



COMMONWEALTH GRANTS COMMISSION

DRAFT ASSESSMENT PAPER CGC 2003/70

NATIVE TITLE

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NOTE

Included in this paper are the results of preliminary calculations based on the methods proposed throughout the paper and using the data currently available. Those results are indicative only and should be seen as work in progress. Ongoing changes are being made to standards and factor calculations as new data come to hand. Moreover, the calculations have been done using a prototype assessment system and are subject to ongoing revision as checking processes proceed.

Note: In this version of the paper State-specific expense data, and data referring to State-specific numbers have been removed for confidentiality reasons.

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BACKGROUND

Introduction

1. The Native Title assessment accounts for the additional costs incurred by the States attributable to the operation of the Commonwealth *Native Title Act* 1993. A High Court decision on 3 June 1992 to recognise Indigenous people's traditional rights on their land at common law resulted in the passage of the *Native Title Act* 1993. This consolidates the rights of holders of native titles.

1999 Review

2. In the 1999 Review, expenses on native title were expected to occur in the form of compensation costs and administration costs. However, no compensation costs were incurred by States in the 1999 Review period. Therefore, the assessment, to date, has only included costs for administration that were incurred by the States in their administration of the Native Title Act.

3. Disabilities associated with the administration of native title claims were assessed by reference to actual per capita expenses. The factor for native title administration was calculated on the basis of an average of the per capita expenses for each State (and Australia) in the last three years of the assessment period. The factors were applied in each assessment year.

4. Table 1 shows the estimated expenses per capita for Australia and the States for the three years used in the 2003 Update. These figures were derived from data returns submitted by the States. Tasmania was not able to provide an estimate of expenses on native title, so its total estimated expense was set to that of the ACT.

Table 1 NATIVE TITLE ADMINISTRATION — EXPENSES PER CAPITA AND FACTOR CALCULATION, 2003 UPDATE

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc
1999-2000	0.22	0.66	6.66	5.88	3.24	0.03	0.04	24.92	2.56
2000-01	0.08	1.29	5.84	7.19	3.86	0.40	0.59	24.16	2.71
2001-02	0.08	0.51	5.51	7.75	4.42	0.43	0.63	24.27	2.55
3 Year Average	0.13	0.82	6.00	6.94	3.84	0.28	0.42	24.45	2.61
Factor	0.04796	0.31419	2.30029	2.65877	1.47182	0.10905	0.16068	9.36938	1.00000

Source: Commonwealth Grants Commission 2003 Update.

5. Table 2 gives expense proportions for categories affected by native title administration expenses. These proportions were calculated in the 1999 Review and remained unchanged for subsequent updates.

6. The effect of assessing a native title administration factor in the 2003 Update, compared to an equal per capita assessment, is shown in Table 3.

Table 2 EXPENSE PROPORTION FOR CATEGORIES AFFECTED BY NATIVE TITLE DISABILITIES, 2003 UPDATE

Category	Native title expenses ^(a)	Category expenses ^(a)	Rounded weight
	\$'000	\$'000	%
Administration of Justice	8 164	1 291 143	0.63
National Parks and Wildlife	778	342 418	0.23
Other General Public Services	5 063	1 577 008	0.32
Primary Industry	565	1 168 672	0.05
Mining Fuel & Energy	3 995	244 432	1.63
Roads	457	2 309 422	0.02
Regulatory and Other Services	8 513	1 073 179	0.79

(a) These proportions were calculated in the 1999 Review and remained unchanged for subsequent updates.

Source: Commonwealth Grants Commission 2003 Update.

Table 3 EFFECT OF THE NATIVE TITLE ASSESSMENT COMPARED TO EQUAL PER CAPITA, 2003 UPDATE

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Total	-13.4	-7.2	10.2	6.8	1.4	-0.9	-0.6	3.6	22.1

Source: Commonwealth Grants Commission 2003 Update.

NATIVE TITLE ADMINISTRATION

State views

7. No State commented on the native title administration assessment in their main submissions, rejoinder submissions or bilateral discussions.

Analysis

8. As a result of the Native Title Act, States incur expenses attributable to the native title claims process. An indication of the processes involved are outlined in Attachment A.

9. Table 4 provides information on the different agencies involved in the native title claims process, the types of services that must be carried out, and the types of costs incurred. The information was provided by the Northern Territory for the 1999 Review.

Table 4 TYPES OF SERVICES REQUIRED DUE TO THE NATIVE TITLE CLAIMS PROCESS

Department of Lands, Planning and Environment	<p><i>Native Title Unit</i> Personnel costs Operational costs (eg tenure searches) Capital (purchase of new imaging technology and an image management system) Mapping services</p> <p><i>Aboriginal Land Branch</i> Policy advice and operational issues</p>
Attorney-General's Department	<p><i>Aboriginal Land Division</i> Counsel/consultancy expenses In-house solicitor expenses Other legal and witness expenses</p>
Office of Aboriginal Development	<p><i>Policy and Development</i> Personnel and operational costs</p>
Department of Mines and Energy	<p><i>Resource Policy and Assessment Division</i> Risk analyses of projects</p>
Department of the Chief Minister	<p><i>Policy and Co-ordination Division</i> Policy formulation, negotiations, conferences</p>

Source: Northern Territory 1999 Review Submission, Figure 16.4, p142.

10. Provisions exist for States to enter into an agreement with the Commonwealth, to enable them to receive assistance in the form of rebates for native title administration and compensation expenses incurred. To date, no State has entered into an agreement. Therefore, no changes need to be made in the native title assessment to compensate for any potential Commonwealth reimbursements¹.

11. Since the 1999 Review, there have been no changes in legislation relating to native title or to State policies that could potentially affect the native title administration assessment. States continue to incur costs on administering the Native Title Act and these costs are material, particularly for Queensland, Western Australia and the Northern Territory. Table 5 shows actual expenses and States have no choice but to meet these costs.

¹ Communication with the Commonwealth Attorney-Generals Department, March 2003.

Commission decision

12. The Commission accepts that a conceptual basis exists for assessing costs incurred due to native title administration. This is because States continue to incur unavoidable costs due to administering the Native Title Act. These costs are material. Actual data on native title administration costs can be obtained from States each year (as was done for the 1999 Review). Therefore, the Commission proposes to continue an assessment for the 2004 Review.

Proposed method and results

13. In the 1999 Review, the native title administration factor was calculated as an average of the actual per capita expenses for each State (and Australia) in the last three years of the assessment period. A three-year average was used to counter year-to-year volatility in expenses.

14. For the 2004 Review, native title administration expenses will be assessed on an annual basis with no averaging of past years' expenses. We consider that using average expenses for the native title administration assessment is not necessary. This is because the final relativities are an average of the relativities calculated for each of the five years in the assessment period. Therefore any volatility would ultimately undergo a smoothing process. The assessment will be updated annually.

15. Further information concerning the proposed method and factor result are presented in the 'Native title compensation - Proposed method and results', section below.

Reality check

16. The native title administration assessment aims to redistribute grants based on an actual per capita basis. Therefore, the amounts of money re-distributed due to the native title assessment should reflect the actual amount of native title administration expenses incurred by the States.

17. Table 5 shows that the implied (as calculated by the Commission) and actual State expenses attributed to native title administration are not the same. This suggests that the calculation processes are not adequate.

Table 5 ACTUAL PER CAPITA NATIVE TITLE EXPENSES AND IMPLIED EXPENSES, 2001-02

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aus
	\$000	\$000	\$000	\$000	\$000	\$000	\$000	\$000	\$000
Actual expenses									50,427
Implied category expenses									41,631
Difference ^(a)	-92	-830	-3,636	-2,259	-1,137	-29	-20	-792	8,796

(a) Implied minus actual.

Source: Native title administration assessment, Commonwealth Grants Commission, 2003 Update.

Note: State level data has been removed for confidentiality reasons.

18. The differences appear to be due to the use of outdated native title component weights. The 1999 Review native title administration methodology used component weights which were set in the first year of the 1999 Review. These component weights were held constant for each year of the review period.

19. If native title component weights are updated annually, other expense proportions in categories with a native title component will also need to be adjusted. During the 2000 Update, the Commission decided that component weights should not change between updates. This was mainly because the weights of components were very small and any changes to these component weights were thought likely to be so small as to be immaterial. However, it appears that, contrary to that, changes to component weights may have material impacts.

Commission decision

20. The Commission considers that there is a conceptual case for updating the component weights for the Native Title assessment annually. While updating component weights each year adds to the complexity of the assessments, the Commission considers it is outweighed by the need to ensure the assessments distribute grants appropriately.

21. Therefore, to obtain more accurate grant distributions for the Native Title assessment, the Commission proposes that component weights be updated annually.

NATIVE TITLE COMPENSATION

State views

22. No State commented on the native title compensation assessment in main submissions.

23. In its rejoinder submission, Western Australia stated that the Commission should recognise the significant costs it faced in settling native title compensation claims. These settlements were usually out-of-court and included service commitments rather than just direct financial compensation. It noted that no claim for compensation for the loss or impairment of native title had been made in Western Australia, and that no court in Australia had made an order setting compensation.

24. In its bilateral discussions, the Northern Territory said it will incur increased costs in the National Parks and Wildlife and Administration of Justice categories due to the effect of the recent 'Ward' High Court ruling. As a result of the ruling, 11 of the Northern Territory's parks were now subject to claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The Northern Territory foreshadows that due to negotiations concerning these land claims, the level of participation by Indigenous people in the management and promotion of the Northern Territory's Parks will increase, thus resulting in higher costs being incurred from 2004-05.

25. No other State views were received concerning native title compensation as part of rejoinder submissions or bilateral discussions.

Analysis

26. Rejoinder submissions indicated that Western Australia was the only State to have incurred native title compensation type expenses. The Commission checked with other States to re-confirm this.

27. New South Wales said that it had had two cases where compensation had been provided to native title holders. These included direct payments and service commitments. Victoria and the Northern Territory also provided the Commission with information concerning their native title compensation payments and the ways in which they had been settled. The other States replied that they had not incurred costs in relation to direct compensation payments or service commitments in lieu.

28. Therefore, half the States have made compensation payments for native title. It is also likely that during the period of the 2004 Review, other States may incur direct compensation or compensation type expenses.

29. Due to the Commonwealth *Native Title Act*, uniform processes and protocols have been put in place to settle native title claims. The claim could be for native title rights, or for compensation. During the process of settling the claim, States may, through negotiation, reach an agreement with the claimants and a settlement will be decided upon. As demonstrated in Western Australia's rejoinder submission, this settlement could be a financial payment or a service commitment. Alternatively, if no settlement can be reached through negotiation, legal proceedings are likely to be initiated.

30. Western Australia provided the following example to illustrate a compensation settlement that was reached for a particular native title claim. The settlement was reached through negotiation.

- (i) To enable some land to be developed for industrial purposes, Western Australia offered a package to native title claimants. Included in this package was an up front payment, education and training opportunities and a stake in future land developments. The agreement also allowed for the establishment of a conservation reserve and allocated funds for the development of a management plan for the reserve. In addition, it allowed for funds, over five years, for the management of the reserve and construction of buildings and infrastructure, including a visitor centre and roads and tracks.
- (ii) Other costs associated with the settlement included funds to establish a body corporate to hold and manage payments under the native title agreement on behalf of native title claimant groups and to fund the operation of this body corporate over four years.

31. In general, States have very little choice as to whether they address a native title claim. In the course of addressing the claim, they may have a choice of whether to oppose it, in how much they pay to settle a claim, and what other proxies for payment might be used.

32. As native title compensation payments are a relatively new issue, it is not yet clear if differing policies concerning native title settlement have a material effect on expenses. However, regardless of whether an up front payment is made, or a service commitment entered, they represent identifiable impacts on State budgets as a result of settling a native title claim.

33. The small amount of data on native title compensation payments and processes makes it difficult to determine the most appropriate assessment. At this stage, we propose to introduce an actual per capita assessment, the same as that proposed for native title administrative expenses.

Commission decision

34. The Commission accepts that a conceptual case exists for assessing native title compensation costs incurred by States. This is because States are now incurring costs due to settling native title claims, and these costs are material. Also, actual data on native title compensation costs can be obtained from States each year.

35. Therefore, the Commission has decided to introduce an assessment for native title compensation costs using the same method (actual per capita) as that proposed for native title administrative expenses.

Proposed method and results

36. It is proposed that an actual per capita assessment be adopted for native title compensation expenses. For simplicity, we intend to combine the native title administration and compensation expenses together into one assessment.

37. The new combined native title factor will be calculated each year, based on the actual per capita expenses for each State (and Australia). The factor will use the latest year of expense data. Component weights will be calculated each year for the combined expenses.

38. Table 6 shows the categories that will be affected by native title expenses in the 2001-02 assessment year and their component weights. Other categories may be added or removed for each update year in the 2004 Review period depending on whether they have native title expenses attributed to them. The native title component weights were calculated by assessing the 2001-02 proportion of native title expenses in each category. The component weights will be updated each year.

Table 6 NATIVE TITLE COMPONENT WEIGHTS FOR CATEGORIES AFFECTED BY NATIVE TITLE DISABILITIES, 2001-02

ACAT	Category	Native title expenses	Category expenses	Expense proportion ^(a)
		\$'000	\$'000	%
4160	Housing	500	2,305,532	0.02
4180	Services to Indigenous Communities	4,150	210,007	1.98
4450	Administration of Justice	7,187	1,757,748	0.41
4720	National Parks and Wildlife	2,804	485,983	0.58
5420	Water, Sanitation and protection of the Environment	34	883,628	0.00
5430	Roads	1,783	5,562,523	0.03
5440	Primary Industry	346	1,693,970	0.02
5450	Mining, Fuel and Energy	8,498	277,475	3.06
5525	General Public Service ^(a)	30,171	7,141,017	0.42

(a) The 1999 Review Regulatory Services category will not exist in the 2004 Review. Expenses have been reallocated to the General Public Service category.

39. Table 7 shows the native title administration and compensation expenses incurred by States for the five years of the 2004 Review (preliminary calculations). It also shows the resulting 2004 Review (preliminary calculations) native title factors which were calculated from the combined expenses.

Table 7 NATIVE TITLE EXPENSES AND FACTORS, 2004 REVIEW

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Native title administration expenses (\$000)^(a)									
1997-98									34084
1998-99									36780
1999-2000									48891
2000-01									52364
2001-02									50024
Native title compensation expenses (\$000)^(b)									
1997-98									0
1998-99									1177
1999-2000									3029
2000-01									290
2001-02									5449
Native title factors									
1997-98	0.42165	0.42619	1.56652	2.91310	0.51622	0.04919	0.09846	13.44409	1.00000
1998-99	0.14991	0.21264	2.00743	2.65354	1.09573	0.06876	0.10404	17.35096	1.00000
1999-2000	0.08245	0.24111	2.45173	2.17071	1.19182	0.00896	0.01342	14.80043	1.00000
2000-01	0.02799	0.47561	2.14751	2.65026	1.41883	0.14621	0.21630	9.34459	1.00000
2001-02	0.06730	0.18047	1.94495	2.74309	1.56301	0.15232	0.22312	16.79242	1.00000

(a) Native title administration expenses from the CGC 2003 Update.

(b) Native title compensation expenses obtained from 2004 Review Rejoinder Submissions and State data returns.

Note: State level data has been removed for confidentiality reasons.

ATTACHMENT A

NATIVE TITLE CLAIM PROCESSES²

1. After receiving a native title application, the Native Title Tribunal notifies the Solicitor for the Northern Territory that a claim has been lodged over an area in the Northern Territory. This could be a claim either for compensation or for determination of native title. Importantly, claims to date have asserted full rights of all minerals in the Territory, control and absolute ownership of water resources, all fish, and exclusive occupation of land to the exclusion of all others.

2. Upon receiving copy documentation from the Native Title Tribunal, the following steps are put in place by the Attorney-General's Department:

- (i) a tenure search of the relevant area is requested from the Department of Lands, Planning and Environment;
- (ii) Ministerial correspondence is prepared advising the Chief Minister through the Attorney-General and any other relevant Ministers that the claim has been lodged, by whom and over what area; and
- (iii) to accompany this Ministerial, a Notice of Intention to Become a Party is prepared to be signed by the Chief Minister and forwarded to the Native Title Tribunal, thus ensuring that the Territory is party to the proceedings before the Tribunal, and, if applicable, before the Federal Court.

3. After tenure searches are received, they are scrutinised by the solicitor within the Attorney-General's Department who has carriage of the relevant matter. If necessary, further information is obtained from agencies with interests in the area (for instance, the Department of Primary Industry and Fisheries, Parks and Wildlife Commission, etc.) depending upon the nature of the claim and the area claimed; that is, rivers / seas / national parks, and so on.

4. Instructions are sought by way of Ministerials from the Chief Minister through the Attorney-General and any other relevant Ministers as to the stance of the Northern Territory with respect to the claim. These instructions are generally sought close to the time of the plenary conference, which is a conference convened by the Native Title Tribunal pursuant to Section 72 of the *Native Title Act 1993*. It is a conference at which the likelihood of settlement by way of mediation is canvassed and, if it appears that this is not an option, the Native Title Tribunal will then refer to the Federal Court.

² Northern Territory 1999 Review Submission, pp138-142.

5. Upon notification of referral of the matter to the Federal Court, the Solicitor for the Northern Territory will be advised by the Federal Court of the date of the first directions hearing. Draft Minutes of Orders will be prepared seeking to set an interlocutory timetable, including such matters as provision by the Applicants of further and better particulars; provision by all parties of documents setting out issues, facts and contentions; service of expert reports by all parties; and other matters. The Territory's representation at the first directions hearing is generally by counsel with an instructing solicitor.

6. Following the directions hearing, preparation for litigation of the proceedings will commence. A "team" of solicitors is required to prepare matters after referral to the Federal Court. At the very least, each claim requires a senior solicitor, junior solicitor, paralegal and secretary dedicated to full time preparation of that one claim.

7. Consultants will be retained in such fields as history, anthropology, archaeology, and linguistics as required. It is often necessary to retain consultants from interstate, given limited resources available in the Territory. The consultants will be contracted to prepare full reports for the Territory on issues such as non-Aboriginal use of claim areas, social history of areas, archaeological investigation of non-Aboriginal use of claim areas, or to prepare reviews of material supplied by the Applicants.

8. In addition to retention of experts, relevant files from government departments will be obtained either to provide discovery to other parties to the litigation or for the purpose of preparing fully for the litigation if these files have not previously been obtained at the tenure history stage.

9. Numerous documents will be prepared giving full details of issues, facts and contentions as perceived by the Territory in response to similar documents served by the Applicants. Requests for further and better particulars from the Applicants will be prepared if required and volumes of tenure and legislation documents will be prepared for assistance to the court and other parties.

10. Closer to the hearing date a timetable for site visits and hearing will be agreed, similar to site visit timetables used in the Aboriginal land claims process. Charter of boats and planes is often required for accessing remote areas such as Croker Island.

11. It is estimated that the hearing of some native title claims could proceed for in excess of three months. This is likely in claims such as the Alice Springs native title claim and the Keep River native title claim which is part of the much larger Mirriuwung Gajerrong number one claim which straddles the Western Australian border.

12. It is more likely that at least two current matters will be referred to the High Court before the end of 1997. The Aboriginal Land Division of the Attorney-Generals Department has already been involved in two High Court native title matters, Wik and Waanyi. These have required intense preparation, briefing of counsel interstate and junior counsel, and instructing solicitors attending Sydney and Canberra for conferences and hearings.