

# Native Title and land rights

## Overview

- 1 On 13 June 2023, the Commission issued a [consultation paper](#) on the Native Title and land rights assessment. The Commission considered changes since the 2020 Review and their implications for the assessment method.
- 2 The Commission proposed to retain the 2020 Review assessment method.
- 3 A summary of state and territory (state) responses to each consultation question is included below, as well as the Commission’s draft position and the draft 2025 Review assessment method.
- 4 State submissions can be viewed [here](#).

## Consultation questions

### Q1. Do states agree that the actual per capita assessment of Native Title expenditure remains appropriate?

#### State views

- 5 Most states agreed that the actual per capita assessment of Native Title expenditure remains appropriate, given their obligations arise under Commonwealth legislation. Moreover, states indicated that as they are operating within the frameworks informed or legislated by the *Native Title Act 1993* (Cth), there is a high degree of uniformity between state policies.
- 6 In discussing uniformity between jurisdictions, some states noted the impact of the National Guiding Principles for Native Title Compensation, which call for ‘consistency within and across jurisdictions and with national best practice in approaches to assessing, valuing and resolving Native Title compensation’.<sup>1</sup> This supports retaining the actual per capita assessment.
- 7 Victoria submitted that an actual per capita assessment is not appropriate as state spending is policy influenced, suggesting an equal per capita assessment instead. It said that, in states where alternative mechanisms are available, some parties may pursue Native Title claims through state legislation, which introduces policy influence into the assessment. It said that its own *Traditional Owner Settlement*

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<sup>1</sup> National Indigenous Australians Agency (NIAA), [National Guiding Principles for Native Title Compensation Agreement Making](#), NIAA, Australian Government, 2021, accessed 23 October 2023.

*Act 2010* (Vic) demonstrates the scope for difference between states in responding to Native Title claims, allowing for an alternative system for resolving claims, with an emphasis on mediation and negotiation.

- 8 Victoria also raised the High Court decision in *Northern Territory v Griffiths* [2019] HCA 7 (Timber Creek case). It said that the High Court’s ruling may change the way in which compensation for Native Title rights is calculated, because it does not set out specific guidelines for the compensation of spiritual or cultural loss, leaving the calculation of this compensation to depend upon case-specific facts and state-based legislation. It said that this also introduces policy influence into the assessment.
- 9 Conversely, Queensland submitted that while the Timber Creek case may have changed how compensation is calculated under the Native Title Act, compensation for spiritual and cultural loss will still be assessed under the existing Commonwealth legislation and national guiding principles. This means policy uniformity between jurisdictions remains. Moreover, Queensland considered that any differences in compensation are the result of circumstances specific to each claim, not state policy differences.
- 10 The Northern Territory said that the GST impacts of the Native Title and land rights assessment should be monitored by the Commission. If the impact increases significantly, the assessment should be reviewed. The Northern Territory also noted the potential for future changes in the type or scale of Native Title claims as litigation continues, but until these matters are resolved, discussions on any changes in quantum or scope of compensation are speculative.

## Commission response

- 11 Most states confirmed the Commission’s preliminary view that states continue to act in broadly the same way when addressing their obligations under the Native Title Act. The Commission also notes the National Guiding Principles for Native Title Compensation and the Native Title Act ensure that there is a high degree of uniformity between jurisdictions.
- 12 The Commission notes that, while Victoria’s Traditional Owner Settlement Act may provide an alternate pathway for claim resolutions in Victoria, the act draws heavily on the Commonwealth’s Native Title Act, relying on its definitions of several key terms in section 3, and for general provisions for settlement agreements in section 10.<sup>2</sup> Given Victoria’s Traditional Owner Settlement Act is informed by the Native Title Act, the Commission considers that Victoria is broadly following the national framework for settling Native Title claims.

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<sup>2</sup> Traditional Owner Settlement Act 2010 (Vic) s 3, s 10.

- 13 The Commission also notes that the Traditional Owner Settlement Act places emphasis on negotiation and mediation in the same way the National Guiding Principles do.<sup>3</sup> Therefore, the Commission considers that this approach is not unique to the Traditional Owner Settlement Act and is reflective of the common approach used by all states.
- 14 The Commission does not consider that the Timber Creek case has introduced policy influence into the assessment. The Commission considers that differences in compensation for cultural or spiritual loss claimable under the Native Title Act will relate to the differences in individual circumstances of claims, not state policy differences, and will still be settled according to the national guiding principles.
- 15 While the Commission acknowledges that states may choose to settle compensation claims through different mechanisms and provide different forms of compensation, it considers that the costs associated with settling Native Title claims continue to reflect state need, and that inconsistencies in quantum or volume of claims are due to historical circumstances outside state control. The actual per capita treatment of this spending reflects the Commission's judgement that costs are driven predominantly by state circumstances rather than state policy. As such, the Commission does not consider an equal per capita assessment would provide a better equalisation outcome.

### **Commission draft position**

- 16 The Commission considers that an actual per capita assessment of Native Title expenditure remains appropriate. The Commission will continue to monitor approaches to Native Title compensation and associated expenditure patterns.

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

### **State views**

- 17 States expressed different views on whether they anticipate Treaty processes to affect the negotiation of Native Title and land rights claims.
- 18 Most states submitted that, while they believe Treaty processes may eventually influence how they negotiate Native Title and land rights claims, it is too early to say how this will materialise. These states suggested that the Commission monitor the development of Treaty processes throughout the next review cycle.
- 19 Victoria considered it likely that Treaty processes will impact Native Title and land rights claims.

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<sup>3</sup> National Indigenous Australians Agency, [National Guiding Principles for Native Title Compensation Agreement Making](#).

- 20 Tasmania and South Australia said that any influence Treaties have on Native Title claims would be policy influenced.
- 21 Western Australia noted that it does not currently plan to pursue formalised, statewide Treaty negotiations, and as such it does not anticipate Treaty processes will affect its negotiation of Native Title and land rights claims.
- 22 The ACT also does not anticipate Treaty processes affecting how it negotiates Native Title claims.

### **Commission response**

- 23 The Commission agrees with the view of most states that the effects of Treaty mechanisms on the negotiation of Native Title and land rights claims can only be assessed once Treaties are operational.

### **Commission draft position**

- 24 The Commission considers recent developments in Treaty negotiation mechanisms do not warrant a move away from an actual per capita assessment at this time. It will monitor the impact of Treaty negotiations on Native Title and land rights expenditure in updates.

## **Other issues raised by states**

### **Should Treaty-related costs be included in the Native Title and land rights assessment?**

- 25 Victoria said that some of its spending on Treaty processes should be assessed under the actual per capita Native Title and land rights assessment.
- 26 Victoria said that other states may be incurring expenses through Native Title and land rights settlements similar to those incurred through its Treaty processes, for example, costs relating to the provision of some services to First Nations communities. As Victoria is relatively advanced in its Treaty development compared with other states, and because it classifies these costs as Treaty-related expenditure, its spending on these outcomes is not captured by the assessment.
- 27 The Northern Territory submitted that if Treaty-related costs were to be assessed, the Commission should assess them separately to Native Title and land rights expenditure. It said that assessing costs associated with the negotiation, implementation or settlement of claims arising from Treaty processes would introduce policy influence into the assessment, as there is currently no national framework for this process.
- 28 Queensland submitted that if Treaty costs were assessed in the Native Title and land rights assessment, the actual per capita assessment of expenditure should be

reviewed. Tasmania and South Australia also submitted that it is likely that Treaty-related costs would be policy influenced.

### Commission response

- 29 While the Commission notes that some spending incurred under Treaty processes may be for services similar to those provided for in Native Title settlements, they fall outside the scope of the assessment.
- 30 The Commission agrees with the point raised by several states that including Treaty-related costs would introduce policy influence into the assessment. There is currently no nationally consistent approach to developing or implementing Treaty processes, and therefore an actual per capita assessment of Treaty-related expenses would not be appropriate.
- 31 Moreover, the Commission considers Treaty-related costs as separate from the spending captured by the Native Title and land rights assessment, given the significant differences in function, scope and purpose between Native Title or land rights legislation and Treaties. As more states progress further with Treaty processes, and Treaty-related expenses increase, appropriate drivers of spending may be examined separate to Native Title and land rights costs.

### Commission draft position

- 32 The Commission proposes not to include Treaty-related costs in the Native Title and land rights assessment.

## Draft 2025 Review assessment method

- 33 Following consideration of state views, the Commission proposes to retain the 2020 Review assessment method.
- 34 Table 1 shows the proposed structure of the 2025 Review Native Title and land rights assessment.

**Table 1 Proposed structure of the Native Title and land rights assessment**

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

## Indicative distribution impacts

- 35 No method changes are proposed for this assessment.