GLP – PMC –

Guideline for Negotiating Indigenous Land Use Agreements for the delivery of public infrastructure (other than public housing) on Indigenous land

Version 1

Endorsed
by Property Management Committee, Queensland Government

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Version history

Version	Date	Comment
1	5 October 2011	New policy

Purpose

To ensure that a consistent approach is taken by all State agencies –

(a) in negotiating Indigenous Land Use Agreements for delivering public infrastructure (other than public housing) on Indigenous land in terms of conducting negotiations, native title compensation and payment of consideration; and
(b) in relation to the compulsory acquisition of native title and non-native title interests on Indigenous land.

This policy establishes:

(a) processes for how a State agency conducts negotiations before referring matters to the Program Office (including behaviours, attitudes and practices that a State agency should demonstrate when negotiating with the native title party);
(b) the upper limit of compensation that a State agency may offer to pay a native title party under an Indigenous Land Use Agreement for the provision of public infrastructure on Indigenous land;
(c) a further amount, by way of additional consideration, that a State agency may also offer to pay a native title party by way of an incentive for entering into the Indigenous Land Use Agreement within four months; and
(d) that the State agency can not commence actions to compulsorily acquire all interests in the required part of the Indigenous land unless and until an Indigenous land use agreement is attempted to be negotiated and approval is provided by the Property Management Committee.

Some key words used in this policy are defined under “Definitions”.

Rationale

Responsibility of the State for provision of public infrastructure

The State is responsible, through its various agencies, for the provision of public infrastructure on Indigenous land in both a timely and cost effective way.

Public infrastructure includes such things as buildings and infrastructure required to deliver government services including, for example, hospitals, schools, public housing and police stations.

NB. This Guideline does not cover public housing. Public or social housing is specifically dealt with in the whole of government native title approach for the delivery of public housing and other government infrastructure on Indigenous land. Refer to the attached flowchart.

Indigenous land

Indigenous land is land set aside for the benefit of Aboriginal or Torres Strait Islander people under various pieces of legislation.

In some communities, the land is granted under a Deed of Grant in Trust for the benefit of Aboriginal or Torres Strait Islander people. In other communities, the land is reserved for the benefit of Aboriginal or Torres Strait Islander people. The Aurukun and Mornington Island Shire communities have legislative leases under the *Local Government (Aboriginal Lands) Act 1978*.

All of these lands are able to be transferred or granted in a special form of freehold under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991*. This legislation allows entities to hold the land on behalf of the Aboriginal people or Torres Strait Islanders particularly concerned with the land. Transfer and grants of some of this land has already occurred.

In all of the above circumstances, a corporate entity or land holding body (a trustee) is entrusted with holding and making decisions about the land for the beneficiaries. This trustee may be the local Indigenous shire council, a land trust, a registered native title body corporate or an Indigenous corporation.

Exclusive native title rights and interests may continue to exist on all of these lands. The Native Title Act provides that native title holders are entitled to just terms compensation for any loss, diminution, impairment or other affect on their native title rights and interests*. The compensation amount may either be agreed or be the outcome of a compensation claim made in the Federal Court of Australia. However, the Native Title Act requires that for an Indigenous Land Use Agreement that the compensation is agreed and the terms of the agreement be set out in the Indigenous Land Use Agreement.

Engagements required for provision of public infrastructure

Where State agencies wish to construct public infrastructure on Indigenous land two separate engagements may be required to obtain access to the required land -

(a) engagement with the trustee to obtain an appropriate tenure (a trustee lease usually between 30 and 40 years in length) over the land from the trustee, e.g. the

Indigenous council. This will involve negotiating the terms or conditions of the trustee lease, including the annual rent; and

(b) engagement with the native title party to ensure that the land or resource dealing (the future act) required to permit the public infrastructure is valid in relation to native title. This engagement can take the form of a notification and invitation for comments, consultation or negotiation in the form of an Indigenous Land Use Agreement.

In the case of land that has been transferred or granted the native title party may also be the trustee for the land. Nevertheless, State agencies will still be required to have the two separate engagements regarding the use of the land (rent for the trustee lease) and native title.

As part of the engagement, rent and native title compensation must be considered. Currently, where State agencies are seeking a trustee lease on Indigenous land, they are required to use a standard terms trustee lease document with a minimum rental of $6,000 per annum for the use of the land. Whilst native title compensation (for the effect of an act on native title) is payable for all future acts, it is only where an Indigenous land use agreement is the mechanism used for native title validity that compensation must be dealt with upfront. In all other cases, payment of compensation is dependant upon a native title compensation application being made by the native title party and a determination being made as to its quantum.

A key issue, in relation to settling on a native title compensation amount, is that currently there is no Court decision on the value of native title.

Recently the State has taken a more consistent approach to lease arrangements (rent, terms and conditions) on Indigenous land but, until now, not in relation to native title consent arrangements under Indigenous Land Use Agreements, including compensation amounts.

Section 24JAA of the Native Title Act and Indigenous Land Use Agreements

Prior to the commencement, in late 2010, of section 24JAA of the Native Title Act, the majority of public infrastructure required an Indigenous Land Use Agreement. However, that is no longer the case as section 24JAA of the Native Title Act provides for a four month notification and consultation process to enable the timely delivery of essential government infrastructure (health, education, emergency services and police). Section 24JAA has a limited life span and will no longer have force after 15 December 2020 , after which public infrastructure will again require an Indigenous land use agreement.

A whole of government native title approach for the provision of public housing and other government infrastructure on Indigenous land is set out in the attached flowchart. Based upon that approach, the majority of government infrastructure will proceed via an enhanced consultation process (involving a negotiation with a view to reaching agreement about a broad range of matters in the form of a template infrastructure agreement).

There are only a few things that would not fall within section 24JAA of the Native Title Act, these include –

- a dam;
- a water treatment plant;
- retail / IBIS (Islanders Board of Industry and Service) stores.

However, an agency still has discretion to proceed via an Indigenous Land Use Agreement in the first instance should it wish to do so.

Overview of Policy

This Policy provides the basis for a consistent approach, across the State, in relation to Indigenous land use agreements, native title compensation, payment of consideration and when compulsory acquisition can be used to acquire native title and non-native title rights on Indigenous land.

This policy represents the whole-of-government position with respect to:

- processes for how a State agency conducts negotiations before referring matters to the Program Office (including behaviours, attitudes and practices that a State agency should demonstrate when negotiating with the native title party);

- the upper limit of compensation that a State agency may offer to pay a native title party under an Indigenous Land Use Agreement for the provision of public infrastructure on Indigenous land;

- a further amount, by way of additional consideration, that a State agency may also offer to pay a native title party by way of an incentive for entering into the Indigenous Land Use Agreement within four months; and

- that the State agency cannot commence actions to compulsorily acquire all interests in the required part of the Indigenous land unless and until an Indigenous land use agreement is attempted and approval is provided by the Property Management Committee.

Policy

This Policy consists of –

(a) Guidelines for the negotiation of an Indigenous land use agreement;
(b) Pre-conditions and approval for compulsory acquisition of native title on Indigenous land;
(c) Compensation methodology for impact on native title;
(d) Review of Policy

Guidelines for the negotiation of an Indigenous land use agreement

The following flowchart outlines the process for negotiating an Indigenous Land Use Agreement under this policy.

Step 1 – Native title assessment
State agency assesses that an Indigenous Land Use Agreement is required by confirming that native title is not extinguished and that another future act provision of the Native Title Act does not ensure validity – refer to Native Title Work Procedures.

Step 2 – Negotiation phase
State agency commences Indigenous Land Use Agreement negotiations based on the principles in this policy with the aim of achieving in-principle agreement within six months.
Negotiations proceed for six months unless parties otherwise agree they should continue. Where negotiations do not continue the State agency immediately refers the matter to the Program Office.

Step 3 - Escalation procedure

The Program Office uses it best endeavours to complete a review of the negotiations within 21 calendar days. If the 21 day timeframe is not met, then the Program Office must provide an interim written report to the Program Office Board.

The Program Office refers the matter with recommendations to the next meeting of the Program Office Board. The Board may approve, for example, the Program Office to continue Indigenous land use agreement negotiations or to increase the compensation offer where that is the issue preventing agreement.

Alternatively, the Board can refer the matter, at the next available opportunity, to the Property Management Committee.

Step 1 – Native title assessment

Prior to commencing negotiations, the State agency must assess that an Indigenous Land Use Agreement is required in accordance with the Native Title Work Procedures. For example, native title may otherwise be extinguished by a public work, or another future act provision of the Native Title Act, e.g. section 24JAA, may provide validity for the public infrastructure.

If it is assessed that an Indigenous land use agreement is required, then the State agency must first advise Aboriginal and Torres Strait Islander Land Services, DERM, before commencing negotiations. This enables the native title assessment to be checked so that the State is not unnecessarily committing to an Indigenous land use agreement process and all options have been considered.

Step 2 - Negotiation Process

The State agency must act in accordance with the following principles in the negotiations with the native title party.

a. Agencies must advise the Program Office of the commencement of their negotiations, including the details of the required land and the *upper limit of their compensation amount*.

b. Agencies are responsible for adequately resourcing the required negotiations by way of both budget and appropriately skilled personnel. This includes responding to reasonable requests from the native title party for resourcing required for their participation, including travel or meeting costs and obtaining appropriate professional advice etc.

c. Agencies must prioritise negotiations and attempt to reach in-principle agreement within six months.

   NB. The calculation of the six months is mainly a matter for agencies. However, as a general rule the six months would commence once the agency had made contact with the relevant native title party about the ILUA negotiations.

d. Agencies must negotiate “in good faith”. Good faith requires a commitment to the process and a readiness to reach agreement, if possible. Appendix 1 outlines a number of “good faith” behaviours that agencies should demonstrate. This includes being responsive to any request to the Agency from the native title party for the compensation offer to be satisfied, or partially satisfied, by way of non-monetary compensation to the native title party, e.g. facilities that benefit the Indigenous community.

e. Agencies should seek agreements that offer broad, flexible and efficient resolution of their issues and which avoid an overly narrow or legalistic approach. Appendix 2 is a copy of the *Guidelines for Best Practice and Flexible and Sustainable Agreement Making* which where developed by the Joint Working Group on Indigenous Land Settlements to offer some practical advice on behaviours, attitudes and practices for best practice negotiations. These Guidelines are endorsed by all Australian Governments. State agencies must give effect to these Guidelines.

f. At the end of six months, agencies must assess the status of the negotiations. If negotiations are proceeding well but there are valid reasons why negotiations have not progressed to an in-principle agreement, e.g. cultural

reasons, environmental or regional weather conditions, or on-going drafting work being done, the agency must seek the view of the native title party as to whether it agrees to continue negotiations.

g. If both the agency and the native title party are agreeable, the agency will continue negotiations. The agency will notify the Program Office that negotiations are to continue by agreement.

h. When in principle agreement is reached, the State agency must provide Aboriginal and Torres Strait Islander Land Services, Department of Environment and Resource Management with a draft of the Indigenous land use agreement. Aboriginal and Torres Strait Islander Land Services will consider the Indigenous land use agreement and brief the Minister for Environment and Resource Management (as the Minister for native title). Once the Minister has approved the in-principle agreement the final version can be provided to the parties for authorisation and signature. The State is the last party to sign. The State agency must then provide the signed copy of the Indigenous land use agreement to Aboriginal and Torres Strait Islander Land Services for the Minister's signature.

   N.B. It is the current practice that only the Premier and the Minister for Environment and Resource Management sign Indigenous land use agreements. However, other Ministers may sign Indigenous land use agreements provided arrangements are made in advance with the Premier or Minister for Environment and Resource Management.

i. Where negotiations do not continue, the State agency must refer the matter to the Program Office immediately for further decision-making and direction.

Step 3 – Escalation procedure

Referral to Program Office

Where the State agency is unsuccessful in reaching the required agreement in accordance with the negotiation process outlined above, it must immediately refer the matter to the Program Office for their further decision-making.

The Program Office may charge the State agency a reasonable fee to consider the matter. The State agency is also responsible for reimbursing the Program Office's reasonable costs incurred in considering the matter, undertaking any further decision making or negotiating the matter further.

The State agency must promptly provide any material requested that will assist the Program Office.

The Program Office must consider any material provided by the agency and must also contact the native title party to obtain their views about the status of the negotiations.

Referral to Program Office Board

On review of the material, and the views of the native title party, the Program Office must refer the matter to the next meeting of the Program Office Board. The Program Office will use its best endeavours to complete its review within 21 calendar days from referral. Where the Program Office does not meet the 21 day timeframe, it must provide a written interim report to the Program Office Board outlining its review to date and expected date of completion of the review.

The Program Office must make recommendations to the Program Office Board. These recommendations could include, for example:

a. an increase in the maximum compensation amount for the impact on native title that can be offered by the State agency;

b. that further negotiations be undertaken by the Program Office; or

c. that the matter be referred to the Property Management Committee.

The Program Office Board must endorse the recommendations of the Program Office, or not, or make another decision. Alternatively, the Board can refer the matter, at the next available opportunity, to the Property Management Committee.

The State agency is responsible for any costs involved with the recommendations, or giving effect to the recommendations, approved by the Program Office Board or any other decision of the Program Office Board.

Referral to Property Management Committee

If the matter is referred to the Property Management Committee, the Committee may endorse the recommendation of the Program Office Board, or not, or make another decision, for example, compulsory acquisition.

Pre-conditions and approval for compulsory acquisition on Indigenous land

Pre-conditions

In accordance with the above *Guidelines for the negotiation of an Indigenous land use agreement*, appropriate attempts to negotiate an Indigenous land use agreement with the native title party must first be made. Whilst this requirement is not required under State native title policy in relation to non-Indigenous land it is considered essential in this case given that there is a unique consequence in relation to Indigenous land.

When Indigenous land is acquired –

(a) the land becomes unallocated State land for subsequent allocation under the *Land Act 1994* for the purposes for which the acquisition was made; and in addition
(b) the land ceases to be *transferable land* under the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*. This means that it no longer must be transferred to the Aboriginal people or Torres Strait Islander people particularly concerned with the land.

This consequence occurs because, under the Native Title Act, native title can only be acquired where all other rights (e.g. the Deed of Grant in Trust interest) are also acquired. Therefore, all other rights in the relevant part of the Indigenous land would also need to be acquired. Compensation may also be required to be paid separately for those other rights that are acquired.

Under the Native Title Act**,** compensation for acquiring native title is payable on just terms and the similar compensable interest test.

Any acquisition must also meet the requirements of the *Acquisition of Land Act 1967* and Acquisition Policy 1: Acquiring and Purchasing Property.

Approval

Only the Property Management Committee may approve that the State agency (as the constructing authority) commence actions to compulsorily acquire all interests (native title and non-native title) in the required part of the Indigenous land. This restriction is to ensure that appropriate attempts in accordance with this Policy are first made to negotiate with the native title party with a view to reaching an agreement.

The State agency will be responsible for the payment of transaction costs and compensation associated with any compulsory acquisition.

Compensation methodology for impact on native title

Under the Native Title Act, compensation is for the effect of an act on native title. It may be monetary or non-monetary in nature. Where the future act is consented to under an Indigenous land use agreement, the compensation for that act must be covered in the Indigenous land use agreement.

As there is no Court decision on the value of native title for the purposes of compensation, the State has independently considered this matter and developed the following compensation methodology to be applied to Indigenous land use agreement negotiations over Indigenous land.

The methodology

During negotiations, State agencies are only authorised to offer compensation for the impact on native title in accordance with the following principles:

a) The *upper limit of compensation* that can be offered by a State agency for the impact on native title is to be calculated as the combination of:
    - a "simulated" market freehold value for the land;

      and

    - an additional "special value" to be calculated by way of which ever is the greater:
        i. 12.5% of the simulated market freehold value for the land; or
        ii. $20,000 (per project, not per lot).

Estimating market value

The estimation of market value is an objective valuation of the identified land ownership rights to a particular property at a specified date. It is arrived at by an objective examination of the nature of property and the circumstances under which given property would most likely trade in the open market. Market evidence is used to examine the highest and best use, or most probable use of the land. This "best use" can include continuation of a property's existing use or for some alternative use. The determined market value is "the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted

knowledgeably, prudently and without compulsion" (International Valuation Standard 1).

What is a "simulated" market value?

The required land, by its nature and tenure (it generally being inalienable), does not have an active or liquid market. Accordingly, a valuation must be based upon a market simulation. A market simulation could be based on a hypothetical notional development of the required land or a direct comparison with the nearest liquid real estate market.

b) State agencies must obtain the simulated market freehold value for the required land from State Valuation Services, Department of Environment and Resources Management. This valuation work is undertaken on a fee for service basis by State Valuation Services.

c) Where a monetary payment is made by State agencies it may be made by a lump sum or a series of CPI adjusted annualised payments being one less than the number of whole years in the term of the trustee lease (unless otherwise directed by the Program Office Board or the Property Management Committee).

Example 1. Calculating the upper limit of compensation.

1. Simulated market freehold value of the land	$ 100 000
2. Additional special value	
Larger of 12.5% of simulated market freehold value ($12,500) or $20,000	$ 20 000
Upper limit of compensation authorised to be offered	**$ 120 000**

d) The Agency can, where requested by the native title party, satisfy, or partially satisfy, their offer of compensation by way of non-monetary compensation to the native title party.

e) The provision of non-monetary compensation must be in accordance with the State Procurement Policy, which has three equally ranked objectives of advancing priorities of the Government, seeking value for money and purchasing with probity and accountability. Therefore, the value of the non-monetary compensation must represent 'value for money' and will equal the purchase price / contract price.

f) Where a State agency is requested by the native title party to provide non-monetary compensation, for example, the native party requests the agency provides new landscaping to an existing recreational facility by way of returfing an oval and the provision of playground equipment, and the State agency agrees to provide non-monetary compensation then the value of the non-monetary compensation is to be determined and then deducted from the upper limit of compensation. This then determines the remaining upper limit of compensation the agency is authorised to offer the native title party as monetary compensation.

Example 2.	**Where non-monetary compensation is requested by the native title party.**	
1.	Upper limit of compensation authorised to be offered	$ 120 000
2.	Value of non-monetary compensation required and agreed to be offered by State agency	$ 85 000
	Remaining upper limit of monetary compensation that can be offered	**$ 34 500**

Additional consideration for entering into the Indigenous Land Use Agreement within four months.

In order to provide the native title party with a further financial incentive to enter into the Indigenous Land Use Agreement within a reasonable period of time, State agencies are also authorised to offer, within the first four months of the negotiations, additional consideration by way of a further sum up to the amount of the "special value".

For the additional consideration to be paid, there must be in principle agreement by the end of the four month period.

Example 3.	**Calculating the additional consideration.**	
1.	Simulated market freehold value of the land	$ 180 000
2.	Additional special value	
	Larger of 12.5% of simulated market freehold value ($22,500) or $20,000	$ 22,500
	Upper limit of additional consideration that can be offered	**$ 22,500**

Therefore, the overall compensation and consideration amount is:

Native title compensation	$202,500
Additional consideration	$22,500
TOTAL	**$225,000**

The additional consideration can be paid as a lump sum payment on registration of the Indigenous land use agreement.

Review of Policy by Property Management Committee

The Property Management Committee shall review this Policy two years following its approval.

Appendix 1 - “Good Faith” behaviours

Agencies must negotiate “in good faith”. Good faith requires a commitment to the process and a readiness to reach agreement, if possible. In particular “good faith” includes that agencies:

a. must not make a statement or give information which is false or misleading;
b. which make a commitment during negotiations should not unreasonably break that commitment and, if unable to fulfil a commitment, should advise the native title party as soon as possible;
c. must be willing to discuss matters that are relevant to the negotiations;
d. must be willing to consider options raised by the native title party;
e. must be willing to put forward alternative options of their own;
f. must treat the native title party with courtesy;
g. must not act in an oppressive, unfair, abusive or intimidating manner towards the native title party;
h. must respect Indigenous customs and practices and take account of cultural and customary concerns of the native title party;
i. must be sensitive to other languages and cultural backgrounds;
j. must respect, and make allowances for, the inclusion of the native title party’s cultural protocols and decision-making practices;
k. if applicable, must respect the “without prejudice” nature of the negotiation;
l. must identify, at the outset of the negotiations the agency’s aims and concerns. It must also consider how these aims and concerns could be accommodated by possible outcomes of the negotiations;
m. must be willing to explain the nature of its aims and concerns to the native title party;
n. must provide to the native title party any documents it seeks to rely upon with sufficient time for the native title party to consider the document;
o. must be responsive to a request from the native title party for any other relevant documents and if the request is to be refused, provide reasons, in writing, why the agency refuses to provide the document;
p. must have a clear understanding of the issues to be addressed in the negotiations;
q. must seek to narrow the issues in dispute as much as possible;
r. must not raise or dispute an issue that does not effect the agency’s interest in relation to the negotiations;
s. should ensure that the native title party, or the agency, does not incur costs unreasonably;
t. must consider options for the resolution of any dispute with the native title party;
u. must make it clear to the native title party if it does not want to continue with the negotiations and must clearly explain its reasons for this decision;
v. must communicate with the native title party clearly and concisely. Where it is necessary to discuss technical or complex information, agencies must try to ensure the information is understood by the native title party;
w. must agree with the native title party on any communication protocols and must comply with these protocols;
x. must not delay negotiations unnecessarily. This includes raising issues that are not central to the matters to be negotiated, including introducing issues late into the negotiations;

y. must acknowledge that the native title party may face unavoidable delays caused by, for example, factors such as a death in a community or weather conditions preventing access to remote areas;
z. must obtain necessary instructions (i.e. from the Minister or Chief Executive Officer) in a timely manner;
aa. must comply with any timetable to be developed in relation to progressing the negotiations;
bb. must promptly tell the native title party should the agency not be able to comply with the timetable and provide reasons to the native title party; and
cc. must avoid substantive and last minute changes of position where to do so would unreasonably delay the negotiations.

Appendix 2 - Guidelines For Best Practice Flexible And Sustainable Agreement Making

GUIDELINES
FOR BEST PRACTICE
FLEXIBLE AND SUSTAINABLE AGREEMENT MAKING

Joint Working Group on Indigenous Land Settlements

August 2009

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.

CONTENTS

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.

Responsibilities

The responsibility for implementing this Policy lies with all State agencies, with the Program Office, Program Office Board and Property Management Committee having special roles within the Policy.

Definitions

compensation: The monetary and/or non-monetary amount payable to the native title party for any loss, diminution, impairment or other effect on their native title rights and interests.

consideration: An amount, in addition to the compensation amount, that may be paid to obtain the agreement of the native title party.

in principle agreement: All the parties have come to an agreement about the issues that were negotiated which has resulted in a written unsigned draft agreement.

Indigenous land: Land set aside for the benefit of Aboriginal or Torres Strait Islander people under various different pieces of legislation.

In some communities, the land is granted under a Deed of Grant in Trust for the benefit of Aboriginal or Torres Strait Islander people. In other communities, the land is reserved for the benefit of Aboriginal or Torres Strait Islander people. The Aurukun and Mornington Island Shire communities have legislative leases under the *Local Government (Aboriginal Lands) Act 1978*.

All of these lands are able to be transferred or granted in a special form of freehold under the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*.

Indigenous Land Use Agreement: An Indigenous land use agreement is a voluntary agreement about the use and management of an area of land or waters, made between one or more native title parties, and others. A registered Indigenous land use agreement is legally binding on the people who are party to the agreement, and all native title holders (and their successors) for that area.

native title: The rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs that are recognised under Australian law.

native title holders: The person or persons who hold native title. Where native title has been determined, the registered native title body corporate may become the native title holder, holding the native title on trust.

native title party: In this policy, this term is used to describe both native title claimants or native title holders. The Native Title Act requires that native title holders are to be compensated. However, where native title has not been determined and not demonstrated to be extinguished, the State still must address native title by negotiating with the native title claimants. In most instances, native title claimants will not consent to an Indigenous Land Use Agreement without compensation being addressed.

Native Title Act: *Native Title Act 1993* (Cth)

Native Title Work Procedures: see Department of Natural Resources and Mines Website

Program Office: Remote Indigenous Housing and Infrastructure Program Office within the Department of Communities.

Program Office Board: A Board overseeing the work of the Program Office consisting of the Directors-General of the Department of Communities (chair)**,** Department of Local Government and Planning, Department of Public Works, Department of Environment and Resource Management, as well as the State

Manager, Department of Families, Housing, Community Services and Indigenous Affairs.

public infrastructure: Buildings and infrastructure required to deliver government services including, for example, hospitals, schools, social housing and police stations.

State agencies: means State government departments and agencies

trustee: A corporate entity or land holding body entrusted with holding and making decisions about the land for the beneficiaries. This trustee can be a local Indigenous shire council, a land trust, a registered native title body corporate or an Indigenous corporation.

References

Acquisition Policy 1: Acquiring and Purchasing Property -

See Department of Natural Resources and Mines Website

Joint Working Group on Indigenous Land Settlements' *Guidelines for Best Practice, Flexible and Sustainable Agreement making* -

See the Commonwealth Department of Attorney-General Website

Native Title Work Procedures -

See Department of Natural Resources and Mines Website

Legislation

Queensland

Aboriginal Land Act 1991
Acquisition of Land Act 1967
Land Act 1994
Torres Strait Islander Land Act 1991

Commonwealth

Native Title Act 1993