




Australian Government
Commonwealth Grants Commission

2025 Methodology Review

Native Title and land rights
consultation paper

June 2023

First Nations people should be aware that this paper contains the names of deceased persons.

| | |
|----------------------------|---|
| Paper issued | 13 June 2023 |
| Commission contact officer | Owen Stewart, 02 6218 5737, Owen.Stewart@cgc.gov.au |
| Submissions sought by | <p>13 October 2023</p> <p>Submissions should be placed in your private state or territory channel in CGC Engagement Teams, with a post notifying Katrina Baldock.</p> <p>Submissions should be in Word format and posted in the relevant state channel of the CGC engagement Team. Submissions more than 10 pages in length should include a summary section.</p> |
| Confidential material | <p>It is the Commission's normal practice to make state submissions available on its website under the CC BY licence, allowing free use of content by third parties.</p>  <p>Further information on the CC BY licence can be found on the Creative Commons website (http://creativecommons.org).</p> <p>Confidential material contained in submissions must be clearly identified or included in separate attachment/s, and details provided in the covering email. Identified confidential material will not be published on the Commission's website.</p> |

CONTENTS

| | |
|--|----|
| Overview of category | 4 |
| Native Title | 4 |
| Land rights | 4 |
| Current assessment method – 2020 Review | 4 |
| Data used in the assessment | 5 |
| Category and component expenses | 5 |
| GST distribution in the 2023 Update | 5 |
| What has changed since the 2020 Review? | 6 |
| Compensation expenditure has increased | 6 |
| The <i>Native Title Act</i> has been amended | 6 |
| States have endorsed a national framework for compensation agreement making | 6 |
| State and Commonwealth governments have advanced truth-telling and treaty processes | 6 |
| Implications for assessment | 7 |
| Are state policies influencing Native Title spending such that an APC assessment is no longer appropriate? | 7 |
| Will treaty-negotiation mechanisms lead to divergence in the way states negotiate Native Title and land rights claims? | 10 |
| Proposed assessment | 11 |
| Differences from the 2020 Review approach | 11 |
| Proposed assessment structure | 11 |
| Consultation | 12 |

Overview of category¹

- 11 The Native Title and land rights assessment recognises the costs incurred by states and territories (states) related to:
- the *Native Title Act 1993* (Cth)
 - the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
 - other related state legislation.

Native Title

- 12 Native Title administrative expenses include the costs of negotiating claims, processing applications, including those concerning future acts,² and employing legal and technical experts to facilitate these processes.
- 13 Compensation expenditure covers the ongoing costs associated with the outcomes of the claims and application processes. Costs include direct financial compensation, housing payments and joint land management projects. These arrangements are linked to states' impact on Native Title rights and interests. For instance, states are required to pay compensation if they were responsible for any extinguishment, diminution or impairment of Native Title rights and interests after the commencement of the *Racial Discrimination Act 1975*.
- 14 The expenditure incurred in each state related to Native Title matters varies, depending on the number and type of Native Title and compensation claims made in the state as well as the number and nature of future acts processed.

Land rights

- 15 Land rights expenses include the costs of negotiating claims, preparing submissions and challenging claims through the courts. There are also ongoing costs associated with securing interests in land under land rights acts, administering legislation and the joint management of land.

Current assessment method – 2020 Review

- 16 Native Title and land rights are assessed on an actual per capita (APC) basis using state data provided annually. The Commission considers states are following the general frameworks for implementing Native Title and land rights legislation, which were established or informed by the Commonwealth, and have adapted them to fit

¹ Native Title and land rights expenditure is assessed as a component of the other expenses category.

² Future acts may include exploration, mining, prospecting, building public infrastructure, tourist resorts, water licenses, some legislative changes and some lease renewals.

their own circumstances. While some states expressed concerns about possible state policy influence on Native Title and land right spending, the Commission was satisfied in the 2020 Review that this was not the case. Therefore, in the current assessment method, what states spend on Native Title and land rights is considered to reflect their actual spending needs.

Data used in the assessment

17 State-provided data inform the assessment of Native Title and land rights.

Category and component expenses

18 Native Title and land rights is assessed as a single component of the other expenses category.

19 Total expenditure on Native Title and land rights is a small proportion of total state expenditure (Table 1).

Table 1 Native Title and land rights expenditure, 2018–19 to 2021–22

| | 2018-19 | 2019-20 | 2020-21 | 2021-22 |
|--|---------|---------|---------|---------|
| Net Native Title and land rights expenditure (\$m) | 185 | 198 | 312 | 306 |
| Proportion of total expenditure (%) | 0.1 | 0.1 | 0.1 | 0.1 |

Note: This net expenditure includes recurrent and investment expenses.

Source: Commission calculation, 2023 Update.

20 Table 2 shows the structure of the Native Title and land rights assessment.

Table 2 Structure of the Native Title and land rights assessment, 2021–22

| Component | Driver | Influence measured by driver |
|------------------------------|-------------------|------------------------------|
| Native Title and land rights | Actual per capita | Spending by each state |

Source: Commission calculation, 2023 Update.

GST distribution in the 2023 Update

21 The Native Title and land rights assessment distributed \$144 million (\$5 per capita) away from an equal per capita (EPC) distribution in the 2023 Update.

22 Further detail on the underlying conceptual case for the assessment method is explained in Volume 2, Chapter 29 – Other disabilities in the [Report on GST Revenue Sharing Relativities, 2020 Review](#) and [New Issues](#) in the 2022 Update.

What has changed since the 2020 Review?

Compensation expenditure has increased

- 23 Native Title expenditure more than doubled from \$119 million to \$252 million between 2018–19 and 2021–22. Commission analysis suggests that compensation expenditure, mainly in Western Australia, has driven this increase.
- 24 Western Australia has spent over \$70 million on compensation expenditure on an annual basis for the South West Native Title Settlement and Yamatji Nations Indigenous Land Use Agreement which began in 2020–21. Western Australia forecasts this expenditure to increase over the next decade.³

The *Native Title Act* has been amended

- 25 The *Native Title Legislation Amendment Act 2021* has sought to:
- give greater flexibility to Native Title claim groups to set their internal processes while increasing transparency and accountability
 - streamline and improve the claims process
 - allow historical extinguishment over areas of national and state parks to be disregarded where governments and claim groups agree.⁴

States have endorsed a national framework for compensation agreement making

- 26 In October 2021 all state Native Title ministers endorsed National Guiding Principles for Native Title Compensation Agreement Making. The principles were developed in response to the emerging significance of the area which is influenced by legal and policy issues. They represent a collaborative effort of Commonwealth and state governments that seeks to ensure Native Title holders receive fair compensation through negotiations conducted in good faith and in a timely manner.

State and Commonwealth governments have advanced truth-telling and treaty processes

- 27 In 2022 Victoria established a Treaty Authority and Treaty Negotiation Framework that will facilitate treaty-making between First Nations peoples and the government in preparation for a state-wide treaty. The Treaty Authority may oversee negotiations that impact Native Title and land rights.

³ Government of Western Australia, [2020–21 Western Australian Native Title Settlements](#), 2021, p 2.

⁴ Attorney-General's Department, '[Key changes in the Native Title Act](#)', accessed 22 March 2023.

- 28 Most other states are also in the process of investigating or establishing mechanisms and institutions that would allow for a respectful treaty-negotiation process to take place. Western Australia has no formal plans for a state-wide treaty, but some of its individual settlements have treaty-like qualities.
- 29 South Australia also passed a bill in March 2023 establishing a Voice to Parliament for First Nations peoples. The South Australian bill specifies that the Voice does not limit the functions of other First Nations persons or bodies.⁵ The proposed National Aboriginal and Torres Strait Islander Voice to Parliament, as currently defined, is also not designed to replace or interfere with existing structures. Therefore, it's unlikely that the establishment of a Voice body would influence Native Title and land rights arrangements directly. However, it may lead to or facilitate treaty-negotiations.

Implications for assessment

- 30 The Commission has identified 2 issues for consideration.
- Are state policies influencing Native Title spending such that an APC assessment is no longer appropriate?
 - Will treaty-negotiation mechanisms lead to divergence in the way states administer and negotiate Native Title and land rights claims?

Are state policies influencing Native Title spending such that an APC assessment is no longer appropriate?

- 31 There is limited scope for state policy to influence the administrative and legal costs of determining Native Title applications. States respond to claims for Native Title applications in a manner consistent with the national legislation. Therefore, any costs associated with the administration of claims reflect state needs. Subject to state views, the Commission considers that an APC assessment of administrative expenses remains appropriate.
- 32 However, there may be more scope for states to influence compensation expenditure. States can choose to settle compensation claims through different mechanisms and provide different forms of compensation that could influence the level of expenditure and have implications for future spending needs. Accordingly, the Commission is considering the appropriateness of an APC treatment for this expenditure.

⁵ Attorney-General's Department (SA), [South Australia's First Nations Voice to Parliament](#), accessed 17 May 2023.

Native Title compensation expenditure and an APC assessment method

- 33 Compensation expenditure can take the form of direct financial compensation along with alternative forms such as:
- housing payments
 - capital works projects
 - joint land management projects
 - heritage projects, or
 - a combination of the above.
- 34 In addition, the process of settling compensation can be the result of formal negotiation or litigation. This may take place as part of negotiating a Native Title claim or at a later time. The compensation expenditure incurred from each process can vary significantly.
- 35 While differences may exist between states in how they settle Native Title compensation claims and what forms of compensation they offer, states are required to consider claims for Native Title compensation in a manner consistent with Principle 3 of the National Guiding Principles for Native Title Compensation Agreement Making. This commits states to ensure ‘there is consistency within and across jurisdictions and with national best practice in approaches to assessing, valuing and resolving native title compensation’.⁶
- 36 In the absence of evidence to the contrary, it is the Commission’s judgement that states are broadly following the national guidelines and spending reflects states’ needs. Any difference in the size and scope of compensation expenditure is largely the result of states responding to individual circumstances and the unique nature of each claim, including the:
- number and location of extinguishment and impairment acts
 - nature of Native Title rights held by the claim group
 - value of land
 - cultural damage caused by acts.
- 37 Identifying a driver that captures these influences would prove challenging without additional data.
- 38 Any assessment method would also need to account for the volatility of compensation expenditure which is in part affected by the form of compensation offered. The unique nature of each claim would therefore undermine possible alternative measures of needs.

⁶ Attorney-General’s Department, [National Guiding Principles for Native Title Compensation Agreement Making](#), 2021.

- 39 There are also issues associated with identifying the level of state expenditure on compensation. For the 2023 Update, states were asked to provide data that separated Native Title administrative expenses from compensation expenditure. However, some states were not able to supply these disaggregated data.
- 40 For these reasons, the Commission’s preliminary view is that that an APC assessment remains the most appropriate method for assessing spending needs for Native Title related administrative and compensation expenditure.

Consultation question

Q1. Do states agree that the APC assessment of Native Title expenditure remains appropriate?

The evolving landscape of Native Title compensation

- 41 There are several legal and legislative changes that could occur independent of state policy influences and alter the Native Title compensation landscape in the coming years.
- 42 For example, there has been an increase in compensation claims after the High Court’s ruling in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (the *Timber Creek Compensation Case*). In the 4 years following the outcome, 16 Native Title compensation claims were lodged compared with 3 in the preceding 4 years. This represents over a quarter of all compensation claims made since the *Native Title Act 1993* was introduced.
- 43 The *Galarrwuy Yunupingu on behalf of the Gumatj Clan or Estate Group (Gove Compensation Claim) v Commonwealth of Australia & ORS* case may also set a precedent for compensation to be claimed for acts that predate the *Racial Discrimination Act 1975*.⁷ If acts prior to 1975 were to become compensable, this would greatly increase Native Title costs for most states but not for those which did not have self-government before this time.
- 44 At the same time the Uluru Statement from the Heart declares that First Nations peoples’ possession of land under their laws and customs has never been extinguished.⁸ Several pre-treaty agreements at the state level share this idea, but state treaties will need to operate in accordance with the Commonwealth legislation, as noted by the Northern Territory Treaty Commission.⁹ Only legislative changes at a national level would affect state compensation expenditure. Should Commonwealth

⁷ C Lawrence, L Flynn and I Harris, ‘[Native title compensation: Not much to see but plenty happening below the surface?](#)’, Ashurst, 11 July 2022, accessed 10 March 2023.

⁸ The Uluru Dialogue, ‘[The Uluru Statement from the Heart](#)’, 2017, accessed 10 March 2023.

⁹ Northern Territory Treaty Commission, [Final Report](#), 2022, pp 65–68.

legislation change to reflect that Native Title rights cannot be extinguished, compensation expenditure may be reduced.¹⁰

- 45 As more compensation claims are settled and the implications of the abovementioned changes are known, the Commission will monitor expenditure and the continued appropriateness of an APC assessment.
- 46 The increasing focus on compensation expenditure may promote the production of datasets that could be used for assessing this expenditure in future reviews. Indeed, the Australian Institute of Aboriginal and Torres Strait Islander Studies, in conjunction with the National Native Title Council, are currently undertaking a project to produce a dataset that aims to ensure First Nations peoples receive compensation on just terms.¹¹

Will treaty-negotiation mechanisms lead to divergence in the way states negotiate Native Title and land rights claims?

- 47 In October 2022, Victoria established a Treaty Authority and Treaty Negotiation Framework under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* that will now enable treaty-negotiations between First Nations peoples and the Victorian Government.
- 48 Under this framework, Native Title and land rights can be the subject of treaty-negotiations.¹² What effect this has on Native Title and land rights expenditure is difficult to assess at this stage, especially since these treaty-negotiations are not aimed specifically at settling Native Title and land rights claims. Costs might be reduced if these sorts of negotiations result in increased efficiency because of the streamlined process. Alternatively, the inclusion of more parties to negotiations may result in additional expenses if the increase in participants requires more financial resources to facilitate.
- 49 Other states are at various stages of establishing the necessary institutions and framework to enable treaty-negotiations. The Commission notes that other states are generally following the same pattern and structures as Victoria. For instance, Queensland is in the process of establishing a proposed First Nations Treaty Institute that will design the treaty negotiation framework.¹³ However, the final design of states' treaty-negotiation mechanisms and the effects they have on Native Title and land rights expenses can only be accurately assessed once they are operating.

¹⁰ Compensation is payable for the extinguishment or impairment of Native Title rights. If Native Title rights cannot be extinguished, Native Title holders would not receive compensation for extinguishment.

¹¹ Australian Institute of Aboriginal and Torres Strait Islander Studies, '[Alternative settlements and modelling loss and reparation for compensation](#)', accessed 10 March 2023.

¹² First Peoples' Assembly of Victoria and the State of Victoria, *Treaty Negotiation Framework*, 2022, p 40.

¹³ Community Support and Services Committee (Qld), *Path to Treaty Bill 2023*, 2023, pp 26–27.

- 50 If the treaty processes set up by states lead to a divergence in the way states administer and negotiate claims, this could challenge the appropriateness of an APC assessment.
- 51 However, should the Commonwealth legislate on the mechanisms states use to negotiate claims, state negotiations can be expected to be similar. States would need to conduct negotiations in a manner consistent with federal legislation, which would likely produce uniformity.
- 52 Considering Victoria has only recently established treaty-negotiations and other states are in the process of doing the same, it is difficult to determine the implications for the assessment of Native Title and land rights expenditure. The Commission’s preliminary view is that recent developments in treaty-negotiation mechanisms do not warrant a move away from an APC assessment, but the Commission will monitor the impact of treaty-negotiations and their implications for the assessment.

Consultation question

Q2. Do states anticipate that treaty processes will affect how they negotiate Native Title and land rights claims?

Proposed assessment

Differences from the 2020 Review approach

- 53 Subject to state views, the Commission proposes no changes to the assessment of Native Title and land rights expenditure.

Proposed assessment structure

- 54 Subject to state views, Table 3 shows the proposed structure of the Native Title and land rights assessment.

Table 3 Proposed assessment structure for Native Title and land rights

| Component | Driver | Influence measured by driver | Change since 2020 Review |
|------------------------------|-------------------|------------------------------|--------------------------|
| Native Title and land rights | Actual per capita | Spending by each state | No |

Source: Commission calculation, 2023 Update.

Consultation

55 The Commission welcomes state views on the consultation questions identified in this paper (outlined below) and the proposed assessment. State submissions should accord with the 2025 Review framework. States are welcome to raise other relevant issues with the Commission.

- Q1. Do states agree that the APC assessment of Native Title expenditure remains appropriate?
- Q2. Do states anticipate that treaty processes will affect how they negotiate Native Title and land rights claims?