not been implemented yet.

**4.88** The ANAO found that the processing time of Respondents Scheme applications, extensions, invoices and internal reviews of decisions had improved with invoices now being processed within the standard 30 day turnaround. However, while performance indicators were in place for the processing of invoices, no indicators had been established for the other assessment processes noted above. As well, the ANAO found that AGD does not have any measures in place to monitor consistency within its decision-making processes.

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<sup>119</sup> AGD has advised that these results were input errors and a function to eliminate such input errors will be considered as part of the DAWGS enhancement programme.

## Recommendation No.4

4.89 To ensure that AGD decision-making is consistent and of a high quality, the ANAO recommends that AGD introduce:

- a periodic quality review of application/invoice processing arrangements;
- a review of the sufficiency of the tools available to support quality decision-making, including the grant administration policies and procedures manual, DAWGS processing and formal training for new legal officers; and
- performance indicators to monitor the grant application and review process.

4.90 **AGD response:** *Agree.*

### *Periodic quality review*

4.91 *Agree.* AGD is committed to employing best practice methods to ensure the timely processing of applications and invoices. AGD will implement periodic quality reviews to ensure that where necessary, application and invoice processing methods are refined and improved.

### *Review of efficiency of tools available*

4.92 *Agree.* AGD will review the *Assessment of Costs* document to ensure that it continues to facilitate the efficient and transparent assessment of invoices, and will also update the document in light of the revision of the Respondents Scheme Guidelines.

4.93 Refinements and enhancements to DAWGS are ongoing. Funding has been secured for 2006–07 for that purpose, including to enhance DAWGS' reporting capacity. An e-learning facility was recently added to DAWGS to assist users.

4.94 New legal officers currently undergo a comprehensive training program to guide them in the processing of applications and invoices. Legal officers also have access to departmental training on the history and scope of the *Native Title Act 1993* and the Native Title System, as well as external training to promote an understanding of the native title claims process. Ongoing internal training is provided to legal officers and administration staff to share knowledge and improve skills and promote best practice.



**4.95** AGD has also established a project team to coordinate the implementation of the recommendations of this Report.

*Performance indicators to monitor the grant application and review process*

**4.96** *Agree.* The project team established to implement the recommendations of this Report will develop tailored performance indicators to monitor the grant application and review process.

## 5. The management, monitoring and acquittal of the Respondents Scheme funding agreements

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*This chapter assesses AGD's management of the grant funding agreements that arise from the decision-making process, discussed in Chapter Four. It also examines AGD's monitoring of the Respondents Scheme, including AGD's monitoring strategy and its financial and performance monitoring and reporting. Finally, AGD's acquittal procedures are reviewed.*

### Introduction

**5.1** The funding agreement is the instrument through which grants are facilitated. Well drafted funding agreements are necessary for the effective management of a grants programme. In the case of the Respondents Scheme, legislation imposes specific requirements such as how, to whom and in what form a grant of financial assistance for respondents in native title matters is made. The Attorney-General's Guidelines specifies particular terms and conditions. Grant administrators are bound to adopt and enforce these requirements. Sound practice requires funding agreements to also incorporate other terms and conditions, which derive from an analysis of the programme's risks.<sup>120</sup> To support their effectiveness, funding agreements require a robust monitoring regime.

**5.2** Monitoring financial performance and programme performance is an essential feature of good administration. Financial monitoring examines whether the relevant accountability procedures associated with the grant have been complied with.<sup>121</sup> Performance monitoring examines the extent to which desired outcomes have been achieved. Timely reporting of both financial and programme performance enables stakeholders to gauge programme effectiveness and allows programme managers to make adjustments where required. It is important for grant administrators that a link between these two aspects of monitoring is established so that the source of discrepancies in performance can be readily detected.

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<sup>120</sup> ANAO, May 2002, op cit, p. 49.

<sup>121</sup> Ibid, p. 57.

5.3 Grant programmes such as the Respondents Scheme expend funds made available to the agency for them to administer on behalf of the Australian Government. Acquittal is one of the processes by which the agency demonstrates to the Minister (and subsequently to the Australian Parliament), that it has administered the funds in a responsible and legal manner.

5.4 In this chapter, the ANAO assessed:

- AGD's management of funding agreements for the Respondents Scheme;
- AGD's monitoring and reporting strategy; and
- the effectiveness of AGD's acquittal procedures.

## Respondents Scheme funding agreements

5.5 Well drafted funding agreements are necessary for the effective management of a grants programme such as the Respondents Scheme. The sound management of funding agreements is dependent on the incorporation of appropriate terms and conditions derived from an analysis of the Respondents Scheme's risks and supported by an efficient and effective monitoring regime.

5.6 It is also important to balance funding agreement accountability requirements involving the protection of the Commonwealth's interests and the achievement of value for money against facilitating the achievement of the outcomes of the grant programme.<sup>122</sup>

5.7 In this section, the ANAO examined the funding agreement template developed by AGD for the Respondents Scheme, to assess:

- whether it establishes a clear understanding between the parties on required outcomes; and
- whether the terms and conditions address accountability and risk management requirements.

### A clear understanding between the parties on required outcomes

5.8 A Respondents Scheme's funding agreement represents the outcome of negotiation between AGD and the grant recipient and should include a shared understanding of the respective obligations of both parties and how the

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<sup>122</sup> ANAO, May 2002, *ibid*, p.49.

agreement will operate. It is important that the agreement includes a clause allowing for a review if there is little or no progress in achieving the agreed outcomes.

**5.9** Once a decision to fund an application has been approved by the delegate, AGD's Data and Workflow Grants System (DAWGS) generates a template funding agreement. The template can be modified by the responsible legal officer to take account of particular terms and conditions which may apply. The funding agreement with the successful applicant takes the form of a letter of advice to the applicant.

**5.10** The template funding agreement includes a total commitment figure, defines the scope of the grant and makes provision for a date range to be included. The ANAO found that in some instances, the specification of required deliverables was very broad—for example, the conduct of preliminary legal work—while in others more measurable components were detailed—such as reviewing the reasons for a Court decision and reporting to and taking instructions from clients.<sup>123</sup>

**5.11** The ANAO considers that AGD needs to be as clear as possible in specifying the outcomes expected from the funding agreement. This may require more initial negotiation between the parties so that each party has a clear understanding of the required outcomes and how they are to be measured.

**5.12** The funding agreements reviewed by the ANAO did not include any provision for review if little or no progress was being made in achieving specified outcomes.

**5.13** The ANAO recognises that native title matters can be protracted. However, to moderate this risk, the ANAO suggests that AGD insert a review clause that requires a report from the grant recipient if no progress has been made on achieving the specified outcome within a reasonable time frame. Such an approach would enable AGD to monitor its commitment, at the individual grant level, in a timely manner.

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<sup>123</sup> The ANAO reviewed the funding agreements, which were contained in the ANAO sample file review.

## Terms and conditions that address accountability and risk management requirements

5.14 Sound practice requires funding agreements to specify terms and conditions that address accountability and risk management requirements.<sup>124</sup>

5.15 The Respondents Scheme's funding agreement template letter includes a clause: 'this grant is made subject to the terms and conditions set out in the *Provision of Financial Assistance by the Attorney General in Native Title Cases Guidelines*, and subject to the additional terms and conditions set out in this letter.' Appendix 4 sets out the 22 terms and conditions which are legislatively prescribed. Seven additional terms and conditions are contained in the funding agreement template.

5.16 The ANAO considers that the use of additional terms and conditions provides the opportunity to address identified programme risks.

5.17 AGD's seven additional terms and conditions are detailed below:

- receipts or vouchers must be provided for all travel-related disbursements and for any other disbursement over \$100;
- each account must be in the form of, or accompanied by, a tax invoice to the 'Attorney-General's Department' that clearly identified the itemised amounts (exclusive of GST) and the total GST component of the invoice. Each account must include sufficient detail to enable the department to determine the reasonableness of costs;
- each itemised account that is provided to the department must be accompanied by a full trust account statement, and a report indicating how the matter has been progressed and enclosing copies of any orders made and any newsletter, legal opinions or expert reports prepared or obtained;
- grants do not cover the payment of GST; grant funds held in trust should not be used to meet any GST<sup>125</sup>;
- the grant of financial assistance (and each of its components, identified above) must not be exceeded without prior approval from the Attorney-General's Department. No part of an amount specified as

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<sup>124</sup> ANAO, Audit Report No. 32 1996–97, *Administration of Grants in the Australian Public Service*, p. 35.

<sup>125</sup> As discussed in Chapter Three, to meet AGD's accounting procedures the GST component of an invoice is paid from a GST specific account, while the GST exclusive component is paid from grant funds.

the upper limit for one component of this grant can be used towards another component, without the department's prior written approval;

- you must contact the department to seek an extension of the grant if you consider that further assistance is required to complete the current stage of work or to cover work outside of the grant;
- if a grant extension is urgently required, you must provide the Department with written notice of this, and, as soon as possible afterwards, provide full details in the application for extension. Only in these circumstances can a grant extension date from before the receipt of the application.<sup>126</sup>

**5.18** The ANAO reviewed both the legislative requirements and the additional discretionary terms and conditions contained in the template funding agreement and found they addressed accountability requirements. However, there was no documentation to indicate whether they were informed by an assessment of programme risks.

**5.19** In Chapter 3 the ANAO examined key risks in the Respondents Scheme funding strategies and identified two additional risk categories:

- the lack of financial monitoring arrangements for advanced grant funds; and
- the treatment of interest earned.

**5.20** These risks are left untreated in the template funding agreement.

**5.21** The ANAO suggests that AGD:

- identifies all Respondents Scheme financial risks; and
- reviews the list of discretionary terms and conditions contained in the funding agreement template letter to treat these risks.

**5.22** Such an approach would enable AGD to ensure that the terms and conditions of AGD's funding agreements address both accountability and risk management requirements.

## Monitoring strategy

**5.23** Generally a monitoring strategy is developed during the planning phase of a grants programme such as the Respondents Scheme. A monitoring

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<sup>126</sup> AGD's template funding agreement.

strategy takes into account the size of the grant and its perceived risk and sensitivity.

**5.24** Sound practice features of a monitoring strategy include:

- arrangements to ensure consistent and appropriately frequent monitoring;
- monitoring arrangements that are linked to the overall objectives of the scheme; and
- performance and financial monitoring of individual grants.<sup>127</sup>

**5.25** In the case of the Respondents Scheme, sound practice would see regular monitoring and reporting on the elements which AGD considers are exposed to unacceptable levels of risk.

### **Consistent and appropriately frequent monitoring**

**5.26** AGD's funding agreement with the grant recipient includes the following monitoring provision:

The letters which advise grantees of grant approvals include a standard term that each account provided to the department for payment must include a report indicating how the matter has been progressed and enclosing copies of any orders made and any newsletters, legal opinions or expert reports prepared or obtained. Progress reports are also required before a decision is made to continue assistance (i.e. any extension to a grant).<sup>128</sup>

**5.27** The ANAO reviewed a sample of files maintained by the Legal Assistance Branch and found adherence to this requirement to be inconsistent. While details of activity can be obtained from account line items, the provision of a report, which indicated how the matter had progressed, was generally lacking.

**5.28** While AGD set out budgets of anticipated work in its funding agreements, the ANAO found there were no monitoring arrangements in place to enable an assessment of whether or not activities undertaken were achieving the required results. AGD's own internal review reported in Chapter 6—see paragraph 6.8, supports this finding. The review found that the frequency and content of reports to the department varied significantly between grants and

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<sup>127</sup> ANAO, May 2002, op cit, p. 59-61.

<sup>128</sup> AGD email, 11 October 2005.

that a picture of significant events, dates and issues in a claim was not revealed until all grants related to the claim were examined

**5.29** The ANAO notes AGD's interactive dialogue with its grant recipients where clarification is sought if discrepancies arise concerning a trust or commitment. This ongoing dialogue supports the more formal provisions of its monitoring requirements.

**5.30** Other AGD initiatives such as Native Title Officers grants included monitoring arrangements. Background information on the Native Title Officer initiative is provided in Appendix 2.

#### *The monitoring of Native Title Officers*

**5.31** AGD funds peak organisations to employ Native Title Officers. Native Title Officers help build capacity within the Native Title System. In peak organisations, Native Title Officers liaise with officials of the organisation and individual members and can influence the policy direction of the organisation's participation in native title matters towards the Government's preference (the resolution of native title matters through negotiation). Members who are represented by peak organisations might more readily be encouraged to enter into agreements as a result of Native Title Officer liaison between the peak organisation and the claimant party.<sup>129</sup>

**5.32** In 2004-05, AGD expended \$643 962<sup>130</sup> on salaries for Native Title Officers. This represented around seven per cent of AGD's budget for grants of financial assistance for respondent parties. It is important that the risks associated with the Native Title Officer initiative are monitored and addressed. Consistent and structured reporting requirements help in monitor this risk. The ANAO examined a series of Native Title Officer quarterly reports.

**5.33** In one case, the Native Title Officer reported quarterly against the twelve work areas covered by their funding agreement. This report was short and concise and no more than four pages. Important documents were attached to the report, on an as required basis.<sup>131</sup>

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<sup>129</sup> AGD, October 2005, Policy—Native Title Officer position.

<sup>130</sup> AGD email, 21 October 2005. This amount does not include disbursements including travel for Native Title Officers.

<sup>131</sup> Native Title Officer Report to end May 2005 and Native Title Officer Report to end July 2005.



**5.34** In another case, Native Title Officers were required to present timesheets, detailed reports—including the percentage of time worked on tasks performed, and copies of all documents prepared.<sup>132</sup>

**5.35** The ANAO found variability in the monitoring and reporting requirements between organisations where Native Title Officers were funded.

**5.36** The ANAO suggests that AGD introduces consistent and appropriately frequent monitoring arrangements to better inform itself of grant performance. This would apply to the Native Title Officer initiative as well as other types of grant arrangements for the Respondents Scheme

**5.37** Subsequent to ANAO fieldwork, AGD advised that peak organisations, where Native Title Officers have been employed, have been provided with templates for reporting on performance and are required to provide quarterly performance reports based on these templates. The templates address the key outcomes expected of the Native Title Officer positions, based on the terms and conditions of the grant.

### **Performance and financial monitoring of individual grants**

**5.38** An individual funding agreement with a grant recipient should be supported by a performance and financial monitoring framework. Such a framework would alert management to shortfalls in performance or situations where there have been significant over or underspends by the grant recipient.

**5.39** A significant number of grants awarded under the Respondents Scheme span several years. The risk of fraud or overpayment would be reduced by establishing sound and regular monitoring arrangements.

**5.40** Funding agreements can be used to reinforce monitoring and reporting requirements with grant recipients. A useful approach is to consult with, and obtain agreement from, grant recipients on the frequency and quality of monitoring and reporting. This also ensures that compliance with the grant monitoring arrangement is understood and can be met by the recipient.

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<sup>132</sup> AGD Letter, *Notification of Native Title Officer grant*, effective 1 July 2004 to 30 June 2005.

### *Performance monitoring of individual grants*

**5.41** Performance monitoring is directed towards assessing the achievement of individual grant objectives and, when aggregated, towards assessing the achievement of programme objectives.

**5.42** There were no monitoring arrangements in place enabling an assessment as to whether individual grants of assistance were achieving the outcomes specified in the funding agreement or contributing to overall programme objectives.

**5.43** The ANAO considers that AGD should—in conjunction with stakeholders—develop a monitoring format that identifies critical aspects of monitoring for performance assessment purposes.

### *Financial monitoring of individual grants*

**5.44** Effective monitoring of financial expenditure is required to ensure that:

- AGD's appropriation for the Respondents Scheme is effectively managed;
- the risk of fraud is minimised; and
- unexpended grant funds are returned to AGD.

**5.45** The ANAO examined the processes AGD has in place to monitor financial expenditure. In particular, the ANAO examined:

- the monitoring of grants at an individual level through DAWGS and audited annual statements;
- reconciliation of AGD records internally and with the client; and
- AGD processes to recall unexpended grant funds—decommitment.

DAWGS monitors payments at individual grant level

**5.46** DAWGS helps AGD staff monitor individual grants. DAWGS calculates the remaining funds that should be held in trust every time authorisation is given for trust drawdowns. AGD relays this information to clients through letters generated by DAWGS.

**5.47** The ANAO considers this an appropriate method of conveying the current status of accounts to clients.

## Monitoring solicitors and peak organisations use of trust and general accounts

**5.48** Proper monitoring requires reconciliation of annual audited statements of accounts against AGD records. As at August 2005, AGD had just under \$11 million held in trust and general accounts.

**5.49** AGD's internal audit recommended:

The division should require solicitors who have had funds paid into their trust accounts to provide the division annually with an audited statement of their trust account transactions relating to grant monies received. The division then needs to ensure that these audited statements agree to the details in relevant grant files.<sup>133</sup>

**5.50** AGD advised the ANAO that, as part of its monitoring strategy, the department requires a full trust account statement with every invoice.<sup>134</sup>

**5.51** The ANAO found that not all grant recipients were sending in trust account statements with invoices. Where grant recipients did not send in trust account statements, no action was taken by AGD.

**5.52** The ANAO also found that AGD did not periodically review trust account statements. Administrative officers place account statements on the relevant grant file which may or may not be reviewed by legal officers or delegates. There is no administrative procedure to ensure a periodic review of trust account statements.

**5.53** Without a level of ongoing scrutiny, the ANAO considers that AGD cannot assure itself that the amount held in trust and general accounts is aligned with the amount recorded in DAWGS.

**5.54** The ANAO suggests that AGD enforce its control requiring that trust account statements accompany invoices and that annual audited account statements are provided by solicitors and peak organisations where grant funds are held in trust or other accounts. To support this, AGD should institute procedures ensuring that staff reconcile these documents promptly against AGD's records.

### AGD's reconciliation project

**5.55** As a result of previous inconsistencies in practice and errors in the handling of grants, AGD found that there were discrepancies both within and

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<sup>133</sup> AGD, October 2002, *Review of grants administered by the Family Law and Legal Assistance Division*, p. 16.

<sup>134</sup> AGD email, 12 October 2005.

between AGD internal records and grant recipient records. AGD commenced a project to reconcile all matters in late 2002.

**5.56** In the context of the Respondents Scheme, reconciliation involves the comparison of all paper documents on the file evidencing transactions or other important business decisions against electronic records kept by the department (such as the department's financial management system [SAP]<sup>135</sup>, the Department's payments database and the section's database, which also records draw-downs from trust which are not captured by SAP).

**5.57** The reconciliation project also involves comparison against the trust account, or bank account statement of the legal firm or peak organisation involved. This has caused delays in the project owing to the quality and sufficiency of the records kept by the legal firms and peak organisations (to evidence the handling of Commonwealth funds) and the adequacy or otherwise of the records maintained by the department.

**5.58** The June 2005 Secretary's report stated:

The total number of open grants of financial assistance under the native title schemes that must be reconciled is 1 265. (The figure does not include grants approved since DAWGS went live—with no funds in trust—which do not need to be reconciled.)<sup>136</sup>

**5.59** Matters must be reconciled before applications, extensions and invoices can be assessed. Matters must also be reconciled to enable AGD to accurately identify its commitment totals and identify which matters can be decommitted—this process is discussed in the next section.

**5.60** AGD informed the ANAO that the progress of the reconciliation project at the end of October 2005 was as follows:

- 571 have been fully reconciled;
- 180 have been reconciled to one end (at the AGD end and to one side at the other end—i.e. the legal service provider or grant recipient); and
- 258 have been reconciled at the AGD end.<sup>137</sup>

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<sup>135</sup> SAPPHIRE (SAP) is a business application combining Systems, Applications and Products in data processing. SAP financial management software is commonly used by Australian Government agencies to increase accounting accuracy and support business processes.

<sup>136</sup> Secretary's Report, June 2005.

<sup>137</sup> AGD email, 4 November 2005.

**5.61** The reconciliation project has continued for over three years. AGD informed the ANAO that the reconciliation work is conducted on a grant-by-grant basis with priority allocated to those grants that are most active. AGD expects active grants to be reconciled by March 2006. AGD further advised that dormant/inactive grants should be reconciled relatively quickly thereafter.<sup>138</sup>

**5.62** As at the end of October 2005, of the 1 265 native title matters, there still remained 256 matters where reconciliation has not yet commenced. In addition, 438 matters required partial reconciliation. In total, 694 matters still required some form of reconciliation.

**5.63** The current problems with reconciliation affect AGD's ability to make informed, consistent and timely grant decisions. Grant recipients are required to wait for their matters to be reconciled before they receive funding for future activities. It also affects AGD's ability to accurately report the financial status of the Respondents Scheme.

**5.64** The ANAO suggests AGD finalise the reconciliation process in a timely manner to ensure that grant funds are approved with minimal delay and that it can accurately report the financial status of the Respondents Scheme.

DAWGS interaction with the department's financial management system (SAP)

**5.65** Reconciliation between the grants management system and AGD's financial management system (SAP) is required to provide assurance that the amount entered into SAP is complete and accurate. Variances in the amounts should be detected and discrepancies followed up in a timely manner.

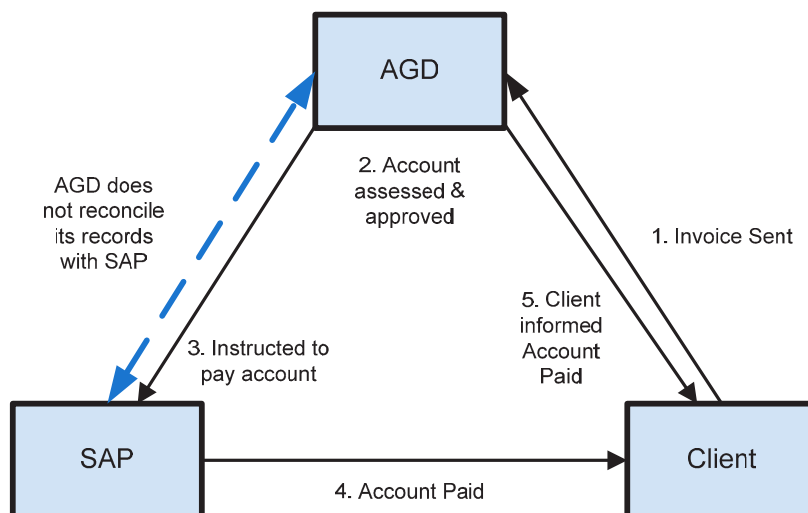
**5.66** Figure 5.1 presents AGD's process of account payment.

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<sup>138</sup> AGD email, 4 November 2005.

**Figure 5.1**

**Respondents Scheme account payment process**



Source: ANAO.

**5.67** The ANAO found that there is no electronic exchange of information between DAWGS and SAP. The ANAO was also advised that reconciliation between SAP and DAWGS records is not performed. As a result, AGD cannot provide assurance that the amounts entered into SAP, and therefore the expense recognised by AGD, is complete and accurate. Without a periodic reconciliation, variations in the amounts are not detected and therefore any discrepancies are not followed up in a timely manner.

**5.68** The ANAO considers that, without a periodic reconciliation between DAWGS and SAP, AGD cannot assure itself that the amounts entered into SAP (and, therefore, the department’s records of Respondents Scheme’s expenditure) are complete and accurate.

**Decommitment project**

**5.69** The management of grants of financial assistance require that grants have a time limitation. Once the time period for the grant has elapsed or a grant becomes inactive, unspent monies should be returned to AGD. Regular monitoring of grants should alert AGD to grants that require decommitment.

**5.70** A useful tool to identify inactive grants is to profile the age of Respondents Scheme grants. The ANAO analysed DAWGS data at 30 June 2005. The result showing the age of Respondents Scheme grants is presented in Table 5.1.

**Table 5.1****Age of current Respondents Scheme grants**

Age of grants at 30.06.05	Under 12 months	12 – 24 months	24 – 36 months	36 – 48 months	> 48 months	TOTAL
<b>Numbers</b>	131	131	128	253	572	1 215
<b>% of total</b>	10.78%	10.78%	10.53%	20.83%	47.08%	100.00%
<b>Running total</b>	131	262	390	643	1 215	
<b>Running %</b>	10.78%	21.56%	32.09%	52.92%	100%	

Source: ANAO analysis of DAWGS data as at 30 June 2005.

Note: These grants are recorded in DAWGS as open, that is, they may be inactive but the grant funds are still able to be used if the need arises.

**5.71** As AGD does not generally place time restrictions on grants of assistance, many grants are inactive or finished, but not closed. Table 5.1 indicates that a large proportion (47%) of Respondents Scheme grants could be in this category, that is, inactive or finished but not closed. AGD advised that as part of the transition to the implementation of the revised Guidelines, all grants will be reviewed to ensure that they remain relevant.

**5.72** AGD does not monitor the progress of grants to determine whether or not grant funds are still required. Therefore, it cannot determine, at an individual or at a programme level, the amount of grant funds remaining in this category. As a result, AGD has not quantified the funds outstanding in these matters and has not recalled these funds.

**5.73** The decommitment of grants and the recall of decommitted funds is important to AGD's strategy to fund its ongoing Respondents Scheme commitment.<sup>139</sup>

**5.74** Decommitment of matters cannot occur until after the matter has been reconciled. Inactive grants are a low priority for reconciliation and this has affected the ability of AGD to decommit matters.

**5.75** AGD's decommitment process occurs in two ways:

- if the process relates to the unused component of a forward commitment, it is simply decommitted;

<sup>139</sup> Secretary's report, 30 September 2005.

- if the process relates to a trust advance already held by either a law firm or a peak organisation, then when the grant is closed, any unused trust advance is reallocated to other active matters. Alternatively we would recall the trust advance and return it to the Consolidated Revenue Fund (CRF).<sup>140</sup>

**5.76** AGD advised the ANAO that from April 2005 to 11 November 2005, 83 grants in native title matters had been decommitted. While DAWGS has the facility to record decommitted amounts, AGD has experienced difficulties with this part of the workflow and has recently begun to manually record the amount of money decommitted. AGD advised that the process of de-commitment and the facility to report on de-commitments will form part of the proposed enhancement of DAWGS.

**5.77** Subsequent to field work, AGD advised that they seek to decommit excess funds in cases where individual grants have been grouped into a regional grant. (Groupings are in some instances ordered by the court or initiated by AGD in agreement with peak bodies.) In such circumstances, efficiencies are achieved through the grouping of parties, facilitating the decommitment of some funds held by individual grantees.

**5.78** In some instances, where grants have been made relating to a specific stage of a matter, AGD has sought to decommit funds that have not been used once that stage of the matter has concluded. AGD advised that individual delegates have initiated the retrieval of reports from DAWGS on matters which have been inactive for 18 or more months for review and possible decommitment. This practice will be more widely used, where it is deemed administratively efficient. It may be the case that there is a high likelihood that additional funding will be required for future stages of a matter. An assessment will therefore be made as to whether it is more efficient for funds to remain committed, and carried over to the new matter, or whether because of timing issues, it is more appropriate to decommit funds.

**5.79** The ANAO notes that AGD has a number of initiatives underway, such as the reconciliation and decommitment processes, which when completed will support the establishment of effective financial monitoring arrangements. However, to provide overall assurance on recorded expenditure, the amounts entered into SAP should be reconciled with DAWGS records on a regular basis.

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<sup>140</sup> AGD email, 11 November 2005.



## Reporting the financial status of the Respondents Scheme

**5.80** The ability to track and report on commitment totals and grant expenditure is necessary to ensure compliance with the FMA Act and to provide a sound basis from which to analyse programme performance.

**5.81** The ANAO assessed AGD's ability to reliably report to Parliament and stakeholders on its financial management of the Respondents Scheme.

### *Unfunded forward commitment*

**5.82** The ANAO analysed DAWGS payments data and found that 80 per cent of payments had been approved more than one year after the matter had been opened. This means that Respondents Scheme grants are largely open ended and span more than one financial year.

**5.83** The ANAO is aware that AGD has structured some grants of assistance in order to limit the length of the grant to a single year. This includes the funding of Native Title Officers in peak body organisations. (See Appendix 2 for more information on Native Title Officers).

**5.84** However, the ANAO notes that AGD has a significant unfunded liability in out years. AGD has advised that the unfunded forward commitment at 12 October 2005 is \$12 992 million. ANAO analysis confirmed this.

**5.85** AGD advised the ANAO that it proposes to develop a strategy with the Department of Finance and Administration (Finance) to deal with the unfunded forward commitment of the Respondents Scheme. Details of the strategy are not yet available.

**5.86** The decommitment project is an essential element of AGD's proposed strategy to manage its unfunded forward commitment.

**5.87** The ANAO was advised that:

AGD will seek agreement in principle from Finance that any trust funds that are recalled from trust may be retained for the purpose of the programme (in order to manage the unfunded forward commitment).

### DAWGS and reporting commitment

**5.88** The ability to accurately calculate commitment totals is essential for the purposes of budgeting and effective management of the Respondents Scheme

programme. An accurate estimate of the scheme's total commitment is also essential when calculating the programme's unfunded forward commitment.

**5.89** To calculate commitment DAWGS allows AGD to summarise the decisions as they occur. Decisions include applications, reviews, decommitment, and commitment changes. For example, when an internal review has been conducted after the initial commitment and a change in commitment occurs, DAWGS updates the new total commitment for the matter.

**5.90** The summarisation of decisions limits DAWGS to reporting on commitment at the time the report is produced. If commitment for a previous time period is required, all new decisions after the reporting period must be deducted from the current commitment total. To calculate the commitment from decisions outside the reporting period, AGD can use DAWGS to provide output decisions from the time period. The report, however, includes all decisions including reviews and commitment changes. This creates the risk of double counting commitment totals. AGD attempts to overcome double counting by physically reviewing records from within the reporting period and deleting occurrences of multiple decisions linked to an action.

**5.91** This method creates a risk of reporting inaccurate and inconsistent totals of commitment and as such compromises AGD's ability to identify and report its unfunded forward commitment.

**5.92** AGD has secured additional funding in the 2006–07 Budget process to refine and enhance DAWGS, including its reporting functionality. The ANAO considers that DAWGS enhancements are essential to enable AGD to accurately and reliably report on commitment, as a precursor to developing a strategy with the Department of Finance and Administration to manage its unfunded forward commitment.

### *Reporting expenditure*

**5.93** At a meeting of the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on 29 November 2005, AGD tabled the following expenditure data:

in 2001–02 spending under our programme was \$6 million. In 2002–03 it was \$8 050 000. In 2003–04 it was \$9 890 000. In 2004–05 it was \$6 993 000. In the year to date, as at 28 November, it has been \$1 992 million.<sup>141</sup>

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<sup>141</sup> Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 29 November 2005, *Committee Hansard*, p. 12.

**5.94** The ANAO analysed DAWGS data as at 24 August 2005. Table 5.2 below indicates the discrepancies between expenditure data provided to the Parliamentary Committee and data which were derived by the ANAO.

**Table 5.2**

**Comparison between AGD estimate of expenditure and ANAO estimate of expenditure**

Financial year	AGD tabled expenditure \$	ANAO estimate of expenditure \$
2001–02	6 000 000	8 710 000
2002–03	8 050 000	8 355 000
2003–04	9 890 000	10 162 000
2004–05	6 993 000	6 986 000

Source: AGD and ANAO analysis of DAWGS expenditure data.

**5.95** AGD advised that these discrepancies occur for the following reasons:

- in some instances the data migrated to DAWGS prior to deployment in August 2004 was not accurate. For example, some data were omitted and data had been entered in an incorrect field—for example, an advance entered as a direct payment;
- AGD’s reconciliation process is essential to improving the quality of Respondents Scheme expenditure data. Once AGD’s records are reconciled with those of solicitors and/or peak organisations, DAWGS data are updated to reflect these new amounts. The changes relate to all payment records—commitments, advances, draw downs and direct payments; and
- as a result, the payments data in DAWGS will vary over time due to identified errors being corrected as the reconciliation process continues.<sup>142</sup>

**5.96** The ANAO notes the improvement in the estimate of expenditure for the Respondents Scheme since DAWGS was implemented in August 2004. However, the ANAO considers that until the reconciliation process is finalised and AGD can accurately and reliably report expenditure data, AGD should attach appropriate explanations to its publicly released Respondents Scheme expenditure data.

<sup>142</sup> AGD email, 10 January 2006.

5.97 The ANAO also suggests that Respondents Scheme expenditure is included in internal management reports as errors in expenditure will impact on AGD's ability to develop future Respondents Scheme budgets.

## Recommendation No.5

5.98 The ANAO recommends that AGD:

- finalise its reconciliation project to facilitate more accurate reporting of Respondents Scheme commitment totals and expenditure;
- enhance DAWGS financial reporting capabilities; and
- reconcile DAWGS to its financial management system (SAP) on a periodic basis and promptly report any discrepancies to senior management for follow up.

5.99 **AGD response:** *Agree.*

### *Finalise reconciliation project*

5.100 *Agree.* Significant AGD resources have been allocated to reconciling files and to date significant progress has been made. As at 30 June 2006, of 1 265 current grants, 81% have been processed by the Reconciliation Team (766 fully reconciled and 259 reconciled by AGD with discussions with the relevant respondent ongoing or pending). Resources continue to be committed to the task to bring the project to finalisation.

### *DAWGS reporting capacity*

5.101 *Agree.* Refinements and enhancements to DAWGS are currently being developed (funding has been secured for 2006–07 for this purpose). Improvements in financial reporting capacity are a particular focus of this upgrade. AGD notes that information on forward commitment can be manually obtained using DAWGS reports. The upgrade of DAWGS will include a facility to automatically generate commitment reports.

### *Reconcile DAWGS to SAP*

5.102 *Agree.* AGD is working to facilitate greater interaction between DAWGS and SAP.

## Acquittal procedures

5.103 Grant acquittals are an integral component of good risk management and provide a measure of assurance that public funds allocated to grant recipients have been spent for their intended purposes.

**5.104** Administrative procedures to acquit grants on a regular basis are an important management control. Reliable, timely and adequate evidence is required to demonstrate that grant funds have been expended in accordance with the terms and conditions of the grant funding agreement.

**5.105** It would be appropriate that AGD puts in place acquittal procedures to coincide with the expiry of the grant of financial assistance. These procedures should include:

- financial statements covering the period of the grant, which grant administrators may require to be audited by a registered auditor; and
- a statement of compliance from the responsible officer of the recipient organisation that reports grant performance against the 'deliverables' specified in the funding agreement.

**5.106** It is important that when analysing documentation for an acquittal, the relevant legal officer comments on issues of relevance (including any concerns raised by an auditor or responsible officer) and ensures that any prior audit concerns have been addressed. Acquittal documentation should be noted on the relevant file.

**5.107** The template funding agreement states that: 'the money advanced as part of the agreement must be acquitted before further advances can be made or any extensions granted.' In the template letter advising an extension of financial assistance, there is a provision for DAWGS to calculate the total funds available for the matter. This includes the amount remaining in the initial commitment held by both the grant recipient and their solicitor.

**5.108** As well, there is ongoing dialogue between AGD and its grant recipients where clarification is regularly sought if there is a discrepancy between the recipient's understanding of the grant commitment and that held by AGD. To support this high level of interaction between AGD and grant recipients, the funding agreement template should provide explicit details for the grant recipient concerning what the grant funds are to achieve and clear instructions as to the acquittal process AGD requires to ensure that the grant funds had been expended in line with the objective of the grant.

**5.109** The ANAO found that AGD has acquittal procedures in place to ensure proper accountability for the funds made available to grant recipients. Current acquittal procedures are such that there can be no loss of Commonwealth funds as grant funds are no longer paid into trust accounts. However, the ANAO found that the specification of 'deliverables' in funding agreements

with grant recipients was clear in some agreements but very broad in others. In addition to checking that funds have been expended appropriately, AGD should assure itself that funds have been expended to achieve Respondents Scheme objectives.

**5.110** The introduction of the Attorney–General’s revised Guidelines, which includes staged grants with stringent reporting requirements will go towards addressing the risk of misusing Commonwealth funds.

## Conclusion

**5.111** The ANAO found Respondents Scheme funding agreements did not:

- specify precisely the deliverables required through the funding arrangements; and
- include a timely review clause to alert AGD to situations where little or no progress was being made to achieve individual grant objectives.

**5.112** AGD’s funding agreements contain terms and conditions additional to those set out in the Attorney–General’s Guidelines. The ANAO reviewed the additional terms and conditions and found they were not based on an assessment of the programme’s risks.

**5.113** While AGD had introduced monitoring arrangements in its funding agreements for new initiatives such as the Native Title Officer positions, there was variability in these arrangements between organisations where Native Title Officers were funded. The ANAO found a lack of consistent and timely monitoring arrangements in the other types of grant arrangements for the Respondents Scheme—for example grants made to respondents to participate in native title proceedings in the Federal Court.

**5.114** DAWGS helps AGD staff monitor individual grants by calculating the remaining funds that should be held in trust every time authorisation is given for trust drawdowns. However, the ANAO found that AGD did not have systematic procedures to monitor individual grant progress to determine whether or not grant funds were still required. Subsequent to ANAO fieldwork, AGD advised that individual delegates have initiated the retrieval of reports from DAWGS on matters which have been inactive for 18 or more months for review and possible decommitment.

**5.115** While AGD sets out budgets of anticipated work in its funding agreements, the ANAO found there were no monitoring arrangements in place to enable an assessment of whether or not activities undertaken were achieving

the required results. AGD's own internal review (see paragraph 6.8) supports this finding. The review found that the frequency and content of reports to the department varied significantly between grants and that a picture of significant events, dates and issues in a claim was not revealed until all grants related to the claim were examined.

**5.116** There were delays with AGD's reconciliation process that impeded the approval of grants and the accurate reporting of the Respondents Scheme's financial status. AGD has secured additional funding in the 2006–07 Budget process to refine and enhance DAWGS including its reporting functionality. The ANAO considers that DAWGS enhancement is essential to enable AGD to accurately and reliably report on commitment as a precursor to developing a strategy with the Department of Finance and Administration to manage its unfunded forward commitment.

**5.117** AGD's decommitment project, which aims to identify inactive grants and recall outstanding grant monies, is dependent on timely reconciliation of AGD grants. While DAWGS has the facility to record decommitted amounts, AGD has experienced difficulties with this part of the workflow and has recently begun to manually record the amount of money decommitted. AGD advised that the process of decommitment and the facility to report on decommitments will form part of the proposed enhancement of DAWGS.

**5.118** The ANAO found that there is no process to reconcile records between DAWGS and AGD's financial management system (SAP).

**5.119** AGD has acquittal procedures in place to ensure proper accountability for the funds made available to grant recipients. Current acquittal procedures are such that there can be no loss of Commonwealth funds as grant funds are no longer paid into trust accounts. However, the ANAO found that the specification of 'deliverables' in funding agreements with grant recipients was clear in some agreements but very broad in others. In addition to checking that funds have been expended appropriately, AGD should assure itself that funds have been expended to achieve Respondents Scheme objectives.

**5.120** The funding agreement template did not provide sufficient instructions to the grant recipient as to what AGD would regard as suitable assurance that grant recipients had, in fact, acquitted the grant in line with the grant's objective.

## Recommendation No.6

**5.121** To complement AGD's existing financial monitoring and acquittal of Respondents Scheme grants, the ANAO recommends that AGD incorporates additional information on what is to be delivered into Respondents Scheme funding agreements. This will allow AGD to better assess whether grant funds have been expended to achieve grant objectives.

**5.122 AGD response:** *Agree.*

**5.123** AGD notes that applicants for funding are currently required to satisfy the Department that clear and appropriate outcomes have been identified in relation to the use of the grant funding. The revised Respondents Scheme Guidelines provide for detailed reporting from applicants on outcomes.

**5.124** AGD has imposed stringent reporting and monitoring arrangements in agreements for all Native Title Officer positions in peak bodies. Recipients of Native Title Officer funding are required to provide quarterly reports on activities. A template has been provided outlining the expected content of reports including:

- number of hours spent by each native title officer per week over the period on general liaison and reporting on native title, research and reviewing information, monitoring of native title claims, mediation and negotiation, liaising with legal representatives and monitoring legal proceedings, administration and financial reporting;
- native title meetings, negotiations and legal proceedings including the issues discussed, purposes of the meeting and outcomes;
- significant developments relating to native title claims including any issue hindering agreement or progress made in reaching agreement;
- general feedback about native title and concerns of members or matters impacting on resolution / progress of native title matters; and
- purpose and outcome of any travel.

**5.125** AGD will closely assess these reports to ensure that the Native Title Officer positions are delivering outcomes as required under the terms of the agreement.



## 6. Respondents Scheme review and evaluation

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*This chapter assesses AGD's approach to the review and evaluation of the Respondents Scheme. The chapter also examines how AGD uses stakeholder feedback.*

### Introduction

**6.1** Review and evaluation is an important part of managing Government programmes. The benefits of including review and evaluation in a programme cycle are:

- the identification of areas where programme management may be improved;
- better accountability; and
- more informed decision-making as to the best use of scarce resources to achieve programme objectives.

**6.2** An effective review and evaluation process is dependent on the identification of programme objectives and the systematic gathering of performance information.

**6.3** This chapter assesses AGD's approach to reviewing and evaluating the effectiveness of the Respondents Scheme and the extent to which AGD's interaction with its key stakeholders is incorporated in this process for programme improvement purposes.

### Respondents Scheme review and evaluation processes

**6.4** The ANAO examined AGD's approach to the review and evaluation of the Respondents Scheme grant programme, including:

- work undertaken to support the Attorney-General's review of the legislatively prescribed Guidelines;
- the reviews undertaken at the Native Title System level; and
- regular and systematic reviews of the Respondents Scheme.

## **Work undertaken to support the Attorney–General’s review of the legislatively prescribed Guidelines**

6.5 Following the 1998 amendments to the Act, financial assistance for respondents to native title claims became more readily available. The Prime Minister publicly assured pastoralists and others that they would not bear the cost of participating in native title matters. At the time of the passage of the amendments the Government was aware that the full funding approach could create an unsustainably large call on the public purse. To limit this exposure, the Government determined that the Guidelines would be reviewed at some future date to determine whether they were achieving a practical outcome.

6.6 To support the revision, AGD undertook a research project which analysed a sample of grants to identify comparative cost structures across the range of legal approaches adopted by grant recipients.

6.7 The review involved a manual examination of Respondents Scheme grant files. AGD noted:

the electronic data held by the department did not enable reports to be produced identifying cost components in grants under review (e.g. counsel and expert fees, title searches, travel or other extraordinary costs). Nor did the data enable scrutiny or the production of reports distinguishing between stages in a determination application (e.g. pre–mediation, mediation or trial costs.)<sup>143</sup>

6.8 Despite data limitations, the review provided a comprehensive analysis of the different approaches adopted in native title matters by respondent groups and the corresponding costs of those approaches. The review finding concerning the provision of performance information to AGD was:

- the frequency and content of reports to the department varied significantly between grants.
- .....often a picture of significant events, dates and issues in a claim was not revealed until all grants related to the claim were examined. National Native Title Tribunal (NNTT) mediation reports on file were infrequent. The provision of information canvassing strategies was exceptional.<sup>144</sup>

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<sup>143</sup> AGD, January 2005, *Assistance provided under section 183 of the Native Title Act 1993*, p. iii.

<sup>144</sup> *Ibid*, p. xiii.

**6.9** The findings of the AGD review confirm the failings in AGD’s collection and analysis of performance information, as discussed previously in this audit report.

**6.10** The ANAO notes that AGD plans to review the Respondents Scheme on a regular basis and suggests that AGD include in its review strategy a focus on the identification of areas where programme management could be improved so as to maximise the deployment of resources to achieve Government and programme objectives. Such a focus would provide AGD with valuable insight into the management of the Respondents Scheme grants programme and the cost structures of different legal approaches.

### **Reviews undertaken at the Native Title System level**

**6.11** System-wide or programme level reviews provide an opportunity to evaluate the effectiveness and resourcing of all the elements within the broader framework.

**6.12** The purpose of the Native Title Coordination Committee (NTCC)—see Figure 1.1 in Chapter 1—is to monitor, regularly review and advise the Government on the Native Title System as well and to make recommendations on the resourcing of the System.

**6.13** The reviews of funding needs in the system are conducted as required and include the participation of the Legal Assistance Branch. The first review was conducted in 2000. This resulted in an allocation of an additional \$86 million over four years. The 2002 review was a mid-point assessment of the impact of the additional funding on the Native Title System. Acknowledging that it was difficult to assess the impact of the additional funding until closer to the end of the four year cycle, that review recommended that a further review be conducted in 2004<sup>145</sup> to assess the impact of the additional funding and the ongoing funding needs of the System.

**6.14** Following the 2004 review, an additional \$72.9 million was allocated to the Native Title System over four years. The next review is scheduled for the 2008-09 funding year, at the end of the current four year funding package.

**6.15** At a general level, the 2004 review referred to a number of benefits and improvements that were generated by the additional funding. In respect of Respondents Scheme funding, the benefit was identified as: ‘meeting the

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<sup>145</sup> The 2004 review also served as a lapsing program review as required by Estimates Memorandum 2004/18 issued by the Department of Finance and Administration.

Australian Government's commitments in relation to the provision of financial assistance for legal and related costs for non-native title parties.<sup>146</sup>

**6.16** The 2004 review also identified funding pressure points within the Native Title System, including the Respondents Scheme:

In relation to the Respondents Scheme's future expenditure trends, because of the nature of its grants, it carries a significant forward commitment that is presently unfunded. [estimated by AGD as \$12.992 million in June 2005].

In addition to the current unfunded forward commitment, AGD continues to make commitments each year of an average value of \$10 750 million on existing and new cases. This is more than the base funding appropriation for the programme for financial assistance for non-native title parties.<sup>147</sup>

**6.17** Implementation of the recommendations of the 2004 review is monitored by the NTCC, of which the Legal Assistance Branch is a member. The branch also reports to the committee on progress in relation to recommendations relevant to the Respondents Scheme as well as recommendations relating to system-wide issues. The ANAO considers that the committee's reviews provide useful comment on the operation of the Respondents Scheme as part of the overall Native Title System. It is appropriate that an on-going external process of review of the System assesses the effectiveness of its component elements, including the Respondents Scheme.

### **Regular and systematic review of the Respondents Scheme**

**6.18** The regular review of a grants programme, such as the Respondents Scheme, assists grant administrators to assess:

- the continued relevance or appropriateness of the programme,
- the effectiveness of the programme (i.e. whether programme outcomes are achieving stated objectives);
- whether there are better ways of achieving these objectives; and
- whether current resource levels are adequate.

**6.19** The quality of performance information at an individual grant level should be sufficient to enable the grants programme to be evaluated on a

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<sup>146</sup> Native Title Coordination Committee, October 2004, *The 2004 Review of Funding of the Native Title System*, p. 8.

<sup>147</sup> *Ibid.*, p. 64.

regular and systematic basis. Management information systems should be structured in such a way to provide timely feedback on the performance of individual grants and to capture information necessary for the evaluation of the grants programme.<sup>148</sup>

**6.20** AGD's Data and Workflow Grants System (DAWGS) is designed to streamline the processing of applications for financial assistance and payments. Currently, DAWGS is not designed to report on, or capture, performance information at the individual grant level.

**6.21** Respondents Scheme funding agreements do not specify performance information enabling an assessment of the grant's effectiveness over its life and there is no information system to collect this information for analytical purposes. As a result, AGD 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. This limits the capacity of AGD to effectively use programme evaluation as a tool to:

- improve programme management;
- provide better accountability; or
- inform resource allocation to more effectively achieve Government and programme objectives.

**6.22** The ANAO suggests that AGD review the adequacy of the performance information it collects to determine whether or not it enables the Respondents Scheme to be evaluated on a regular and systematic basis.

## Incorporating stakeholder feedback

**6.23** Important benefits of stakeholder feedback include engaging stakeholders' concerns and ideas for programme improvement; building concerns and ideas into programme improvement; and disseminating information to stakeholders.

**6.24** The ANAO assessed:

- AGD's strategy for engagement with stakeholders;
- AGD's Native Title Consultative Forum; and
- AGD's process to gather grant recipient initiatives and concerns and act on them.

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<sup>148</sup> ANAO, May 2002, op cit, p. 64.

## **Strategy for engagement with stakeholders**

**6.25** Engagement with stakeholders is important for two reasons:

- to notify of changes to the Respondents Scheme in a timely manner; and
- to incorporate ideas and concerns into programme improvement initiatives.

**6.26** Liaising with industry parties is essential to understanding whether the Respondents Scheme is addressing industry concerns in native title matters. Regular liaison with industry parties could enable AGD to understand and act on concerns by modifying the Respondents Scheme where appropriate.

**6.27** AGD liaises with stakeholders on a regular basis through the course of grant management. Legal officers and delegates are in frequent communication with most stakeholders in the grant assessment process. However, AGD did not have a strategy that detailed how it proposed to use information obtained in this way for programme improvement purposes.

**6.28** The ANAO suggests that AGD formulate a strategy to guide its liaison with industry parties and incorporate ideas and concerns into programme design.

### *Consultation on revised Guidelines*

**6.29** As part of the development of the revised Guidelines AGD undertook extensive consultations with respondent stakeholders in all States and Territories (except for Tasmania where there are no respondent stakeholders).

**6.30** AGD canvassed initiatives to improve its capacity to evaluate programme performance. These included:

- more transparent planning by funded respondents that is focused on achieving outcomes by limiting grants of assistance to six to 12 month periods combined with strengthened reporting to identify issues in dispute and strategies for resolution; and
- signalling to funded respondents that the maintenance of their grant is subject to their adopting reasonable positions in negotiations.

## **Native Title Consultative Forum (NTCF)**

**6.31** The NTCF is a forum which provides an opportunity for all stakeholders including governments and other participants in the Native Title

System to hear and understand the needs, interests and responsibilities of other parties. The NTCF is a multilateral body with membership comprising representatives from Australian Government agencies, State and Territory Governments, the Federal Court, the NNTT, Native Title Representative Bodies (NTRBs), the Human Rights and Equal Opportunity Commission and representatives from local government and the pastoral, fishing, mining and petroleum industries. (See Figure 1.1 in Chapter 1.)

**6.32** Participants in the NTCF have the opportunity to report their experiences and concerns to the forum on a formal basis and also to network and share experiences and concerns informally.

**6.33** AGD advised that while it actively encourages representatives from respondent organisations to attend, in order to be effective, the NTCF needs to remain at a manageable size in terms of the number of participants. Members representing peak organisations are encouraged to consult their own constituents in order to bring a broad range of views from their industry to the forum, as well as to report information back to constituents (e.g. the National Farmers' Federation Native Title Taskforce represented all State Farming Organisations at the December 2005 meeting). Minutes are provided to participants who may distribute them to constituent members. AGD further advised that the views and issues raised at NTCF meetings are taken into account in the formulation of policy advice to Government.

**6.34** Useful ideas and concerns were raised at the forum. AGD analyses these issues to ensure they inform the development of advice to Government. Targeted presentations are also used at forum meetings to explore particular issues as they arise and which are relevant to stakeholders.

### **Process to gather grant recipient initiatives and concerns and act appropriately**

**6.35** Continuous programme improvement requires a process to be developed which can incorporate grant recipient initiatives and concerns into programme design. The ANAO examined AGD's process for incorporating grant recipient initiatives and concerns.

#### *Grants Database*

**6.36** A major stakeholder in the Respondents Scheme developed a database to help it manage grants of financial assistance from AGD. Informal discussion with another stakeholder led to the development of a similar database for that

stakeholder. These databases have been of significant assistance to the organisations in managing and reporting on Respondents Scheme funding.

**6.37** AGD could make other stakeholders aware of this approach, especially peak organisations, to help improve the management and reporting of Respondents Scheme funding. Such an initiative could help stakeholders develop a common and consistent reporting format by which AGD can measure progress.

#### *Governance document*

**6.38** As a positive initiative, a stakeholder developed a governance document to help manage Respondents Scheme funds. The governance document included:

- a commitment to agreement making over litigation;
- annual external auditing of accounts to ensure compliance with terms and conditions of grant funds;
- reporting requirements;
- the organisation's native title policy;
- the Native Title Officer duty statement; and
- that legal costs were to be approved by the peak body to ensure that proposed expenditure was valid, within the terms of the grant and represented value for money.

**6.39** The ANAO considers this governance document to be a useful tool to help manage the Respondents Scheme and suggests that AGD considers modelling elements of the governance structure more broadly.

#### *Managing other Government grants*

**6.40** A number of stakeholders who met with the ANAO were also responsible for managing grants of assistance from other government agencies at both the federal and State/Territory levels. Invoicing and reporting practices required by AGD varied considerably from the grant requirements of other government agencies.

**6.41** The ANAO considers that AGD could review the requirements of select Australian Government grants programmes to see if there are areas where the Respondents Scheme could be improved and streamlined, while still meeting accountability requirements.



## Conclusion

**6.42** The Native Title Coordination Committee monitors, reviews and advises the Government on the Native Title System as a whole. The ANAO considers that the committee's reviews provide useful comment on the operation of the Respondents Scheme as part of the overall Native Title System. It is appropriate that an ongoing external process of review of the System assesses the effectiveness of its component elements, including the Respondents Scheme.

**6.43** The ANAO considers that AGD's ability to evaluate the effectiveness of the Respondents Scheme at the individual grant level and at the programme level would be enhanced by the specification of performance information at both levels.

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Ian McPhee  
Auditor-General

Canberra ACT  
30 August 2006



# Appendices



## Appendix 1: The Native Title System and Native Title Outcomes

This appendix contains background information on the Native Title System including system expenditure; system reporting requirements; the role of governments in the System, including the Australian Government’s proposed reforms of the System; native title claims and native title outcomes.

### Native Title System expenditure

Table A1.1 below provides details of System-wide expenditure and identifies Respondents Scheme expenditure. AGD provided these data to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on 29 November 2005.

**Table A1.1**

#### Respondents Scheme expenditure as a component of System expenditure

Year	Native Title System expenditure \$	Respondents Scheme expenditure \$	% of total expenditure
2001-02	100.10m	6.00m	5.99%
2002-03	106.45m	8.05m	7.56%
2003-04	112.25m	9.89m	8.81%
2004-05	110.77m	6.99m	6.31%

Source: AGD.

### Native Title System reporting

#### *Native Title Co-ordination Committee*

The Native Title Unit of the federal Attorney-General’s Department (AGD) chairs the Native Title Coordination Committee. The prime function of the committee is to monitor, regularly review and advise the Government on the Native Title System. It includes representatives from the Legal Assistance Branch, the Federal Court of Australia, the Office of Indigenous Policy Coordination (OIPC) within the Department of Families, Community Services and Indigenous Affairs (FaCSIA) and the National Native Title Tribunal. The Department of Prime Minister and Cabinet and the Department of Finance and Administration are also members, but have observer status only in committee meetings that relate to funding reviews.

The committee conducted reviews of System funding in 2000, 2002 and 2004 and reported to Government on future funding levels aimed at improving the overall efficiency and effectiveness of the system.

### *Aboriginal and Torres Strait Islander Social Justice Commissioner—HREOC*

Under s.209 of the Act, the Commissioner is required to report annually on the operation of the Act and its effect on the exercise and enjoyment of human rights by Indigenous Australians. The Commissioner's Native Title Reports are released annually and provide an overview of current and emerging trends in native title matters.

### *National Native Title Tribunal (NNTT)*

Section 133 of the Act requires the President of the NNTT to prepare and give to the federal Minister a report of the management of the administrative affairs of the Tribunal during the year. The annual report contains information on the performance of the Tribunal over the year and its accountability processes.

### *Native Title Representative Bodies (NTRBs)*

Under s.203DC of the Act, each representative body must prepare a report on the operations of the body during that year, together with audited financial statements and provide these documents to the Office of Indigenous Policy Coordination, which in turn provides them to the federal Minister for tabling in Parliament.

### *The Federal Court*

While not required to report on its operations with regard to native title matters under the Act, the Court in its annual report provides details of its performance in the native title jurisdiction and strategies for improving its effectiveness.

### *The Native Title Respondents Scheme*

The scheme is reported in AGD's Annual Reports to Parliament and includes information on the number of current grants of financial assistance and measures taken to improve AGD's efficiency in processing grants and tracking and reporting on grants.

## **The role of Governments in the Native Title System**

The 2003–04 Annual Report of the National Native Title Tribunal commented on the critical role Governments have in the resolution of native title issues:

Without the support of Governments, consent determinations of native title and some other agreements cannot be made. Governments can do much to set the tone of mediation and some other parties take a lead from the attitude and approach of a Government.<sup>149</sup>

The following section provides background information on the role of Government at the federal and the State and Territory levels. This includes reference to the Australian Government's recently announced reform agenda aimed at improving the performance of the Native Title System.

### *The Australian Government*

The Australian Government is responsible for the *Native Title Act 1993*. It funds the agencies at the federal level charged with responsibility for the native title claims process—the Federal Court and the National Native Title Tribunal.

The Act provides that the federal Attorney-General can participate in the proceedings that are commenced when a native title application is filed in the Federal Court. The Australian Government can act as a party in response to a notice of application, or by intervening at any time in a proceeding.

The Australian Government also participates in agreement making to facilitate projects that involve dealings in land that is or may be subject to native title.

The Australian Government considers that a consensual resolution of native title issues is the best way to balance the legitimate interests of native title holders, resource-based industries, pastoralists and other Australians. In June 2004, the Attorney-General re-iterated that the Government has a policy of preferring to resolve native title matters by negotiation rather than litigation.<sup>150</sup>

The Attorney-General's Department chairs the Native Title Consultative Forum (NTCF) which provides an opportunity for Governments and other participants in the Native Title System to hear about and understand the needs, interests and responsibilities of other parties. The NTCF is a multilateral body with membership comprising representatives from Australian Government agencies, State and Territory Governments, the Federal Court, the NNTT, NTRBs, the Human Rights and Equal Opportunity Commission and representatives from local government, the pastoral, fishing, mining and petroleum industries—see Figure 1.1 in Chapter One.

<sup>149</sup> National Native Title Tribunal, 2003–2004, *Annual Report*, p. 5.

<sup>150</sup> Minister Ruddock, 4 June 2004, *The Government's Approach to Native Title*, presented at the Native Title Representative Bodies Conference 2004, p. 3.

### *The role of the State and Territory Governments in the system*

State and Territory Governments, in their role as managers of land and resources, also play a critical role in the process as primary respondent to a native title claim. This is especially with respect to the range of leases, licenses and permits that are issued under State-based legislation and confer certain rights on their holders. State and Territory Governments also play a central role in exploring the range of options that might be available to settle native title applications—including the preparation of connection reports. In addition, some States and the Northern Territory have their own land rights legislation.

Table A1.2 sets out:

- State and Territory Government approaches to connection reports;
- key pieces of State based legislation for the purposes of native title;
- whether or not land rights legislation is in place; and
- the State/NT policy positions on native title.

Because of the very small amount of native title activity within the Australian Capital Territory and no activity within Tasmania, neither jurisdiction is included in Table A1.2.



**Table A1.2**

**State and the Northern Territory Governments approach to native title**

State and Territory	Connection criteria	Key state legislation	Land rights legislation	Policy position
NSW	Requirement for 'credible evidence'.	<i>Western Lands Act 1901</i> (NSW) provides for perpetual pastoral leases in western NSW – some 42 per cent of the state.	<i>NSW Aboriginal Land Rights Act 1983</i>	Stated preference for ILUAs as way of resolving native title.
NT	The negotiation process is not conditional on satisfying NT Government that claimants meet legal tests of 'connection'.	<i>Parks and Reserves (Framework for the Future) Act 2003</i> provides for the establishment, maintenance and joint management with traditional owners of a comprehensive system of parks and reserves.	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth) has resulted in around 42 per cent of land in the NT being granted as Indigenous freehold.	NT Government policy is directed to achieving native title outcomes that provide economic and social benefits for traditional owners. Policy of agreement making.
QLD	Requires claimants for consent determinations to meet connection requirements under the federal Act.	Two cultural heritage laws were passed in 2003 to protect significant Aboriginal or Torres Strait Islander areas and objects and established a duty of care for all land users, regardless of tenure. The laws enable a land user to negotiate a cultural heritage agreement with traditional owners under a registered ILUA under the <i>Native Title Act 1993</i> .	Two pieces of land rights legislation were passed in 1991 to enable land to be claimed by or transferred to Indigenous people. However, these Acts do not affect the right of any group to make a native title claim. It is estimated that since 1991, 769 000 ha have been transferred to Indigenous groups.	Different policy approaches to native title determination and native title agreement making.

State and Territory	Connection criteria	Key state legislation	Land rights legislation	Policy position
SA	<p>The agreement—making process is not conditional on satisfying the SA Government that claimants meet the legal tests of ‘connection’. However, a native title claimant group must meet a number of criteria before the Government will enter into negotiations over a consent determination.</p>		<p>The Anangu Pitjantjatjara and Maralinga Tjarutja Land Rights Acts provided for the transfer of inalienable freehold title over lands in the state northwest of the state covering approximately 20 per cent of the state.</p>	<p>The South Australian Government has a clear preference for negotiating agreed outcomes in relation to native title matters. To this end it has sponsored the State wide Indigenous Land Use Agreement process.</p>
VIC	<p>Approach to connection reports is flexible and dependent on the types of outcomes sought from the process.</p>	<p>The State has developed pro forma templates to assist resource companies and Indigenous communities in negotiations. The agreements came about due to a shared interest in streamlining processes under the federal Act to reduce time, cost, and uncertainty for all parties.</p>	<p>Six Aboriginal Land Rights Acts transfer small areas of reserves to Aboriginal organisations. Freehold transfer has conditions attached.</p>	<p>Victoria’s Department of Justice coordinates the whole-of government approach to resolving native title claims in Victoria through compliance with the federal <i>Native Title Act 1993</i>. The Department works together with claimants to reach agreed outcomes on native title claims.</p>

State and Territory	Connection criteria	Key state legislation	Land rights legislation	Policy position
WA	Requires connection reports.	<p><i>The Land Administration Act 1997</i> (WA) establishes a process for the renewal of pastoral leases. All pastoral leases expire on 30 June 2015. Section 241C of the <i>Native Title Act 1993</i> provides that non-exclusive leases, such as those in WA, may be validly renewed if the renewed lease contains conditions that were included in the previous lease for the benefit of Indigenous people.</p> <p>As previous leasing arrangements provided access for Indigenous people to unenclosed or unimproved part of the land under a pastoral lease, parties are seeking to reach access agreements in this regard.</p>		<p>The Office of Native Title, within the Department of Premier and Cabinet, is responsible for the implementation of the State Government's native title policy, which is based on the principles of negotiation, not litigation.</p> <p>The Department of Premier and Cabinet represents the State's interests in every native title determination application over land and water, and takes the lead in the negotiation and implementation of major projects on land under native title claim. All negotiations are conducted with a view to obtaining agreements that are both representative and sustainable.</p>

Source: State Government websites and the *Native Title Report 2003*, prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.

## **Reform of the Native Title System**

The Australian Government announced, on 7 September 2005, a plan for practical reform to improve the performance of the Native Title System. The reforms are focussed on measures to promote resolution of native title issues through agreement making wherever possible, in preference to litigation.

The six inter-connected aspects to the reforms include:

- measures to improve the effectiveness of Native Title Representative Bodies;
- amending the Guidelines of the native title respondents financial assistance program to encourage agreement making rather than litigation;
- preparation of exposure draft legislation for consultation on possible technical amendments to the Native Title Act to improve existing processes for native title litigation and negotiation;
- an independent review of the claims resolution processes to consider how the NNTT and the Federal Court can work more effectively in managing and resolving native title claims;
- an examination of current structures and processes of Prescribed Bodies Corporate (PBCs), including targeted consultation with relevant stakeholders; and
- increased dialogue and consultation with the State and Territory Governments to promote and encourage more transparent practices in the resolution of native title issues.

In revising the respondent funding Guidelines, the Government will consider how they can be focussed more strongly on agreement making over litigation. AGD is undertaking an extensive consultation process with respondent stakeholders.

## **Native Title claims by State/Territory**

The following table illustrates the current status—as detailed by the National Native Title Tribunal—of active claims within the Native Title System by State and Territory.

**Table A1.3**  
**Active Native Title Claims**

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	TOTAL
Active claimant	1	37	197	179	25	0	19	126	<b>584</b>
Active compensation	0	1	5	3	0	0	1	3	<b>13</b>
Active non-claimant	0	28	0	1	0	0	0	2	<b>31</b>
<b>Sub-total</b>	<b>1</b>	<b>66</b>	<b>202</b>	<b>183</b>	<b>25</b>	<b>0</b>	<b>20</b>	<b>131</b>	<b>628</b>

Source: Data provided by the National Native Title Tribunal as at 29 September 2005.

Note: A compensation application is one made by Indigenous Australians seeking compensation for loss or impairment of their native title.

A non-claimant application is one made by a person who does not claim to have native title but who seeks a determination that native title does or does not exist.

## Native Title Outcomes

There are a number of native title outcomes that can be achieved. These include court assisted outcomes through consent and litigated determinations. There are also agreements about how the claimants and respondents will use the land or waters subject to the claim. These voluntary agreements may be registered with the National Native Title Tribunal, which gives them the extended effect and operation provided for in the Act.

### *Determinations*

A native title determination is a court decision that native title does or does not exist over a particular area of land or waters. Where native title continues to exist, the determination will include a description of the rights and interests of the native title group. The main two types of determinations are consent and litigated determinations.

#### Consent determinations

Consent determinations are made when all parties involved in mediation reach an agreement about native title. This is a Federal Court determination which sets out the rights and interests enjoyed by a native title claim group and are valid as against the whole world.<sup>151</sup>

<sup>151</sup> Crown Solicitor's Office—Government of South Australia, 2004, *Consent Determinations in South Australia*, p.1.

When negotiating a consent determination, all parties to the native title claim must reach agreement on the nature and extent of native title rights and interests in all or part of the claim area. If that is achieved, they can ask the Federal Court to make a determination of those rights and interests with the consent of all parties to the claim, i.e. a consent determination.

#### Litigated determinations

Litigated determinations are made when an application is contested and the parties have to argue their cases in a trial process. The Australian Government seeks to encourage the making of well-founded and well-developed native title claims and their orderly and timely resolution, consistent with the Act, preferably through negotiation. It is acknowledged that the litigation process can be slow and may not deliver outcomes for participants.<sup>152</sup> A High Court judge has questioned whether litigation provides the appropriate framework for resolving native title issues<sup>153</sup> and a Federal Court judge described the problems of appropriately ascertaining facts in native title cases when using the adversarial system.<sup>154</sup>

However, it should be noted that litigation can be a useful tool in specific circumstances, although in other circumstances it may be resource-intensive and narrow in its outlook. Litigation and agreement making need not be mutually exclusive. Parties, with the assistance of the courts, can utilise the litigation process to facilitate resolution of particular issues which may otherwise impede the successful negotiation of an agreement. Some aspects of the litigation process may also assist mediation, such as the ability to test some evidence through preservation hearings.

Litigated determinations frequently only determine whether native title exists and subsequently claimants and respondents must decide how the parties will interact on the ground. This requires further negotiation and possibly the development of an Indigenous Land Use Agreement. This can prove difficult to achieve when the parties have previously had an adversarial relationship.

Table A1.4 below details the number and types of Native Title determinations across Australia.

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<sup>152</sup> Attorney-General, 4/9/2002, *Native Title: The Next 10 Years – Moving Forward by Agreement*.

<sup>153</sup> McHugh J in *Western Australia v Ward* (2002) 76 ALJR 1098 at [561].

<sup>154</sup> O'Loughlin J in *De Rose v South Australia* [2002] FCA 1342 at [89] & [144].

**Table A1.4**  
**Native Title determinations**

<b>Total number of Native Title determinations in Australia:</b>	<b>72</b>
Determinations <b>that native title exists</b> in the entire determination area or in parts of the area:	53
Determinations <b>that native title does not exist</b> in the determination area:	19
Consent determinations:	45
Litigated determinations:	15
Unopposed determinations:	12
Determinations involving claimant applications:	58
Determinations involving compensation applications:	1
Determinations involving non-claimant applications:	13
Determinations under appeal:	3

Source: National Native Title Tribunal website at 10 October 2005.

## *Agreements*

### Indigenous land Use Agreements

An Indigenous Land Use Agreement (ILUA) is a voluntary agreement about the use and management of land, made between a native title group and other people. While ILUAs do not provide a determination of native title, an ILUA may be a stepping stone on the way to a native title determination or it may suit the parties better than a determination. ILUAs, once registered, are binding on all native title holders in the area covered by the agreement, whether or not they are parties to the agreement.

The advantage of an ILUA is its flexibility – it can be tailored to suit the needs of the people involved and their particular land use issues. ILUAs can incorporate non-native title outcomes and can include employment, heritage issues, infrastructure development and Indigenous management of parks. The Australian Government does not fund the making of agreements, under the

Respondents Scheme, concerning non-native title outcomes such as heritage protection agreements, unless they are in the form of an ILUA.

Table A1.5 below provides information on the number of registered ILUAs by State and Territory as at 10 October 2005.

**Table A1.5**  
**Number of registered ILUAs**

<b>Total number of registered ILUAs in Australia:</b>	<b>215</b>
Queensland	121
Western Australia	3
Northern Territory	66
Victoria	15
New South Wales	4
South Australia	6

Source: National Native Title Tribunal website at 10 October 2005.

**Other agreements**

There are also numerous future act and native title related agreements entered into by native title parties with proponents of development, such as mining companies. These agreements provide a mechanism for parties to seek to find the solution to best meet their needs to resolve native title issues and in some circumstances, to address the broader aspirations of native title claimants. It is estimated that to date over 6 000 such agreements have been negotiated.



## Appendix 2: Native Title Officers

Peak representative organisations employ Native Title Officers (NTOs). Instead of an hourly rate, a package—which generally includes office administrative costs and the NTOs salary—is negotiated between the peak organisation and AGD. Currently peak organisations can have up to three NTOs. Whilst the nature of activities to be undertaken by NTOs can legitimately vary between peak organisations, it is a requirement that the activities undertaken be within the scope of s.183 of the Act.

As at 24 October 2005, there were a total of 13 NTOs across various peak organisations in Australia. The spread of NTOs included six in Queensland, four in Western Australia, and three in South Australia.

Native Title Officer duties can include:

- liaising with and arranging meetings with members for the purpose of progressing the members' involvement in the claims process;
- disseminating advice and other information provided by their solicitors to all the members in the group;
- attending meetings for the purpose of generally administering claims; and
- assisting with tenure history and historical land use research—particularly in relation to extinguishment arguments.

NTOs also assist in building capacity in the Native Title System, particularly within the peak organisation. NTOs are in a good position to liaise with and encourage their members to pursue agreement making instead of litigation.

NTO work also has the potential to shift less legally oriented work away from solicitors—such as research into tenure history. This could potentially result in cost benefits for AGD.

## Appendix 3: South Australian State-wide Indigenous Land Use Agreement (ILUA) Negotiations

While the typical method of funding individual grants of assistance to respondent parties continues to apply in South Australia, various parties in that State have been meeting to consider resolving native title matters across the State through a coordinated approach focussing on agreement making.

The South Australian State-wide ILUA Negotiations process is developing ways of resolving generic issues, leading to the development of template ILUAs in a range of focus areas including minerals exploration, pastoral, fishing and aquaculture, local government, parks and outback areas. The parties are also testing out these ILUA templates in specific negotiations and undertaking a planned approach to negotiating ILUAs across the State.

The long term objective of the parties is to achieve certainty over access to and sustainable use of land, water and resources through negotiated recognition and just settlement leading to the resolution of native title claims across the State. The State-wide ILUA process is still in its early stages and is unique to South Australia.

AGD is providing financial assistance to the peak organisations, in the form of a packaged amount, to participate in the process. The amount is inclusive of legal costs, peak organisation Native Title Officer wages, the costs of senior peak body participation and administrative costs.

### Funding strategy

Peak organisations are funded for three separate components:

- Native Title Officer positions (see Appendix 2 for more detail on these positions);
- peak body representation and legal support for State-wide negotiations; and
- negotiations with specific native title claimants.

Table A3.1 below sets out the distinct characteristics of AGD's funding strategy.

**Table A3.1****Characteristics of AGD's funding strategy**

Funding strategy components	Characteristics
Native Title Officer salaries	paid directly to peak organisations in advance on an annual basis.
core funding for peak organisation representation	paid directly to peak organisations in advance on an annual basis.
legal support	paid directly to peak organisations six months in advance.
reporting	report to AGD on a quarterly basis on amounts expended during the quarter and indicating the balance remaining for the legal cost component.
management arrangements	peak organisations are responsible for managing the activities of their legal support and associated costs. Unexpended legal funds are reimbursed to AGD.

Source: ANAO, based on AGD information.

The ANAO considers this funding strategy enables AGD to more efficiently administer grants payments within the Respondents Scheme's annual budget. Grant funding is linked to the achievement of annual stages and accountability is provided through the production of quarterly reports. This is in accord with the ANAO better practice guide on cash management.

## Appendix 4: Terms and conditions set out in the Attorney–General’s Guidelines

<b>Terms and Conditions</b>
1. Grants cannot be authorised retrospectively.
2. Generally all legal and associated costs will be covered.
3. Assistance does not extend to costs incurred in completing applications.
4. Assistance is provided in stages. At the end of each stage, a decision is made to continue or not.
5. Limits on grants of assistance must not be exceeded.
6. Assistance can be provided through lawyers and other professionals but must be drawn from the Native Title Practitioners Panel.
7. A group representative may be funded to provide general advice and assistance to their members, including where they are acting as an agent.
8. Solicitor’s fees are paid at 100 per cent of the Federal Court scale.
9. Solicitor’s accounts are to be itemised to enable a decision as to the reasonableness of the costs.
10. Counsel will only be funded where the case is judged to warrant the retainer of counsel.
11. Solicitors must provide a copy of an account where any one disbursement exceeds \$100.
12. Solicitors are prohibited from demanding payments from assisted persons.
13. Costs recovered from another party are to be reimbursed to the Commonwealth.
14. A grant of assistance does not extend to an indemnity for costs that may be awarded against a legally assisted person.
15. An assisted person is to provide any information that may be reasonably requested from time to time, including a report on completion of a matter.
16. AGD must be advised of the reasons for the withdrawal or discontinuance and the grant may be terminated in certain circumstances.
17. Where the applicant or their legal representative misrepresents the application in any way, AGD may terminate the grant.
18. Where the applicant obtains an award of the court for costs in their favour, an amount equal to the monies paid under the grant must be reimbursed.
19. Sets out costs schedule for legal professional fees.
20. Sets out costs schedule for para–legal/clerks, anthropologists and other professionals.
21. Sets out costs schedule for photocopying, facsimile etc.
22. Sets out costs schedule for travel and accommodation costs.

Source: ANAO, based on the Attorney–General’s Guidelines.

## Appendix 5: Attorney–General’s Department full comments in response to ANAO’s recommendations

### *Recommendation No. 1*

The ANAO recommends that AGD:

- develops programme performance indicators that can measure and track, over time, the Respondents Scheme’s contribution to the government’s objectives for the Native Title System; and
- carries out a structured risk assessment to assure itself that all of the risks specific to the Respondents Scheme are identified and treated.

### **AGD response**

#### *Programme performance indicators*

Agree. As noted in the Report at paragraph 2.37, new performance indicators have been specified as part of a Department-wide review of all performance indicators, and are shown in the Portfolio Budget Statements for 2006–07. As noted in paragraph 2.38, a further indicator has been proposed which will apply solely to the Respondent Funding Scheme—funding for matters involving mediation/agreement making as a percentage of current grants.

#### *Risk assessment*

Agree. AGD notes that the Report acknowledges at paragraph 23 that AGD has undertaken a range of risk treatments as part of the Respondents Scheme planning process. Noting that financial risk assessment and management are fundamental aspects directing the Scheme and informing programme management, AGD will formally document these risk management arrangements where it has not already done so.

AGD evaluated the strategic and organisational context of the Scheme and has identified potential risks. These include failure of the Scheme to reach its objectives, unfavourable publicity, stakeholder dissatisfaction and deficiencies in financial control and reporting.

AGD has undertaken treatment measures including:

- internal audits of the Scheme in 2002, 2004 and 2005;
- review of the Scheme as part of the 2000, 2002 and 2004 Reviews of Funding in the Native Title System;

- the development of the Data and Workflow of Grants System (DAWGS) programme to assist with the management of grants including recording decisions, tracking payments and grant balances;
- undertaking a major reconciliation project to reconcile trust advances against all grants, with ongoing reconciliation while funds remain in trust;
- high level scrutiny of legal costs by assessment of invoices submitted by legal firms to ensure legal work is reasonable, necessary and accords with the purpose of the grant (including by reference to budgets of anticipated work settled by AGD);
- the implementation of shorter grant periods (usually covering work anticipated up to six months in active matters and 12 months in less active matters);
- the practice of requesting information and documents whether to monitor progress of a matter or to assess reasonableness of charges (such requests are routinely made upon new grants, assessment of invoices, or during the life of a grant); and
- the practice of allowing applicants for funds to seek an internal review of a decision by an officer not involved in the original decision.

Risk assessment processes and treatment measures will continue to be reviewed on an on-going basis.

## ***Recommendation No. 2***

To promote the efficient, effective and ethical use of Australian Government resources, the ANAO recommends that AGD ensures that the design of Respondents Scheme funding strategies includes the appropriate management of interest earned on funds advanced to grant recipients.

### **AGD response**

Agree. AGD is developing a protocol for the management of interest earned in relation to funds currently held by grant recipients. AGD notes that funds are no longer advanced to grant recipients or their legal representatives (other than funds provided to peak organisations for Native Title Officer positions).

### ***Recommendation No. 3***

To ensure AGD staff have access to high quality data, the ANAO recommends that AGD evaluates, on a periodic basis, the data held in its Data and Workflow Grants System tables to:

- determine which data are essential for business purposes; and
- ensure that the quality of these data is sufficient to support business purposes, for example performance and financial reporting.

#### **AGD response**

Agree. AGD notes that DAWGS is a workflow tool that records decisions, payments and grant balances. Information on the status of a native title claim is readily available on each individual native title claim file, although recording of the information on DAWGS provides a useful central access point.

### ***Recommendation No. 4***

To ensure that AGD decision-making is consistent and of a high quality, the ANAO recommends that AGD introduce:

- a periodic quality review of application/invoice processing arrangements;
- a review of the sufficiency of the tools available to support quality decision-making including the grant administration policies and procedures manual, DAWGS processing and formal training for new legal officers; and
- performance indicators to monitor the grant application and review process.

#### **AGD response**

##### ***Periodic quality review***

Agree. AGD is committed to employing best practice methods to ensure the timely processing of applications and invoices. AGD will implement periodic quality reviews to ensure that where necessary, application and invoice processing methods are refined and improved.

##### ***Review of efficiency of tools available***

Agree. AGD will review the *Assessment of Costs* document to ensure that it continues to facilitate the efficient and transparent assessment of invoices, and

will also update the document in light of the revision of the Respondents Scheme Guidelines.

Refinements and enhancements to DAWGS are ongoing. Funding has been secured for 2006–07 for that purpose, including to enhance DAWGS' reporting capacity. An e-learning facility was recently added to DAWGS to assist users.

New legal officers currently undergo a comprehensive training program to guide them in the processing of applications and invoices. Legal officers also have access to departmental training on the history and scope of the *Native Title Act 1993* and the Native Title System, as well as external training to promote an understanding of the native title claims process. Ongoing internal training is provided to legal officers and administration staff to share knowledge and improve skills and promote best practice.

AGD has also established a project team to coordinate the implementation of the recommendations of this Report.

#### *Performance indicators to monitor the grant application and review process*

Agree. The project team established to implement the recommendations of this Report will develop tailored performance indicators to monitor the grant application and review process.

### **Recommendation No. 5**

The ANAO recommends that AGD:

- finalise its reconciliation project to facilitate more accurate reporting of Respondents Scheme commitment totals and expenditure;
- enhance DAWGS financial reporting capabilities; and
- reconcile DAWGS to its financial management system (SAP) on a periodic basis and promptly report any discrepancies to senior management for follow up.

### **AGD response**

#### *Finalise reconciliation project*

Agree. Significant AGD resources have been allocated to reconciling files and to date significant progress has been made. As at 30 June 2006, of 1 265 current grants, 81% have been processed by the Reconciliation Team (766 fully reconciled and 259 reconciled by AGD with discussions with the relevant



respondent ongoing or pending). Resources continue to be committed to the task to bring the project to finalisation.

### *DAWGS reporting capacity*

Agree. Refinements and enhancements to DAWGS are currently being developed (funding has been secured for 2006–07 for this purpose). Improvements in financial reporting capacity are a particular focus of this upgrade. AGD notes that information on forward commitment can be manually obtained using DAWGS reports. The upgrade of DAWGS will include a facility to automatically generate commitment reports.

### *Reconcile DAWGS to SAP*

Agree. AGD is working to facilitate greater interaction between DAWGS and SAP.

## ***Recommendation No. 6***

To complement AGD's existing financial monitoring and acquittal of Respondents Scheme grants, the ANAO recommends that AGD incorporates additional information on what is to be delivered into Respondents Scheme funding agreements. This will allow AGD to better assess whether grant funds have been expended to achieve grant objectives.

### **AGD response**

Agree. AGD notes that applicants for funding are currently required to satisfy the Department that clear and appropriate outcomes have been identified in relation to the use of the grant funding. The revised Respondents Funding Guidelines provide for detailed reporting from applicants on outcomes.

AGD has imposed stringent reporting and monitoring arrangements in agreements for all Native Title Officer positions in peak bodies. Recipients of Native Title Officer funding are required to provide quarterly reports on activities. A template has been provided outlining the expected content of reports including:

- number of hours spent by each native title officer per week over the period on general liaison and reporting on native title, research and reviewing information, monitoring of native title claims, mediation and negotiation, liaising with legal representatives and monitoring legal proceedings, administration and financial reporting;

- native title meetings, negotiations and legal proceedings including the issues discussed, purposes of the meeting and outcomes;
- significant developments relating to native title claims including any issue hindering agreement or progress made in reaching agreement;
- general feedback about native title and concerns of members or matters impacting on resolution / progress of native title matters;
- purpose and outcome of any travel.

AGD will closely assess these reports to ensure that the Native Title Officer positions are delivering outcomes as required under the terms of the agreement.

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