

Summary of how to negotiate in good faith

Section 31(1)(b) of the *Native Title Act 1993 (Cth)* states that all of the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties (i.e. the registered native title claimant or registered native title body corporate) to the doing of the future act, with or without conditions to be complied with by any of the parties.

What is meant by 'negotiation in good faith'?

The National Native Title Tribunal (NNTT) has advised that:

- **'Negotiation'** can be understood by its dictionary definitions, and 'involves communicating, having discussions or conferring with a view to reaching an agreement'.
- **'Good faith'** means 'honesty of purpose or intention, sincerity', and 'doing what is reasonable in the circumstances' – in this context, in order to negotiate and reach agreement with the native title parties.

The NNTT has stated that the following indicators may be a useful guide if used in a commonsense manner in determining whether a party has not negotiated in good faith. This was not meant to be a complete list, and everything listed may not apply to each negotiation, there may also be other relevant considerations:

1. unreasonably delay the start of discussions in the first instance;
2. failure to make proposals in the first place;
3. unexplained failure to communicate with the other parties within a reasonable time;
4. failure to contact one or more of the other parties;
5. failure to follow up a lack of response from the other parties;
6. failure to attempt to organise meetings between the parties;
7. failure to take reasonable steps to facilitate and engage in discussions between the parties;
8. failure to respond to reasonable requests for relevant information within a reasonable time;
9. stalling of negotiations by unexplained delays in responding to correspondence or telephone calls;
10. unnecessary postponement of meetings;
11. sending negotiators to meetings who do not have the authority to do more than argue or listen;
12. refusal to agree on trivial matters, such as incorporation of statutory provisions into an agreement;
13. shifting of negotiating position just as agreement seems in sight;
14. adoption of a rigid non-negotiable position;
15. failure to make counter-proposals;
16. unilateral conduct which harms the negotiating process e.g. issuing inappropriate media statements;
17. refusal to sign a written agreement in respect of the negotiation process or otherwise;
18. failure to do what a reasonable person would do in the circumstances; and
19. unreasonable failure to disclose facts or legal argument which a party intends to rely on in an arbitral enquiry.

Note: This summary is provided as a guide only and should not be relied on as legal advice. If legal advice is required, a party should consult his or her own solicitor.