

Mediation Guidelines

Guidelines for the behaviour of parties and
their representatives in mediation in the
National Native Title Tribunal

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Preface

These Mediation Guidelines set out principles of best practice and standards of behaviour which parties to mediation in the National Native Title Tribunal (the Tribunal), and their representatives, should seek to uphold.

Why have the Guidelines been developed?

The Guidelines have been developed in response to a recommendation made by the Claims Resolution Review, an independent review into the processes for resolving native title claims.¹ The *Native Title Act 1993* was amended in April 2007 to impose an obligation on parties and their representatives to act in good faith in relation to the conduct of Tribunal mediation.² These Guidelines have been developed to assist parties in meeting this obligation and to encourage parties to act in a way that is conducive to agreement-making.

Requirement to act in good faith

The Native Title Act requires each party, and any person representing that party, to act in good faith in relation to the conduct of mediation before the Tribunal.

What is the purpose of native title mediation?

The purpose of native title mediation is to assist parties to reach agreement on matters which are essential to a determination of whether native title exists³ or on issues relevant to compensation.⁴ Mediated agreements can also involve matters other than native title.

Mediation can help parties narrow the scope of issues in dispute. For example, it may become clear during mediation that it will be necessary for the Federal Court of Australia (the Court) to determine a point of law before the parties can consider resolving the application. Identifying these issues will help to expedite resolution of the claim.

Successful mediation requires parties to identify their interests and concerns, exchange information and views, seek to understand the interests and concerns of the other parties, and explore whether and how the interests of the different parties can be met.

¹ Recommendation 4 of the Claims Resolution Review recommended that consideration be given to formulating a good faith obligation to be included in the Native Title Act and developing a code of conduct for parties involved in native title mediations.

² Subsection 136B(4) of the Native Title Act. This subsection is set out at **Attachment A**.

³ Subsection 86A(1) of the Native Title Act.

⁴ Subsection 86A(2) of the Native Title Act.

What is 'good faith'?

Good faith requires a commitment to the process of mediation and a readiness to reach agreement if possible. Requiring parties to act in good faith does not mean a party cannot have a firm position at the outset which they are reluctant to compromise, nor does it necessarily require parties to participate in all aspects of mediation in the Tribunal.⁵ If a party does participate in a mediation conference, participating in good faith does not necessarily require the party or its representative to attend mediation conferences in person. In some instances, it may be appropriate for the party or their representative to participate through telephone or video conference.⁶

Good faith and the Guidelines

The Guidelines are a guide for parties and their representatives about behaving in good faith and accordingly set out four sets of behaviours which underpin the behaviour of parties when acting in good faith. The Tribunal member presiding over a mediation conference (the presiding member) *may* take the Guidelines into account in considering if a party has acted in good faith.

The Guidelines are not an exhaustive statement of the standards of behaviour expected of parties and their representatives participating in Tribunal mediation. The President of the Tribunal may give directions to members and employees of the Tribunal about procedures to be followed when considering whether a party or its representative has acted in good faith in relation to the conduct of Tribunal mediation.

Who should comply with the Guidelines?

All parties who are involved in mediation of a native title claim before the Tribunal should comply with the Guidelines. In addition, any person who is representing a party, including a legal practitioner, should also comply with the Guidelines. The Native Title Act requires all parties and their representatives to act in good faith in the conduct of mediation. In these Guidelines, a reference to a party includes a party's representative.

Who decides if a party is not acting in good faith?

The Native Title Act says that the presiding member may report to the Court, and other specified persons and entities, if the member considers a person is not acting, or has not acted, in good faith.

If you believe a party has not acted in good faith or has failed to comply with the Guidelines, you may raise this with the presiding member.

⁵ Parties to proceedings need not participate in all aspects of mediation in the Tribunal as some aspects of mediation may only require the involvement of a limited number of parties. Subsection 136B(1) of the Native Title Act provides that the presiding member may direct that only one or some parties may attend, and be represented, at a mediation conference.

⁶ Subsection 136A(6) of the Native Title Act.

Reports about failure to act in good faith

Where the presiding member considers a party has failed, or is failing, to act in good faith, the presiding member may report the party's conduct to different persons or entities, depending who the party in question is.⁷ The table below summarises the kinds of reports the Tribunal may make pursuant to sections 136GA and 136GB.⁸

If the person is, or the person represents ...	the Tribunal may report their conduct to ...
any party	the Court
a native title representative body or a native title service provider who is provided with funds by Secretary of the Department of Families, Community Services and Indigenous Affairs under sections 203C or 203FE respectively	the Secretary of the Department of Families, Community Services and Indigenous Affairs
the Commonwealth	the Commonwealth Minister
a State or Territory	the relevant State or Territory Minister
a party who is provided with funds by the Attorney-General under section 183 of the Native Title Act	the Attorney-General
a legal practitioner	the State or Territory legal professional body that issued the legal practitioner with a practising certificate.

In addition, if the presiding member considers a Government party or its representative has failed, or is failing, to act in good faith, details of the failure to act in good faith can be included in the Tribunal's annual report. A Government party can be the Commonwealth or a State or Territory government.

The Native Title Act provides that generally, in proceedings before the Court, evidence may not be given, and statements may not be made, about any word spoken or act done in a mediation conference. This restriction does not apply to reports made by the Tribunal to the Court or to a legal professional body about a failure to act in good faith.⁹

⁷ See sections 136GA and 136GB of the Native Title Act set out at **Attachment A**.

⁸ These sections are set out in full at **Attachment A**.

⁹ See subsections 136GA(3) and (4).

When will the Tribunal make a report?

It will be up to the presiding member to decide whether or not he or she considers a party has not acted in good faith, and whether to report that party's conduct.

Failing to comply with these Guidelines may lead the presiding member to consider a party has not acted in good faith and to report the matter. Tribunal members are not bound by these Guidelines¹⁰ and have a broad discretion in choosing how to manage a mediation, including whether or not to report a perceived breach of good faith.

However, these Guidelines will form part of the material the presiding member may consider in deciding whether a party has acted in good faith. Ultimately, whether or not a party is perceived to be acting in good faith will be determined by the presiding member on a case-by-case basis, having regard to the facts and context of the party's behaviour and any directions given by the President of the Tribunal.

Where the presiding member is considering whether to make a report, principles of natural justice will require the member to provide the relevant person with details of the alleged failure to act in good faith and afford the person an opportunity to respond.

What happens when a report is made by the Tribunal?

If the presiding member does make a report, it will be at the discretion of the person or body receiving the report to take any action they consider appropriate.

Mediation can continue after a report about a breach of the good faith obligation is made, if the presiding member considers it is appropriate.

Are the Guidelines legally binding?

These Guidelines are not legally binding, although they may overlap with legal obligations imposed on parties and their representatives. The Guidelines do not affect the requirement for parties and their representatives to comply with their legal obligations, including obligations they may have under the Native Title Act. Some of the legal obligations in the Native Title Act have been noted in the Guidelines where compliance with these obligations is consistent with the behaviour of a party acting in good faith.

Legal practitioners' duties

Legal practitioners must also comply with their duties to their clients (for example, legal practitioners may be bound to act in accordance with instructions), their duties as officers of the Court, and with any obligations imposed on the practitioner by the relevant legal professional body.

¹⁰ Members of the Tribunal are not bound by these Guidelines but have voluntarily adopted a code of conduct which outlines the ethics and standards of behaviour they need to do their work. Information about the code of conduct is available from the Tribunal's website: <http://www.nntt.gov.au>.

1. Behaviour of parties

Integrity

- 1.1 A party should not act dishonestly.
- 1.2 A party should not make a statement or give information to other parties or the presiding member which the party knows is false or misleading.
- 1.3 If a party realises it/he/she has made a statement or given information that is false or misleading, the party should advise the presiding member and those parties who were present when the statement was made or the information given.
- 1.4 If a party makes a commitment during the course of mediation, the party should not unreasonably break that commitment.
- 1.5 If a party is unable to fulfil a commitment, that party should advise all parties who may be affected as soon as possible.

Cooperation

- 1.6 Parties should cooperate with each other and the presiding member by:
 - talking about matters that are relevant to the mediation
 - being willing to consider options raised by the presiding member or the other parties, and
 - being willing to put forward options of their own.

Courtesy

- 1.7 A party should treat other parties and members, consultants and staff of the Tribunal, and any other person involved in mediation with courtesy.
- 1.8 Parties should not act in an oppressive, unfair, abusive or intimidating manner towards other parties, the presiding member, or other members, consultants or staff of the Tribunal.¹¹

¹¹ Note, under section 177 it is an offence to obstruct or hinder the Tribunal, a member or a consultant engaged under subsection 131A(1) in the performance of the functions of the Tribunal, or do any other act or thing that would, if the Tribunal were a court of record, constitute contempt of that court.

Cultural courtesy

- 1.9 Parties should respect Indigenous customs and practices and take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.
- 1.10 All persons involved with the mediation should be sensitive to other languages and cultural backgrounds.
- 1.11 Parties should respect, and make allowance for, the inclusion of Aboriginal and Torres Strait Islander cultural protocols and decision-making practices in the mediation process.
- 1.12 Parties may wish to consider holding a cultural awareness session or cross-cultural training at the outset of the mediation process.

‘Without prejudice’

- 1.13 Parties should respect the ‘without prejudice’ nature of mediation. In a proceeding before the Court, unless the parties otherwise agree, evidence may not be given and statements may not be made about any word spoken or act done at a mediation conference.¹²

Disclosure of information

- 1.14 Where parties agree not to disclose information provided in a document or communicated orally at a mediation conference, parties must not disclose that information, unless the agreement of all parties to the conference is obtained.
- 1.15 Where the presiding member makes a direction prohibiting disclosure of information under section 136F of the Native Title Act, parties must abide by the direction.

Cultural confidentiality

- 1.16 A party should advise other parties if the oral or written material is culturally sensitive.
- 1.17 Oral or written communications prepared or used in mediation that are culturally sensitive should be treated with respect and confidence.¹³

¹² See subsection 136A(4) and the limited exceptions to subsection 136A(4) in subsections 136GA(3) and 136DA(2).

¹³ The presiding member may make an order prohibiting disclosure of information given, statements made or documents produced at a mediation conference: section 136F.

2. Preparation for Mediation

Identifying parties' concerns

- 2.1 A party should identify at the outset of the mediation process how its interests may be affected by a determination in the proceedings and issues that are of concern to the party. A party should also consider how its interests could be accommodated by a possible outcome of the mediation.
- 2.2 A party should be willing to explain the nature of its interests and concerns to other parties to the mediation and the presiding member.
- 2.3 Before a mediation conference begins, the presiding member may ask a party to advise of:
 - any topics the party would like discussed in the conference
 - the party's main reasons for being involved in the proceeding, and
 - how the party's interests could be adequately accommodated.
- 2.4 If the presiding member asks a party for this advice, the party should advise the member before the mediation conference commences.

Timely production of relevant materials

- 2.5 If a party is going to rely on a document in mediation, the party should give the document to other parties who will be participating in the mediation and ensure they have sufficient time to consider the document before the mediation conference.
- 2.6 If a party asks another party to provide a document and the request is refused, the refusing party should provide, in writing, reasons why the party refuses to provide the document.

Reading material

- 2.7 Parties should familiarise themselves with relevant documents circulated prior to or during mediation.

3. Effective Resolution Principles

Effective participation in mediation

- 3.1 Parties should have a clear understanding of the issues to be addressed at a mediation conference.
- 3.2 Parties should try to narrow the issues in dispute as much as possible.
- 3.3 A party should not raise or dispute an issue that does not affect the party's interests in relation to the native title claim.
- 3.4 Parties should ensure costs are not unreasonably incurred.
- 3.5 Parties should remain at the mediation until the presiding member determines that the process is at an end or excuses the parties, unless the party notifies the presiding member prior to the mediation conference of a pre-existing commitment.

Genuine desire to reach agreement

- 3.6 Parties should consider options for the resolution of the dispute.
- 3.7 The obligation for a party to mediate in good faith does not mean a party must:
 - act for, or on behalf of, or in the interests of, another party
 - act otherwise than by having regard to its interests
 - relinquish their position, or
 - reach an agreement.
- 3.8 If a party does not want to enter into mediation, or continue to mediate, the party should clearly explain their reasons for this decision to the presiding member and other parties.

Effective communication

- 3.9 Parties should try to communicate clearly and concisely.
- 3.10 Parties should have regard to cultural and linguistic differences and any cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.
- 3.11 Where it is necessary to discuss technical and complex information, parties should try to ensure the information is understood by other parties.
- 3.12 At the outset of mediation, parties should consider whether participants in the mediation have any particular communication needs and, if necessary, agree on communication protocols to be followed during the mediation.
- 3.13 If parties agree on communication protocols, parties should comply with these protocols.

4. Timeline

Unnecessary delay

- 4.1 Parties should not delay mediation unnecessarily.
- 4.2 This may include raising issues which are not central to the matters to be resolved, or unreasonably introducing new issues late in the mediation process.
- 4.3 Parties should acknowledge that Indigenous parties may face unavoidable delays caused by, for example, factors such as deaths in a community or weather conditions preventing access to remote areas.

Obtaining instructions

- 4.4 A party's representative should obtain necessary instructions from the party in a timely manner.

Mediation timetables

- 4.5 Timetables developed in relation to mediation should be complied with.
- 4.6 If a party cannot comply with a timetable, the party should promptly tell the presiding member and other parties and give reasons for the delay.
- 4.7 Parties should comply with directions given by a member of the Tribunal or with rules, directions or orders of a Court.
- 4.8 Parties should comply with regional work plans prepared by the Tribunal under section 136G(3A) of the Native Title Act.

Shifting of position

- 4.9 Parties should try to avoid substantive and last minute changes of position where to do so would unreasonably delay the mediation or an agreement.

Definitions

Court	Federal Court of Australia
Government party	The Commonwealth, State and Territory Governments.
Party	A party includes a party's representative.
Presiding member	The member of the National Native Title Tribunal presiding over the mediation conference. This may include a consultant engaged by the President of the Tribunal to conduct the mediation.
Tribunal	National Native Title Tribunal

*Native Title Amendment Act 2007***136B Parties at conferences**

...

Mediation in good faith

- (4) Each party and each person representing a party must act in good faith in relation to the conduct of the mediation.

136GA Reports about breaches of the requirement to act in good faith*Reports to government*

- (1) If the presiding member considers that a party mentioned in column 1 of the following table in relation to an item, or a person representing such a party, did not act or is not acting in good faith in relation to the conduct of a mediation, the presiding member may report that failure to the person mentioned in column 2 of the table in relation to the item:

Reports about persons who do or did not act in good faith		
Item	If the party is or a person represents ...	then, the presiding member may report the failure to act in good faith to ...
1	the Commonwealth	the Commonwealth Minister
2	a State or Territory	the State Minister or the Territory Minister for the State or Territory
3	a party that is provided with funds by the Attorney-General under section 183	the Attorney-General
4	a representative body that is provided with funds by the Secretary of the Department under section 203C	the Secretary of the Department
5	a person or body performing functions of a representative body that is provided with funds by the Secretary of the Department under section 203FE	the Secretary of the Department

Reports to legal professional bodies

- (2) If the presiding member considers that a legal practitioner did not act or is not acting in good faith in relation to the conduct of a mediation, the presiding member may report that failure to the relevant State or Territory legal professional body that issued the legal practitioner with a practising certificate.

- (3) For the purposes of a report made under subsection (2), subsection 136A(4) does not apply to the extent that words spoken or acts done at a conference under that section relate to the failure mentioned under subsection (2).

Reports to the Federal Court

- (4) If the presiding member considers that a party, or the party's representative, did not act or is not acting in good faith in relation to the conduct of a mediation, the presiding member may, despite subsection 136A(4), report that failure to the Federal Court (whether or not a report is also provided as mentioned in subsection (1) or (2)).

What a report must include

- (5) A report must include:
- (a) the details of the failure to act in good faith; and
 - (b) the context in which the conduct took place.

Copy of report to be provided to the person to whom it relates

- (6) At the time that a report is provided as mentioned in subsection (1), (2) or (4), a copy of the report must also be provided to the person to whom it relates.

Presiding member not a consultant

- (7) If the presiding member is not a consultant engaged under subsection 131A(1), a report may only be provided under this section on the initiative of the presiding member.

Presiding member a consultant

- (8) If the presiding member is a consultant engaged under subsection 131A(1), a report may only be provided under this section on the initiative of the presiding member, if a presidential member agrees.

Mediation may continue

- (9) If a report is provided under this section, the presiding member may continue mediation if he or she considers that it is appropriate.

136GB Public reporting about breaches of the requirement to act in good faith

- (1) If the presiding member considers that a Government party, or that party's representative, did not act or is not acting in good faith in relation to the conduct of a mediation, the annual report may include particulars of that failure and the reasons why the presiding member considers that the conduct was not in good faith.
- (2) If it is proposed to make an inclusion in the annual report, the presiding member must inform the Government party, or that party's representative, before doing so.