Commonwealth Grants Commission 2022 Update

2020-21 Western Australian Native Title Settlements

KEY POINTS

- In 2020-21, Western Australia commenced compensation under two large native title settlements – the South West Native Title Agreement (SWNTA), which has estimated compensation of $0.8 billion over 12 years, and the Yamatji Nation Indigenous Land Use Agreement (YNILUA), which has estimated compensation of $0.5 billion over 15 years.
- WA Treasury will record liabilities and up-front expenses for components of these settlements in line with accounting standards. The Australian Bureau of Statistics (ABS) advises that it will record these payments as expenses when they occur. This raises the question of whether the CGC should assess these payments fully in the 2020-21 assessment year, or over time.
- Although no other native title settlements of a comparable size exist in Australia, we consider these settlements to be consistent with policies applied by all States, as driven by the Commonwealth native title legislation. Hence, they should be assessed actual per capita.
- Native title compensation depends on expert opinion across a range of issues. The Commonwealth and States have been working collaboratively to settle national principles for native title compensation since the *Timber Creek* ruling, and the SWNTA and YNILUA settlements align with those principles.
- All States seek to settle outcomes without court direction. Western Australia would have been exposed to far larger compensation claims had it not made these settlements.

In 2020-21, Western Australia commenced compensation under two large native title settlements – the SWNTA and the YNILUA. We discussed these with the relevant Commonwealth Grants Commission (CGC) staff on 9 June 2021, and agreed to provide this document describing the agreements and their comparability to other native title settlements in Australia.

Description of the SWNTA and YNILUA

The SWNTA is the largest and most comprehensive agreement to settle Aboriginal interests over land in Australia. The settlement involves six Noongar Native Title Agreement Groups and covers 200,000 km^2 of land. Benefits detailed under the agreement are valued at $789 million (before indexation), which will be provided over 12 years. These comprise $720 million to the Noongar Boodja Trust, $10 million to refurbish and maintain housing properties, $47 million into a land fund, $5 million for a Noongar Cultural Centre, and $6.5 million for office accommodation. In addition, there are transfers of up to 3,200 km^2 of land that has yet to be valued.

The YNILUA covers 48,000 km^2 of land and waters in the Geraldton area. Benefits detailed under the agreement are valued at $393 million, which will be provided over 15 years. These comprise $325 million in cash benefits (before indexation) and $68 million in economic development initiatives and assets. In addition, there is the transfer of 1,480 km^2 of land that has yet to be valued.

CGC assessment of SWNTA and YNILUA payments

Accounting treatment

A significant feature of these settlements is that the compensation will be provided over time (as per the table below). Based on accounting advice, WA Treasury will expense the majority of these settlement costs up front in 2020-21 in line with accounting standards. An initial estimate used in the State's March 2021 *Quarterly Financial Results Report* is expected to be reflected in the 2021-22 Budget which will include an indicative $1.3 billion expense in 2020-21. The magnitude of this up-front is subject to further refinement that will be reflected in the 2020-21 *Annual Report on State Finances* (to be released by 28 September 2021).

The ABS has advised WA Treasury that for Government Statistics Purposes, it will record these payments on an emerging cost basis (i.e. the timing of expenses will match the payments).

This raises an issue for the CGC. Should it assess the payments under these settlements fully in the 2020-21 assessment year, or should it assess them over time as the payments are made? WA Treasury can see arguments for both approaches, but would like the CGC staff to provide analysis of this in the new issues discussion paper, before we form a definitive view. Whichever approach the CGC ultimately uses, WA Treasury and the CGC staff will need to work together to ensure that the CGC's data consistently reflect that approach over time.

SWNTA and YNILUA Estimated Compensation [a]

	SWNTA $m	YNILUA $m	Total $m
2020-21	60	15	75
2021-22	79	21	100
2022-23	70	16	85
2023-24	71	20	90
2024-25	71	22	94
2025-26	71	33	105
2026-27	71	36	107
2027-28	70	36	106
2028-29	70	36	106
2029-30	71	37	108
2030-31	71	35	106
2031-32	71	36	106
2032-33	-	35	35
2033-34	-	36	36
2034-35	-	24	24
Total	**847**	**451 [b]**	**1,298 [b]**

(a) Estimates consistent with March 2021 *Quarterly Financial Results Report*. To be revised in State 2021-22 Budget and 2021-22 *Annual Report on State Finances*. Does not include some additional non-expensed items.

(b) Total includes $15 million under the YNILUA for housing that has not been allocated across years.

Comparability to Other Native Title Expenses Nationally

The CGC's actual per capita assessment of native title expenses recognises that all States have similar policies, driven by the Commonwealth native title legislation. All States' compensation liability exists as a result of the *Native Title Act 1993 (Cth)*. In introducing the Native Title Bill in 1993, then Prime Minister Paul Keating said in the second reading speech that:

> *"In the interests of fairness for existing grant holders, where compensation is owed to native titleholders for validation of past grants, it will be government, not the grant holder, who pays."*

CGC staff requested that we provide information to enable the CGC to consider if the assumption of similar policies is valid for the SWNTA and YNILUA. Our view is that it is, which we address below.

In addition, we note that if the CGC decided policies were not similar, then it would have to determine average policy. In this case, Western Australia would form a substantial part of that average (particularly once the SWNTA and YNILUA are included), just as it does in some of the mining revenue assessments.

Native title determinations across Australia currently cover over 3,115,000 km^2 (456 determinations), of which 1,900,000 km^2 are in Western Australia (123 determinations), followed by 538,000 km^2 in South Australia and 497,000 km^2 in Queensland.

Other States have settled native title claims. However, the value of such claims have been much smaller than the recent SWNTA and YNILUA settlements. Although this reflects many differing circumstances, and that (even within States) every native title claim has its own issues, it particularly reflects the vast land areas subject to native title claims in Western Australia. The SWNTA also provides for the surrender of native title rights and interests over the South West, and that no future act regime will apply from April 2021 (i.e. processing for future actions by the State will be streamlined under the Commonwealth's native title legislation).

High Court Timber Creek Decision

The principles and criteria for assessing native title compensation were first considered by the High Court in *Northern Territory v Griffiths* [2019] HCA 7 (*Timber Creek*), which stipulated the need for a bifurcated approach that assessed both economic loss and cultural loss. The *Timber Creek* case awarded $2.53 million for extinguishment of non-exclusive native title over 1.19 km^2 of land. This is a significant contrast to the 248,000 km^2 of land covered by the SWNTA and YNILUA.

The Commonwealth and States have been working collaboratively to settle national principles for compensation since that time, to understand valuation approaches and agreement content while ensuring compliance with *Timber Creek* principles in negotiations.

The principles in the Timber Creek decision provide guidance, but the process of identifying the quantum of compensation liability is complex. For each native title determination area, the calculation requires a detailed tenure analysis to identify compensable acts dating back to 1975, an expert valuation of each of those acts as at the time of impairment or extinguishment, and both Aboriginal and expert anthropological evidence on the cultural loss caused by that impairment or

extinguishment. The calculation varies on a case by case basis depending upon whether the various compensable acts impaired or extinguished native title, its timing and the value of the land at that time, and its impact on the rights held by the native title holders and their spiritual connection to the land.

In *Timber Creek* the High Court found that the economic loss for exclusive native title equated to 100 per cent of the equivalent freehold value of the land (non-exclusive native title would be half that). While the SWNTA was finalised well prior to the *Timber Creek* decision, it was reasonable to assume that a court at the time would value the compensation to be, at a minimum, the market value of the land. There are no native title settlements of a comparable size and scope to the SWNTA.

Other States

Full details of other State agreements are not available, nor the extent to which those agreements provide full and final settlement of the State's compensation liability (such as in SWNTA and YNILUA). A full and final settlement agreement would involve resolution of compensation liability for all compensable acts dating back to 1975, and may involve a range of other benefits and also address issues such as access, joint management, heritage and other matters as negotiated by the parties. Agreements by some other States may relate only to a particular future act, or provide for access or joint management arrangements and not provide full and final settlement of State compensation liability. This means that those States would potentially face further liabilities in the future under the Commonwealth native title legislation, which would in due course be reflected in the CGC's assessments. Therefore, over the long run, WA's agreements are expected to cost no more than they would if negotiated by other States.

Every agreement reflects the specific circumstances faced by the State. Some States face much smaller liabilities. This is for a number of reasons, including because of less area of determined native title, and fewer compensable acts because native title had been extinguished prior to 1975.

We would expect that other States would have made similar agreements to the SWNTA and YNILUA if faced with such circumstances, or may be planning more comprehensive compensation agreements in due course and in response to the Timber Creek decision. Notably, however, all States seek to reach settlements in a consultative manner, and seek to settle non-litigated outcomes where possible.

Only limited information is publicly available on other States' agreements, so if the CGC wishes to examine agreements made by other States, it would have to seek details from those States. However, a few examples illustrating how other States seek consultative agreements reflecting the specific circumstances they face are as follows.

- The **Northern Territory** Government and the Lhere Artepe Aboriginal Corporation are currently negotiating an Indigenous Land Use Agreement (ILUA) that relates to five parcels of land in the Alice Springs area. The NT Government is offering a $20 million package over 10 years[1] in return for use of the land for residential, industrial and commercial development. The package includes opportunities for Arrernte businesses; and housing, land and infrastructure transfers.

- The **Victorian** Government registered an ILUA with the Taungurung people in 2020 to recognise their Indigenous rights. Although this ILUA was set aside by the Federal Court in 2021, it initially extinguished federal native title rights over five Crown properties totalling 'a few hectares'.[2] The settlement included approximately $34 million cash; land transfers; and a range of access, use, and management arrangements.[3]

- **South Australia** has developed a State-wide ILUA approach and framework that brings together Aboriginal groups, industry and government to resolve disputes through negotiation. In addition, the South Australian Native Title Resolution Framework helps determine consent. Both frameworks sought to circumvent the social division and legal costs associated with a litigated approach to native title, by favouring claim resolution via ILUAs and consent determinations.

- On 13 May 2021, the **Queensland** Government announced that new legislation would result in the transfer of protected areas on Mulgumpin (Moreton Island) back to the Quandamooka people.[4] The new legislation would not only result in the transfer of land, but also joint management ventures and tourism opportunities. The Queensland Government is also developing a treaty with its Aboriginal population.[5]

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[1] https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0010/923518/laac-ilua-onepage-factsheet.pdf

[2] https://www.abc.net.au/news/2021-02-20/taungurung-aboriginal-land-agreement-federal-court-ruling/13174910

[3] https://www.justice.vic.gov.au/your-rights/native-title/taungurung-recognition-and-settlement-agreement

[4] https://statements.qld.gov.au/statements/92090

[5] https://www.dsdsatsip.qld.gov.au/resources/datsima/programs/tracks-to-treaty/path-treaty/treaty-statement-commitment-august-2020.pdf