

# Native Title and land rights

## Review outcomes

- No changes were made to the assessment method for Native Title and land rights.
- The actual per capita treatment of Native Title and land rights expenditure will be retained on the basis that states continue to have consistent obligations under Commonwealth legislation and costs are driven predominantly by state circumstances rather than state policy.
- Treaty-related expenses will not be included in the assessment because they are different in nature to Native Title and land rights expenditure and could be policy influenced.
- The Commission will monitor Native Title compensation expenditure for significant changes, and for the impact of Treaty processes on the negotiation of Native Title and land right claims.
- Compensation in the form of a revaluation of state government land assets will not be included in the assessment. This is because revaluations of land assets are out of scope of the fiscal equalisation process.

## Introduction

- 1 On 6 July 2024, the Commission published the [Draft Report](#) for the 2025 Methodology Review.
- 2 The Draft Report included a detailed analysis and response to issues raised by states and territories (states) in their [submissions](#) on the Commission's [consultation paper](#).
- 3 State submissions on the Draft Report can be viewed [here](#).
- 4 This chapter includes:
  - an overview of the issues considered throughout the review
  - the Commission's response and decision on each issue.
- 5 A description of the assessment method can be found in the other expenses chapter of the *Commission's Assessment Methodology*.

## Issues considered

### Actual per capita approach

- 6 An actual per capita assessment method is appropriate when states' policies have negligible influence on expenditure. Given increases in state expenditure on

Native Title matters, particularly compensation, the Commission re-examined the appropriateness of the method.

- 7 The key consideration was whether states followed a common policy approach, with differences in expenditure due to circumstances beyond their control. The existence of a national framework is highly relevant.

## State views

- 8 Most states said that the actual per capita assessment remained appropriate, given their consistent obligations under Commonwealth legislation. Some also 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>
- 9 Victoria said Native Title expenditure was policy influenced and an actual per capita assessment was not appropriate. It cited its own *Traditional Owner Settlement Act 2010* (Vic) as evidence of state policy influence on Native Title administration. Victoria also said the Timber Creek case had introduced policy influence into Native Title compensation. Conversely, Queensland said that the Timber Creek case established a structure and formula for calculating Native Title compensation in certain cases.

## Commission response

- 10 Most states continue to act in broadly the same way when addressing their obligations under the *Native Title Act 1993*. Furthermore, the National Guiding Principles for Native Title Compensation and the Native Title Act ensure there is a high degree of uniformity between jurisdictions. This includes Native Title matters settled under Victoria’s *Traditional Owner Settlement Act*.
- 11 The Commission does not agree that the Timber Creek case introduced policy influence into the assessment. While states may choose to settle compensation claims through different mechanisms and provide different forms of compensation, the costs associated with settling Native Title claims continue to reflect state need. Inconsistencies in the size or volume of claims are due to historical circumstances outside state control.
- 12 The actual per capita treatment of Native Title expenditure 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 fiscal equalisation outcome.

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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.

## **Commission decision**

- 13 The Commission will retain the actual per capita assessment and continue to monitor whether state policies have a significant influence on Native Title compensation expenditure.

## **Impact of Treaty processes**

- 14 Some states have established, or are in the process of establishing, Treaty processes. This raises the question of whether they affect the negotiation of Native Title and land rights claims. The Commission explored whether the operation of Treaty processes leads to a divergence in how states finalise claims. Divergence could affect the appropriateness of the actual per capita assessment method.

## **State views**

- 15 Most states said it was too early to say whether the negotiation of Native Title and land rights claims would be affected. They suggested the Commission monitor the development of Treaty processes throughout the next review cycle.
- 16 There were mixed views on whether Treaty processes would impact Native Title claims. Most states that said Treaty processes would affect Native Title claims also suggested that any impact on expenditure would be policy influenced.

## **Commission response**

- 17 The effects of Treaty processes on the negotiation of Native Title and land rights claims will only be able to be assessed once Treaties are operational. The Commission considers that recent developments in Treaty processes do not warrant a move away from an actual per capita assessment at this time.

## **Commission decision**

- 18 The Commission will monitor the impact of Treaty negotiations on Native Title and land rights expenditure.

## **Treaty-related expenses**

- 19 In response to state comments, the Commission considered whether Treaty-related expenses should be included in the Native Title and land rights assessment.

## **State views**

- 20 Victoria said its Treaty processes aligned with both the Native Title Act and land rights legislation. It suggested its Treaty expenses would be most appropriately assessed alongside Native Title and land rights. Other states noted the potential for Treaty-related expenses to be policy influenced.
- 21 Victoria was concerned Treaty expenses may be allocated under a category with a differential assessment. If these expenses were not included in the assessment, it

requested the Commission confirm its Treaty-related expenses are being assessed on an equal per capita basis or use its data returns to ensure that these costs are assessed in this manner.

### **Commission response**

- 22 Given the differences in function, scope and purpose between Native Title and land rights legislation and Treaties, the Commission considers that Treaty-related expenses are separate from expenditure assessed in the Native Title and land rights assessment.<sup>2</sup>
- 23 Including Treaty-related expenses would introduce policy influence into the assessment. With no nationally consistent approach to developing or implementing Treaty processes, the Commission considers that an actual per capita assessment of Treaty-related expenses would not be appropriate.
- 24 The Commission acknowledges that this is an emerging area of state spending that is not explicitly recognised in 2020 Review methodology. However, data provided by Victoria for the 2024 Update indicate its Treaty-related expenses would have to increase substantially for a differential assessment to become material. The Commission notes that other states have Treaty-related expenses, and these also appear to be relatively small.
- 25 It may be that the expenses are allocated across several different categories. However, given the relative size of these expenses, it is unlikely that an adjustment would meet the \$12 per capita materiality threshold for data adjustments.
- 26 As Treaty processes progress, and Treaty-related expenses increase, the Commission will work with states to determine whether comparable data are available to inform analysis in the next review.

### **Commission decision**

- 27 The Commission will not include Treaty-related expenses in the Native Title and land rights assessment. The Commission will work with states to determine whether comparable data on Treaty-related expenses are available to inform analysis in the next review.

### **Land rights compensation**

- 28 In response to state comments, the Commission considered whether compensation in the form of the revaluation of state land assets should be included in the assessment.

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<sup>2</sup> The Commission understands that Native Title and land rights are linked to land (and marine) tenure and associated rights (these relate to Articles 25–28 of the United Nations Declaration on the Rights of Indigenous Peoples), whereas Treaties seek to achieve broader goals including self-determination (Articles 3–5) and ongoing relationship frameworks (for example, Article 15). United Nations Human Rights Council, [United Nations Declaration on the Rights of Indigenous Peoples](#), United Nations, 2007.

## State views

- 29 New South Wales noted that land rights claims affect the fair value of land that is subject to claims. It considered this reduction in value to be a form of compensation. New South Wales said that the Commission is not recognising this change in the asset's revaluation reserve as a cost incurred by the state.

## Commission response

- 30 The Commission acknowledges that Native Title and land rights processes affect the value of state land assets. However, the Commission considers these revaluations to be out of scope of the fiscal equalisation process. Only land that is bought or sold affects states' fiscal capacities and is captured in the Commission's adjusted budget.
- 31 The Commission does not consider it appropriate to include imputed compensation expenditure representing a reduction in land values in the assessment, especially since there are differences between states in how they value and account for land assets.

## Commission decision

- 32 The Commission will not assess the revaluation of land assets within the Native Title and land rights assessment.

## GST impacts of method changes

- 33 There are no method changes to this assessment.