



Government
of South Australia

Department of the
Premier and Cabinet

Negotiating in Good Faith **Guideline 5**

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Introduction

The *Aboriginal Heritage Act 1988* (Heritage Act) protects heritage in South Australia, including from the impacts of excavation, damage, disturbance or interference. Aboriginal heritage includes Aboriginal ancestral remains, areas, sites and objects (heritage).

The Heritage Act now recognises Aboriginal people as primary decision makers about their own heritage. This includes the creation of Recognised Aboriginal Representative Bodies (RARBs) empowered to represent and make agreements about heritage.

RARBs can enter agreements with land use proponents (eg a miner, researcher or government department) called local heritage agreements – see Guideline 3 for more information.

There is no obligation on RARBs to negotiate local heritage agreements. Where a RARB decides that it will consider entering a local heritage agreement, the Heritage Act requires that all parties discussing or negotiating a local heritage agreement do so “in good faith”.

What does "good faith" mean?

There is no one legal definition of good faith and the Heritage Act does not provide one. However, the concept has been examined extensively by the courts, and a set of indicators of expected behaviour in good faith negotiations has been developed.

What constitutes good faith in negotiations will always depend on the facts of each case. The unique context of Aboriginal culture and heritage will also be relevant. Therefore, any criteria set out in this Guideline are not rigid requirements whose absence or breach will necessarily indicate that a party is not negotiating in good faith.

Definitions of “negotiate” and “good faith”

Negotiation involves communicating, consulting, having discussions or conferring with a view to reaching an agreement.

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 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. It just means that all parties are working genuinely towards agreement.

What is negotiating in good faith?

This Guideline does not constitute legal advice, but the following criteria¹ may indicate that a party is attempting to negotiate in good faith. This list is not definitive or exhaustive, and the weight given to any item must depend upon the circumstances of the matter:

- initiating communications in a timely manner
- making clear proposals in the first place
- communicating within a reasonable time
- genuine attempts to contact one or more of the other parties
- following up any lack of response from the other parties
- responding to reasonable requests for relevant information within a reasonable time
- sending negotiators with authority to make decisions.

Indicators a party may be failing to negotiate in good faith may include:

- stalling negotiations by unexplained delays in responding to correspondence or telephone calls

- unnecessary postponement of meetings
- sending negotiators without authority to do more than argue or listen
- refusing to agree on trivial matters, for example, a refusal to incorporate statutory provisions into an agreement
- shifting position just as agreement seems in sight
- adopting a rigid non-negotiable position
- failure to make counter proposals
- unilateral conduct which harms the negotiating process (for example, issuing inappropriate press releases)
- refusal to sign a written agreement in respect of the negotiation process or otherwise
- failure to do what a reasonable person would do in the circumstances.

Negotiating in good faith essentially means communicating with honesty and sincerity and working genuinely towards mutually acceptable outcomes, whether an agreement is eventually reached or not.

1. Taken from *Re Minister for Lands, State of Western Australia and Marjorie Strickland & Or* (1997) 3 AILR 260 (at 224-225)



Further Information

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