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Best practice for agreement making

This page was authored by:

Austin Sweeney

Consultant native title lawyer

Austin Sweeney is a lawyer, facilitator and mediator who has practised in the area of land rights and native title for over 25 years.

An important responsibility that native title holders and a PBC may have from time to time is to negotiate agreements in order to carry out the PBC's statutory functions or to pursue the broader goals and objectives of the native title group. Agreements may need to be negotiated with governments, or with other organisations or individuals in relation to future acts, or in the many other circumstances where a PBC is representing the interests of the native title group.

There are some fundamental considerations that are likely to apply to many different types of agreements, and taking these into account can assist a PBC to make an agreement that will best meet the needs and expectations of the native title group.

Context for agreement making

The broader context or environment in which a PBC is making an agreement will influence the process of negotiation and the content of the agreement. Where negotiations are purely voluntary and not subject to deadlines imposed by a Court or Tribunal or particular provisions in the Native Title Act, it will be easier to ensure that any agreement is entered into on the basis of free, prior and informed consent and fully meets the expectations of native title holders.

However, even in a situation where a PBC is working to externally imposed deadlines and processes, there are steps it can take in terms of preparation, negotiation and implementation that will provide it with the opportunity to make the best possible agreement in the circumstances.

Preparation for negotiations

Capacity building

When a PBC first begins its operations and takes responsibility for negotiations on behalf of the native title group it is quite likely that some members of the PBC will be relatively inexperienced in undertaking negotiations and agreement making.

There may be significant benefit to a PBC if there are resources available to provide its directors and negotiators with high quality negotiation training to assist them develop the skills to negotiate effectively with other parties in order to make the best possible agreements.

Capacity development of this nature has been provided to native title holders in many places. One example where building the negotiation capacity of native title holders has been supported and prioritised is in Victoria, where negotiation training has been provided by independent negotiators and facilitators for a number of years through the [Right People for Country program](#) that is funded by the State Government.

Other preparations for negotiations

In preparing for negotiations it is important to be clear about the objectives or goals that a PBC wants to achieve through making an agreement. It is also appropriate to consider what alternative strategies may be available to achieve these objectives. Political action and building political alliances, media campaigns or litigation are some of the options that may be available in addition to negotiation.

If entering into negotiations to make an agreement appears to be the preferable course of action it is important to consider what work needs to be undertaken before negotiations begin. This work may involve undertaking any necessary research or obtaining technical, legal or other advice.

How the negotiations will be supported and resourced is a significant consideration, and any timeframes or other limitations that could impact on the negotiation process should be factored into early negotiation planning.

It is also vitally important for a PBC to ensure there is effective communication with the wider native title group throughout the agreement making process to keep the group members informed, and to secure their ongoing support for the process and the agreement that is finally made.

Negotiation and implementation resources

There are a variety of resources that a PBC may be able to draw on to assist in its negotiations and the implementation of its agreements. For many PBCs the regional native title representative body will be able to assist with negotiations and provide resources to support consultations with the wider native title group. Alternatively, a PBC may be able to obtain technical or legal advice from other professional service providers on a fee for service or pro bono basis.

In both instances it is important to identify the need for technical or legal assistance at an early stage of negotiation planning so that it can be obtained when it is likely to be of greatest benefit and can provide the information required for informed decision making.

Guidelines

There are also numerous resources that have been developed over recent years that are now available online. One example is the best practice guide: '[Guidelines for best practice, flexible and sustainable agreement making](#)' that was developed by the Joint Working Group on Indigenous Land Settlements in 2009.

While these guidelines were prepared to provide practical guidance to government parties negotiating broader native title settlement agreements, they nonetheless provide a useful checklist of best practice principles that a PBC can take into account when making agreements, particularly with government parties. The guidelines cover important matters to be considered during the preparation for negotiations and during the course of

substantive negotiations, and in ensuring successful implementation of agreements.

Templates and precedents

The [Agreements, Treaties and Negotiated Settlements database](#) is a valuable repository of information and examples of agreements between Aboriginal and Torres Strait Islander people and others in Australia, and between indigenous people and others overseas. The materials it contains can provide useful insights and resources for PBCs that are involved in agreement making.

AIATSIS has also developed a [Native Title Precedents Database](#) that has a range of resources that are contributed by and shared between a number of the native title representative bodies around the country.

Toolkit

There are also useful resources that have been developed by indigenous groups in other countries that have faced similar negotiation challenges to those confronting Aboriginal and Torres Strait Islander people in Australia. A useful and detailed resource developed for indigenous groups negotiating with mining companies in Canada is the [IBA community toolkit](#).

Lessons learned

In the years since native title rights were first recognised by the High Court, many native title groups have been involved in significant negotiations with governments, mining companies and others, and in the process they have continued to develop the standards for best practice agreement making.

Lessons can be learned from these different agreement making processes. Notable examples include the Waanyi People's dispute and negotiations over the [Century Mine](#), the [Statewide native title negotiations](#) that were undertaken in South Australia, and the recent Noongar People's [South West Native Title Settlement](#). These and many other agreement making processes can provide useful examples for PBCs to consider when developing their own best practice agreements.

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