

NATIONAL NATIVE TITLE COMPENSATION STRATEGY

Overview of the strategy prepared for the Research Managers' Meeting 3 September 2020

The NNTC membership of Native Title Representative Bodies and Service Providers (NTRB/SPs) and PBCs has endorsed a National Native Title Compensation Strategy. The purpose of the strategy is to have, as far as possible, a sector wide coordinated approach to native title compensation litigation and the negotiation of native title settlements.

The High Court's decision in *Griffiths v Northern Territory* [2019] was the first step towards a degree of certainty for native title holders and governments on the question of compensation. However, it leaves unanswered a number of significant questions that will need to be resolved by further jurisprudence. It is the position of most governments that further jurisprudence is required before comprehensive settlements addressing native title compensation can be negotiated.

The National Native Title Compensation Strategy contains several components.

1. Test Case Strategy

The NNTC and its members have identified a number of test case issues that require jurisprudence to inform a comprehensive settlement regime. These include clarification of the classes of compensable acts, establishing the value of compensation for the impairment of native title, the application of the non-extinguishment principle, principles and models for the calculation of the quantum of compensation, and the awarding of compound interest in relation to economic loss.

Federal Court and High Court judgments in well-resourced and researched claims will help clarify these and other issues and provide all parties with a better understanding of the nature and value of native title in different circumstances. This in turn should provide parties with greater confidence to resolve native title compensation matters on just terms through negotiated settlements.

2. Streamlined Litigation Strategy

The NNTC is liaising with the Federal Court and the Commonwealth and State governments on measures to streamline native title litigation around the country.

Matters being discussed include:

- Convening a National Advisory Group of senior Commonwealth, State and Territory and NNTC representatives to develop and co-ordinate a national response to resolving native title compensation matters

- Developing appropriate test cases to clarify legal issues
- Developing practices that make litigation processes more effective
- Possibilities around the States and Territories making land tenure data available and undertaking tenure research
- The use of assessors or co-mediators to assist the Court in defining the issues between native title groups and the State
- Multi-party agreements to accept connection from native title determination proceedings
- Development of practice notes and new processes for the preservation of evidence
- Fast tracking of matters by referral of key issues to the Full Federal Court

3. Develop NTRB Capability

NNTC is facilitating ongoing communication between NTRB/SPs regarding test case and streamlined litigation strategies, research, and the negotiation of comprehensive settlements.

NNTC is working to increase NTRB/SP capability through collaboration on national policy development, native title research, legal advice, and lessons learned, and is sharing this information across the native title sector.

NNTC has established a Community of Practice for principal legal officers and senior lawyers that meets periodically to share information across jurisdictions about recently filed or upcoming compensation claims, claims that are being run by private lawyers (some legitimate and some ambit), compensation negotiations, and other issues and developments.

4. Best Practice Models for Negotiated Settlements

NNTC is researching and developing a knowledge base in collaboration with AIATSIS and others on best practice for the negotiation of comprehensive settlements, and how these agreements can be structured and implemented to deliver the best social and economic outcomes for native title groups. The research will cover existing settlements across Australia and international settlements in Canada, USA and New Zealand.

5. Education (PBC capacity) strategy

The education component of the Strategy has a strong emphasis on providing information on native title compensation to native title groups and PBCs to help them understand native title processes and their options for resolving native title compensation. This is being done in collaboration with NTRB/SPs by delivering Native Title Compensation Information Workshops, and these are currently being revised so they can be delivered online.

Information and educational materials are also being developed so they will be available on the NNNTC's website in the form of fact sheets, videos, and other material.

6. Stakeholder engagement and collaboration

The NNTC is engaging and working with a range of key stakeholders.

In the first instance it is engaging with its NTRB/SP and PBC members, and with Commonwealth and State governments and the Federal Court.

It is collaborating with research partners (AIATSIS, Centre for Native Title Anthropology and the University of Melbourne) on issues relating to compensation. The development of a research community of practice for compensation is also being considered with research partners.

The NNTC is also engaging with representative industry bodies such as the Minerals Council of Australia.

It is engaging with the general public through traditional media outlets and various social media platforms.

7. Communication Strategy

NNTC has developed a detailed communication strategy to support the stakeholder engagement and education elements of its strategy.
