Queensland Government Native Title Work Procedures

Module JAA: Attachment A

Consultation process guideline for public housing

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### Version history

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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

(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 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 -

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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
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.

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

This Guideline for public housing sets out a straightforward but solid consultation process focused on the matters that must be consulted about as set out in Part 2.

In contrast, the Guideline for other government infrastructure (Attachment B) 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: What is to ‘consult’?**

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.

Therefore, the consultation right is not a veto or consent right.

The State is not seeking the native title party’s consent to the proposed future act nor is it seeking their agreement through the consultation process.

However, it is hoped that through the 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.

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Any relevant concerns, issues and comments raised by the native title party must be considered before making the final decision to proceed with the proposed future act. In some cases, this may result in proceeding in a modified way.

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

Part 5: 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 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 6: Steps for consultation

This part sets out the process for consultation in a number of steps. By following the steps, you are ensuring that your 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 A.
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 Aboriginal and Torres Strait Islander Land Services (ATSILS).

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

It is very likely that you have already contacted the trustee, e.g. 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
(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
(e) what, if any, next steps you might consider.

Departments and agencies are responsible for adequately resourcing the consultation 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.  

**Step 5 - Holding the meeting**

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

To meet the legislative requirement, the conversation at the meeting should be directed to discussing -

(a) ways of minimising the impact of the future act on the registered native title rights and interests
(b) the access to the future act area (if relevant)
(c) the way in which the future act may be done (if relevant).

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

Make sure someone takes notes at the meeting so that the consultation 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**

It is possible that as a result of the meeting further consultation 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 will need to be decided on a case by case basis.

**Step 7 - Finalise details of proposed future act and proposed dealing area**

Having considered the relevant comments and also the consultation outcomes, 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.

**Step 8 - Advise native title party of outcome of consultation**

As a final step, 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 the next step 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 notified 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

1. Receipt of comments and request to be consulted
2. Contact registered native title bodies corporate / registered native title claimants to arrange meeting
3. Contact the trustee
4. Prepare for meeting, including consideration of comments
5. Meeting
6. Further consultation
7. Finalise details of proposed dealing area and future act
8. Advise registered native title bodies corporate / registered native title claimants of outcome of consultation

Notification day
End of notification period

2 months
End of consultation period
Report provided to Commonwealth
Commence future act

2 months, unless native title party shortens it in writing