



## Negotiating in Good Faith

### Parties to a local heritage agreement must negotiate in good faith

The *Aboriginal Heritage Act 1988* (the Act) requires that a person or body taking part in negotiations to enter into a local heritage agreement<sup>1</sup> must do so in good faith.

### What does it mean to negotiate in good faith?

There is no settled legal definition of good faith negotiations nor does the Act provide a definition. There have however been several court cases where the requirement to negotiate in good faith has been an issue and certain criteria of expected behaviour in good faith negotiations have therefore been developed.

What constitutes good faith negotiations depends on the legislative and factual context and must be considered in the unique circumstances of Aboriginal heritage and negotiations to enter into a local heritage agreement. Therefore, the individual criteria set out below cannot be seen as rigid requirements whose breach will necessarily indicate that a party is not negotiating in good faith. The relative weight of any individual element of conduct in the overall assessment of whether a party has not been negotiating in good faith depends upon the circumstances.

### Definitions of 'negotiate' and 'good faith'

Negotiation involves communicating, having discussions or conferring with a view to reaching an agreement. The dictionary definitions of the word 'negotiate' include discussions or communications towards a compromise or an agreement.

'Good faith' is defined as honesty of intention and sincerity in stating a position. However, besides having honest and sincere intentions, it is necessary to consider whether what is done by the parties is reasonable in the circumstances. Some preparedness to shift position or make concessions in order to achieve agreement appears to be an important part of good faith negotiations in its ordinary meaning.

Negotiation in good faith does not mean that a party has an obligation to capitulate or to accept the other side's position. Nor does it mean that a negotiated agreement must be reached between the parties.

### What may amount to negotiating in good faith?

Subject to a disclaimer that this guide does not constitute legal advice, the following criteria<sup>2</sup> may be useful indicators of whether a party has failed to negotiate in good faith. Such a list cannot be prescriptive or exhaustive and the weight given to any item must depend upon the circumstances of the matter:

- (i) unreasonable delay in initiating communications in the first instance;
- (ii) failure to make proposals in the first place;
- (iii) the unexplained failure to communicate with the other parties within a reasonable time;
- (iv) failure to contact one or more of the other parties;

<sup>1</sup> See Guideline no.xx *Local Heritage Agreements*

<sup>2</sup> Taken from *Re Minister for Lands, State of Western Australia and Marjorie Strickland & Ors* (1997) 3 AILR 260 (at 224-225).

- (v) failure to follow up a lack of response from the other parties;
- (vi) failing to respond to reasonable requests for relevant information within a reasonable time;
- (vii) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
- (viii) unnecessary postponement of meetings;
- (ix) sending negotiators without authority to do more than argue or listen;
- (x) refusing to agree on trivial matters, for example, a refusal to incorporate statutory provisions into an agreement;
- (xi) shifting position just as agreement seems in sight;
- (xii) adopting a rigid non-negotiable position;
- (xiii) failure to make counter proposals;
- (xiv) unilateral conduct which harms the negotiating process (for example, issuing inappropriate press releases);
- (xv) refusal to sign a written agreement in respect of the negotiation process or otherwise;
- (xvi) failure to do what a reasonable person would do in the circumstances.

**Further Information**

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