

CHAPTER 28

NATIVE TITLE AND LAND RIGHTS

WHAT IS THE NATIVE TITLE AND LAND RIGHTS ASSESSMENT?

- 1 This assessment recognises the additional costs incurred by the States due to the operation of:
 - the Commonwealth's *Native Title Act 1993*; and
 - the Commonwealth's Aboriginal Land Rights (Northern Territory) Act 1976.

Native title

- 2 The Native Title legislation was the result of a High Court decision on 3 June 1992, which recognised Indigenous people's traditional rights on their land as common law.
- 3 The expenses incurred in each State due to native title matters vary, depending on the number and type of native title claims made in the State and the compensation awarded in settling a claim. The *Native Title Act 1993* applies to all States.
- 4 Native title expenses include the costs of administering the legislation, compensating holders of native titles in the settlement of claims, and any on-going costs associated with joint management of land.

Land rights

- 5 The *Aboriginal Land Rights (Northern Territory) Act 1976* only applies in the Northern Territory and recognises the traditional connection and the ongoing cultural and social connection Indigenous Australians have to the land. It allows for areas of Crown Land (excluding land in towns) to be transferred to Indigenous Australians as a result of claims accepted by the Aboriginal Land Commissioner. The *Aboriginal Land Rights (Northern Territory) Act 1976* has resulted in 44 per cent of land in the Northern Territory being transferred as inalienable freehold land to Indigenous people.
- 6 The Northern Territory incurs costs in negotiating claims and preparing submissions to the Commissioner and in challenging claims through the Federal and High Courts. Compensation or other arrangements relating to the settlement of a claim can also lead to on-going costs.

Although there is a sunset clause in the legislation, it is expected that claims will proceed for many years.

Native title and land rights expenses

- 7 Native title and land rights expenses are small. They represent less than 1 per cent of total combined State expenses. However, they are concentrated heavily in the Northern Territory and Western Australia and potentially can have a material effect on State budgets. They are likely to continue to be incurred for some time as claims are resolved and on-going payments relating to their resolution made.
- 8 Table 28-1 shows the combined per capita expenses on native title and land rights for the period 2005-06 to 2008-09. It shows that the Northern Territory is the only State for which per capita expenses are large, although Western Australia spent more than \$10 per capita in all of the last four years. It also shows there is volatility from year to year in the expenses incurred in each State.

Table 28-1 Native title and land rights expenses, 2005-06 to 2008-09

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m
2005-06	3.2	4.4	14.2	21.2	8.1	0.0	0.0	12.8	63.9
2006-07	3.5	4.9	16.1	35.1	8.2	0.0	0.0	13.1	80.8
2007-08	4.0	4.6	16.4	39.5	7.6	0.0	0.0	19.0	91.1
2008-09	17.7	5.2	17.5	35.2	7.9	0.0	0.0	21.8	105.3
	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc	\$pc
2005-06	0.47	0.87	3.51	10.39	5.20	0.00	0.07	61.22	3.11
2006-07	0.51	0.94	3.88	16.83	5.23	0.00	0.00	61.73	3.87
2007-08	0.58	0.88	3.86	18.49	4.76	0.00	0.00	87.44	4.29
2008-09	2.51	0.98	4.02	15.98	4.89	0.00	0.07	98.12	4.86

Source: State data returns.

- 9 We were advised during our visit to the Northern Territory in 2008 that amendments to the *Native Title Act 1993* and the *Aboriginal Land Rights (Northern Territory) Act 1976* due to the Northern Territory emergency response (NTER) had the potential to increase native title and land rights costs as land tenure on Indigenous land is 'normalised'. Increases in expenses related to the negotiation of lease arrangements in the Northern Territory were reported in 2007-08 and 2008-09, perhaps reflecting these higher costs. However, the full impact of the NTER may be difficult to quantify because costs may be difficult to identify separately.

ASSESSMENT APPROACH

- 10 We consider the simplest and most reliable way of assessing what States need to spend because of Commonwealth native title and land rights legislation is to use data on what they

actually spend. We consider that State spending is due to Commonwealth legislation and States have adopted uniform policies in response to their individual circumstances, including:

- the size of their remote Indigenous populations;
- the number of Indigenous groups living traditional life styles who have retained a continuing connection to the land;
- the history of land development and economic activity in a State; and
- the location of claims and competing interests in the areas claimed.

- 11 These factors influence the likely number of claims made and their nature and complexity. Table 28-2 shows remote Indigenous people are larger proportions of the population in the Northern Territory, Western Australia and Queensland and these States and South Australia have larger proportions of Indigenous land. It also shows the States with the largest number of claims outstanding per capita are the Northern Territory, Western Australia and Queensland. These States and South Australia have the largest per capita expenses.

Table 28-2 Differences in State circumstances, 2008

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Remote Indigenous population (% of State population)	0.14	0.00	0.78	1.42	0.27	0.04	0.00	22.31	0.60
No. of active claimant applications (per '000 population)	0.005	0.003	0.032	0.045	0.014	0.000	0.003	0.749	0.022
Total Indigenous land as a proportion of total land (%)	0.50	0.00	3.20	14.40	20.70	0.20	0.00	44.80	16.00

Sources: ABS.

National Report: Native Title, National Native Title Tribunal March 2009.

Institute of Aboriginal and Torres Strait Islander Studies — Native Title Research Unit.

- 12 We considered freezing Native title and land rights expenses at their current level, or indexing them in some way, to prevent grant seeking behaviour. We have decided not to do so because the movements in State expenses over time and the unpredictability of future expenses can make a material difference to the assessment. We consider it simpler to obtain data annually and to carefully monitor the data States provide.
- 13 Queensland, Western Australia, the ACT and the Northern Territory supported the proposed approach. South Australia said it is difficult to be confident that no policy differences affect actual expenses, but was largely supportive. New South Wales, Victoria and Tasmania argued that there are policy influences on State expenses.
- 14 New South Wales and Victoria pointed to the number of claims settled by litigation in the Northern Territory as evidence of potential policy contamination. New South Wales provided evidence from *Native Title Amendment Bill 2009, Second Reading Speech 19 March 2009* that States expenses have been high because of a tendency to litigate rather than negotiate, and that tendency varied between States. New South Wales appeared to conclude implicitly that States

would be more inclined to litigate because the costs are covered by the Commission's assessments. New South Wales supported an equal per capita (EPC) assessment.

- 15 Tasmania suggested removing potential policy influences by assessing expenses using the Australian average cost of addressing a claim multiplied by the number of claims made. However, this approach cannot be used because past research has shown that the costs associated with native title claims are highly variable for different claim types and across States. Average expenses are higher in States where claims overlap with competing activities (predominantly mining and other development activities) and litigation or protracted negotiation is required. Such competing activities are concentrated in Queensland, Western Australia and the Northern Territory. Also, it is not clear average native title claim costs would be applicable to land right claims.
- 16 While State expenses may be affected by policy differences, we think it more likely such differences are due to differences in the type of claims. Further, it appears State approaches to native title are converging. Evidence from the Australian Institute of Aboriginal and Torres Strait Islander Studies — Native Title Research Unit¹ shows States are adopting a common approach to the resolution of claims and litigation is now occurring only when considered absolutely necessary. In 2005-06, 85 per cent of claims were settled through negotiation, up from 60 per cent of total determinations since 1994. We do not accept New South Wales' view that decisions to negotiate or litigate are made on the basis of Commission's assessments. We have concluded actual expenses are sufficiently policy neutral to be used in the assessment.

THE ASSESSMENT METHOD

Method

- 17 We have assessed native title and land rights disabilities using the actual per capita (APC) method. We consider State spending to be the result of Commonwealth policies and States have adopted common policies in response. Consequently, a State's actual expenses are used as the estimate of the amount it would spend under average policies.
- 18 The assessment for both land rights and native title expenses will be undertaken together in the Other expenses component of the categories in which the expenses are recorded.

Data

- 19 Data on native title and land rights expenses will be collected from States every year. These collections will be subject to the Commission's quality assurance protocol, whereby any large or unexpected changes in expenses will need to be explained by the State providing the data. This will ensure data of sufficient quality are provided and the assessment remains contemporaneous.

¹ Originally sourced from the National Native Title Tribunal.

Affected categories

- 20 Based on the information currently available, native title and land rights expenses will be included in the assessments in the following categories:
- Justice services;
 - Services to industry;
 - Services to communities;
 - Roads;
 - Welfare and housing; and
 - Other expenses.

WHAT IS THE IMPACT OF THE NATIVE TITLE AND LAND RIGHTS ASSESSMENT?

21 Table 28-3 shows the extent to which the native title and land rights assessment moves the recommended distribution of the GST away from an equal per capita distribution. The assessment is based on the average of data from the 2006-07 to 2008-09 financial years. It shows that Western Australia, South Australia and the Northern Territory are assessed as needing to spend more than the average per capita amount to cover the costs imposed by the Commonwealth legislation. It is expected these States would have above average expenses given their circumstances, such as the above average remote Indigenous populations, the characteristics of those populations, land development history, economic activity and claim numbers. Queensland is assessed as needing to spend more than the average on native title expenses, reflecting its above average Indigenous population and claims. However, this impact is offset by the below average need for land rights expenses. The other States, with their below average remote Indigenous populations, incur fewer than average claims.

Table 28-3 Impact on the GST distribution of the Native title and land rights assessment

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Redist
Dollars million	-22.6	-18.7	-2.0	28.6	0.9	-2.2	-1.5	17.6	47.1
Dollars per capita	-3.16	-3.43	-0.46	12.64	0.57	-4.36	-4.34	77.59	2.14

Note: The difference from an equal per capita assessment, derived using 2006-07 to 2008-09 assessed revenue and 2009-10 GST.

Source: Commission calculation.

22 Table 28-4 shows native title and land rights expenses by category for years 2005-06 to 2008-09.

Table 28-4 Native title and land rights expenses, 2005-06 to 2008-09

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
Justice services									
2005-06	0	2 402	36	5 829	4 005	0	23	2 598	14 893
2006-07	0	3 318	0	16 250	4 272	0	0	2 830	26 669
2007-08	0	2 033	4	7 720	4 260	0	0	2 660	16 675
2008-09	0	2 794	7	9 129	4 817	0	23	2 295	19 066
Services to industry									
2005-06	0	0	2 420	4 401	69	0	0	2 626	9 517
2006-07	21	0	2 863	5 336	27	0	0	1 837	10 083
2007-08	117	0	3 663	11 672	105	0	0	1 793	17 349
2008-09	13	0	2 799	0	19	0	0	1 619	4 450
Services to communities									
2005-06	0	0	48	363	0	0	0	2 240	2 652
2006-07	32	0	87	54	0	0	0	2 392	2 566
2007-08	6	0	20	0	0	0	0	2 779	2 805
2008-09	6	0	23	0	0	0	0	2 584	2 613
Roads									
2005-06	0	0	1 030	0	0	0	0	690	1 720
2006-07	0	0	1 220	0	0	0	0	706	1 926
2007-08	0	0	1 307	0	0	0	0	1 249	2 556
2008-09	55	0	1 512	0	0	0	0	973	2 540
Welfare and housing									
2005-06	0	0	26	0	0	0	0	0	26
2006-07	15	0	25	0	0	0	0	0	40
2007-08	24	0	27	0	0	0	0	4 485	4 536
2008-09	1	0	127	0	0	0	0	8 686	8 814
Other expenses									
2005-06	3 211	2 033	10 624	10 581	4 041	0	0	4 606	35 096
2006-07	3 418	1 548	11 866	13 447	3 939	0	0	5 344	39 561
2007-08	3 852	2 610	11 363	20 131	3 213	0	0	6 046	47 214
2008-09	17 577	2 445	13 021	26 099	3 041	0	0	5 594	67 777

Source: State data returns.

23 Table 28-5 shows the impact on GST distribution of the Native title and land rights assessment by category.

Table 28-5 Impact on the GST distribution of the Native title and land rights assessment, by category

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Redist
	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m
Justice services	-7.1	-2.6	-4.4	9.5	2.9	-0.5	-0.3	2.5	14.9
Services to industry	-3.5	-2.7	1.0	4.8	-0.8	-0.3	-0.2	1.7	7.5
Services to communities	-0.9	-0.7	-0.5	-0.3	-0.2	-0.1	0.0	2.7	2.7
Roads	-0.8	-0.6	0.9	-0.2	-0.2	-0.1	0.0	1.0	1.9
Welfare and housing	-1.5	-1.1	-0.9	-0.5	-0.3	-0.1	-0.1	4.4	4.4
Other expenses	-8.9	-11.0	1.8	15.3	-0.5	-1.2	-0.9	5.3	22.4
Total	-22.6	-18.7	-2.0	28.6	0.9	-2.2	-1.5	17.6	47.1

Source: Commission calculation.

24 Table 28-6 provides a summary of the main reasons for changes since the 2009 Update.

Table 28-6 Changes since the 2009 Update, Native title and land rights

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Redist
	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m
Shortening the review period	0.1	-0.4	-0.6	2.4	-0.3	0.0	0.0	-1.0	2.4
Method changes	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Data revisions	-1.4	-1.0	-0.8	1.8	-0.3	-0.1	-0.1	1.9	3.7
State circumstances	1.1	-2.7	-1.8	2.7	-1.2	-0.3	-0.2	2.5	6.2
Total	-0.2	-4.2	-3.3	6.8	-1.9	-0.4	-0.3	3.3	10.1

Source: Commission calculation.

25 The main changes in the GST distribution from the 2009 Update are due to changes in State circumstances.

- New South Wales, Western Australia and the Northern Territory have increased their expenses more than average between 2005-06 and 2008-09, resulting in increased GST requirements.

UPDATE PROCESS

26 We recommend data used in these assessments be updated annually to ensure the relativities remain contemporary and consistent with the circumstances of the States. Data on native title and land rights expenses should be sought from States.

SIMPLIFICATION

27 While the approach is the same as that adopted in the 2004 Review, we have combined these two assessments into one.

FURTHER INFORMATION

28 Background material in support of this assessment is published on the Commission's website. That material includes the following documents, released for comment in the development of this assessment, together with State submissions responding to those documents:

- Staff discussion paper *2007/05-S Native title and land rights for the 2010 Review*;
- Commission position paper *2009/02 Native title and land rights for the 2010 Review*;
and
- *2010 Review Draft Report*.