

Module JAA Attachment B

Section 24JAA

Consultation process guideline for other government infrastructure

Does your proposed future act fall within Module JAA and the native title party has requested to be consulted?

This Attachment is a guideline for consultation processes required under section 24JAA of the NTA.

You should only be using this Attachment where –

- (a) your proposed future act falls within **Module JAA**; and
- (b) the consultation has been requested within the required time period by the registered native title bodies corporate and/or registered native title claimants.

TABLE OF CONTENTS

Part 1	Introduction.....	3
Part 2	Legislative requirements for consultation.....	3
Part 3	Policy considerations and requirements for consultation.....	4
Part 4	Enhanced consultation process	5
Part 5	What is to 'consult' and to 'negotiate'?.....	6
Part 6	Time for consultation	7
Part 7	Steps for consultation / negotiation.....	8
Step 1	<i>Receipt of request to be consulted.....</i>	8
Step 2	<i>Contact the native title party.....</i>	8
Step 3	<i>Contact the trustee of the Indigenous land</i>	9
Step 4	<i>Prepare for the meeting</i>	9
Step 5	<i>Holding the meeting</i>	10
Step 6	<i>Any further consultation / negotiation.....</i>	11
Step 7	<i>Reaching and signing of agreement</i>	11
Step 8	<i>Finalise details of proposed future act and proposed dealing area</i>	12
Step 9	<i>Advise native title party of outcome of consultation / negotiation, where agreement cannot be reached.....</i>	12

Part 1 Introduction

Consultation forms a key part of the procedural rights process under section 24JAA of the Commonwealth *Native Title Act 1993* (NTA). This requirement is set out in **Part 7 of Module JAA**.

This Guideline seeks to assist officers in carrying out that consultation.

The Guideline is based upon section 24JAA of the NTA, the relevant Explanatory Memorandum and State native title policy.

Consultation on the proposed future act must also comply with any requirements determined by way of legislative instrument. At the time of publishing, there is no relevant legislative instrument.¹

Part 2 Legislative requirements for consultation

The consultation process under section 24JAA is only triggered where the registered native title bodies corporate and/or registered native title claimants advise in writing that they wish to be consulted about the doing of the proposed future act in so far as it affects their native title rights and interests.



This request must be made within the required time period set out in the notice, that is, within the period of 2 months beginning on the notification day.

If a request to be consulted is made, then you must consult with the native title party about –

- (a) ways of minimising the impact of the future act/s on their registered native title rights and interests in relation to the land and waters;

and

- (b) if relevant:
 - (i) any access to the land or waters; or
 - (ii) the way in which any thing authorised by the future act/s might be done.

The Explanatory Memorandum advises that the legislative instrument, when made, may specify requirements as to the manner of consultation and matters to be dealt with through consultation.²

It advises –

It may require the action body to hold one or more face to face meeting with native title claimants or body corporate who have requested consultation, provide translators during consultation, or address issues of the design, location and nature of the proposed act.

Part 3 Policy considerations and requirements for consultation

The key basic necessities for life are food, water and shelter. The need for improved shelter, that is housing, is currently a key priority for Australian Governments.

The National Partnership Agreement on Remote Indigenous Housing advises in its objective –

Housing investment for the benefit of Indigenous people in remote Indigenous communities is a central plank to achieving the targets for 'Closing the Gap' on Indigenous disadvantage.³

As part of Closing the Gap on Indigenous disadvantage, the Council of Australian Governments is committed to reforming

housing and infrastructure arrangements in remote Indigenous communities. This will address significant overcrowding, homelessness, poor housing conditions and severe housing shortages in remote Indigenous communities. Improving housing conditions will provide the foundation for lasting improvements in health, education and employment and make a major contribution towards closing the gap in Indigenous disadvantage.⁴

It is therefore important that the State deliver this public housing as quickly and efficiently as possible, in compliance with the NTA.

¹ Once a legislative instrument has been made, the requirements determined by the legislative instrument will be incorporated into this Guideline.

² [1.14], *Explanatory Memorandum to the Native Title Amendment Bill (No.1) 2010*

³ Clause 11 -

http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf

⁴ http://www.fahcsia.gov.au/sa/indigenous/pubs/general/Documents/closing_the_gap/p3.htm

This is why two separate consultation guidelines have been developed for public housing and other government infrastructure.

The Guideline for public housing (**Attachment A**) sets out a straightforward but solid consultation process focussed on the matters that must be consulted about as set out in **Part 2**.

In contrast, this Guideline for other government infrastructure sets out an *enhanced consultation process*. The State considers that the consultation process for the non-housing government infrastructure provides an opportunity for the State to deliver a greater benefit to the native title holders and the Indigenous community in which the infrastructure will be located.

Part 4 Enhanced consultation process

The key elements of the enhanced consultation process is as follows –



Converting the required consultation process to a negotiation process



Negotiating about a broader range of matters –

- (a) the things which must be consulted about under section 24JAA – see **Part 2**.
- (b) cultural heritage – this could form an agreement for the purposes of the *Aboriginal Cultural Heritage Act 2003* or *Torres Strait Islander Cultural Heritage Act 2003*; and
- (c) addressing other community needs, eg. playground equipment, landscaping a park area, including an office space in a building for a registered native title body corporate or a community worker, constructing a cultural centre, new text books for school children;



Reaching an agreement in the form of a template Infrastructure Agreement about the things that are negotiated.



This enhanced consultation process is not seeking the native title party's consent to the proposed future act.



This Agreement is NOT in the form of an Indigenous land use agreement. This is because the Agreement is not providing consent to the proposed future act nor is it dealing with native title compensation for the doing of the future act.



If agreement cannot be reached, then the proposed future act still proceeds under section 24JAA. Not only is it still valid under section 24JAA but it is also essential community infrastructure that should not be unnecessarily delayed.



As this infrastructure is still essential community infrastructure the timeframe is the same as that required for consultation under section 24JAA.



To guide the negotiations, the principles contained in the *Guidelines for Best Practice Flexible and Sustainable Agreement Making* should be followed.

Part 5 What is to 'consult' and to 'negotiate'?

The Macquarie Dictionary defines **consult** as –

1. *to seek counsel from; ask advice of*
2. *to refer to for information*
3. *to have regard for (a person's interest, convenience, etc.) in making plans;*
4. *to consider or deliberate; take counsel; confer.*

The Macquarie Dictionary defines -

- “negotiate” as (amongst other things) –
 1. *to treat with another or others, as in the preparation of a treaty, or in preliminaries to a business deal*
 2. *to arrange for or to bring about by discussion and settlement of terms*
- “negotiation” as –

Mutual discussion and arrangement of the terms of a transaction or agreement.



The *Guidelines for Best Practice – Flexible and Sustainable Agreement Making* assist in the negotiation process by providing practical guidance for government parties on the behaviours, attitudes and practices to achieve flexible, broad and efficient agreements that may be adapted to the circumstances of the particular agreement.



As the validity for the proposed future act is through section 24JAA, the consultation / negotiation right is not a veto or consent right. However, under the enhanced process the State is seeking the native title party's agreement about the things to be consulted and negotiated as set out in **Part 4**.

It is hoped that through the enhanced consultation process, the native title party feels that their concerns have been heard and understood, even if those concerns are unable to be addressed to their satisfaction or agreement is able to be reached.



Where agreement has not been reached, you must still consider any relevant concerns, issues and comments raised by the native title party before making the final decision to proceed with the proposed future act. In some cases, this may result in proceeding in a modified way.

Part 6 Time for consultation

As soon as the native title party requests to be consulted (provided the request is made in the required time period) you may commence the consultation process.

The consultation period ends 4 months from the notification day, unless it is shortened. It can only be shortened if each notified native title party who requested to be consulted advise in writing that they have been consulted.



This means you will have at a minimum 2 months in which to consult. More, if the native title party requests to be consulted earlier in the notification period.

Part 7 **Steps for consultation / negotiation**

This part sets out the process for consultation / negotiation in a number of steps. By following the steps, you are ensuring that the enhanced consultation process meets the requirements under the NTA.

The steps are set out in the flowchart at the end of this Attachment.

Step 1 ***Receipt of request to be consulted***

In response to the section 24JAA notification, you have received a request to be consulted about the proposed future act. This may or may not have been accompanied by comments.



The right to consultation only arises where the request is made within the 2 month notification period, and it is made by the registered native title body corporate and/or registered native title claimants.



Provided the report has not been provided to the Commonwealth Minister, discretion may be used as to the date the request is received. For example, if the request was received a day late, then you may wish to consider the consultation request.



If no consultation request is made within the required time period, then proceed directly to **Part 8** of **Module JAA**.

Step 2 ***Contact the native title party***

Your next step is to contact the native title party, i.e. the registered native title body corporate and/or registered native title claimants, to arrange a meeting.

This should be done by way of letter using Template B.



At a minimum, one meeting must be held with the native title party. It is probably best that the meeting be held in the relevant Indigenous community. However, an offer can be made that the meeting be held elsewhere, if the native title party would prefer.



If there is more than one native title party, you may wish to offer separate meetings. However, joint consultations could be held where the native title parties agree. To seek guidance on this point, contact the Claim Resolution unit of ATSILS.

Step 3 ***Contact the trustee of the Indigenous land***

It is very likely that you have already contacted the trustee, eg. the Council, about the proposed future act before commencing the section 24JAA process. This is because your proposed future act is likely to require an approval from the trustee, such as a trustee lease.

It is recommended that you now contact or recontact the trustee to –

- (a) advise the trustee of where you are at in the native title process;
- (b) advise that a meeting has been arranged with the native title party for x date; and
- (c) seek permission to enter the trust area (i.e. the Indigenous land) to hold the meeting.

Step 4 ***Prepare for the meeting***

In preparing for the meeting consider the following –

- (a) all relevant comments received from the native title party – **Annexure 8.5**;
- (b) preparation of visual material, e.g. maps, plans, design drawings;
- (c) travel arrangements – flights, car hire and accommodation;
- (d) catering; and
- (e) what, if any, next steps you may consider.



Departments and agencies are responsible for adequately resourcing the consultation / negotiation 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.⁵

Step 5 *Holding the meeting*

The meeting is a time to consult and negotiate, that is, explain the proposed future act (including through maps, plans, etc.), listen and answer questions.



To meet the legislative and policy requirements, you must consult and negotiate, with a view to reaching an agreement, about

- (a) ways of minimising the impact of the future act on the registered native title rights and interests; and
- (b) the access to the future act area (if relevant); and
- (c) the way in which the future act may be done (if relevant);
- (d) cultural heritage – this could form an agreement for the purposes of the *Aboriginal Cultural Heritage Act 2203* or *Torres Strait Islander Cultural Heritage Act 2003*; and
- (e) addressing other community needs, eg. donation towards playground equipment, landscaping a park area, including an office space in a building for a community worker, constructing a cultural centre, donation of new text books for school children;



Where a physical act on the ground is committed to, the trustee will need to provide approval. Also, it may be a future act in itself.

The conversation should also include discussing the location, nature of the proposed future act and its design.

⁵ Under the *Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)*, a registered native title body corporate may charge the State a fee for costs when performing certain activities in relation to future acts. In the case of section 24JAA, it may charge the State for costs it incurs in relation to the consultation process.

In carrying out the negotiation, the principles contained in the *Guidelines for Best Practice Flexible and Sustainable Agreement Making* should be followed.

Make sure someone takes notes at the meeting so that the consultation / negotiation can be accurately recorded.



Where possible, use part of the meeting to go and have a look at the proposed future act area. This may provide a useful way to explain the proposed future act, proposed dealing area and access.

Step 6 ***Any further consultation / negotiation***

It is possible that as a result of the meeting further consultation / negotiation is required or requested by the native title party.

This could be in the form of another meeting or through provision of further information (such as modified plans/design drawings) for comment. A further option may be holding a meeting by way of teleconference or video conference. However, this will be dependant upon the technology available and whether it is appropriate in the circumstances.

The type of, and need for, further consultation / negotiation will need to be decided on a case by case basis.

Step 7 ***Reaching and signing of agreement***

If agreement has been reached, it must be recorded in the template Infrastructure Agreement.

The Agreement must then be signed by –

- (a) the State representative;
- (b) where there is a registered native title claim - all of the registered native title claimants; and
- (c) where there is a determination of native title – the registered native title body corporate.



The State should be the final party to sign.

If agreement was not able to be reached, proceed to Step 8.



The Agreement will also advise that the native title party has been consulted for the purposes of section 24JAA of the NTA. This means that once all parties have signed, the Report can be provided to the Commonwealth Minister before the end of the consultation period. This will allow the future act to proceed as soon as possible.

Step 8 ***Finalise details of proposed future act and proposed dealing area***

If agreement was not able to be reached, consider the relevant comments and the consultation / negotiation outcomes to decide whether you will –

- (a) proceed as is, i.e. with no changes;
- (b) proceed in a modified way, e.g. adjusting the location or certain aspect of the design of a building;
- (c) not proceed.

If agreement was able to be reached, take all steps that can be taken, apart from proceeding with the proposed future act, to ensure that commitments made in the Agreement can be actioned and the proposed future act can proceed once the Report has been made to the Commonwealth Minister.

Step 9 ***Advise native title party of outcome of consultation / negotiation, where agreement cannot be reached***

As a final step, where agreement cannot be reached, advise the native title party of the outcome of the consultation.



Use Template C. Where appropriate, you may wish to also use this letter to request the native title party to respond in writing that they have been consulted. This will allow you to proceed to issue the Report to the Commonwealth Minister without having to wait for the 2 month consultation period to end. Remember, if there is more than one native title party, you must receive the response from all native title parties.



You have now completed the consultation process. Please proceed to **Part 8 of Module JAA** which deals with your next step – Report to the Commonwealth Minister.

Flowchart – Steps for consultation process

