GUIDELINES
FOR BEST PRACTICE
FLEXIBLE AND SUSTAINABLE AGREEMENT MAKING

Joint Working Group on Indigenous Land Settlements

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The Joint Working Group on Indigenous Land Settlements acknowledges that each State and Territory will have different approaches to certain aspects of agreement-making and implementation, depending upon its settlement history, legislative framework, programs and policies.
The Working Group also acknowledges that every native title claim and negotiation is unique.

These guidelines will be interpreted and implemented by State and Territory government parties consistent with the priorities and policy approaches of their jurisdictions, and with regard to the particular requirements of each case.

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INTRODUCTION

The unrealised potential of native title

1. The recognition of native title can significantly contribute to the social, cultural, spiritual and economic wellbeing of Indigenous Australians. As recognised in the Preamble to the *Native Title Act 1993* (NTA), the efficient and effective resolution of native title has the potential to:
    - afford Indigenous Australians the 'full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture fully entitle them to aspire'
    - rectify consequences of past injustices perpetrated against Indigenous Australians, and
    - provide benefits to the broader Australian community, including the advancement of reconciliation and the creation of certainty of land tenure.
2. However, this potential has not been fully realised. The system has become constrained by technical and inflexible legal practices and processes.

Australian Governments' commitment to a new approach to native title

3. At the Native Title Ministers' Meeting on 18 July 2008, Australian Governments acknowledged that the backlog of undetermined native title applications, and the time it can take to resolve claims, is unsatisfactory.
4. Governments recognised that real advances in native title require all parties to adjust their attitudes and expectations. They committed to work proactively in their jurisdictions to resolve native title through non-technical and flexible approaches. They agreed:
    - to develop innovative policy options for progressing native title through interest-based, negotiated settlements where possible
    - the native title system can facilitate broader settlement packages that offer a range of real opportunities and practical outcomes for Indigenous Australians
    - to establish and pursue jurisdiction-specific targets to benchmark progress, and
    - to meet regularly to assess progress, share experiences and to develop a strategic approach for the effective resolution of native title.

Purpose of the Best Practice Guide

5. This Best Practice Guide is designed to provide practical guidance for government parties on the behaviours, attitudes and practices that can achieve flexible, broad and efficient resolutions of native title. It identifies a range of common factors indicative of successful broader land settlements that may be applied or adapted to the circumstances of particular settlements.
6. This Guide complements *Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal.*
7. Broader land settlements to which the guidelines could apply include:
    - native title settlements (eg consent determinations and Indigenous Land Use Agreements (ILUAs))
    - non-native title settlements, and

- settlements which include a mix of both native title and non-native title outcomes.

8. These Guidelines are divided into three parts, which reflect distinct phases of broader land settlement negotiations.
9. Part One provides guidance on how to adequately prepare for the early stages of a negotiation. These guidelines encourage government parties to adopt behaviours, attitudes and practices early in the negotiation process that will ensure agreements deliver outcomes attuned to the needs and interests of all parties.
10. Part Two provides guidance on the substantive stage of the negotiation process. These guidelines encourage government parties to adopt an interest-based approach to negotiations, to remain flexible as to the potential benefits that might be provided and to act in good faith throughout the negotiation.
11. Part Three provides guidance on the successful implementation of agreements, so that appropriate corporate and governance frameworks are in place to ensure the delivery of sustainable benefits into the future.

1 EARLY NEGOTIATION

1. Prepare thoroughly prior to commencement of a negotiation

12. Prior to the commencement of negotiations, government parties should endeavour to:
    a. ensure all parties are authorised to commence negotiations
    b. identify and complete necessary research
    c. outline outcomes sought so that relevant policy parameters can be defined and understood by all parties
    d. agree on the broad structure, timeframes, parameters and purpose of the negotiations
    e. agree on roles and responsibilities of all parties, and
    f. seek to assist with the resolution of inter and intra-Indigenous conflict, where possible and appropriate.
13. The level of research to be completed will depend on the nature of the negotiation and the outcomes sought. However, government parties should identify any research that is necessary to support the negotiation and ensure it is completed before the commencement of negotiations.
14. In some circumstances tenure material will inform the negotiation process, particularly in circumstances where a native title outcome is not being sought. Where possible, government parties should be prepared to share tenure information and any other information that may assist a negotiation, subject to confidentiality and privacy requirements. In some cases, tenure information could shape the negotiations, rather than connection reports or connection evidence.
15. Government parties should also have done some preparation to know what programs or benefits might be able to be offered and be aware of what benefits they can commit to (see Guideline 6 for examples of potential benefits).

2. Engage proactively to enable timely and efficient outcomes

16. Two issues that can contribute to significant delays in resolving a claim are overlapping claims and connection evidence.
17. Where appropriate, government parties should proactively engage to do what they can to resolve overlaps that occur in negotiations. It is not equitable to deny negotiations to particular Indigenous groups simply because their claim is relatively difficult due to overlapping claims. Nor does it provide certainty for other potential land users.
18. Overlaps should be considered on a case by case basis. For example, some marginal or unsubstantiated overlaps can be more practically dealt with by excising part of the claim subject to the overlap, consenting to a partial determination where there is no overlap, or agreeing to a degree of shared rights in the overlapping area.
19. For more substantive overlaps, tools such as land summits, regional settlements and targeted mediation and litigation could be used.
20. The production of connection and tenure information early on may assist to focus the negotiations through early assessment of the magnitude of overlaps, the degree to which native title has already been extinguished, and claim boundaries.
21. Government parties should provide information in their possession where possible, including:

a. relevant tenure material, and

b. access to any relevant connection material (taking into account confidentiality requirements).

22. Where appropriate, government parties should also engage with all other agencies (for example, local government) that might be able to contribute to the process and be proactive in accessing and disseminating all relevant information.

3. Determine who the right people for country are early in the negotiation process

23. Government parties need to be satisfied they are dealing with the right people for country before commencing negotiations for a broader land settlement. A focus on interest-based negotiations with the right people for country will also assist all parties to establish the strengths and weaknesses of the underlying native title claim.

24. Any one of the following factors can assist in establishing whether an Indigenous party represents the right people for country:

a. existence of a registered claim or ILUA with no overlaps

b. recognition by the relevant Native Title Representative Bodies (NTRBs) that the group comprises the 'right people'

c. demonstrated genealogical affiliation to ancestors who occupied the area at settlement

d. evidence of past dealings with State and Territory government over the particular area, and

e. evidence that shows the group's traditional and contemporary link to the land, including access, responsibility for caring for country, important sites, traditional laws and activities.

4. Consult effectively to achieve a sustainable agreement

25. A settlement is more likely to be successful when it is understood and accepted by the parties and the broader community affected by the settlement. Trust, ownership and commitment is built and maintained by inclusive decision making and transparency.

26. NTRBs, or other parties representing claimants, have a crucial role in ensuring that all Indigenous parties are consulted and have the opportunity to approve the content of the negotiated agreements.

5. Promote equitable engagement of negotiating parties

27. Government parties should promote the effective engagement of all parties involved in the negotiation of an agreement. Where appropriate, government parties should encourage the appointment of experienced negotiators and support teams that have a good understanding of the interests they are representing and how those interests could be best served.

6. Consider potential benefits prior to the commencement of a negotiation

28. As noted in Guideline One, government parties should spend time researching and considering the nature of the benefits they can possibly provide. This will ensure that when substantive negotiations commence parties have a clear idea of the parameters within which agreement can be found.

29. Sustainable benefits can be financial or non-financial and could include, but are not limited to:
    a. land
    b. employment, education, mentorship and training opportunities
    c. business start-up assistance or provision of an established business
    d. provision of longer term assets and investments
    e. licences to hunt, fish, camp or organise cultural events in the agreement area
    f. co-operative management arrangements, for example, of a national park
    g. ongoing commitment to collaborate on future projects
    h. timed funding for the relevant Prescribed Body Corporate (PBC), and
    i. multi-lateral land access agreements between the Commonwealth, State and local governments and third parties.
30. In addition to early consideration of the type of benefits to be provided, government parties should remain open and flexible throughout negotiations. A range of benefits, tailored to concerns and interests will enhance commitments to long term relationships and the negotiation of agreements.

7. Engage parties who have ongoing responsibilities early on

31. Those who will have responsibility to implement an agreement should be involved in its negotiation so that they can inform, shape and ultimately own the process of implementation. This is particularly the case for government parties where it is likely the government negotiators will not themselves be providing all of the benefits.

8. Consider engaging in a regional settlement

32. In some circumstances, it might be appropriate to use a settlement on a regional basis to reach an agreement. A regional settlement may involve claims brought by different claim groups in the same region, or an amalgamation of claims by the same claim group within a region.
33. Regional settlements do not necessarily require the collective resolution of every issue in every claim within particular regions. For example, claims could involve collaboration on specific aspects such as research into, or negotiation or mediation of common issues, and leave any issues of substantial difference, such as the actual determination of native title, for resolution on an individual claim basis. In some circumstances, however, it may be possible to achieve substantive resolution of all claims within a region through a smaller number of sub-regional processes, or possibly a single process.
34. Regional resolutions may assist in overcoming specific issues, including overlaps and cross-jurisdictional claims. For example, regional settlements offer the possibility of negotiating shared rights or withdrawal of one group, by offering practical benefits in lieu of continuing to assert native title rights in the overlapping area.
35. In determining the appropriateness of a cross-jurisdictional approach, parties should engage early in the negotiation process and look for synergies between:
    a. the types of tenure and legislative schemes involved
    b. policies and programs of respective governments

c. the resources and views of respective NTRBs, and

d. the willingness or capacity of non-government and non-Indigenous parties to be involved in cross-jurisdictional negotiations.

9. Acknowledge that a clear commitment to the delivery of appropriate sustainable benefits encourages constructive negotiations

36. Government parties should demonstrate a clear intention and capacity to provide appropriate sustainable benefits to engender the goodwill necessary for Indigenous parties to fully engage in the negotiating process.

10. Acknowledge that successful broader land settlements bring benefits to all parties

37. Government parties should recognise and acknowledge that all stakeholders can benefit from an agreed broader land settlement. This can contribute to improved relationships and a shared commitment to achieving high quality outcomes.

2 SUBSTANTIVE NEGOTIATION

11. Develop good working relationships to assist in reaching and implementing agreements

38. Sustainable outcomes can only be achieved through an ongoing relationship based on trust, respect and understanding.
39. To develop trust, parties must have a strong commitment to the settlement and delivery of agreed sustainable benefits. Another important requirement in developing trust can be the protection of confidentiality.
40. Any person with specific responsibilities under the agreement should be involved in the negotiations so that they can inform, shape and ultimately own the process of implementation. This will facilitate an ongoing relationship and promote commitment to the implementation of the agreement.

12. Exercise cultural awareness and sensitivity when convening the negotiation

41. Government parties should take the time to develop awareness of the most appropriate and effective ways to communicate with the Indigenous parties involved. This includes creating an atmosphere in which Indigenous parties feel comfortable discussing their concerns. It also includes observing cultural rules regarding who can discuss certain cultural matters, and may even include awareness of different understandings of the meaning of terms.
42. An important aspect of developing good relationships is for all non-Indigenous parties to have an understanding of what Indigenous parties are being asked to do, to potentially 'give up' and to think creatively about what measures can be implemented to assist Indigenous parties to maintain community and culture.
43. Government parties should consider using skilled interpreters to facilitate claimants' participation in negotiations, where English is a second language.
44. Governments recognise the importance of allowing sufficient time for Indigenous methods of decision-making.

13. Employ an interest-based approach to negotiations and avoid technical or positional bargaining

45. An interest-based approach should be employed in negotiations with the aim of providing benefits based upon the aspirations of the parties, as opposed to narrow and technical definitions of what may constitute native title rights. Government parties should be open to considering and initiating innovative solutions, rather than holding a fixed bargaining position.
46. Government parties should also be flexible in resolving issues that arise during negotiations, including being prepared to use independent experts to resolve issues.
47. This approach will allow more flexibility for all parties and provide increased incentives to reach agreement.
48. Government parties should identify interests and the best way to satisfy those interests as early as possible. Governments should also be clear as to why they and other parties hold particular interests and identify workable solutions that could meet those interests.

49. An interest-based approach should also be used to identify any potential areas of inter- and intra-Indigenous conflict, and whether a regional settlement would be appropriate in areas subject to various competing Indigenous interests.

50. Government parties should also have an appreciation of the interests they represent in comparison with other negotiation parties. If their interests are less extensive than other parties, this should be reflected in the way they negotiate and the issues they become involved in.

51. Government parties should endeavour to demonstrate how a negotiated settlement can better serve the interests of native title parties through a benefits package that meets the practical needs and aspirations of native title parties.

52. Where government parties consider a formal native title determination is required to meet their needs, they should recognise that there may be differing but legitimate views regarding the evidence required to reach a positive determination of native title under the NTA.

53. In considering the evidence available, government parties should therefore ensure that they do not become entrenched in unyielding positions on the particular evidence they consider is required, and carefully consider whether their view of the evidence is overly burdensome or unnecessary given the requirements of the NTA.

14. Take a flexible approach to the negotiation and benefits offered

54. An interest-based approach requires flexibility on the part of government parties, in regard to the process of the negotiation and consideration of:

    a. the range of benefits offered (both monetary and non-monetary)

    b. material presented, and

    c. policy positions and process (eg some issues might be better resolved at a regional level, while, other issues might be better dealt with separately with particular Indigenous parties).

55. Government parties should have the flexibility to, within reason and legislative parameters, adapt the benefits on offer to match the interests of Indigenous parties. This may involve, for example, being flexible in how government programs are provided, including eligibility requirements.

15. Ensure that positions on key points are made clear at the commencement of negotiations

56. Clarifying the position of government parties early in the negotiation will ensure expectations are managed and time and energy is not diverted to misguided targets. To achieve this, government parties must identify issues properly and explore options. Government parties should ensure that information about possible benefits is conveyed to the parties at the earliest possible opportunity.

57. The focus should be on working towards mutually beneficial and sustainable solutions. While it may not always be possible to have a solution in line with all Indigenous parties' aspirations, government parties should seek positive solutions that benefit claimants.

16. Reality-test the viability of solutions as they are negotiated

58. Early in negotiations, before parties commit to the agreement, government parties should ensure that the benefits and obligations being offered are practical and sustainable.

59. Where possible and appropriate, Government parties should evaluate the agreements against their objectives and establish appropriate processes such as schedules of ongoing commitments and periodic review meetings to reality test the options. A realistic assessment of whether the agreed benefits and obligations can be carried out is critical to ensuring effective implementation.

17. Adhere to model litigant principles and conduct negotiations in good faith

60. Government parties should adhere to model litigant principles, where negotiating an agreement or litigating a claim. This requires government parties to act honestly and fairly, including:

    a. not causing unnecessary delay
    b. assessing potential liability/likelihood of success early and settling legitimate claims without litigation
    c. impartiality and consistency in handling claims
    d. engaging in alternative dispute resolution where possible
    e. not relying on technical defences unless it would result in prejudice
    f. not taking advantage of a claimant who lacks resources, and
    g. Government leadership should influence the behaviour of other parties in this regard.

61. It is also imperative that government parties act in good faith at all stages throughout the negotiation. While these guidelines support good faith negotiations, it is also important that government parties:

    a. conduct themselves with integrity, honesty, cooperation and courtesy during negotiations
    b. comply with agreed negotiation procedures including attendance at meetings
    c. make a genuine attempt to reach agreement
    d. disclose relevant information as appropriate for the purposes of the negotiations
    e. comply with agreed timeframes and ensure the timely production of relevant materials, and
    f. effectively and efficiently participate in mediation through adequate preparation and a clear understanding of the issues.

62. The obligation to act in good faith does not require government parties to act in the interests of the other party at the expense of its own interests. In recognising that not all disputes can be successfully mediated, these principles do not require parties to reach an agreement.

3 IMPLEMENTATION

18. Allocate adequate resources to implement the agreement

63. Delivering sustainable benefits requires the allocation of appropriate resources and cooperation from all parties. Government parties should ensure there are adequate resources so that longer term commitments are met.

19. Ensure agreements clearly identify roles and responsibilities, and are written in plain English

64. A clear, plain English agreement is an important aspect in assisting present and future generations to understand and implement the agreement.

65. Agreements should be drafted so that:

    a. they are self contained and self evident and able to be used by people who were not necessarily present or part of negotiations

    b. the roles and responsibilities of each party are clearly set out, including where appropriate schedules of roles and responsibilities in relation to the provision of particular benefits, and

    c. timelines and timeframes for implementation of particular aspects are included, and review and monitoring mechanisms are incorporated, including timelines for review.

20. Assess the viability of implementation, in particular, the capacity of the parties to fulfil obligations

66. A realistic assessment of whether the agreed benefits can be provided over the life of the agreement is critical to ensuring effective implementation. Government parties should determine before they commit to the agreement that the benefits and obligations are practicable and suitable. Government parties should also consider capacity issues as a part of the agreement.

21. Acknowledge that sustainable benefits include the provision of relevant capacity building and governance frameworks

67. A sustainable benefit is not just a large lump sum or asset. It is a benefit that will deliver benefits now and in the future. When negotiating sustainable benefits parties should acknowledge that some capacity building or governance training may need to be included as part of those benefits.

68. Government parties should consider with Indigenous parties whether new skills or expert advice will be necessary to realise the full potential of sustainable benefits and address this in the terms of the agreement where appropriate. For example, it is common that Indigenous parties may aspire to owning businesses or utilising revenue streams from lump sum cash payments. Where this is the case it may be necessary to investigate appropriate corporate structures and have external expert financial advice, or to provide small business management training.

69. In many cases, the most appropriate form of assistance regarding sustainable benefits, capacity building and governance frameworks will be to broker the involvement of government agencies charged with relevant responsibilities, including the development and implementation of national and jurisdiction-specific Indigenous economic development strategies.

70. In order for settlements to deliver sustainable benefits, appropriate corporate structures need to be adopted by Indigenous parties to assist them to deal effectively with issues including tax, governance and accountability.

71. Where appropriate, Government parties should be prepared to provide advice on structures that are acceptable to them in the context of a particular settlement. This will allow the structure of the agreement to be considered early in negotiations.

22. Utilise legal safeguards for implementation.

72. Legal devices such as caveats and contractual terms specifying evaluation and monitoring requirements can guarantee land is dealt with according to the terms of the agreement.

23. Foster an ongoing commitment to implementation.

73. There should be a recognition and understanding, at the start of the negotiations, of the ongoing commitment necessary to implementation over the life of the agreement. This also ensures the relevant resources and people will be available at the end of negotiations to implement that commitment.

24. Review agreements to ensure the requirements are still being met.

74. Where relevant, it is important that review mechanisms are built into agreements to ensure the objectives of the agreement are met.