



National
Native Title
Tribunal

Negotiation in good faith

Information sheet

Future act unit, September 2002

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Relevant sections of the Act

Relevant sections of the *Native Title Act 1993* (Cwlth):

- s. 31: normal negotiation procedure
- s. 31(1)(a): government party to invite submissions from native title party
- s. 31(1)(b): negotiation parties must negotiate in good faith
- s. 31(2): negotiation in good faith is about matters related to the effect of the future act on native title rights and interests
- s. 31(3): Tribunal may be requested to mediate
- s. 33: profit sharing may be negotiated
- s. 35: applying to the Tribunal for a future act determination
- s. 36(2): no determination if government or grantee did not negotiate in good faith
- s. 38: kinds of future act determinations
- s. 39: criteria for making a future act determination

What is the right to negotiate?

The right to negotiate is the right of the native title party to be involved in discussions about—but not veto—certain proposed developments. The right to negotiate applies to proposed developments (such as mining and petroleum activities and some compulsory acquisitions of native title) on areas of land or waters where native title exists and will be affected.

Registered native title claimants have the right to negotiate while their native title application is being considered by the Federal Court. If the right to negotiate applies to a future act, the state or territory government cannot validly do the future act (e.g. grant a mining tenement or petroleum permit for an area included in a native title claim area) unless it has complied with the right to negotiate provisions of the Native Title Act.

Unless the grant can be fast-tracked this means that:

- the government party must give the native title party an opportunity to make submissions to it about the future act, and
- the negotiation parties must negotiate in good faith with a view to reaching agreement on the doing of the act with or without conditions.

The state or territory government will invite claimants and the people who are proposing to do the activity, such as the grantees of a mining tenement, to hold discussions (i.e. negotiate). Parties can ask the Tribunal to mediate during this negotiation phase. You can find more information on what mediation involves in the information sheet *What to expect in a future act mediation*.

You should be involved in negotiations if you are any of the following parties (i.e. are a negotiation party):

- the state or territory government representative (the government party)

- the beneficiary (grantee party) of the future act; for example, the person or company applying for the title or the person or company for whom the land is being compulsorily acquired, or
- a person who has been determined to hold native title or a person with a native title application lodged over the area of the proposed future act who has the right to negotiate (a native title party).

What is negotiation in good faith?

If you are a negotiation party in any future act negotiations you should approach them in a responsible and serious manner. There is no definition of the term 'negotiate in good faith' in the Native Title Act, but basically it means that negotiation parties should enter into negotiations with an open mind and genuine desire to reach agreement.

When dealing with some future acts (e.g. the grant of mining tenements and petroleum permits or certain compulsory acquisitions of native title) all native title parties have the right to negotiate about them. Negotiation parties must negotiate in good faith.

What is involved in negotiating in good faith?

The negotiation parties:

- should communicate and have discussions or confer with a view to reaching agreement about the doing of the future act
- are only required to negotiate in good faith about the future act and issues which are related or connected to it. For instance, if there is a proposal to start a mine, negotiation in good faith is only required to be about that proposal or issues which are related to it. There is no obligation to negotiate about matters unconnected with the proposal, and
- may voluntarily agree to negotiate about other matters not connected with the future act but are not required to. That is, the native title party may put forward proposals which are unconnected with the future act and the other parties may, if they wish, consider them. However, failure to consider them will not be a failure to negotiate in good faith.

Good faith negotiations should cover the issues referred to in section 39 of the Native Title Act, which the Tribunal must take into account in making a future act determination. You can find more information on what is involved in this process in the information sheet *Future act determination inquiries*.

What happens if the parties cannot reach agreement?

If negotiation parties cannot reach agreement, any party can apply to the Tribunal to make a future act determination about whether the proposed activity can go ahead, and whether there should be any conditions attached to it. This is known as a future act determination application, and parties can only make an application six months after the date the proposed activity was advertised (notification date). If raised by one of the parties, the Tribunal will consider, as a preliminary issue, whether either the government or grantee parties have negotiated in good faith.

What is good faith inquiry and why is it relevant?

As the first part of an inquiry into a future act determination application the Tribunal will usually call the parties together for a preliminary conference. At the preliminary conference, a member of the Tribunal will ask whether any of the parties think that either the government or grantee party has not negotiated in good faith. If one party says that either the government or grantee party has not negotiated in good faith, then the Tribunal will hold a mini-inquiry to investigate and make a decision on this issue before conducting a full inquiry.

To determine if there has been negotiation in good faith, the Tribunal will look at the conduct of parties during the negotiation phase. To help establish that they have negotiated in good faith, parties may wish to use documents generated during the mediation process. Using mediation documents in this way is an exception to the general rule that mediation meetings are confidential and without prejudice.

The Tribunal prefers to make its decision on whether there has been negotiation in good faith based on the documents provided by the parties (this is called a 'hearing on the papers'). As hearings can be costly and time-consuming, the Tribunal will conduct a hearing only if necessary. Where the Tribunal member is satisfied that a hearing is necessary, parties may give oral evidence.

The full inquiry hearing cannot proceed if:

- the government party has not given the native title party an opportunity to be involved in negotiations about how the future act will affect them, or
- the government or grantee party have not negotiated in good faith.

How does the Tribunal tell if there has been negotiation in good faith?

In order to decide if the government or grantee party has negotiated in good faith, the Tribunal will look at the whole of their conduct during the negotiations. The Tribunal will consider whether the parties have negotiated with an open mind and genuine desire to reach agreement and, where appropriate, been prepared to compromise.

This does not mean that the parties must reach agreement. They are entitled to have regard to their own interests. However, negotiation in good faith involves the parties acting honestly and reasonably in all the circumstances of the case. If the government and grantee parties receive proposals from the native title party which fall within the scope of negotiations in good faith they must give genuine consideration to them.

If a native title party does not:

- make submissions to the government party about the future act, or
- negotiate in good faith

then the Tribunal can take this behaviour into account in deciding whether the government and grantee parties have negotiated in good faith.

Whether the government and grantee party have negotiated in good faith will depend very much on the nature of the future act proposed and its effect on native title rights and interests that may vary significantly from case to case. The Tribunal will examine the parties' overall behaviour during the negotiations but may look at the following type of things when making its decision:

- level of active communication, for example, returning telephone calls and responding to letters
- timeliness of responses
- exchange of relevant information between the parties
- the number of meetings and who organised them
- conduct at meetings
- whether people with decision-making authority attended the meetings
- whether parties put forward genuine offers and counter-proposals
- whether parties were prepared to move from their original position
- whether parties changed their position just as an agreement was in sight
- whether parties made an issue of trivial items of disagreement
- appropriate conduct outside negotiations, for example, making comments to the media
- disclosure of significant facts or legal argument; and
- willingness to put a verbal agreement into writing.

What do the outcomes of a good faith inquiry mean?

If the Tribunal concludes that parties have not negotiated in good faith, it will dismiss the future act determination application, and the proposed activity cannot go ahead. Parties will have to recommence their negotiations and try again to reach an agreement before applying for another future act determination.

If the Tribunal concludes that parties have negotiated in good faith, the Tribunal will proceed with a full inquiry to determine whether the proposed activity can go ahead, and whether there should be any conditions imposed. You can find more about this process in the information sheet *Future act determination inquiries*.

List of terms

Arbitration

An inquiry conducted by the Tribunal into a future act determination application which takes into account the effect of the future act on the enjoyment by the native title party of their registered native title rights and interests (among other things) and the economic or other significance of the future act and the public interest. The arbitration (inquiry) leads to the Tribunal making a determination whether the future act can be done and if so, whether conditions should be imposed.

Future act

The granting of the right to conduct a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about the future act are given to native title claimants. In the case of some future acts including the grant of mining or exploration rights and some compulsory acquisitions of native title, the future act cannot validly be done unless the right to negotiate process in the Native Title Act is followed.

Future act consent determination

A decision by the Tribunal that a future act may proceed and whether any conditions apply, which is made when parties have reached agreement and consented to those conditions applying.

Future act determination

A decision by the Tribunal that a future act may proceed and whether any conditions apply.

Future act determination application

An application made by any negotiation party to the Tribunal for it to determine whether a future act may proceed, and if so what conditions should apply.

Mediation (future act)

A process which allows negotiation parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement. Mediation processes are useful where negotiation is not progressing.

Member

A person who has been appointed by the Governor-General as a member of the Tribunal under the Native Title Act. Members are classified as presidential or non-presidential. Some members are full-time and others are part-time appointees.

Native title application

An application for the legal recognition of the native title rights and interests held by Indigenous Australians over a particular area of land or waters, according to traditional laws and customs.

Native title determination

A decision by an Australian court or other recognised body that native title does or does not exist in a particular area of land or waters.

Native title party

Registered native title claimant, registered native title body corporate, or representative Aboriginal or Torres Strait Islander body.

Negotiation party

An individual, group or organisation that may participate as a party to proceedings in a right to negotiate inquiry, namely the government party (usually a state or territory government which proposes to do the future act); the grantee party (the person who has requested the future act to be done) and the native title party (the registered native title claimants).

Notification date

The 'notification date' is identified in the published notice. Starting from the notification date parties have specific periods of time in which to lodge applications. Periods of time vary, depending on the type of application.

Preliminary conference

A meeting of the parties, convened by the Tribunal member appointed to the inquiry, at which directions may be made and information sought from the parties about issues relevant to the inquiry. A preliminary conference may be conducted by telephone.

Registered native title claimants

Native title claimants who have met the conditions of the registration test.

Registration test

A set of conditions under the Native Title Act that is applied to native title claimant applications. If an application meets all the conditions, it is included in the Register of Native Title Claims, and the native title claimants then gain the right to negotiate together with certain other rights, while their application is under way.

Right to negotiate

The right of native title claimants (whose application has satisfied the registration test) to be involved in discussions about — but not veto — proposed developments (such as mining) on areas of land or waters where native title exists. Where the right to negotiate applies, negotiations with native title claimants must occur before the grant for the proposed development can go ahead. The right to negotiate process is managed by the State or Territory government, but the Tribunal may be requested to mediate.

Further information and background reading

The Tribunal's *Guide to future act decisions* lists the major 'negotiation in good faith' cases and summarises their main points. The guide is from the Tribunal's website www.nntt.gov.au .

Cases of particular interest include:

- Carr J in *Walley v State of Western Australia* (1996) 67 FCR 366
- Minister for Mines WA/Taylor (Njamal people)/Mullan, NNTT WF96/4, Hon C J Sumner, August 1996
- Minister for Lands WA/Strickland (Maduwongga), NNTT WF97/4, Hon C J Sumner, 10 December 1997
- Minister for Mines WA/Hayes (Thalanyi)/WAPET, NNTT WF00/7, Hon C J Sumner 9 March 2001

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