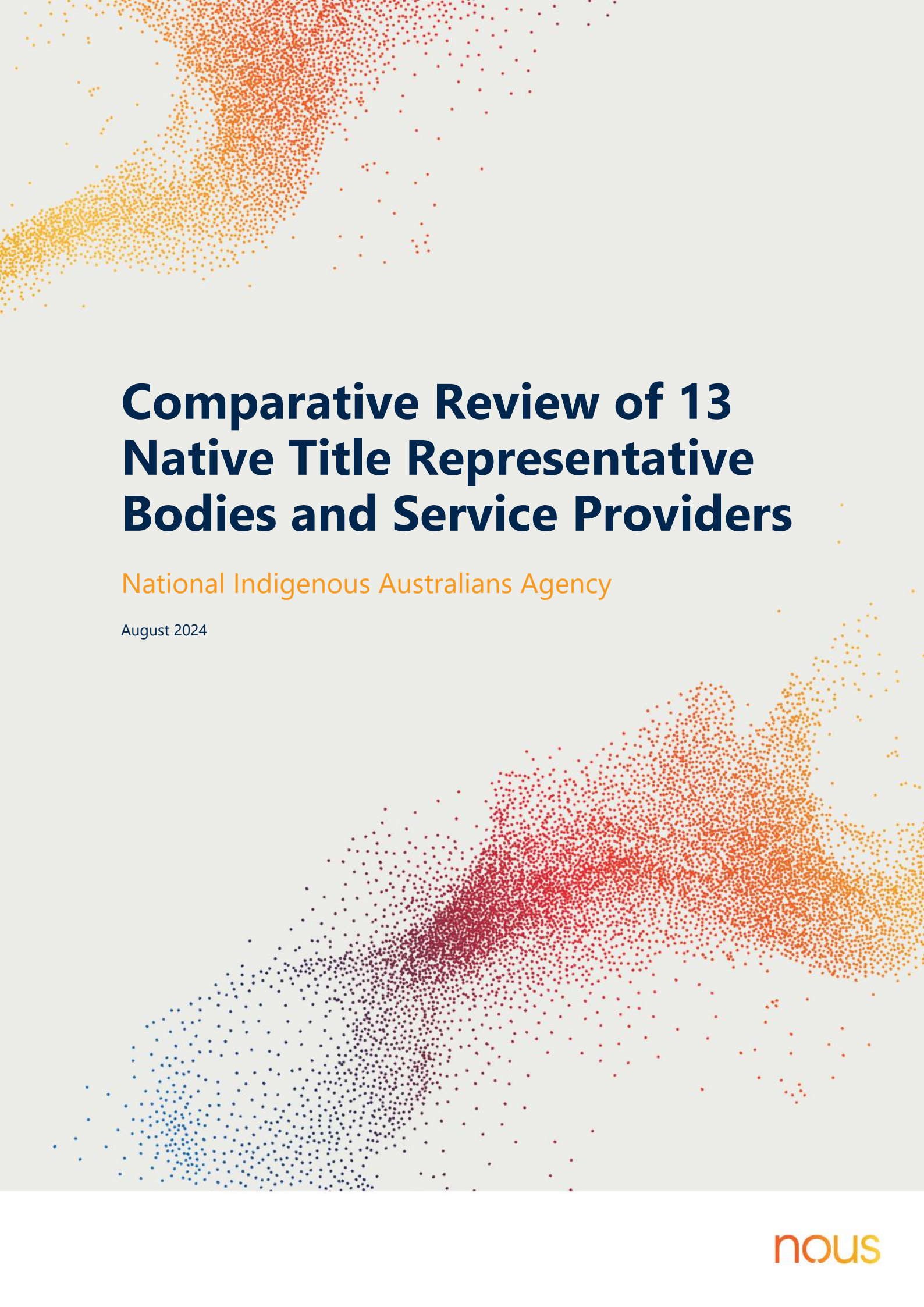




Comparative Review of 13 Native Title Representative Bodies and Service Providers

National Indigenous Australians Agency

August 2024

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1 Introduction

The National Indigenous Australians Agency (NIAA) engaged Nous Group (Nous) to undertake independent reviews of the native title functions of 13 Native Title Representative Bodies and Service Providers (NTRB-SPs) across Australia, followed by a report of comparative performance across the 13 NTRB-SPs. These reviews considered the performance of the NTRB-SPs in providing high quality services and delivering outcomes for native title claimants and holders in accordance with their functions under the *Native Title Act 1993* (Cth) (the NTA).

This comparative performance report draws from the completed individual performance reports of the 13 NTRB-SPs and includes consideration of systemic issues that came to light as a result of the reviews. This comparative report should be read in conjunction with the individual reports.

The individual reviews were carried out for the 13 organisations during the period March 2023 to July 2024 using a consistent reference period of **1 July 2019 to 30 June 2022** (the Review period). This consistent period allowed a comparative understanding of performance during and post the COVID-19 pandemic. It also allowed for commentary on the extent to which organisations had addressed recommendations from the previous organisational performance reviews, which were carried out between 2017 and 2021 and covered various time periods from financial year (FY) 2014-15 to FY2018-19.

This report also addresses a range of systemic issues that the individual reviews identified, including some issues specifically requested for consideration by the NIAA in the Review Terms of Reference (TORs). The requirements are described in the TORs, points two and three, provided below.

Review TORs

1. Focussing on the period 1 July 2019 to 30 June 2022 and addressing developments since the previous Review of each organisation the Service Provider will:
 - a. Review and assess the extent to which each organisation:
 - i. has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19
 - ii. assesses and prioritises applications for assistance in a manner that is equitable, transparent and robust and is well publicised and understood by clients and potential clients
 - iii. deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints
 - iv. performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation
 - v. has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery
 - vi. is adequately supporting Prescribed Body Corporate towards self-sufficiency
 - vii. has developed its planning for a post-determination environment.
2. Compare the individual performance of the 13 organisations.
3. Make incidental findings about any systemic issues identified during the Review and assessment of individual organisations, including the implications of the more contested nature of many of the remaining claims, and ways in which requests for assistance via funding to third party firms might be best managed in a way that is transparent, equitable, relatively consistent across the country and manageable within existing funding envelopes.

Methodology

The methodology used by Nous to complete the comparative analysis drew on the findings against the TORs for each individual review. The consistent application of the method for each individual review, based around the performance indicators, has enabled a comparative lens to be applied across all the organisations for this comparative report.

To rate the performance of each organisation against the TORs, Nous used a rating process contributed to by all members of the Nous individual review teams. Each NTRB-SP was individually rated out of a score of five for each TOR. A score of five signals significant achievement and substantially superior performance; a score of one signals very limited achievement and substantially inferior performance.

This score considered the external factors that were assessed for some TORs where the Review methodology recognised that factors outside of the control of the NTRB-SP had an impact on performance. The external factors were assessed on a three-point scale of “easier” (one point – meaning this factor made it easier for the NTRB-SP to achieve outcomes), “limited impact” (two points – meaning this factor did not really make a difference to the NTRB-SPs achievement of outcomes) and “harder” (three points – meaning that this factor made the achievement of outcomes more difficult).

The reliability of the ratings was reinforced by senior members of the Review team who were involved in all the reviews and rated across all the organisations.

Framing accurate and fair comparisons relied on contextual analysis of the data as well as on analysis and insights drawn from a variety of sources. For example, raw data about the number of determinations facilitated by an NTRB-SP was considered against factors such as the size of the Representative Aboriginal/Torres Strait Islander Body (RATSIB) area, the size and nature of the determined area and the complexity of the environment. The process for determining the score for each NTRB-SP against each TOR has been through examination of the evidence and robust discussion among the Review team.

Some stakeholders were concerned that a valid comparison across the organisations was challenging and perhaps not possible. For example, some stakeholders identified challenges in comparing NTRB-SP performance across jurisdictions, due to the nature and degree of differences in factors beyond the control of NTRB-SPs.

The Review acknowledges, and to some extent shares, these concerns. However, the Review team believes the methodology developed for the Review, including the use of the external factors, does enable valid comparisons of performance to be drawn. Many factors build to an effective and efficient overall operation and the Review has sought to identify and analyse these through the use of performance indicators.

While the Review was able to draw several comparative insights into performance across the organisations, the methodology deliberately did not provide an overall ranking for each organisation as a whole. This is because the external or environmental factors that impact on performance (the external factors) are different for each NTRB-SP and make an overarching ranking too simplistic. Nevertheless, the combination of scores and attribution factors produces a picture of efficiency and effectiveness that the Review believes is sound.

Systemic issues

This report also provides a discussion of systemic issues that arose in the course of conducting the reviews and are pertinent to the broader native title system, including native title holders, NTRB-SPs and government. They have a current or potential future impact on NTRB-SP efficiency and effectiveness in achieving native title outcomes now and into the future. They provide an opportunity for the Australian Government and NTRB-SPs to consider reforms supporting sector wide or organisational level improvements. Some issues are also raised as they may otherwise inform NIAA’s planning as the funder of all the NTRB-SPs. The issues identified in this report have been informed through discussion with the

NTRB-SPs and their stakeholders, as well as an understanding of good practice as it is occurring across individual organisations.

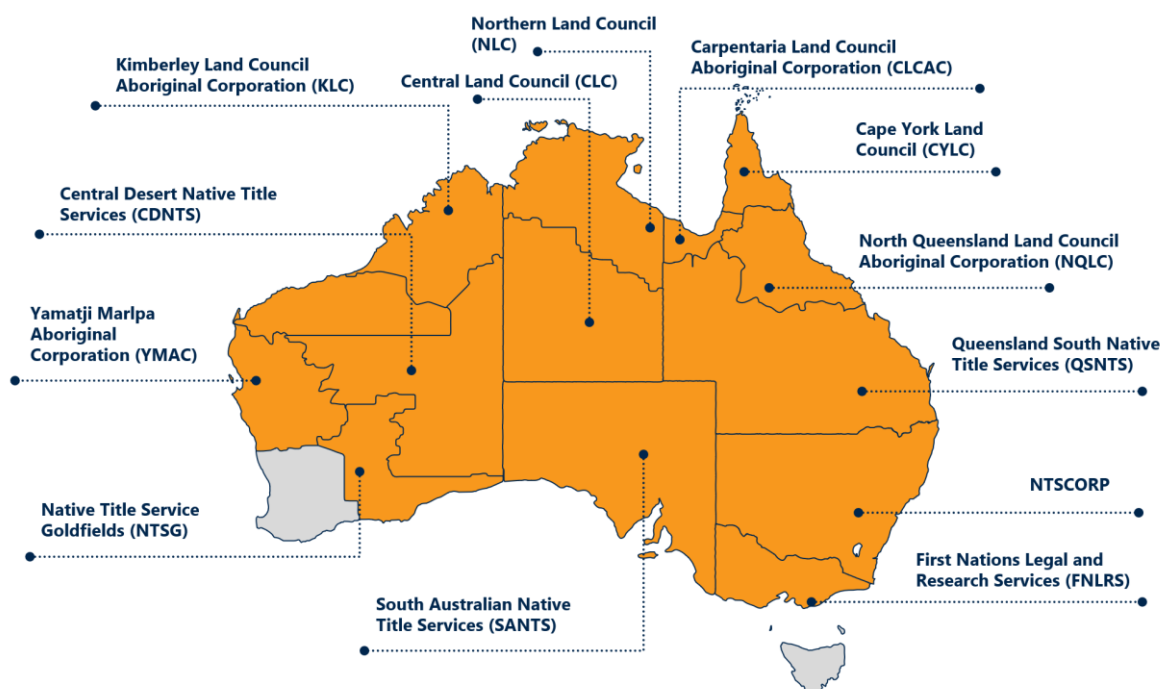
As noted above, the TORs requested particular consideration of the implications of the more contested nature of many of the remaining claims, and *ways in which requests for assistance via funding to third party firms might be best managed in a way that is transparent, equitable, relatively consistent across the country and manageable within existing funding envelopes.*

2 Profile of the organisations reviewed

There are 14 NTRB-SPs that operate across Australia. All the NTRB-SPs, except the Gur A Baradharaw Kod Torres Strait Sea and Land Council (GBK) were reviewed. This is due to GBK being new to its role as an NTRB-SP.

The organisations reviewed and their location are presented in Figure 1.

Figure 1 | NTRB-SPs reviewed by Nous



The 13 organisations reviewed differ significantly in their governance arrangements.

There are three main types of corporate entities:

1. Six organisations are *Corporations Act 2001* corporations limited by guarantee and registered with the Australian Charities and Not-for-profits Commission:
 - Central Desert Native Title Services (CDNTS)
 - First Nations Legal and Research Services (FNLRS)
 - NTSCORP Limited (NTSCORP)
 - Native Title Services Goldfields (NTSG)
 - South Australian Native Title Services (SANTS)
 - Queensland South Native Title Services (QSNTS).
2. A further five organisations were created as Aboriginal corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).
 - Cape York Land Council (CYLC)
 - Carpentaria Land Council Aboriginal Corporation (CLCAC)

- Kimberley Land Council (KLC)
 - North Queensland Land Council Aboriginal Corporation (NQLC)
 - Yamatji Marlpa Aboriginal Corporation (YMAC).
3. Two organisations are Australian Government corporate entities and were established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).
- Central Land Council (CLC)
 - Northern Land Council (NLC).

All the organisations reviewed are allocated funding by the NIAA for the purpose of carrying out their native title functions.

While some organisations were primarily engaged in carrying out native title functions under the NTA, others were larger organisations or Aboriginal Land Councils, with the native title work forming just one of its functions.

3 List of abbreviations

Abbreviation	Meaning
AAMC	Aboriginal Associations Management Centre
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AICD	Australian Institute of Company Directors
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
ALRA NSW	<i>Aboriginal Land Rights Act 1983 (NSW)</i>
CDNTS	Central Desert Native Title Services
CEO	Chief Executive Officer
CLC	Central Land Council
CLCAC	Carpentaria Land Council Aboriginal Corporation
CYLC	Cape York Land Council
DABS	Desert Accounting and Business Support Pty Ltd
FAN	Future Act notification
FNLRS	First Nations Legal and Research Services
GBK	Gur A Baradharaw Kod Torres Strait Sea and Land Council
HR	Human resources
ILUA	Indigenous Land Use Agreement
KLC	Kimberley Land Council
NIAA	National Indigenous Australians Agency
NLC	Northern Land Council
NNTT	National Native Title Tribunal
Nous	Nous Group
NQLC	North Queensland Land Council Aboriginal Corporation
NTRB	Native Title Representative Body
NTRB-SP	Native Title Representative Body and Service Provider
NTSCORP	NTSCORP Limited
NTSP	Native Title Service Provider

Abbreviation	Meaning
NTSG	Native Title Services Goldfields
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
PBCSU	PBC Support Unit
PLO	Principal Legal Officer
PPP	People, Place and Partnership
QSNTS	Queensland South Native Title Services
RATSIB	Representative Aboriginal/Torres Strait Islander Body
SANTS	South Australian Native Title Services
The CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
The NTA	<i>Native Title Act 1993 (Cth)</i>
The Review period	1 July 2019 to 30 June 2022
TOR	Terms of Reference
TOS Act	<i>Traditional Owner Settlement Act 2010 (Vic)</i>
YMAC	Yamatji Marlpa Aboriginal Corporation

4 Executive summary

The Review found that most of the 13 NTRB-SPs were generally performing in a way that provided value for money through the provision of high-quality services to native title claimants and holders. The organisations demonstrated different areas of strength and opportunities for improvement.

Based on the findings of each of the 13 individual reports, the Review developed a comparative view of the performance of each organisation against each of the seven TORs, as set out in Table 1.

This table scores the performance of NTRB-SPs against each of the TORs. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 1 | NTRB-SP performance scores against each TOR, adjusted for the impact of external factors

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 1 – native title claim outcomes	4	2	4	4	5	4	4	4	5	4	5	4	4
TOR 2 – assessment and prioritisation	3	2	5	3	2	5	4	4	3	5	3	3	3
TOR 3 – respect, equity and transparency	4	2	4	5	5	5	2	5	5	5	5	4	3
TOR 4 – cost effectiveness	4	4	4	4	4	4	4	4	4	4	4	4	3
TOR 5 – governance and culture	3	2	3	4	4	4	3	3	4	4	5	5	1
TOR 6 – PBC self-sufficiency	5	4	3	5	3	4	4	3	4	4	5	3	2
TOR 7 – post-determination planning	5	1	4	5	4	5	3	4	3	5	4	3	1

1 = very limited achievement	2 = limited achievement	3 = good achievement	4 = considerable achievement	5 = strong achievement
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TOR 1 considered performance in relation to native title outcomes. There was considerable variation in the size of each organisation and its region, the population and the complexity of the environment, which meant that performance was not judged on the basis of number of claims determined, although this was one of the factors considered. Each organisation faced different challenges and complexities. While demand for facilitation and assistance services was uneven, the quality of legal work was generally considered very high, as was the strength of connection reports. Traditional Owner satisfaction was mixed and generally reflected whether the claims of individuals who spoke with the Review had been realised. In general, NTRB-SPs progressed claims relatively quickly during the Review period.

TOR 2 considered the assessment and prioritisation policies and practices of each organisation. These were generally robust, but for some there was room for improvement in the transparency of the process and for greater clarity around decision-making.

TOR 3 focused on the way each organisation engaged with people who hold or may hold native title, and how they managed complaints. The Review found that organisations were not always consistent in engaging in a respectful and culturally appropriate way but that all organisations aspired to do so. High performing NTRB-SPs embedded First Nations people, processes and practice. The management of complaints was highly variable, with some organisations responding effectively while others did not have adequate processes in place.

TOR 4 looked at how cost effective each organisation was, including in organisational practice and in management of claim meetings. The Review found that all organisations maintained a strong approach to cost effectiveness. COVID-19 helped most NTRB-SPs familiarise more clients with virtual meetings and reduce travel costs moving forwards.

TOR 5 examined governance and management structures, and organisational policies and culture. This TOR demonstrated wide variability amongst the NTRB-SPs. While the separation between Board and Executive was well managed by most NTRB-SPs, in at least one NTRB-SP it was not accepted. One Board did not engage with the Review, despite repeated requests. Board appointment processes and tenure were not consistently transparent and open, with some very long-serving Directors. There were robust conflict of interest policies and practices in place in all organisations.

TOR 6 considered how well each organisation was supporting Prescribed Body Corporates (PBCs) towards self-sufficiency. About half of the organisations had dedicated PBC Support Units (PBCSUs) and some had found resources to bolster PBC self-sufficiency through business and economic support. However, for many NTRB-SPs, resources did not allow for much more than assistance for PBCs to remain compliant with their legal requirements.

TOR 7 looked at how far each NTRB-SP had advanced its planning for the post-determination environment. The degree of preparedness for post-determination varied markedly, primarily driven by how close each organisation was to finalising the claims in its region. Two organisations had made very little progress in thinking about post-determination. Most NTRB-SPs had developed a strategic plan that typically explored what services it could offer PBCs and how the organisation would be financially sustainable in the absence of ongoing claims funding from the NIAA.

5 Comparative performance assessment

The following sections of the report provide a summary of each NTRB-SP's performance against the TORs for the Review.

5.1 TOR 1 | Extent to which each organisation has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19.

5.1.1 TOR 1: Overall summary

What strong performance looked like

- Skilled and experienced team of senior lawyers with well supervised junior lawyers and paralegals.
- Responsive attitude to the Federal Court and Federal Court timelines met.
- Considered and justified use of briefing out with clarity around the criteria for its use.
- Expert and independent connection reports.
- Effective internal support to external anthropologists from in-house research/anthropology teams.
- Independence and mutual respect between legal staff and anthropological staff to ensure that both the legal and anthropological work was undertaken by experts and the independence of connection reports was maintained.
- Determinations were achieved within five years of making the application.
- Timely management of Future Act notifications (FANs) with legal advice to PBCs where appropriate.
- Effective management of Indigenous Land Use Agreements (ILUAs) and other agreements, including clear communication and outcomes that respected the wishes of the clients.

Concerns noted by the Review

- Mixed views on the utility of NTRB-SPs acting as respondents on all claims.
- Absence of a professional disciplinary head of the research/anthropology discipline.
- Structure of PBCs in claims involving multiple family groups has led to dissatisfaction and conflict within some PBCs.

Innovators

- Regular use of targeted brief out arrangements for claims work.
- Use of an accredited panel for briefing out litigation work.
- Assignment of a multi-disciplinary team of legal, anthropology and First Nations staff for each claim.
- Offering anthropology internships in order to generate more interest in working in native title anthropology, particularly among First Nations candidates.

5.1.2 TOR 1: External factor-adjusted scores for each NTRB-SP

Table 2 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 2 | External factor-adjusted scores for TOR 1, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 1 – native title claim outcomes	4	2	4	4	5	4	4	4	5	4	5	4	4

1 = very limited achievement	2 = limited achievement	3 = good achievement	4 = considerable achievement	5 = strong achievement
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5.1.3 TOR 1: Comparative performance against key performance indicators

NTRB-SP lawyers acted as the solicitor on the record for 53 of the 68 determinations of native title during the Review period

Across all organisations there was a strong record of achievement during the Review period. All the NTRB-SPs subject to review achieved native title outcomes on behalf of Traditional Owners. Combined, NTRB-SP lawyers acted as the solicitor on the record for 53 of the 68 determinations of native title.

Three NTRB-SPs each achieved more than ten determinations over the course of the Review period.¹ Two organisations did not achieve any determinations over the Review period although both organisations made progress within their specific circumstances.

While there was considerable variation in the number of native title determinations achieved by each NTRB-SP, this was not necessarily an indication of relative effectiveness. NTRB-SPs that achieved fewer determinations were limited by external factors (discussed below), such as the ease of achieving native title in that state and the RATSIB area, the progress toward establishing claim groups and the complexity of remaining claims. This report does not make quantitative comparisons between the achievements of the NTRB-SPs.

Demand for NTRB-SP claims assistance was uneven

The 13 NTRB-SPs filed 52 new applications for native title during the Review period.² Some organisations experienced high demand for their services, with multiple active claims and new claims during the Review period.

Other organisations had few active or new claims.

Information about the number of claims that each NTRB-SP filed during the Review period and the number of active claims that each NTRB-SP was representing at the end of each Review period is contained in Table 3, listed in descending order.

¹ Only refers to determinations for which the NTRB-SP was the solicitor on the record.

² Only refers to applications for which the NTRB-SP was the solicitor on the record.

Table 3 | Number of claims filed during the Review period and active claims at 30 June 2022, in descending order

	Highest												Lowest
Claims filed during the Review period	12	9	8	7	7	3	3	2	1	0	0	0	0
Active claims at 30 June 2022	16	15	8	5	2	7	4	11	13	17	4	2	1

Demand for facilitation and assistance services was impacted by the proportion of claimable land within the RATSIB area not subject to a registered claim or a determination, which varied considerably. Three NTRB-SPs still have over 50 per cent of the RATSIB area not subject to a native title determination or claim. On the other hand, four NTRB-SPs each have less than five per cent of the RATSIB area remaining as claimable land. This means that the extent of ongoing claim work and the progress towards a post-determination environment vary considerably for different NTRB-SPs (noting that this comparison of demand for facilitation and assistance services does not consider the complexity of the claims or other demand factors). These issues are discussed further in section 6.

The proportion of remaining claimable land for each NTRB-SP, listed in descending order, is detailed in Table 4. This calculation approximates the proportion of claimable land in the RATSIB area that is not yet subject to a claim or determination.

Table 4 | Proportion of claimable land that remains for each NTRB-SP, in descending order

Highest												Lowest
66%	64%	50%	27%	26%	23%	19%	14%	11%	6%	5%	5%	3%

Note: The figures in Table 4 do not include land held in trust under the ALRA. Much of the land not subject to a native title claim in the Northern Territory was held in trust under the ALRA. The land rights provided by the ALRA were widely considered to be stronger than those provided by the NTA and so Traditional Owners usually considered a native title claim to be unnecessary over land already held under the ALRA.

There was mixed use of briefing out of claims through the provision of financial assistance to external lawyers

Based on advice provided by the NTRB-SPs, the 13 NTRB-SPs that were reviewed provided financial assistance to external legal firms to represent claim groups in relation to 23 claims during the Review period.³ In addition, there were several claims that were represented by external law firms, and brought by these law firms, without the involvement of the NTRB-SPs.

The extent to which NTRB-SPs briefed out claim work varied considerably. Seven of the 13 NTRB-SPs reviewed did not wholly brief out any claims to external organisations.

NTRB-SPs generally briefed out work under the following circumstances:

- There would be a real or perceived conflict of interest if the NTRB-SP represented the claim.

³ This is an approximate measure as this information was not made available to the Review for all NTRB-SPs.

- The claim group had an established relationship with an external legal firm that they wished to maintain.
- Capacity constraints prevented the NTRB-SP from progressing the claim.

Some NTRB-SPs established panels of providers with the relevant expertise to manage claims

A small number of NTRB-SPs had put in place a process to better manage the quality of external legal providers. This involved the establishment, through an independent process, of a panel of lawyers with relevant expertise in native title litigation. If a funded party appointed a lawyer from the panel, the organisation would enter into a funding agreement with that lawyer. If the funded party appointed a lawyer who was not on the panel, the organisation's Principal Legal Officer (PLO) would confirm that person had relevant expertise in native title matters before the organisation would enter into a funding agreement with that lawyer.

The quality of legal work across the NTRB-SPs was relatively high

A common theme across all 13 reviews was that native title lawyers were hard-working and went above and beyond to deliver positive outcomes for Traditional Owners. For all NTRB-SPs, stakeholders from the Federal Court reported that lawyers at NTRB-SPs were professional, responsive and competent. This was despite the consistent theme that attracting and retaining legal staff was a key challenge for all NTRB-SPs, with some more challenged than others due to their location. Attracting qualified and experienced native title lawyers was particularly challenging for NTRB-SPs based in remote or regional areas. Many NTRB-SPs used junior lawyers or paralegals to build capacity and capability. This was successful where sufficient supervision was available and provided. This is discussed further in section 6.

The quality of research and of independent connection reports was generally considered to be sound

The extent to which NTRB-SPs used in-house vs external research/anthropology services was typically dependent on the size of the organisation. Some NTRB-SPs rarely engaged external anthropologists while some engaged external anthropologists for almost all or all anthropological work.

Most NTRB-SPs adopted a model of engaging external anthropologists to undertake connection reports with in-house anthropologists providing support and, in some cases, supervision. External commentators reported that the connection reports were generally of a high quality.

Strong performers provided detailed briefs to external anthropologists, and adequate support to arrange and facilitate meetings. Concerns were raised about the level of support provided by some of the organisations, but this criticism was not necessarily accepted by those organisations. There was a noticeable improvement in the level of support provided to anthropologists in at least one organisation since this was raised as an issue during the previous Review period.

The difficulty of hiring experienced native title research/anthropology staff was noted as a significant concern for multiple NTRB-SPs.

The relationship between research and legal teams varied

Some NTRB-SPs had a dedicated research/anthropology unit, separate from the legal unit, while in others the research team reported to the PLO. The Review did not note any significant difference in performance as a result of the different approaches. Strong working relationships and respect for each role were more important considerations.

The importance of a professional head of research/anthropology was noted by the Review, as this provided a clear avenue for raising research related issues within the organisation. A concern was raised with the Review by the anthropology team at one NTRB-SP that legal staff were at times tempted to

conduct anthropological work when anthropologists were unavailable or busy. This was not accepted by the legal team and was not a complaint raised more generally across the organisations.

The Review noted that a stronger approach to the use of multi-disciplinary teams for claims management, with each team comprising a lawyer, a researcher/anthropologist and a First Nations Engagement Adviser, appeared to work well in one of the organisations.

NTRB-SPs generally responded to Future Acts and negotiated ILUAs effectively, although demand was uneven across the NTRB-SPs

NTRB-SPs generally responded to Future Acts effectively. Some NTRB-SPs managed the Future Acts and agreement-making work separately from their legal teams while others had dedicated legal support to undertake this work. They argued that the skills involved in agreement-making were quite distinct from claims work and separate teams were more effective.

All NTRB-SPs negotiated ILUAs and other agreements effectively during the Review period. NTRB-SPs varied on the extent to which they pursued ILUAs and the types of ILUAs that were pursued. This was usually determined by external factors, such as the attitude or requirements of the state government and the extent of economic activity in the RATSIB area. There were two main categories of ILUAs negotiated through the Review period:

- 1. ILUAs relating to FANs.
- 2. ILUAs relating to the settlement of native title claims.

Notably, ILUAs relating to the settlement of native title claims were much more complex and required greater resources to pursue. Table 5 displays the total number of FANs and ILUA negotiations for each NTRB-SP during the Review period, in descending order.

Table 5 | Total number of FANs and ILUAs for each NTRB-SP during the Review period, in descending order of FANs received ⁴

	Highest												Lowest
FANs received	7,882	4,224	2,493	2,183	751	549	406	304	250	245	30	-	-
ILUAs registered	9	25	1	33	0	9	3	2	13	5	3	4	4

Note: Due to limitations in the information made available to the Review, there are some gaps in the data and some numbers are estimates only.

Traditional Owner satisfaction was mixed and generally reflected the success or otherwise of the claims of particular groups

The Review understands that the composition of claim groups was a highly sensitive and potentially divisive issue that could cause enormous distress for the parties. All NTRB-SPs acknowledged that the unwavering views of the parties involved in disputes was challenging and could complicate mediation processes, adding to the difficulty of achieving acceptable outcomes for all claimants.

Many Traditional Owners who engaged with the Review did so because they were dissatisfied with the outcome of claim group membership decisions. There was also a significant group that was concerned that the composition of the resultant PBC was skewed towards a particular group.

⁴ Note that a small number of figures in this table are approximations based on NTRB-SP estimates. Two NTRB-SPs did not provide information about the numbers of FANs received to the Review.

The Review notes that claims (including claim group composition) were authorised by claim groups (not the NTRB-SP) and determined by the Federal Court following rigorous testing of evidence, with NTRB-SP staff indicating that “we can only do what the evidence tells us”. The Review additionally acknowledges that structural issues arising from the impacts of colonisation and the nature of the native title system, including the requirements for proving native title, were still being felt in many RATSIB areas and for the most part were not attributable to the way the NTRB-SP performed its functions under the NTA.

In general, NTRB-SPs progressed claims relatively quickly during the Review period

The speed at which NTRB-SPs could progress claims was significantly affected by external factors such as the complexity of claims, the extent of opposition, the attitudes of state government and the timeframes set by the Federal Court.

Table 6 shows the average time in years between filing an application and the date a determination is made for determinations during the Review period, in descending order.

Table 6 | Average number of years between filing an application and a determination being made for determinations made during the Review period, for each NTRB-SP, in descending order

Highest (years)												Lowest
9.1	8.7	8.5	8.3	7	6.1	4.5	4.5	3.2	3.1	1.5	N/A	N/A

External commentators broadly reported that NTRB-SPs were typically not responsible for delays in Federal Court proceedings and were effective at meeting Federal Court deadlines. Delays to the finalisation of claims were the result of many factors, including the approach taken by respondents, such as federal, state and private interests. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has noted that “the ‘integrity’ of the native title system lies in ensuring that measures to improve the timeliness of matters will at least do no harm and that considerations of efficiency should focus first on ‘just’ and then on ‘timely’.”⁵ Nevertheless, an impact of claims that take many years to determine is that membership of claim groups change as claimants pass away.

The extent to which NTRB-SPs pursued compensation claims under section 61 of the NTA varied considerably during the Review period

During the Review period, most NTRB-SPs did not file any applications for compensation under section 61 of the NTA. Three NTRB-SPs each filed one section 61 compensation claim during the Review period. Only one compensation claim under section 61 of the NTA was successfully determined during the Review period – this was *Ward v Western Australia*.⁶ There were also several section 61 compensation claims being represented by private lawyers.

Compensation under this section of the NTA is an emerging area of native title law and very few claims have been resolved to date. In 2016, the Timber Creek compensation case⁷ was the first time the High Court assessed compensation for the extinguishment of native title rights and interests under section 61 of the NTA, setting a precedent for Traditional Owners wishing to pursue native title compensation. Since then, there have been more than 20 applications filed for compensation under section 61 of the NTA, two of which have been determined. Five applications lodged during the Review period remain active at the time of writing in August 2024.

⁵ Submission by AIATSIS, Australian Law Reform Commission, Efficient resolution of native title claims. 2015. Accessed March 2024.
⁶ *Ward, on behalf of the Pila Nature Reserve Traditional Owners v State of Western Australia* [2022] FCA 689.
⁷ *Griffiths v Northern Territory of Australia* (No 3) [2016] FCA 900 (24 August 2016)

Some NTRB-SPs reported that they were waiting for more jurisprudence before pursuing compensation claims. For other NTRB-SPs with large amounts of claim work remaining section 61 compensation claims were not a priority during the Review period. Some external commentators considered that compensation claims will become an increasingly important part of the role of NTRB-SPs in the future as the amount of claimable land continues to decrease.

Compensation activity was also undertaken by a number of NTRB-SPs as part of agreement making or claim determination. The extent of this compensation activity was largely dependent on the attitude of state/territory governments. There were increasing components of compensation being incorporated into complex ILUA agreements. One NTRB-SP achieved compensation outcomes with all its claims across the Review period. Other NTRB-SPs worked with their state government to settle compensation at the time of the determination. The preferences of native title holders and the position of the state or territory government were important factors in managing these claims. Much of the inconsistency around how NTRB-SPs approached compensation was because state and territory governments did not have a clear position on compensation claims and how they would approach them.

5.1.4 TOR 1: Impact of external factors on performance

Each of the NTRB-SPs faced a range of unique challenges specific to their context that were beyond their control

The reviews assessed the impact of six “external factors” in the NTRB-SP’s environment that were beyond the NTRB-SPs control and affected the performance of each NTRB-SP against TOR 1. The external factors assessed for each NTRB-SP were:

- State/territory government policy and legislation.
- The history of previous claims.
- The complexity of remaining claims, including the levels of disputation.
- The complexity of land use and tenure.
- The effects of COVID-19.
- The amount of native title funding available.

Table 7 indicates the combined effect of external factors on the performance of NTRB-SPs against the TOR. 1 = easier to perform and 3 = harder to perform. The legend is captured below.

Table 7 | Combined effect of external factors on NTRB-SP performance against TOR 1

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 1 – external factors	1	2	2	1	2	2	3	2	1	3	3	3	3

1 = Easier	2 = Limited impact	3 = Harder
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The combined external factor scores were achieved by consideration of the individual factors briefly described below.

Three NTRB-SPs reviewed were considered to be most impacted by the state/territory government external factor.

For two NTRB-SPs the outcome of claims prior to the Review period created additional challenges in relationships and claims management.

The Review found that there was a significant level of disputation in relation to native title claims across the country. Every NTRB-SP was affected to some extent.

Some NTRB-SPs experienced challenging land use and tenure in areas of high population density.

The Review noted that the level of funding did not appear to create a level playing field as it was essentially based on historical precedent, with incremental changes made each year in response to requests. While the NIAA has gradually adjusted the funding allocated to each NTRB-SP over time, the Review concluded that there is a need for a systematic review of funding provided to each NTRB-SP, with the objective of reallocating funding based on the amount of work still to be done. Evidence for this is that many NTRB-SPs who have now completed much of their claim work are still receiving large amounts of funding while NTRB-SPs with significant claim work remaining are receiving relatively low amounts of funding. Further discussion around the allocation of funding is in the systemic issues at section 6.2.

Across Australia, COVID-19 had a significant effect on meetings, but not on native title outcomes

Although the impact of COVID-19 caused disruption to meetings, it did not significantly impact achievements and in many cases increased the take-up of virtual communication, leading to cost savings.

5.2 TOR 2 | Extent to which each organisation assesses and prioritises applications for assistance in a manner that is equitable, transparent, and robust and is well publicised and understood by clients and potential clients.

5.2.1 TOR 2: Overall summary

What strong performance looked like

- Clear, public-facing policy/process documents describing the assessment criteria and process and the prioritisation criteria – ideally on the organisation’s website.
- Clear and transparent governance framework for both assessment and prioritisation decisions, with clarity about the specific decision-makers. Involvement of the Board would usually be for endorsement only.
- Clear criteria for the situations in which the NTRB-SP will consider briefing out a matter to an external provider.
- Culturally appropriate external communication of the policy, process and governance arrangements for decision-making, with clients and potential clients generally aware of the criteria and process.
- Staff across the organisation were aware of the criteria and process so that they could communicate with stakeholders about these decisions.
- Decisions were made in a timely manner.
- Decisions included adequate reasons for decision, or the right to seek reasons, with information about the potential claimant’s right to seek internal review and review by the NIAA.
- Reasons for decisions were communicated in plain language.
- Clients and potential clients were aware of how and why decisions were made.

Concerns noted by the Review

- Low priority given to claims that did not have development proposals over the land could lead to long delays for such claims.
- Lack of clarity among Traditional Owners about the role of the NTRB-SP’s Board in decision making could lead to perceptions of conflicts of interest in the decision-making process.
- Lack of clear access pathways to policy and complaint documents.

Innovators

- Inclusion of an independent native title lawyer in assessing applications for assistance.

5.2.2 TOR 2: External factor-adjusted scores for each NTRB-SP

Table 8 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 8 | External factor-adjusted scores for TOR 2, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 2 – assessment and prioritisation	3	2	5	3	2	5	4	4	3	5	3	3	3

1 = very limited achievement	2 = limited achievement	3 = good achievement	4 = considerable achievement	5 = strong achievement
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The only external factor proposed for TOR 2 was the number of claims relative to the size and resourcing of the NTRB-SP. The Review did not have enough detailed evidence to assess the comparative impact of this external factor.

5.2.3 TOR 2: Comparative performance against the key performance indicators

Assessment and prioritisation documentation was generally robust

Most NTRB-SPs had an internal policy containing the process and criteria for assessment and prioritisation.

The Review developed a set of criteria for identifying equitable resourcing and defensible decisions, based on the identification of good practice throughout the previous round of NTRB-SP reviews (2017 to 2019)⁸. They were:

- Clear description of the specific decision-makers for assessment and prioritisation decisions (for example, Board, Board sub-committee, Chief Executive Officer [CEO] and/or Executive).
- Clear description of processes and decision-makers for the conduct of internal reviews of prioritisation decisions (when requested).
- Clear description of the circumstances in which matters may be briefed out prior to decision-making.
- Considerations such as Federal Court-imposed timelines and the service of section 29 notices that require the lodgements of claims within four months are expected to be built into the relevant prioritisation policies.

Aside from two exceptions, all NTRB-SPs completely or mostly fulfilled these criteria. The Review heard that in practice, prioritisation was often impacted by Federal Court requirements or factors beyond the control of the NTRB-SP.

Each NTRB-SP had a set of formal or informal (undocumented) criteria used to assess applications for assistance. The specific criteria used by each NTRB-SP varied slightly, depending on contextual factors, but typical criteria included:

- The strength of the evidence to support the claim.
- The likelihood of success for the claim.
- The cohesion of the claim group.
- The level of complexity added by any extinguishment or tenure issues.
- The number of people who would benefit from the claim.

⁸ The criteria are set out in the Review's methodology.

- Whether the claim raised test case issues.
- External pressures such as development proposals over the land.

In some cases, NTRB-SPs placed a strong emphasis on responding to claims over land subject to a development proposal. The Review found that this prioritisation could lead to inequitable outcomes as NTRB-SPs did not have enough resources to also deliver claims on land without development proposals. As a result, some claimants had been overlooked for many years in favour of more urgent claims.

The decision-making processes usually involved the senior legal team and decisions were generally endorsed at Board level

Decisions about whether to provide assistance to a particular claim were generally made after internal consideration of the evidence against the relevant criteria. Internal consideration was mostly led by the PLO or CEO in consultation with senior lawyers.

Board involvement in the decision-making process was generally for endorsement. Most NTRB-SPs took decisions up to the Board for endorsement, or there was a Board sub-committee in place for this purpose. The Review was not made aware of incidents where Boards had declined to endorse decisions.

There was a fairly often-expressed concern from Traditional Owners who engaged with the Review across all areas that Board Directors exerted undue influence on assessment and prioritisation decisions. Traditional Owners in some RATSIB areas were particularly vocal about these concerns but they were also raised more generally in other areas. The Reviews did not investigate the merits of these claims but noted that all organisations had conflict of interest policies that appeared to be followed in practice.

Some NTRB-SPs could improve the transparency of the assessment and prioritisation process

Less than half of the NTRB-SPs (five of the 13 reviewed) had a publicly facing assessment and prioritisation policy that appeared to be well communicated. Where there was no public-facing policy, Traditional Owners were nevertheless often aware of the process and were provided with information at the time of making an application for assistance. Feedback suggested that clients and potential clients were generally satisfied with their awareness of the relevant NTRB-SP policy and process.

Poor performance regarding communication of the outcome of the assessment and prioritisation process included a lack of information sharing with Traditional Owners about why assessments were made, leading to reports of dissatisfaction. Some staff reported that the criteria listed in the policy were sometimes overlooked in favour of other criteria. Some Traditional Owners who were refused assistance from their respective NTRB-SP reported that they did not get sufficient explanation or clarity behind the reasons for the decision. Few of these Traditional Owners requested that the decision be reviewed.

The facilitation and assistance landscape was changing for some NTRB-SPs

As some NTRB-SPs drew closer to a post-determination environment, assessment and prioritisation was less of an issue because many claim groups had already achieved determinations and were no longer seeking representation. Decision making was therefore occurring in a less crowded landscape and there were fewer groups who were disappointed. This meant that some NTRB-SPs reported that they were able to fund all claim groups that approached them to make a claim.

On the other hand, some NTRB-SPs had progressed to working on the most contested and difficult claims – which were earlier not prioritised due to the level of disputation or the complexity of tenure issues. In this contested environment, the Review heard commentary from some expert external stakeholders that some NTRB-SPs made assumptions about which group had the strongest claim over the land before conducting adequate research to properly understand the anthropology of the claim area.

5.2.4 TOR 2: Impact of external factors on performance

The only external factor assessed for TOR 2 was the number of claims relative to the size and resourcing of the NTRB-SP. The number of claims varied considerably across the organisations with some involved in at least ten concurrent claims. Others had very few claims at any one time. This is discussed further in section 6.2.

The Review did not have enough detailed evidence to assess the impact of this external factor on the comparative performance of the NTRB-SPs.

5.3 TOR 3 | Extent to which each organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints.

5.3.1 TOR 3: Overall summary

What strong performance looked like

- Appropriate cultural competency training and resources available to all staff.
- A strong regional presence, allowing maintenance of constructive relationships with Indigenous communities in the RATSIB area (noting that this may not have been possible for some of the smaller NTRB-SPs and had ramifications for ease of recruitment).
- Thorough policies for addressing complaints that were visible and easily accessible on the website and adhered to in practice.
- Internal review policies that were clearly accessible on the website or made available with a decision not to support a claim.
- Internal reviews carried out by someone with sufficient independence from the decision maker (and for internal review of assistance decisions, ideally, informed by advice from independent lawyers/anthropologists).
- A high proportion of First Nations staff with experience working in Indigenous communities that helped the NTRB-SP liaise with Traditional Owners.
- First Nations staff in professional or leadership positions seen to be integral to the NTRB-SP.
- Investment in mechanisms to appropriately communicate legal concepts to Traditional Owners, including Indigenous staff presence at meetings to provide assistance.
- Informed consent and community engagement embedded in the use of cultural materials.
- Respectful engagement highlighted as a core value in both policies and practice.

Concerns noted by the Review

- Unresolved complaints tended to cause distress for Traditional Owners without a clear escalation process beyond the NTRB-SP.
- There was room for more frequent and clearer communication with Traditional Owners across all NTRB-SPs.

Innovators

- Clarification of the nature of complaints, including distinguishing between “concerns” and “complaints”.
- A deliberate approach of sorting out issues through conversation and informal means to prevent them from escalating.
- Regular inclusion of a cultural awareness component at all staff conferences to ensure that all staff had the opportunity for ongoing and contemporary training in best practice.

5.3.2 TOR 3: Scores for each NTRB-SP

Table 9 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 9 | External factor-adjusted scores for TOR 3, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 3 – respect, equity and transparency	4	2	4	5	5	5	2	5	5	5	5	4	3

1 = very limited achievement	2 = limited achievement	3 = good achievement	4 = considerable achievement	5 = strong achievement
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5.3.3 TOR 3: Comparative performance against key performance indicators

NTRB-SPs were generally respectful and culturally appropriate in their engagement, though not always consistently

Performance against this TOR reflects how respectfully, transparently and culturally appropriately the NTRB-SPs engaged with Traditional Owners.

Most NTRB-SPs demonstrated considerable or strong achievement in their engagement with Traditional Owners. Only two organisations demonstrated limited and inconsistent performance. The Review noted that most staff working in the native title sector were genuinely and sincerely motivated to assist their communities in achieving native title outcomes and wanted to do this in a way that was respectful and culturally responsive. However, they were not always effectively supported by their workplaces to do this. Feedback from some Traditional Owners engaged by the Review suggested that intensive staff workloads sometimes made it challenging to get timely responses or sufficient dedicated attention to concerns about their claims.

High performing NTRB-SPs embedded Indigenous people, processes and practice

The NTRB-SPs that performed well on this TOR had strong relationships with the Traditional Owner community and a sincere mission to serve Traditional Owners in their RATSIB area.

The Review observed that strongly performing organisations had an engagement strategy to guide their native title approach, a strong Aboriginal leadership team and a regional presence that supported trusted working relationships with claim groups. They also invested in resources to communicate complex legal native title information to Traditional Owners.

Other elements of strong performance included being proactive in communication with Traditional Owners: engaging with clients and potential clients through a range of channels, including in-person meetings, social media posts, community noticeboards, the production of regular newsletters sent to native title groups and stakeholders, and a weekly radio show and podcast.

A longstanding history of working directly with the community, through native title but also through other activities also contributed to the strong performance of some organisations.

Cultural competency and respectful practices were generally embedded into all the organisations reviewed, including through induction programs, cultural immersion sessions and organisational policies.

A strong cohort of Indigenous staff – including in leadership positions – with close ties to the region, lent itself to strategic and operational insight into cultural appropriateness at all levels of the organisation.

Poorly performing NTRB-SPs paid limited attention to aspects of engagement

In the absence of written policies, resources or training on culturally appropriate engagement, one NTRB-SP relied solely on the accumulated experience and knowledge of staff. This overly strong reliance on a number of Indigenous staff meant that valuable knowledge of local communities left the organisation when those staff left. Others required Aboriginal staff to attend all meetings with community and demonstrated strong skill in translating complex concepts for community understanding.

Only one NTRB-SP had very limited information on its website, including no complaints policy or internal review process that was accessible to the public, indicating a lack of transparency and accountability to the community.

Limited Aboriginal representation on the Board was noted as a concern for some Traditional Owners, who felt that their views were not being heard or effectively responded to.

Some Traditional Owners who spoke with the Review noted that they felt engagements with staff were rushed, and interactions were transactional, where no time was taken to have a yarn and build a relationship. These Traditional Owners experienced a legalistic, western approach to engaging with them, which often came across as too formal and rigid.

Complaints and internal review processes highlighted the need for transparent and clear communication

The number of complaints and requests for internal review varied significantly between NTRB-SPs, with some having none while others received more than 20. The Review does not consider the number of complaints received to be a good indicator of relative performance, given that certain vocal claimant groups often submitted multiple complaints through various people and channels, and more complex and disputed claims frequently attracted greater dissatisfaction among Traditional Owners. Larger NTRB-SPs with more active or ongoing claims also tended to have a higher number of complaints and requests for internal review.

Not all organisations were consistent in recording complaints received – a high number of complaints could also indicate that the NTRB-SP had transparent complaints handling practices. An NTRB-SP's policy and process for handling complaints and internal review were much more important than the number of complaints in influencing relative performance.

Most NTRB-SPs adhered to best practice and published their complaints policies and internal review procedures publicly on their website, making it easily accessible for stakeholders. Two NTRB-SPs only had their policies available internally.

Very few NTRB-SPs received a request for internal review during the Review period. A fair process for internal review ensured that it was completed by someone with sufficient independence from the original decision maker and who was ideally informed by advice from independent experts when reviewing decisions for assistance. This was usually documented in the policies made available to the Review, however practice varied. Staff at one NTRB-SP reported that they were not clear on the complaints and internal review process themselves.

Traditional Owners reported that there could be greater transparency in communication and handling of feedback and meetings across all NTRB-SPs. However, in the higher performing NTRB-SPs, there was a recognition that there was room for improvement and this meant that more constructive, practical ways forward together were explored. In lower performing organisations there was entrenched negativity towards feedback from vocal Traditional Owner groups within their communities and an absence of any desire to change existing norms.

An innovative approach towards feedback was developed at one NTRB-SP that distinguished between concerns and complaints in its complaints policy. A concern was recorded when a community member contacted the NTRB-SP expressing “worry or doubt over an issue” as opposed to submitting a formal complaint. Concerns did not always receive a formal response. If Traditional Owners did not have their concern addressed appropriately, they had the option to lodge their concern as a complaint. Other organisations also addressed this distinction by attempting to resolve issues through conversation and informal means to prevent them from escalating.

Consent was highlighted as key to effective use of cultural materials

Informed consent through clear and intentional community engagement was highlighted by Traditional Owners as being a key indicator of proper and acceptable use of cultural materials. This was frequently a source of dissatisfaction for many Traditional Owner groups who spoke with the Review about various NTRB-SPs and was seen as a distinct issue to the return of cultural materials (discussed under TOR 6) where NTRB-SPs predominantly liaised with PBCs.

There were few NTRB-SPs with well-developed guidelines in this area. A strong performer had policies for the management of cultural materials that the Review found were well-considered and conscious of the need for security and safety, with staff taking a very proactive approach to the collection and management of materials.

Traditional Owners who spoke with the Review regularly expressed concerns about the use of evidence in claims and a lack of communication after evidence was obtained. The Review recognises this is a challenging issue many NTRB-SPs are grappling with and that opportunities for further collaborative development of policies and procedures remain.

5.3.4 TOR 3: Impact of external factors on performance

There were no external factors considered for TOR 3.

5.4 TOR 4 | Extent to which each organisation performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation.

5.4.1 TOR 4: Overall summary

What strong performance looked like

- An awareness of cost-containment amongst staff.
- Travel allowance available was capped but provided to the appropriate people.
- Cost reimbursement was only available where attendance at meetings was demonstrated.
- Cost-effective travel options such as group transportation was encouraged and recommended by the NTRB-SP.
- Timing for multiple meetings was aligned where travel (particularly to distant or remote locations) was required.

Concerns noted by the Review

- NTRB-SP funding allocation did not appear to be consistent with the level of claims work that is yet to be completed by individual NTRB-SPs, or the other funding streams that individual NTRB-SPs have.
- Fees for external consultants varied immensely and this was managed differently by different NTRB-SPs.

Innovators

- Three NTRB-SPs had a pre-qualified panel of external consultants who could be engaged by the organisation.
- COVID-19 helped most NTRB-SPs familiarise more clients with virtual meetings and reduced travel costs moving forwards. One NTRB-SP was a notable exception, with senior management arguing that reduced funding during this time contributed to a series of staff redundancies.

5.4.2 TOR 4: External factor-adjusted scores for each NTRB-SP

Table 10 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 10 | External factor-adjusted scores for TOR 4, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 4 – cost effectiveness	4	4	4	4	4	4	4	4	4	4	4	4	3

1 = very limited achievement

2 = limited achievement

3 = good achievement

4 = considerable achievement

5 = strong achievement

5.4.3 TOR 4: Comparative performance against key performance indicators

All NTRB-SPs were conscious of the need to manage costs but there was room for greater efficiencies in some cases

All NTRB-SPs have experienced cost pressures, though some more than others. Performance against this TOR reflected the extent to which key cost-drivers for the organisation and its native title functions had been managed appropriately. None of the NTRB-SPs showed evidence of financial irresponsibility. Most NTRB-SPs demonstrated to the Review that they had actively developed a range of strategies to manage costs associated with delivery of native title functions.

The Review encountered some practices that it considered false economies, such as senior executive leadership undertaking operational tasks. Delegation of these matters to more junior colleagues could realise greater efficiencies. Similarly, the absence of human resource (HR) functions (whether in-sourced or out-sourced) meant that very senior staff, including lawyers, were spending time on managing these functions, including recruitment and complaints management.

Staff salaries was a key cost-driver for NTRB-SPs

The Review identified a number of key cost drivers for all the NTRB-SPs, with staff salaries being the most significant, usually accounting for more than half of an organisation's expenses. NTRB-SPs need to maintain competitive salaries in order to attract and retain talent, given the high demand relative to supply of professional staff with native title expertise. This is particularly true for the NTRB-SPs based in regional or remote locations.

Management of the cost of claim group meetings varied across the NTRB-SPs

Claim group meetings and related travel were also a key cost for all NTRB-SPs. All NTRB-SPs reviewed had active policies in place which clearly outlined the type of meetings they could support financially and the type and amount of support that could be offered. While the exact details of support provided differed between NTRB-SPs, the majority used similar strategies to minimise costs wherever possible, including:

- A cap on available travel allowance.
- Only reimbursing costs where attendance at meetings was demonstrated.
- Recommending cost-effective travel options, such as group transportation.
- Aligning the timing of multiple meetings where travel (particularly to distant or remote locations) was required.

There were differences between NTRB-SPs on the type of meetings for which financial reimbursement was available. Some NTRB-SPs only provided funding for key claim group meetings such as authorisation and determination meetings, while others believed that presence at meetings was vitally important in bringing along the full group.

Both within and between NTRB-SPs, the size of claim groups varied significantly. For example, within a single NTRB-SP, the size of the claim groups it assisted during the Review period varied from 80 to 550.

The approach to arranging travel also differed, largely dependent on the geography of the region. Some NTRB-SPs would help book charter buses or flights to enable attendance. Others required Traditional Owners to be more proactive and submit receipts for expenses incurred (which could be a disadvantage for those with limited funds).

One organisation in a highly colonised and disrupted area with a lot of non-resident claimants had adopted a policy of only providing funding to the named applicants in the claim. This presented significant cost-savings to the organisation both directly and indirectly through reduced resources and staff time

needed to be dedicated to claimant engagement. This approach was not considered satisfactory by other NTRB-SPs with a different regional profile.

Costs for external consultants varied significantly between NTRB-SPs

Fees for external legal and anthropological consultants were also a key cost driver for NTRB-SPs, although the extent of the costs varied significantly. For NTRB-SPs who retained their own legal and anthropological teams on staff, use of external consultants was generally limited to:

- expert advice for complex or challenging cases
- brief out during periods of high workload or limited staffing
- brief out when the NTRB-SP was already representing another client, which presented a conflict of interest for the NTRB-SP.

For most NTRB-SPs, the Review found the expenditure on external consultants to be well justified and reasonable. Even where costs were significantly high, this was usually explained by particular complexities to certain claim proceedings which required expert input, or some limitation in internal capacity which required work to be outsourced.

On average, 11 per cent of the total expenditure of NTRB-SPs went toward consultants. Good performers had a pre-qualified panel of external consultants who could be engaged, with use of external practitioners who were not already on the list requiring prior approval by the executive. This vetted list allowed costs to be more rigorously monitored and managed.

5.4.4 TOR 4: Impact of external factors on performance

The Review assessed four factors that impacted NTRB-SP performance against this TOR – the size of the RATSIB area, the remoteness of the RATSIB area, the average number of people within a claim group and the need for interpreters.

Table 11 indicates the effect of external factors on the performance of NTRB-SPs against the TOR. 1 = easier to perform and 3 = harder to perform. The legend is captured below.

Table 11 | Combined effect of external factors on NTRB-SP performance against TOR 4

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 4 – external factors	3	3	3	2	3	3	3	3	2	1	3	3	3
1 = Easier				2 = Limited impact				3 = Harder					

Size and remoteness of RATSIB areas varied considerably between NTRB-SPs, with both factors having a significant impact on expenses for claimant travel and meetings. The Review found that all NTRB-SPs generally handled challenging circumstances to the extent that they could. The average number of people within claim groups likewise varied considerably between double to triple digits. Again, all NTRB-SPs used their available resources to the extent that was possible. Interpreters were used to a limited extent by a small number of NTRB-SPs and rarely constituted a significant expense.

Changes due to the COVID-19 pandemic led to increased efficiencies for most NTRB-SPs

The COVID-19 pandemic and state imposed public health travel restrictions delayed Federal Court timelines and claims work for all NTRB-SPs. This frequently led to budget underspends and funds set aside

for litigation and other legal costs being carried forward to later years. However, core funding for most NTRB-SPs and the PBC support services they provided remained relatively stable over the Review period. Most NTRB-SPs were able to handle COVID-19 well, with many turning it into an opportunity to increase virtual meetings and reduce travel spending moving forwards.

5.5 TOR 5 | Extent to which each organisation has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery.

5.5.1 TOR 5: Overall summary

What strong performance looked like

- Clear separation between the role of the Board and the Executive, with appropriate documentation and Board Directors' acceptance of their role.
- Regular governance training for Board Directors.
- A current strategic plan, endorsed by the Board.
- Regular, comprehensive reporting to stakeholders through annual reports and a range of other communications and communication channels.
- A clear line of communication between the Board and Traditional Owners.
- Robust financial management with financial delegations that were clear and adhered to.
- Active recruitment of Indigenous staff from a range of backgrounds (including those from outside the RATSIB area) and support for the promotion of Indigenous staff within the organisation.
- Recognition and action on the need to have policies in place to protect, monitor and enhance staff wellbeing.
- Robust conflict of interest policies which were adhered to when staff or Board members were involved with claims.
- A skilled HR function, either in-house or outsourced.
- A system of performance reviews that was regularly implemented and used to improve quality in all roles.

Concerns noted by the Review

- Long tenure of some Board Directors and a lack of opportunity for refreshing of Board membership.

5.5.2 TOR 5: Scores for each NTRB-SP

Table 12 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 12 | External factor-adjusted scores for TOR 5, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 5 – governance and culture	3	2	3	4	4	4	3	3	4	4	5	5	1

1 = very limited achievement	2 = limited achievement	3 = good achievement	4 = considerable achievement	5 = strong achievement
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5.5.3 TOR 5: Comparative performance against key performance indicators

There was a diversity of legal structures and Board compositions and tenure

As outlined in section 2, there were three main legal structures in place among the cohort. Six organisations were registered under the *Corporations Act 2001* and five were registered under the CATSI Act. The CLC and NLC were established under the ALRA and subject to the *Public Governance and Performance Accountability Act*.

Some organisations were Native Title Representative Bodies (NTRBs) while others were Native Title Service Providers (NTSPs). NTRBs are recognised by the Minister for Indigenous Australians under section 203AD of the NTA. NTSPs perform the same functions as NTRBs in areas where there is no NTRB but are not Ministerially recognised. NTRBs and NTSPs are both funded by the NIAA under Grant Opportunity Guidelines for performance of representative body functions.⁹ Their funding agreements contain identical terms and they go through the same process in applying for funding. Table 13 shows NTRBs and NTSPs as at 1 April 2024.

Table 13 | NTRBs and NTSPs¹⁰

NTRBs	NTSPs
• KLC • YMAC • NLC • CLC • CYLC • NQLC	• CDNTS • NTSG • SANTS • QSNTS • CLCAC • NTSCORP • FNLRs

There was also variation in the structure of the Boards (which did not necessarily coincide with being an NTRB or an NTSP). Over half of the NTRB-SPs (nine) had representative boards where Board Directors were elected or appointed to represent an area of Country within the RATSIB area. Boards constituted in this way tended to have 100 per cent Indigenous membership. Elections were held to select Directors in all cases with one exception. The representative structure was widely understood and accepted although the Review heard frustration from some Traditional Owners that this arrangement tended to favour larger families who could garner more votes and therefore achieve stronger representation.

⁹ Funding is provided under section 203C of the NTA for NTRB and under section 203FE(1) of the NTA for NTSPs.

¹⁰ NNTT. RATSIB Areas. 2024. Accessed July 2024. https://www.nntt.gov.au/Maps/RATSIB_map.pdf

Several NTRB-SPs had a governance model, or were transitioning to one, that consisted of a core, lean Executive Board, which was advised by larger regional councils or other committees which had elected or nominated representatives. This meant the Board could remain at a functional size while allowing Traditional Owners from all areas to have a voice.

A further four NTRB-SPs had skills-based Boards where Directors were recruited for specifically relevant skills – typically Indigenous organisation experience, native title expertise or knowledge of financial management. Requirements for Aboriginality varied between these NTRB-SPs, with some having formal requirements for an Indigenous or Indigenous majority Board, while others flagged a strong preference, but had no such formal requirement. Only two NTRB-SPs had a Board where the majority of Directors were non-Indigenous.

As a result of the different structures, the number of Directors on Boards varied significantly between NTRB-SPs, with some having as few as five Directors, while some of the representative Boards had 12 Directors.

Separation between Board and Executive was well managed by most NTRB-SPs

All NTRB-SPs had strong documentation on Board delegations and Board separation from day-to-day operations. The Review found that the Boards of most NTRB-SPs functioned well across the Review period and provided strategic direction to their organisations.

Board performance was less than optimal in a small number of cases. In one case, the Board did not accept the “separation of powers” between Board and management and had voted against a change to the Board structure that would have brought in greater expertise in governance. In another case, the Board had not renewed its strategic plan for at least eight years, did not hold elections and did not engage with the Review.

In general, conflict of interest policies and procedures were recognised as being key and were well known and implemented in practice across Board Directors. While these policies appeared effective, they did not stop some Traditional Owners who spoke with the Review from alleging that Board Directors were able to influence decisions through long-established close relationships or other means of influence. The Review was not able to verify or disprove these claims.

Governance training was undertaken in most organisations, with some providing funding for Directors to attend external governance training workshops. Only one organisation had a specific staff position to support Board members’ understanding of their role. At least one organisation did not appear to run regular governance training.

Board tenure was a concern in some organisations

Board tenure is an important element in the quality of governance. A mixture of renewal and stability is generally regarded as most effective.

Some organisations had particularly long tenured Boards. This tended to draw negative commentary from Traditional Owners who spoke with the Review. These Traditional Owners felt excluded from decision-making and expressed concerns that the families of these individuals had undue influence on decision-making.

The Review notes that factors such as seniority, cultural knowledge and leadership experience are important considerations in the nomination and election of Board Directors and Chairpersons. While the Office of the Registrar of Indigenous Corporations’ (ORIC) Model Rule Book for Indigenous Corporations allows Directors to serve multiple terms and be re-elected, the Review considers that the principles of good governance promulgated by the Australian Institute of Company Directors (AICD) are nevertheless

relevant for NTRB-SPs to consider in relation to the tenure of Directors. These principles suggest that the tenure of Directors be limited to encourage renewal.¹¹

The Review notes that while there is a need for continuity in governance, there is also a need to balance this with providing opportunities for the development of other leaders. Particularly where tenure has extended beyond ten years, the appointment of Directors should be reviewed to assess the balance between continuity and renewal and to gauge whether the overall balance continues to be in the best interests of the organisation's performance.¹² While experience brings with it many advantages, there is a balance to strike with providing opportunity for new perspectives and voices.

Organisational management was generally fit-for-purpose

Of the 13 NTRB-SPs reviewed, at least three of the larger ones were diverse organisations with a range of functions beyond native title. In these organisations the management of native title issues tended to be dispersed across a range of legal and anthropological functions. In contrast, the other NTRB-SPs were generally smaller and focused primarily on native title.

Organisational restructures were fairly common throughout the Review period, responding to changes in priorities.

Financial management appeared robust in all organisations, with financial delegations in place and adhered to, and audited financial reports achieved by all organisations throughout the Review period. Significant underspends were an issue in a number of organisations and can be largely attributed to COVID-19 causing delays in claims work across the country.

HR services were primarily undertaken in-house although some organisations successfully used outsourced arrangements and one had no HR function.

Organisational culture was generally positive with access to staff training

Most NTRB-SPs demonstrated a positive culture, with staff reporting an environment where they were supported to perform well. While there were instances of bullying and harassment, the Review saw these as exceptional and there were processes in place to manage them. A number of NTRB-SPs reported implementing initiatives to improve internal culture. Two organisations were found to have less supportive cultures and limited avenues to understand and address the relevant issues.

Many NTRB-SPs prioritised staff training with multiple avenues for formal and informal training. Nurturing of junior staff was a key priority for many, in the hope they would remain in the organisation.

While many organisations had policies relating to performance management, few carried them out on a consistent basis. This was noted by the Review as a key area for improvement, as ongoing quality assurance is key to ongoing strong performance.

Career pathways for Indigenous staff were not always clear

NTRB-SPs generally targeted Aboriginal and Torres Strait Islanders in their recruitment for all staff positions, including professional roles. Those who had experience working in remote communities or in the local region were particularly sought after candidates. However, in line with the challenges of recruiting into the sector in general, this often proved difficult.

About half of the NTRB-SPs reviewed had specific training options for Indigenous staff and Indigenous leadership in some of the NTRB-SPs had progressed up through these processes. There were successful

¹¹ AICD. Principle 3: Board composition. 2019. Accessed November 2023. <https://www.aicd.com.au/corporate-governance-sectors/not-for-profit/principles/board-composition.html>

¹² AICD. 2022. How to get CEO succession planning right. Accessed April 2024. <https://www.aicd.com.au/leadership/qualities-of-a-good-leader/challenge/how-to-get-ceo-succession-planning-right.html>

stories of individual Indigenous staff members who had worked their way up at almost every NTRB-SP. At least three NTRB-SPs had a number of long tenured staff members who had progressed from entry or graduate level positions such as receptionist, to their current roles as team or regional managers. Despite this, few NTRB-SPs had a clearly defined employee value proposition or career pathway for Indigenous staff and there is an opportunity for greater development in this area across the sector, particularly for professional and leadership roles.

5.5.4 TOR 5: Impact of external factors on performance

There were no external factors for TOR 5.

5.6 TOR 6 | Extent to which each organisation is adequately supporting Prescribed Body Corporates towards self-sufficiency.

5.6.1 TOR 6: Overall summary

What strong performance looked like

- Considered use of PBC basic support funding to ensure compliance and facilitate PBC capability development and independence.
- Resources devoted to supporting PBCs with FANs and the making of agreements.
- Regular monitoring of PBC aspirations.
- Support for PBCs to undertake strategic planning and increase access to funding as needed, for example, through business, enterprises or grants, including the NIAA PBC Capacity Building Program.
- Support for PBCs to represent the rights and interests of native title holders, including social, cultural and economic aspirations.
- A clear and transparent PBC service offer, based on a targeted assessment of PBC needs and aspirations, which allows flexibility and choice for PBCs regarding the services they receive.
- The existence of a policy on the return of cultural materials – or active development of one.

Concerns noted by the Review

- A lack of clarity and consistency across the sector on how PBC basic support funds could be used.
- Unequal ability across NTRB-SPs to devote resources to supporting PBCs towards economic sustainability.
- The potential for NTRB-SPs to be in competition with PBCs for funds flowing from activities such as heritage clearances or economic development opportunities.

Innovators

- Programs that support PBC economic development and address the challenge of PBCs operating independently and reaching self-sufficiency with no income outside of basic support funding.
- Development of a service offer that provides quality administrative support (such as accounting and HR support) to PBCs at affordable prices.

5.6.2 TOR 6: External factor-adjusted scores for each NTRB-SP

Table 14 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 14 | External factor-adjusted scores for TOR 6, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 6 – PBC self-sufficiency	5	4	3	5	3	4	4	3	4	4	5	3	2

1 = very limited achievement	2 = limited achievement	3 = good achievement	4 = considerable achievement	5 = strong achievement
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5.6.3 TOR 6: Comparative performance against key performance indicators

Most NTRB-SPs saw their mission as building PBC capability, with the intention of promoting independence over time

Most NTRB-SPs stated that the purpose of their PBC support activities was to grow the skills needed for independence. For many NTRB-SPs, however, the only resources devoted to this were the PBC support funds for basic compliance support provided by the NIAA. The extent to which priority and resources could be applied to supporting PBCs more broadly, for example in areas of economic development, was also highly dependent on how far progressed the NTRB-SP was with claims activity.

More advanced support activities were able to be undertaken by NTRB-SPs who employed staff with a specific economic development focus to support their PBCs. Most of these services were provided by the NTRB-SP under fee for service arrangements, depending on the capacity of the PBC to pay for these services.

The PBC basic support funding from the NIAA was used differently across the cohort

All NTRB-SPs applied to the NIAA for PBC basic support funding, which was allocated by the NIAA in the range of approximately \$50,000 to \$80,000 per PBC¹³. During the COVID-19 pandemic the NIAA removed the individual application-based process. Beyond using the funds to support compliance with the CATSI Act requirements, there was no formal expectation from the NIAA for how these funds would be used by the NTRB-SP. They were in fact used very differently:

- Some NTRB-SPs required the PBC to develop a budget which was then approved by the NTRB-SP. A variation on this was that PBCs needed to apply to the NTRB-SP for the funding and the amount the PBC received was up to the NTRB-SP's discretion.
- Some NTRB-SPs reported that they passed on the funds directly to their PBCs. PBCs in these regions both appreciated and expected this source of support. Feedback indicated that it was largely used to employ staff to support compliance and the management of Future Acts.
- Other NTRB-SPs reported that they kept the funding to resource the support they provided to PBCs.
- Where PBCs did not have bank accounts or the systems in place to handle the money, the NTRB-SP paid the invoices submitted by the PBCs against an agreed budget.

The varied arrangements reflected the different maturity levels of PBCs, the different interpretation of how the funds could be used, as well as different attitudes from the NTRB-SPs to the PBCs in their RATSIB area.

In at least one case the lack of clarity about use of the funds, together with poor relationships with PBCs, resulted in continual underspends of the PBC support funding.

¹³ There was a separate process through which PBCs could apply for Capacity Building Grants.

The NIAA has noted that since the Review period, formal guidance for PBC basic support funding is being developed.

The mainstay of PBC support provided was assisting organisations to remain compliant with legal requirements

A significant part of PBC support activity during the Review period was assisting PBCs to comply with their legal requirements under the CATSI Act. This included administrative support, such as arranging annual general meetings, taking meeting minutes and submitting reports. PBCs that were relatively mature could manage their own compliance, or if they had a good income they could purchase these services elsewhere. These PBC compliance support efforts were largely successful, with only one of the PBCs supported by the NTRB-SPs reviewed reported to be non-compliant with the CATSI Act requirements.

PBCSUs were in place across more than half the NTRB-SPs

Two main organisational structures were in place across the NTRB-SP cohort. Over half the organisations (seven) had a PBCSU with specialised staff who focussed solely on PBC issues. These PBCSUs varied in the extent to which they provided support beyond PBC corporate compliance such as undertaking the management of FANs and agreement making. Six organisations used staff from the legal team to undertake management of FANs and agreement-making. These organisations often used the same staff who had supported a particular determination to continue the legal relationship into providing PBC support.

There was no clear trend across the cohort that indicated whether one structure reliably delivered superior service. However, the establishment of separate PBC-focused units is likely to provide a better focus on holistic PBC support into the future.

Some NTRB-SPs delivered a range of non-legal supports aimed at promoting independence

Some of the better-resourced organisations had developed strategies to promote independence and self-determination through regular monitoring of PBC aspirations, tailoring supports to achieve PBC goals and monitoring progress towards the goals expressed. Two NTRB-SPs used surveys to understand the aspirations of individual PBCs.

Many NTRB-SPs also supported PBCs to apply for capacity building grants from the NIAA. Some of these were innovative, supporting PBC economic development or in one case addressing the challenge of PBCs operating independently and reaching self-sufficiency with no income outside of basic support funding.

NTRB-SPs with access to state/territory funding generally had much better resourced PBC programs, with additional staff to support economic development.

Most NTRB-SPs had service agreements and fee schedules to describe the range and cost of services a PBC could expect to be delivered

Service agreements or contracts are a standard means of establishing expectations around what services will be provided between parties. Such an agreement acts as an anchor for any professional relationship. In terms of supporting self-determination they are an important example of a commercial relationship.

More than half of the NTRB-SPs had service agreements with all the PBCs to whom they provided services. Two organisations did not have any service agreements in place.

Fee schedules had also been developed by most organisations, especially in regions where there was competition for service provision or where PBCs had independent resources. Relatively low fees could serve as an encouragement for PBCs to maintain a relationship with the NTRB-SP, rather than seeking alternative providers. Some NTRB-SPs had responded to this by establishing a dedicated business offer that aimed to provide quality administrative support to PBCs at affordable prices.

The proportion of PBCs within a RATSIB area that received support from their NTRB-SP varied across the cohort

The four NTRB-SPs with few (five or less) PBCs in their region delivered support to all the PBCs in their region. The remainder of NTRB-SPs generally supported the majority of PBCs in their RATSIB area – ranging from 93 per cent to around 50 per cent of the PBCs in the region. Section 6.7 provides more detailed information. Those PBCs that did not receive support from their NTRB-SP either purchased support from another provider or managed their own compliance.

Limited progress has been made on the return of cultural materials

The previous round of Reviews (2017 to 2019) flagged the need for a strategic approach to govern organisational practices on the return of cultural materials. NTRB-SPs acknowledged that this was needed but challenging, as the return of materials involved sensitive confidentiality issues. In some cases, material needed to be retained by the NTRB-SP to support further claims. The Review understands that this issue is under consideration by all NTRB-SPs but notes that as more claims are determined the need for a consistent approach to this issue will grow.

Across the cohort only four NTRB-SPs had a policy on the return of cultural materials. Three NTRB-SPs had a systematic approach to the issue but did not have formalised policies. The remaining NTRB-SPs had neither a policy nor a consistent approach to practice.

5.6.4 TOR 6: Impact of external factors on performance

The Review assessed one factor that impacted NTRB-SP performance against this TOR – the extent to which self-sufficiency for PBCs was achievable.

Table 15 indicates the effect of external factors on the performance of NTRB-SPs against the TOR. 1 = easier to perform and 3 = harder to perform. The legend is captured below.

Table 15 | Combined effect of external factors on NTRB-SP performance against TOR 6

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 6 – external factors	3	3	3	3	3	3	3	3	3	2	3	3	3

1 = Easier

2 = Limited impact

3 = Harder

The Review noted that there were a number of PBCs in almost every NTRB-SP’s RATSIB area situated in remote locations with limited avenues for economic development. Based on this factor, the Review rated the external factors for most NTRB-SPs as being harder.

PBCs across the country varied widely in their potential for economic development and establishing independence

Across the country there was enormous range in the potential of individual PBCs for achieving economic independence. This was typically associated with whether their Country had potential for mining, tourism and large scale land management (such as national parks). Some Traditional Owners found themselves in highly mineralised regions such as the Pilbara and consequentially could negotiate agreements that led to their financial independence. Others had very little prospect for development and associated agreements and income, and would face challenges in achieving self-sufficiency. These PBCs were likely to need ongoing support even to remain compliant with their obligations under the CATSI Act.

5.7 TOR 7 | Extent to which each organisation has developed its planning for a post-determination environment.

5.7.1 TOR 7: Overall summary

What strong achievement looked like

- A strategic plan in place that explored how the NTRB-SP would function in an entirely post-determination environment. Ten organisations had such strategic plans.
- Concrete key performance indicators in the plans for post-determination.
- Practical steps put in place to market NTRB-SP services to their regional PBCs.

Concerns noted by the Review

- Lack of broad input from Traditional Owners in the strategic planning process.
- Perceived or real competition between NTRB-SPs and PBCs over economic opportunities.

5.7.2 TOR 7: External adjusted scores for each NTRB-SP

Table 16 scores the performance of NTRB-SPs against the TOR. 1 = limited achievement against the TOR and 5 = very substantial achievement. The legend is captured below.

Table 16 | External factor-adjusted scores for TOR 7, by NTRB-SP

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 7 – post-determination planning	5	1	4	5	4	5	3	4	3	5	4	3	1

1 = very limited achievement

2 = limited achievement

3 = good achievement

4 = considerable achievement

5 = strong achievement

5.7.3 TOR 7: Comparative performance against key performance indicators

The degree of preparedness for post-determination varied markedly across the cohort. The driver of this variation was primarily how close each organisation was to finishing the claims in their RATSIB area. To some extent the whole cohort delivered post-determination services, with all organisations delivering ILUAs and assisting with FAN management. This was seen by the whole cohort as part of their core business.

Most NTRB-SPs had a strategic plan that included a focus on post-determination

Most NTRB-SPs had strategic plans to guide their transition to an entirely post-determination environment. Typically, these plans explored how the organisation would be financially sustainable when they were no longer delivering claims-related native title services funded by the NIAA. This generally included consideration of the services they could offer PBCs and on what financial basis, as well as consideration of compensation claims.

A common theme in these strategic plans was the need for positive relationships with all the PBCs in the region, in order to maximise the likelihood of being accepted as the service provider for the future. Plans set out strategies for creating and sustaining such relationships. In at least one case the NTRB-SP had commenced a transition phase towards badging itself as a service provider to Aboriginal organisations in any sector – not solely native title – providing legal advice, financial management, organisational support and consultancy services to a wide range of clients.

Only three NTRB-SPs did not focus on the post-determination era in their strategic plan. As noted above, these organisations still had many claims to resolve.

The inclusion of concrete measurements to monitor the extent to which post-determination strategic goals are implemented is key to ensuring an ongoing focus. About half of the NTRB-SPs included concrete key performance indicators into their plans for post-determination. For most of these organisations the detail of who had responsibility for collecting and analysing the data nominated was not clear. Three NTRB-SPs had aspirations in their planning, but no key performance indicators.

The extent of consultation across Traditional Owners varied

Five NTRB-SPs had strategic planning processes that consulted Traditional Owners more widely than those who were on the Board. Typically, these processes involved meetings with larger groups of Traditional Owners to discuss the future challenges and areas of focus. This was largely done through established regional processes. The remaining six organisations with functioning strategic plans tended to consult staff and Boards (who often had significant Traditional Owner representation), but not the wider group of Traditional Owners. A potential risk was that those with more distant relationships to their NTRB-SP felt that a relatively small group of people controlled the organisation and the decisions on future directions.

Some NTRB-SPs had firmly established their organisations in the post-determination environment while others were unclear on their role

A number of NTRB-SPs have invested in subsidiary or affiliated enterprises to diversify their income streams and reinvent their role in the post-determination environment. Some NTRB-SPs have supported PBCs to start developing economic independence through starting businesses. Conversely, other NTRB-SPs also nearing the end of the claims in their RATSIB areas were much less clear on how they would move forwards as an organisation.

Some stakeholders expressed concerns that NTRB-SP and PBC interests could be in competition

Stakeholders in some of the more enterprising NTRB-SP areas expressed some concern to the Review that NTRB-SPs seeking to find means to support themselves in the post-determination era were potentially in competition with the PBCs for economic opportunities. The need for transparent and agreed negotiations between NTRB-SPs and PBCs with clear delineations of the various types of economic activity involvement is discussed further in section 6. Native title holder rights and interests must be paramount in any such arrangements.

5.7.4 TOR 7: Impact of external factors on performance

The external factor that impacted performance against this TOR was how far the claims in the RATSIB area had been determined – progress towards a post-determination environment.

Table 17 indicates the effect of external factors on the performance of NTRB-SPs against the TOR. 1 = easier to perform and 3 = harder to perform. The legend is captured below.

Table 17 | Combined effect of external factors on NTRB-SP performance against TOR 7

	A	B	C	D	E	F	G	H	I	J	K	L	M
TOR 7 – external factors	1	2	1	2	2	1	3	2	1	1	3	3	3

1 = Easier	2 = Limited impact	3 = Harder
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Those that were closer to a post-determination environment generally had more developed planning and implementation in place. Two NTRB-SPs still had some years to reach complete determination of all land in their RATSIB area, however they were aware that this transition was on the horizon and paid close attention to the issues in their strategic planning process. Four NTRB-SPs anticipated a focus on determinations for many years to come. These organisations were considerably less advanced in planning for post-determination.

6 Systemic issues

6.1 Recruitment and retention of skilled legal and anthropological staff is a challenging issue for the whole cohort

The sector experienced considerable staff turnover during the Review period. The average annual staff turnover across the whole group was 22 per cent, with four organisations between 28 to 34 per cent. The lowest average annual staff turnover was 11 per cent. These figures represent a significant loss of expertise and the need for organisations to resource ongoing recruitment, induction and training. NTRB-SP staff, clients, state and court representatives all recognised the shortage of professionals with native title expertise. They noted that there are a limited number of lawyers with the capability to lead challenging cases. They also noted a lack of anthropologists with the knowledge or professional expertise to be expert witnesses or manage complex anthropological research.^x

Several NTRB-SPs reported experiencing significant difficulties filling vacant positions. The issue was exacerbated for the NTRB-SPs based in regional or more remote areas which had even greater trouble attracting and retaining staff, particularly in the context of competition from the mining industry which typically offered better remuneration. NTRB-SPs consistently reported that competition from mining companies, other private sector companies and government, placed pressure on wages and staff attraction and retention. One large NTRB-SP reported that due to the intense competition for senior lawyers, it had not been able to recruit an external senior lawyer to the organisation since 2018.

Vacancies often tended to be filled with staff from other NTRB-SPs, with some legal stakeholders adding that the senior lawyers were recycled and the sector had effectively become a “closed shop”. As more PBCs are established, the need for staff in PBCs will compete with NTRB-SPs. Many of the CEOs and senior staff in PBCs have come from the NTRB-SP sector. Stakeholders reported that in more recent times, the Queensland Government Truth-telling and Healing Inquiry was also seeking to recruit native title professionals which is likely to impact NTRB-SPs.

Rather than having constant recruiting campaigns, many NTRB-SPs adopted strategies such as promoting from within the organisation or hiring paralegals and junior lawyers. While hiring internally provided an effective means of meeting claim deadlines, these approaches tended to constrain the overall professional legal experience level of the team. Numerous senior stakeholders in the sector reported that due to the whole-of-sector staff shortages it was becoming more common for junior professionals to be promoted into senior roles too early, without having had sufficient experience or time to develop the appropriate skills. The Review heard from several legal stakeholders that some junior lawyers were left unsupervised, as the senior lawyers were stretched too thin. The shortage also forced some NTRB-SPs to prioritise cases more stringently in light of available resources.

The Review spoke with individuals who had left the sector after one to two years or were considering leaving to take less demanding and better paid jobs elsewhere. As happens in many sectors, young lawyers with two or three years of experience often leave the sector to avoid being limited to native title, or because they are offered higher wages elsewhere.

Continuous high workloads were also consistently an issue across all NTRB-SPs. The timing demanded by the Federal Court, under-resourced teams and extensive travel made working in the NTRB-SPs a highly demanding proposition. Staff vacancies increased the workload and placed additional pressure on remaining staff, exacerbating staff turnover.

It is clear that the number of new lawyers and anthropologists being trained in native title is not keeping up with demand. Some feedback suggested that this was the result of a lack of younger graduates

identifying native title as an area of interest. A number of stakeholders noted that native title anthropology in particular had become an increasingly difficult area to work in because cases had become increasingly complex and because the ethics approvals required by AIATSIS were stringent.

Several legal staff mentioned that the demise of the Aurora Foundation's support for an entry pathway to the native title sector, which had previously matched interns with NTRB-SPs, courts and other workplaces in the native title space, had further exacerbated recruitment difficulties. Other staff noted that they had not recruited interns from the Aurora Foundation, so it had not had a significant impact. Reinstating the Aurora program, which was largely designed to support legal staff, or a similar program, may assist over time in increasing the number of lawyers entering the field. It would also assist in increasing the number of Indigenous staff working in NTRB-SPs.

Indigenous anthropology course offerings through universities have also reduced. A historical example which was initially very successful was the Graduate Diploma in Native Title Anthropology established by Dr David Trigger and funded by the Western Australian Government and a mining company. More recently, the Review noted an initiative by one NTRB-SP to host an anthropology internship in connection with a University, dedicated to generating more interest in working in anthropology for NTRB-SPs, particularly among First Nations candidates. Further encouragement for these kinds of collaborative approaches would be a positive step.

Additionally, the National Native Title Council is providing training and workshops for NTRB-SP/PBC staff. This training is addressing a range of operations, management and cultural heritage topics and is likely to assist in building interest and capability in the broader NTRB-SP and PBC workforces.

Other stakeholders noted that the native title sector needs to look over the fence at workforce shortages in other fields – workforce shortages are not unique to the native title specialisation. They advocated solutions such as forgiving HECS debts or paying for/subsidising placements. They also highlighted the value of attracting lawyers to native title from other fields, to introduce some different skills and perspectives to assist in future proofing skills for the post-determination world. In their view most native title lawyers are narrowly focussed because they do not do any other kind of cases. They argue that the legal skills required for agreement-making, which in the end is essentially a commercial deal, will be useful for many NTRB-SPs and PBCs into the future. In their view there is an opportunity to recruit more broadly.

An immediate approach to this issue would be for NTRB-SPs to look at diversification of skills to support the PBCs they provide services to. This would assist the entire system as it transitions to the post-determination world. Stakeholders advised that they were aware of many young lawyers/anthropologists who are more interested in working with native title holders in the PBC environment due to the diversity of issues, working directly with a community and leveraging what native title rights can deliver. There is a strong focus on heritage, green energy, economic development and compensation claims.

6.2 Relative funding levels for claims management are outdated

The workload of NTRB-SPs has not remained static over time. While claims work still represents the primary workload for some NTRB-SPs, others have fewer claims remaining and are more focussed on supporting PBCs, including with responding to Future Acts and agreement-making. Support to PBCs remains an area of considerable potential growth. While compensation claims have begun to create workload for NTRB-SPs, they are likely to ramp up into the future.

Given that claims work has been the mainstay of NTRB-SP workload, the Review undertook an analysis of the relative levels of funding in relation to the potential level of claims work remaining in the region. The Review team acknowledge that this is not the only indicator of resource need, particularly as priorities may change into the future. Nevertheless, an understanding of future relativities based on potential future claims work at the end of the Review period is instructive.

Th NIAA notes that funding to NTRB-SPs is primarily based on the operational plan of current activities to be funded, not the future projection of land not determined or under claim (which this analysis is based on). This means that work on current claims for the funding period may be quite substantial, relative to future requirements.

NTRB-SP funding allocation did not appear to be consistent with the level of claims work remaining

The Review formed the view that the level of funding available to each NTRB-SP did not appear to be consistent with the level or complexity of claims work remaining in the region. The way NTRB-SPs are funded has largely remained the way it was historically, despite the RATSIB areas of some NTRB-SPs being almost fully claimed.

For example, in two organisations more than 95 per cent of the land area had already been determined. Yet these two organisations continued to receive a large amount of funding from the NIAA relative to other NTRB-SPs which still had significant claims work to progress. Some organisations also had a number of alternate sources of income that may assist them to undertake their roles into the future.

The Review notes that there have been few funding changes to recognise and respond to the differing claim loads between the NTRB-SPs. Table 18 presents an analysis of NTRB-SP funding compared to areas still left to claim.

Table 18 | NTRB-SP funding relative to RATSIB area not determined or not under claim (\$/sq km)¹⁴

Highest												Lowest
2,316	1,959	804	246	226	212	198	165	91	75	50	36	32

The table demonstrates misalignment between current funding levels and the ongoing need to support native title claims – which was in the past the primary activity of each NTRB-SP. The Review notes that geographic areas are a very crude measure of demand, given the complexity of claims and other variables. Nevertheless, the broad point demonstrated in Table 18 needs to be taken into consideration.

The table indicates that some of the organisations that still have a high load of claims are receiving significantly less funding per square kilometre of undetermined land than those organisations which have very few claims remaining. Conversely, the two poorest performers of the cohort are among those with the highest proportion of land left to claim.

Claims management is of course not the only activity of the NTRB-SPs. Support for Future Acts and agreement-making have increasingly become key aspects of NTRB-SP activity as has basic support for PBCs – which is discussed later in this report. However, claims management has been the basis on which historical funding allocations were made. The Review also acknowledges that the cost per claim can vary markedly, depending on the size, complexity of tenure, level of disputation and attitude of the state/territory government in the RATSIB area. These factors would seem to be more important determinants of funding requirements than historical allocations. The Review believes that any transition to future funding allocations for claims related activity should consider:

- claims load – proportion of the RATSIB area still to claim
- difficulty of remaining claims (noting that there is currently no method of assessing this).

¹⁴ Much of the claimable land in the Northern Territory was held in trust under the ALRA. The land rights provided by the ALRA are widely considered stronger than those provided by the NTA and so Traditional Owners usually consider native title to be superfluous over land already held under the ALRA. The Review has not considered land already covered by the ALRA as claimable.

6.3 Improvements to governance

A fairly often repeated concern from the Traditional Owners who engaged with the Review was that in some NTRB-SPs there was no transparent pathway to join the Board. For example, one organisation appointed Board members through a sub-committee of the Board without an open and transparent process and most Board Directors had been there for extended periods. This arrangement meant that Traditional Owners who were not happy with how the organisation functioned had no real avenue for seeking change. Other NTRB-SPs also had no public process through which Board members were recruited. This too drove a lack of trust. For others the disempowerment came from being in a small family who were unlikely to ever garner sufficient votes to gain a place on Boards whose composition was determined through elections. Amendments to rule books, discussed below, may go some way towards addressing this.

A lack of transparency about Board recruitment also removes oversight to ensure that the Board composition represents the necessary skill set to oversee the organisation. It is particularly important in respect of financial literacy, corporate governance and cultural expertise. As a good governance principle, transparency and consistency are key and if an NTRB-SP does not employ good governance at the Board level, it is, at the very least, missing an opportunity to build capacity in members for taking on PBC Board roles.

The Review acknowledges that there are many variations in how representative and skills-based Board Directors are elected or appointed – some NTRB-SPs employ cultural processes to determine Board membership and the process for the Northern Territory Land Councils is determined by legislation. Nevertheless, the Review suggests that, where feasible, all NTRB-SPs should ensure that Board recruitment takes place via an open and transparent process.

As described in section 5, the governance structure of some NTRB-SPs meant it was sometimes possible for the same individuals to hold positions on the Board for long periods of time. While a majority vote model is familiar to most people and has historically been most commonly used in corporate elections, it may not always be the most suitable model for an NTRB-SP. Alternative voting models that continue to allow for Traditional Owner representation but increase opportunities for leadership renewal could be considered – for example, limiting the number of terms a Director can serve, limiting the number of votes each family has, a nomination process that rotates around different families, or rotating nomination by PBCs (if PBCs in the region are functional and united). The Review suggests that governance of the sector would benefit from the provision of more information across the sector about available models, to ensure the options are fully explored by Boards.

Regular review of NTRB-SP governance structures and rule books would ensure they remain fit for purpose. A provision for regular review of NTRB-SP governance structures and rule books – ideally by an independent expert to ensure the process was objective and fair – would prompt Board Directors and Traditional Owners to consider whether existing Board composition was adequate for meeting the changing needs of the organisation. It would also encourage leadership renewal and ensure that organisational governance properly reflected the current needs and functions of the NTRB-SP.

Where Directors are elected from the community on representative Boards, they may not necessarily understand the requirements for good governance. This can make it difficult for the Board to collectively ask for the training or skill development it might require to develop its governance ability or native title expertise. Under these circumstances it can be easier for executive staff to influence Board decisions.

The onus is placed on the NTRB-SP to facilitate training and skills development for the Board and some NTRB-SPs have the resources to do this. For example, some NTRB-SPs gave Board Directors access to AICD training annually and others enrolled Board Directors in a workshop with the Australian Indigenous Governance Institute during the Review period. Other NTRB-SPs did not prioritise scarce resources to dedicate to Board upskilling. The NIAA, as the funder, could require NTRBs to deliver a defined level of

training to Board members as part of the terms of their funding agreements. There would also be an opportunity (through the provision of more information across the sector about available models as suggested above) to include information about best practice approaches to issues such as length of serving periods.

The Review suggests that the presence of at least one independent Board Director with governance experience, preferably in the native title sector, can be hugely helpful in supporting the skill development of other Board Directors and providing an informed perspective to Board decisions. Such an independent Director can also encourage the Board to push for greater learning and development opportunities and perhaps offer other perspectives than those of embedded executive staff. The inclusion of an independent Director on some NTRB-SP Boards has encouraged greater consideration of processes to improve governance structures.

6.4 Management of complaints

There is a fragmented national process for handling complaints about NTRB-SPs

Most NTRB-SPs adhered to best practice and published their complaints policies and internal review procedures publicly on their website, accessible by stakeholders. The best examples of this included information about how complaints are processed, links to enable the submission of an online form or how to address a complaint to the CEO, timeframes for resolution of the complaint and information about how decisions could be reviewed. Many NTRB-SPs also encouraged prospective complainants to first speak to staff before making a formal complaint.

Keeping a register of complaints was also an important mechanism to understand the concerns of stakeholders. Not all NTRB-SPs adhered to best practice and this in part contributed to the variability in numbers of complaints registered and reported.

Analysis of the complaints received across the NTRB-SPs during the Review period identified a few consistent themes including:

- Decisions to decline assistance to Traditional Owners wishing to make a native title claim.
- Issues relating to the management of particular claim meetings or travel arrangements.
- PBC funding allocations and processes.
- The accuracy of claim membership or apical ancestors.
- The priority of claim groups.

Unsurprisingly, the resolution of complaints by the NTRB-SP was not always to the satisfaction of the complainant. In some cases, this led to complainants re-addressing their complaint to the Minister for Indigenous Australians or to the NIAA or the National Native Title Tribunal (NNTT). In other cases, complainants chose to address their complaint directly to the NIAA or to the NNTT where they were concerned it might not be properly considered by the relevant NTRB-SP.

The Review experienced an opaqueness about how complaints are dealt with across the system as a whole. NNTT staff field concerns about complaints made to both NTRB-SPs and the NIAA on a regular basis and there is frustration at complaints being referred backwards and forwards, and often to ORIC as well. Similarly, at the state level, many claimants resort to ringing state government departments to complain about NTRB-SPs and asking the state to intervene. Dissatisfied complainants also often (mistakenly) saw the Review process as an opportunity for their complaint to be resolved.

Complaints appeared to generally be brought to the attention of the NTRB-SP which was encouraged to try to resolve it. State representatives noted that it was not uncommon to advise an NTRB-SP or the NIAA

of an ongoing complaint. Feedback about the complaint was not always received, nor an indication that matters had been investigated.

The NIAA advised the Review that approximately 30 complaints had been submitted to the NIAA from Traditional Owners about their NTRB-SP during the Review period. These complaints were not necessarily forwarded by the NIAA on to the relevant NTRB-SP, often for confidentiality reasons or because they were concerned with broader legislative or administrative processes. The NIAA advised the Review that it takes all complaints about NTRB-SPs seriously and works closely with ORIC and the NNTT as relevant. It follows a complaints resolution process in which the complainants are encouraged to connect with the relevant NTRB-SP to work through what are often very complex and personal issues associated with Country and connection.

The Review finds it would be appropriate for the NIAA's funding agreements to require NTRB-SPs to have a consistent complaints process and for the sector to establish a consistent escalation point if a complaint cannot be resolved at the local level.

The Review notes that the NNTT has the power to mediate issues with NTRB-SPs, PBCs and Traditional Owners where it believes a complaint has valid standing. This can sometimes be a flawed process, as the NTRB-SP has to agree to independent mediation. Centralising complaints with the NNTT as the independent arbiter of claims would be a logical first step to bridging the gap in the current complaints process. While the NNTT is a neutral body and could undertake this role, the lack of any power to compel an NTRB-SP to participate is a significant barrier. The regulations would need to be changed to provide the NNTT with the power to compel a party to attend mediation and produce relevant documents.

The Review suggests that an agreed and consistent national process to register and investigate particular kinds of complaints would increase the ability of Traditional Owners to hold their NTRB-SP to account. While it is appropriate that the first approach should be to the relevant NTRB-SP, an unsatisfactory response from the NTRB-SP could lead to an agreed national process for escalation. This would be similar to the escalation process provided for the internal review process.

6.5 Facilitating basic support for PBC governance

Over the Review period there were more than 50 determinations achieved nationally. While there has not historically been a 1:1 relationship between native title determination and establishment of a PBC, this nevertheless equates to significant growth in the order of some 35 new PBCs¹⁵ across the Review period. The level of new incorporation over the past ten years has averaged approximately 12 PBCs each year. While the rate of growth is likely to taper off over the next ten years with the decreasing area remaining to be claimed, the numbers of PBCs being incorporated will continue to grow with time. These new PBCs will potentially have significant ongoing needs including governance, financial assistance, strategic and business planning, land use planning and operational assistance such as corporate functions and HR.

During the Review period – and initially in response to COVID-19 – the NIAA gave NTRB-SPs a global allocation of funding for PBC basic support. It was left to each NTRB-SP to decide how to allocate this funding between PBCs. The amount of funding available to NTRB-SPs for PBC support was widely described by stakeholders (including NTRB-SP staff, Traditional Owners and government representatives) as being insufficient to meet PBC needs. During the Review period, most PBCs could potentially access a funding envelope from their NTRB-SP, funded by the NIAA, of approximately \$50,000 to \$80,000 per annum. NTRB-SPs reported that the available funding envelope was barely enough to meet basic administrative and corporate requirements, which meant resources for building capability and developing self-sufficiency were very limited, particularly where PBCs did not have alternate sources of income such as

¹⁵ Information was only available by calendar year: 2019 – 14 new PBCs; 2020 – seven new PBCs; 2021 – 14 new PBCs; 2022 – 12 new PBCs.

from ILUAs or other arrangements. This was in turn a limiting factor on the transition of PBCs to self-sufficiency.

PBC Boards are almost always voluntary and Directors have day jobs which means meetings with NTRB-SPs generally occurred in the evenings or on weekends. This was challenging for NTRB-SP staff and increased staff expenses.

While the NIAA has a capacity building fund, PBCs usually require assistance to apply for this. Many NTRB-SPs took on the task of assisting their PBCs to successfully apply for these funds.

A number of stakeholders reported to the Review that they noticed PBCs without financial resources or capacity becoming more and more dysfunctional, while PBCs with financial resources and capacity became stronger and more self-sufficient. The latter were often located in mining regions and had the capability to handle sophisticated engagements with the state, resource companies and other businesses.

Some PBCs who had access to independent resources were able to manage their own administrative or legal support, sometimes by using NTRB-SP services – or other service providers – on a cost-recovery basis. The grouping of PBCs into a single PBC in one NTRB-SP streamlined the management of compliance functions as only one set of services needed to be provided for almost all the determined claims. However, there were divergent views about the other drawbacks of this approach in relation to limited transparency and accountability to Traditional Owners and concerns about the self-determination of individual claim groups.

Under existing arrangements, effective approaches to creating PBCs with sustainable governance place more demands on NTRB-SPs who are already fully stretched. Under the NTA, funding for the performance of the representative body functions that relate to providing support for PBCs can only be directed through NTRB-SPs. Some NTRB-SP staff noted to the Review that the changes to the CATSI Act requirements placed additional pressure on the NTRB-SPs, without any financial or other assistance from ORIC.

While there would be a considerable administrative burden involved in the NIAA directly funding PBCs in the future, the Review suggests it would not be an insurmountable task to establish an alternative funding process. Without an alternative, the NIAA will need to continue funding NTRB-SPs even when all claims have been resolved. Many PBCs have successfully transitioned from claimant groups to running effective corporate structures, usually with limited support.

The Review suggests that there may be merit in the NIAA, ideally in collaboration with ORIC, funding a small number of PBC governance specialist positions to work with NTRB-SPs in supporting PBCs. Currently this support tends to be the responsibility of NTRB-SP staff, on top of their business-as-usual responsibilities. This new role could consult on rule books and assist in day-to-day governance matters more appropriately and efficiently.

Additionally, the NIAA or ORIC could be required to establish more robust and relevant training and support for PBCs. Given that PBCs represent less than ten per cent of the corporations under ORIC's remit, this is more appropriately a role for the NIAA, taking into consideration various training programs already in place to develop a more strategic approach to the provision of support to PBCs.

There is also an opportunity to work with industry to establish a PBC training institute or similar. It is in the interests of industry to support PBC development so that industry has sustainable and functioning corporate structures to deal with.

Given the various options to improve the current approach, it would be sensible to undertake a study and make recommendations on a sustainable future funding model for PBCs.

6.6 The impact of claim group composition on the resultant governance of PBCs was a significant issue for some Traditional Owners

The Review received significant levels of feedback that some PBCs in a range of RATSIB areas had entrenched dissatisfaction with the composition of their PBC. This appeared to arise most commonly where determinations included different family groups and one of these groups dominated the governance. This was usually due to a large family consistently garnering the most votes at elections for officers. This pattern of voting remained constant, so members of smaller groups felt disenfranchised. The groups that felt disenfranchised experienced distress as they saw the PBC making decisions for what they perceived as their Country, without their input. In some cases, the opportunity to carry out often lucrative heritage clearances was an example of unequal distribution of benefits across PBC members.

Another dynamic that was creating distress was the range of day-to-day involvement with Country within a given claim group. Some claimants lived on Country, had extensive knowledge of story and regularly participated in ceremony. Others might have been Stolen Generation and not lived on Country, or may have been connected through their relationship to an apical ancestor, but not lived on or visited Country. These diverse claimants all had equivalent rights through the PBC structure. Some people with strong knowledge of law and custom did not hold senior roles in the PBC.

The Review acknowledges that individual NTRB-SPs are not responsible for the structural injustices of the native title system and the tendency to blame an NTRB-SP for these matters does not necessarily indicate a failure to perform its functions under the NTA. The Review additionally recognises that within claim boundaries, many further delineations are possible depending on the perspectives of relevant stakeholders. The highly contested nature of native title claims can be a result of the disconnect between Indigenous and non-Indigenous concepts of Country, where hard line boundaries (as required under the NTA) may have led to dissatisfaction.

This dynamic often arose when claims were composed of a range of clan groups and areas that had been amalgamated in order to meet the requirements for a successful native title determination under the NTA. At some point a judgement had been made, possibly on advice from the state government or Federal Court, that a claim that was configured in a particular way had the highest chance of success.

Whatever the cause of the constitution of particular claim groups, a significant number of native title holders across the country who spoke with the Review were deeply unhappy with the way their PBC functioned due to its composition. While the PBCs were compliant with the CATSI Act requirements, a proportion of their members did not believe they were enjoying their native title rights and interests.

Traditional Owners in those circumstances tended to put the blame for these circumstances on the NTRB-SP and the original claim composition. They thought the NTRB-SP should be assisting them to resolve the issues. Some individuals within PBCs were frustrated that they could not access legal assistance from their NTRB-SP to prosecute their internal issues. The Review notes that these disputes could be seen to fall within the dispute resolution functions of NTRB-SPs and therefore be within the scope of NIAA funding. The provision of legal assistance in such cases might not, however, be assessed as a priority for funding by the NTRB-SP. Moreover, the exercise of an NTRB-SP's dispute resolution functions to assist with disputes between PBCs and their members would require the PBC's consent. This means that minority or oppressed members of PBCs often had no source of support other than pro-bono advice from lawyers who often had no background in native title and PBCs. Solutions for these challenges are not necessarily within the control of the relevant NTRB-SP in managing the claim.

Another theme from PBC feedback was a concern that under the CATSI Act all PBC Directors did not have to be a member of the claim group. For example, where the rule book specifically allows it, a non-member can be appointed by a resolution of a general meeting, so long as a majority of Directors are native title holders. In some instances, the use of this provision gave rise to an (incorrect) perception that people who

had no connection to the Country in question were making decisions about it. This too gave rise to dissatisfaction with the experience of achieving and exercising native title.

In these circumstances, claim group architecture is only part of the picture, as the rules governing PBCs are also a key driver of PBC functioning. One solution to these issues is to look to amend the PBC Rule Book. The Federal Court provides a six-month period to finalise the PBC Rule Book after a claim is determined. This can be insufficient to conduct complex consultations to generate a Rule Book that maximises the likelihood of sustainable governance, particularly for lawyers with very heavy workloads. The Review suggests that the Federal Court be approached to consider extending this period to 12 months in cases where PBC members have a challenging governance arrangement to resolve.

The Review recommends that in such cases it would be useful for individual NTRB-SPs, or the sector as a whole, to develop a document with options available to Traditional Owners who are concerned about the governance of their PBC or are looking to models for their particular situation. This could be a means to address the dissatisfaction of Traditional Owners where significant tensions between groups have arisen as a result of the claim process or determination.

Some alternative models are currently in place and are considered by ORIC as “indirect representation models”, acceptable under the NTA. These include the structure of the Wajarri Yamaji Aboriginal Corporation¹⁶ or the Wanjinia-Wunggurr Aboriginal Corporation¹⁷ where there is an overarching PBC, with underlying corporate structures such as Land Groups represented by a committee of Traditional Owners from that specific region who govern the native title activities in specific parts of the determination area. The PBC Rule Book can be structured so that there is equal representation of Directors from each of the underlying corporate entities, to deal with any issues of large family groups being able to dominate decision making.

An important solution to many of these issues is to have the PBC Rule Book developed prior to the determination and having it authorised prior to determination so that claimants are seeing the resulting determination holistically and ensuring the governance structure represents the group’s reality. These are essentially issues related to corporate law rather than claims determination.

6.7 How best should the development of PBCs be undertaken into the future

Until now, the mandate of NTRB-SPs has been to be the portal and overwhelming majority provider of native title claim services. This primary role has remained essentially unchanged since their inception.

The steady achievement of native title determinations over the last 30 years, particularly from the 2000s, has delivered a fundamental shift in the native title landscape. NTRB-SPs have been working to achieve native title determinations since 1994.¹⁸ Across the country there have been more than 600 determinations,¹⁹ resulting in the establishment of 267 PBCs at the time of writing in June 2024.²⁰

When analysed at a more granular level the picture varies markedly across NTRB-SPs. Figure 2 shows the proportion of land determined under the NTA over time. Figure 3 presents the proportion of land already determined.

¹⁶ WYAC. WYAC – The Corporation. 2019. Accessed July 2024. <https://www.wajarri.com.au/wyac/>

¹⁷ See <https://nativetitle.org.au/find/pbc/4692> for the Wanjinia structure.

¹⁸ Department of Finance. Transparency Portal – Central Land Council Native Title. 2022. Accessed July 2024. <https://www.transparency.gov.au/publications/prime-minister-and-cabinet/central-land-council/central-land-council-annual-report-2021-22/output-group-6/native-title>

¹⁹ NNTT. Statistics. July 2024. Accessed July 2024. <https://www.nntt.gov.au/Pages/Statistics.aspx>

²⁰ AIATSIS. PBC National Snapshot. 2024. Accessed July 2024. <https://nativetitle.org.au/learn/role-and-function-pbc/pbc-national-snapshot>

Figure 2 | Proportion of land yet to be determined and number of PBCs registered over time

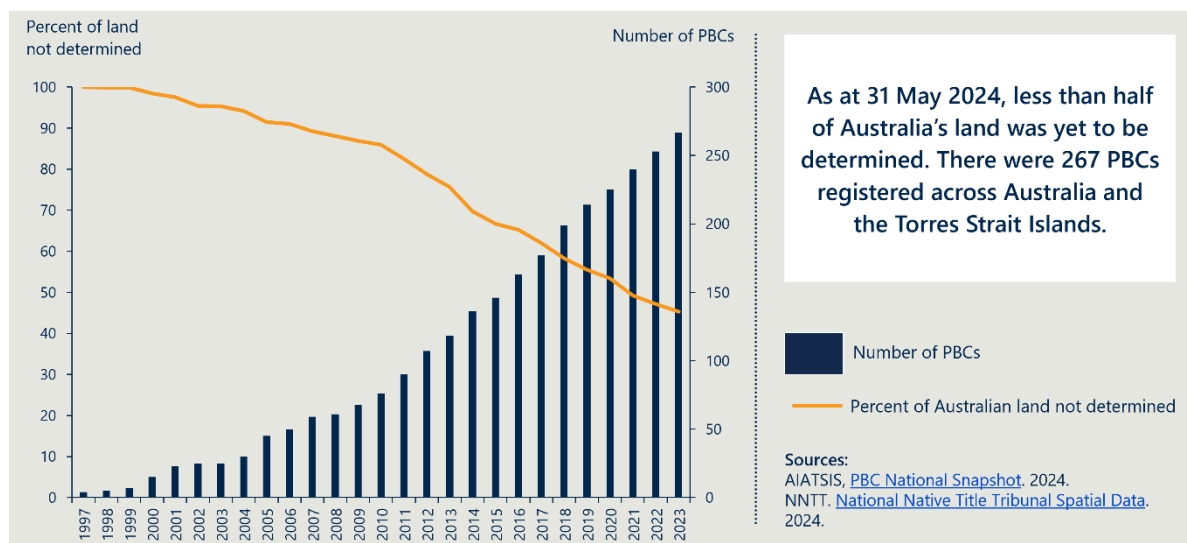
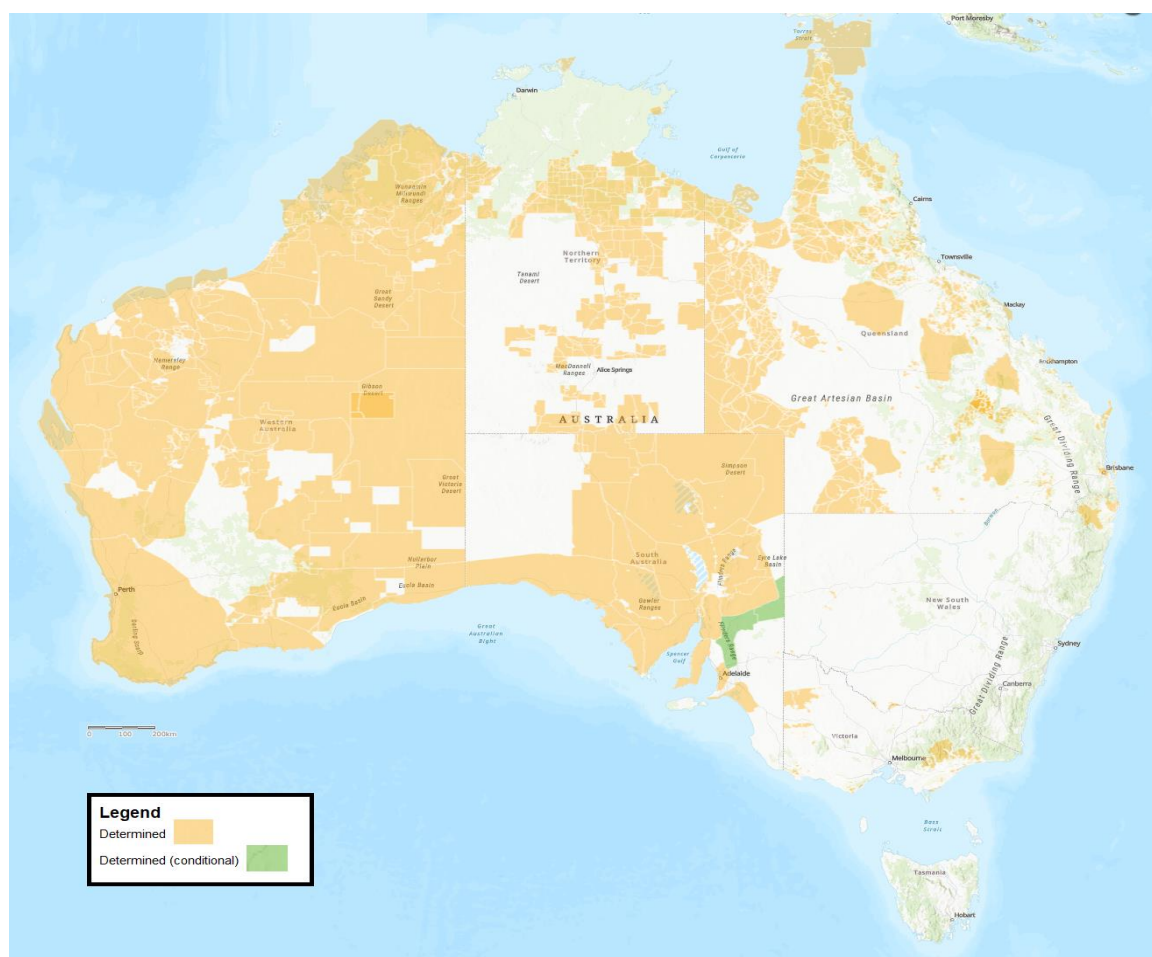


Figure 3 | Area under native title determination, as at 30 June 2024 ²¹



²¹ Native Title Vision. National Overview. 2024. Accessed 2 July.
<https://nntt.maps.arcgis.com/apps/webappviewer/index.html?id=d7aec94e0e204c48af7ef93b96160ba5>

Figure 4 | Approximate proportion of land not claimed or determined by RATSIB area, as at June 2024²²

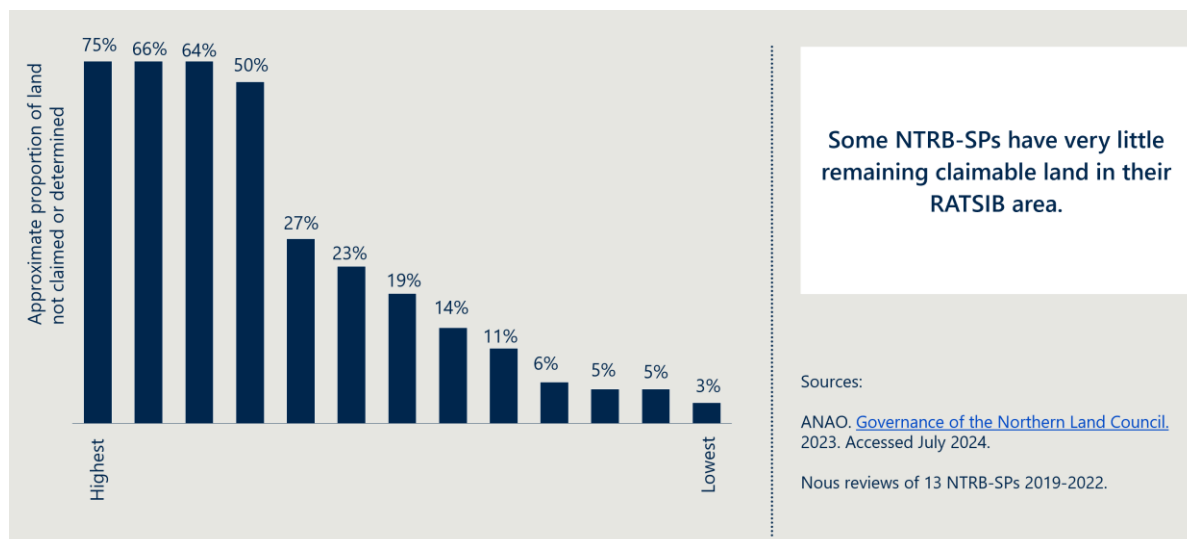


Figure 4 clearly shows that the focus of the work for many NTRB-SPs is changing markedly. Four members of the cohort (30 per cent) still have considerable claims work ahead of them. A further four organisations (30 per cent) have less than ten per cent of claimable land left. The remaining five organisations (40 per cent) are functioning in an environment where more than half of land and claims have been determined. Most of these organisations still have claims work and often on complex and demanding claims, however the quantum varies hugely across the cohort.

The role of NTRB-SPs will fundamentally change over the next decade as more determinations are made and land yet to be claimed continues to diminish, with support for PBCs becoming the primary focus of their activities into the future. As shown in

²² Much of the claimable land in the Northern Territory was held in trust under the ALRA. The land rights provided by the ALRA are widely considered stronger than those provided by the NTA and so Traditional Owners usually consider native title to be superfluous over land already held under the ALRA. The Review has not considered land already covered by the ALRA as claimable.

Table 19, most NTRB-SPs provided some level of support to at least two-thirds of the PBCs in their RATSIB area during the Review period, indicating that the majority of PBCs considered there were valuable services being delivered by NTRB-SPs. (This refers to any services provided beyond or in addition to notification of FANs. FAN notifications were often a service that most NTRB-SPs provided to almost all the PBCs in their RATSIB area.) The nature of service provision varied, with some PBCs supported through Future Act and agreement-making assistance as well as application of the basic support funding from the NIAA while others were supported through fee-for-service or more ad-hoc arrangements.

Table 19 | Percent of PBCs receiving support from NTRB-SP (beyond notification of FANS), during the Review period, in descending order

	Highest												Lowest	Total
Number of PBCs that NTRB-SP supported	4	4	4	1	29	31	8	24	21	24	14	15	10	189
Total number of PBCs in RATSIB area	4	4	4	1	31	34	9	33	29	34	20	22	20	245
Percent of PBCs in RATSIB area receiving support from NTRB-SP	100	100	100	100	94	91	89	73	72	71	70	68	50	77

It is also reasonable to question whether this should be an ongoing role for the NTRB-SPs or whether it is time to consider whether this role of support to PBCs might be provided and funded in some other way.

The level of support needed by each PBC varies markedly and this creates different workloads for supporting the range of PBCs in each RATSIB area. The level of support able to be provided also varies markedly with some NTRB-SPs having access to state funding to supplement their PBC support activities. Many PBCs require legal support to respond to FANs and to facilitate agreement-making (in addition to the support for compliance with the CATSI Act, as discussed above).

Many PBCs and NTRB-SPs are calling for additional support for economic development that can underpin the drive towards self-determination. This means that as the sector continues to move further into a post-determination environment, economic and business support for PBCs will likely become issues that are more central to the support of PBCs. The predominance of claim lawyers in NTRB-SPs may be replaced by the need for specialists in business or economic development and agreement-making.

Some NTRB-SPs have already recognised the distinct nature of FANs work, which involves commercial agreements and contract writing, and is a very different area of law to claims, which is more about a litigated process involving the gathering and contesting of evidence.

The Review encountered some examples of effective units focussed on PBC business development. One such unit managed high volumes of FANs, negotiated and drafted ILUAs and other agreements, and designed and delivered capacity development programs to support native title groups to deal with Future Act matters. The unit included legal positions and was separate from both the PBCSU and from the legal claims unit. This separation allowed staff members within those teams to develop specialist knowledge of their areas and to fully focus on work they were most qualified to do. Nevertheless, limited funding restrained their capacity to provide adequate assistance to PBCs to identify and promote business and economic development opportunities available through their native title rights.

Other units across the NTRB-SPs with a strong focus on supporting PBCs to develop and pursue economic opportunities encouraged native title holders to participate in the broader economy by investing in businesses that generate financial returns and create jobs. Such units also supported PBCs to apply for and secure the NIAA PBC Capacity Building Funding.

One NTRB-SP developed a rights-based, strengths-focused approach towards PBC development through successful application to the PBC Capacity Building Funding through the NIAA. This approach was seen by PBCs and other stakeholders as very effective in supporting PBC economic development and addressing the challenge of PBCs operating independently and reaching self-sufficiency with no income outside of basic support funding.

Other NTRB-SPs demonstrated a more limited approach to PBC business and economic development. To remain relevant and continue to provide PBCs with the necessary and appropriate support, all NTRB-SPs would need to recruit staff with the appropriate expertise and develop the appropriate roles in their organisation.

In the post-determination environment, NTRB-SPs will need to market their services to PBCs and maintain a sufficient volume of clients to remain viable

Most NTRB-SPs who are well into the post-determination environment have understood that the power balance in their relationship with their PBCs may change into the future. NTRB-SPs have often been seen as having a monopoly or a leader who controls everything (vs the shift in the post-determination environment to one of listening and asking how they can better support PBCs).

Given that basic support funding for PBCs is only available to PBCs through the relevant NTRB-SP²³, this has meant that PBCs needed to have a relationship with their NTRB-SP to be considered for the receipt of this funding. Into the future, PBCs may wish to seek services from the NTRB-SP, or private provider, who can best meet their needs. Some NTRB-SPs are well down this track already, with examples of NTRB-SPs establishing a new service provider that aims to meet the needs of PBCs at a reasonable price.

Clarity is yet to be provided about what kind of supports NTRB-SPs will be funded to provide and how this will be allocated across the country to deliver support that is tailored to the range of PBC needs and circumstances.

There is a risk that NTRB-SPs compete with PBCs for limited economic opportunities

As NTRB-SPs consider how to remain financially sustainable in a future with reduced funding for claims work, they are looking for ways to create income. This has led some of the larger organisations to develop a range of economic activities and to respond to other opportunities for income as they arise. In this quest for income there is a need for NTRB-SPs and PBCs to work closely together to ensure they are clear about how each is representing and working for the benefit of native title holders.

The Review heard concerns from a number of PBCs in some regions who believed their NTRB-SP was acting in competition with the PBC. While all NTRB-SPs have rejected this possibility, the emergence of these concerns suggests that there is both a broad issue to be managed, as well as the need for some greater transparency and scrutiny of particular cases of NTRB-SP behaviour.

At a broad level, there are a number of strategies that should be pursued to avoid a contest developing – or being seen to develop. This includes determining a transparent and agreed split of economic activity relating to native title rights and interests. One important distinction on commercial activity would appear to be the extent to which the activity leverages native title rights and interests. Determining the kinds of activities where PBCs should have priority and which activities could be subject to open market conditions (that is, open to NTRB-SPs) is likely to be complex and will need to be worked through between the parties. This should involve a strategic planning process to articulate the relationship between the NTRB-SP and the PBC.

An example of the need for transparent and agreed arrangements was highlighted by some native title holders in areas where the NTRB-SP had a number of commercial initiatives in place, including fee-for-service heritage work and consulting services. The Review encountered a perception among some PBC members that the NTRB-SP was competing with them to bolster its own income from the often-lucrative provision of heritage-adjacent services and survey work for commercial enterprises (which could pay about \$200,000 for a two-week survey). Instead, they advocated that the NTRB-SP should better support PBCs to establish the systems and structures to take on these engagements.

²³ The NIAA does not have powers to fund PBCs directly under the NTA.

The Review noted that in some cases, mining companies felt more confident in dealing with an NTRB-SP that had strong administrative structures and contract templates in place, or with a well-established PBC rather than a new or small PBC which would typically have minimal resources and staff who were learning the processes and may not be as responsive. In such cases, the role of the NTRB-SP should be to support the PBC in the push for self-determination, rather than to accrue any benefits.

This example highlights the need for NTRB-SPs that wish to engage in commercial activities to develop transparent and negotiated agreements about the split of economic activity. It will be critical that all parties understand and appreciate the benefits that should accrue to each organisation. This should include clear and transparent service offerings, native title benefits management processes and agreed benefits distribution plans, based on adequate consultation with Traditional Owners.

Similarly, the placement of environment and ranger services with NTRB-SPs rather than with PBCs, which was raised with the Review in some areas, will require transparent consideration of the relative benefits and to whom they should accrue.

NTRB-SPs will also need to manage potential conflicts of interest. For example, if a proponent could situate their project in a couple of different areas, how can it be assured that the NTRB-SP will maintain independence and neutrality?

6.8 The contested nature of the remaining claims in nearly all regions suggests fundamental changes for the sector

Since the introduction of the NTA, NTRB-SPs have generally prioritised relatively straight-forward claims with less disputation and a greater likelihood of success. Three decades later, the claims that remain are highly complex, characterised by the presence of competing interests over the land, primarily due to disputes within the Aboriginal community. The challenges increase as the amount of claimable land that can be subject to determination decreases. The Review notes the complexity of some recent and remaining claims, with as many as five different groups asserting interests in some claim areas.

This contested environment has the potential to slow the rate of determinations, increase dissatisfaction among Traditional Owner groups and increase the potential for conflicts of interest. It coincides with a desire by Traditional Owners for greater choice of representation.

Under the current configuration of the system, NTRB-SPs can be considered effective monopoly providers of Australian Government-funded native title assistance (reflecting the establishment of the system, to ensure value for money and professional expertise). They also have extensive corresponding obligations under the NTA²⁴. Funding provided by the Australian Government passes through the NTRB-SPs as the only facilitators of claims assistance (and PBC funded support). While the resolution of native title determinations is testament to the success of the NTRB-SP sector, the desire for private representation is growing.

Over the Review period, around 22 per cent of the determined claims were briefed out to private legal firms by the NTRB-SPs, using federal funding: of the 68 determined claims over this period, 53 were represented by NTRB-SPs while a further 15 were represented by private legal firms. Only a small minority of claims have been brought through private funding.

While some NTRB-SPs fund private lawyers to manage claims, some do not brief out claim work externally except in rare circumstances. NTRB-SPs advised the Review that during the Review period, approximately

²⁴ These obligations include: to ensure an orderly, efficient and cost-effective process for making native title claims (203BC(3)); to perform their functions in a timely manner (203BA(1)); and to maintain organisational structures and processes that operate fairly towards, and promote representation of and consultation with, Traditional Owners in their regions (203BA(2)).

23 brief out arrangements were in place (indicating some remained active beyond the claims already determined).

Currently, Traditional Owners without their own resources can only seek representation from an NTRB-SP, or from a private lawyer where the NTRB-SP supports the arrangement and agrees to support the claim financially. Some claimants are approaching the NIAA directly, as they are reluctant to deal with the NTRB-SP for a range of reasons – including that the NTRB-SP might be representing another party to the claim.

The Review found increasing frustration across the sector that claimants had little choice but to persevere with their NTRB-SP as they could not afford a private lawyer. While this current arrangement ensures that Traditional Owners are represented by lawyers who specialise in the resolution of native title claims, it places restrictions for many Traditional Owners on their ability to be represented by a lawyer of their own choice. They remain entirely reliant on their NTRB-SP for realising their native title ambitions and some reported that they were powerless in their dealings with their NTRB-SP. In some cases, animosity had arisen between the claim group and the NTRB-SP, which was unlikely to be resolved.

The Review notes that the United Nations Declaration on the Rights of Indigenous Peoples – endorsed by Australia in 2009 – requires governments to consult with First Nations peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.²⁵ There is a growing realisation that claimant groups have a right to choice of legal practitioner and that it is important for all parties to listen and to respect their choices, especially in the context of self-determination.

There is increasing realisation that there may be a strong case for multiple parties to have a right to representation for disputed native title matters

Where multiple groups or families assert interests in an area, there is a continued shift away from NTRB-SPs being expected to choose the group with the strongest case and work exclusively with them to represent their interests. Rather, some NTRB-SPs have adopted a more neutral position using brief out arrangements to deliver support to multiple claimant groups.

Some NTRB-SPs have long recognised the importance of choice of provider and have regularly provided funding to support a claim where the group has an existing relationship with an external legal firm. However, these NTRB-SPs have then encountered dissatisfaction from Traditional Owners where they refuse applications to support respondents to a claim where they are already funding the applicants via brief out arrangements.

The shift towards the right of all parties to representation has been broadly supported by the NIAA and in some cases encouraged by the Federal Court. While it may lead to the further entrenchment of an adversarial approach, stakeholders in the sector have reported to the Review that it may simply reflect the reality that some matters can only be adequately resolved by having cases managed in the Federal Court, even where the basis for claims are relatively weak.

Representation of more than one side of a dispute has an inevitable impact on costs. It is therefore important to ensure that the system continues to have safeguards and a consistent process around how the funding is provided and the professionalism of the players. The Review sees three important steps:

1. Making a decision whether to support legal representation for a claim, subject to agreement on funding and legal representation.
2. High quality legal representation for the claim (either the NTRB-SP legal team or a qualified private

²⁵ Australian Human Rights Commission. UN Declaration on the Rights of Indigenous Peoples. 2007. Accessed July 2024. <https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-people>

firm).

3. Controlling the cost of the legal representation.

Some NTRB-SPs have already implemented parts of a more systemic approach to third party claims. These initiatives could be built on to develop either a regionally based model or a national model that provides a pathway for third party claims and Traditional Owner choice.

Step one: Making a decision on whether to fund legal representation for a claim

The Review sees two components to decision-making about claims where multiple parties are seeking the right to representation:

1. Criteria for provision of assistance.
2. Measures to avoid (perceived) conflict of interest.

Criteria for the provision of assistance

Assessment and prioritisation decisions are currently made in different ways across the NTRB-SPs but, as set out under TOR 2 above, in general they take into consideration a range of factors. These include:

- The strength of the evidence to support the claim.
- The likelihood of success for the claim.
- The cohesion of the claim group.
- The level of complexity added by any extinguishment or tenure issues.
- The number of people who would benefit from the claim.
- Whether the claim raised test case issues.
- External pressures such as development proposals over the land.

To these might be added an additional criterion, to acknowledge the increasing complexity of some disputes:

- Resolution of a long-standing dispute.

Measures to avoid (perceived) conflict of interest

In most cases recommendations about which claims to support are currently made by the PLO and senior lawyers, sometimes in discussion with the CEO. These recommendations are usually endorsed by the Board or a Board sub-committee. Some of the Traditional Owner frustration and dissatisfaction made clear to the Review concerned perceptions that Boards or other influential players were influencing these decisions inappropriately.

There is currently no satisfactory process beyond internal consideration by the NTRB-SP to ensure that conflicts of interest do not influence decision-making. Use of the internal review process for re-consideration of these decisions was patchy during the Review period and there were no clear guidelines or consistent practice around who should undertake the internal review. This contributed in some cases to further distrust of the NTRB-SP. The external review process (managed by the NIAA) was not used frequently. In addition, the mandatory statutory criteria for these external reviews focus on wider statutory requirements for NTRB-SP decision-making rather than the particulars of a given matter.

A new model could draw from the arrangements already developed in one NTRB-SP to deal with the conflict of interest issue. Under this model a sub-committee of the Board has been established, including an independent and experienced native title lawyer from outside the region, to make the recommendation about whether to support a claim. While the decision-making ability remains with the NTRB-SP (as

required under the NTA), this model aims to increase both parties' sense of fairness in the process and reduce perceptions of conflict of interest.

Drawing on this initiative, a new advisory body to consider assistance decisions could be created nationally, or on a regional basis. Such a body would consider requests for assistance and provide a recommendation to the NTRB-SP for decision. The approach to the national or regional body could be direct or by referral from an NTRB-SP. Circumstances where this might be used could include applications where there are a number of conflicting groups, there is likely to be cultural or political sensitivities, other potential claim complexities, or existing dissatisfaction with the NTRB-SP from the applicant. The national or regional bodies could be chaired by an experienced, well-respected and non-political figure in the sector, such as a retired Federal Court justice. Other members could be decided by NTRB-SP nomination or by recommendation from the NNTT or from the claimants. Again, this advice would only constitute a recommendation to the NTRB-SP as under the NTA, the decision-making must reside with the NTRB-SP. This model would however ensure that conflict of interest issues can be largely avoided in challenging cases.

Step two: Choosing a legal representative from a national (or regional) panel of accredited providers

Once a decision has been taken on whether the claim should be supported, the claimants could then nominate a preferred representative from a nationally or regionally approved panel of accredited native title lawyers. This would require a national (or regional) accreditation process with agreed clear, transparent and robust criteria for accreditation of private law firms to become accepted into the arrangement. This would ensure that experienced, professional native title lawyers can offer value for claimants.

Establishment and maintenance of this legally accredited panel could be managed by a sub-set of PLOs from across the NTRB-SPs, or by the proposed new advisory body described above. Given this process has already been undertaken in some NTRB-SPs, there is a strong basis to build on. Those NTRB-SPs who brief out claim work on a consistent basis also use a version of this process, but without the formally accredited panel.

Step three: Controlling the costs – the regulation of fees will be a critical part of a new third-party model

Senior staff across a number of NTRB-SPs and external stakeholders in the sector pointed out that the fees for external lawyers, and to a more limited extent, external anthropologists, can vary markedly. Without a coordinated response to this issue, NTRB-SPs have been handling this aspect themselves, sometimes resulting in very challenging situations. For example, one NTRB-SP reported that when matters were briefed out to external legal firms, the NTRB-SP had limited input into the cost of a claim or how efficiently work was done. In these cases, their avenue to contain costs was to establish a tender process to independently vet the quality of legal firms to whom they would refer and by having a clear funding agreement in place.

These arrangements are not without their controversy, with external consultants raising complaints about rates being set too low, or what they perceive to be unclear or non-transparent criteria for panel selection. There have in some cases been significant challenges when the CEO of an NTRB-SP is left to vet the quality and cost of third-party legal firms Traditional Owners wish to hire.

Decisions about the rates to be paid require a more consistent approach across the sector and could function through capped rates to minimise excessive charging. Many sector stakeholders who spoke with the Review believe that a coordinated national approach to fees is required to create a scheme that is perceived to be fair, objective and acceptable to the community.

A standardised scale of fees for external representation would increase the predictability of costs and foster equitable access to representation. Nous recommends that development of an appropriate model be undertaken with oversight from a sub-set of PLOs to ensure objectivity and delivery of the model. There are a number of models that could be drawn on, including the Federal Legal Aid arrangements. This would significantly improve the predictability of the cost of engaging a third-party law firm. Legal firms who wished to be on the panel would need to agree to the proposed rates, perhaps with some indication of the likelihood of regular work.

Presently there is no clear sector-wide guidance on appropriate circumstances for the NTRB-SP to provide financial assistance, payment caps or cost containment and standards to ensure quality of private legal providers. As the private sub-sector of native title becomes increasingly mature, addressing these issues through establishing a set of national standards and accreditation process should be a key priority.

A national or regional legally accredited panel would bring greater benefits and help to restrain costs

This new panel approach could be introduced alongside the ongoing claim work undertaken by NTRB-SPs, as a complementary measure. Over time, as the contestability of claims increases, it could potentially replace the claim work currently done by NTRB-SPs, leaving the NTRB-SPs to the primary post-determination role, described above, of supporting PBCs. The impact of greater third-party choice is likely, over time, to place NTRB-SPs in a more neutral role, rather than having to make a decision about which party to represent. It would also hasten the move to a stronger support role for development of PBC business and economic opportunities, as discussed earlier.

Dispute resolution and mediation will become increasingly important

Another important consideration in addressing the challenge of increasingly contested claims, is the role of mediation. Several commentators made the point that dispute resolution will become an increasingly important tool to shift the way groups engage by employing specialist dispute resolution, rather than forcing people into agreements that are unlikely to last. There has been a significant shift over the past ten years to strong and intensive mediation by Federal Court registrars in working with disputing groups to resolve issues prior to, or instead of, trial. This has proved very successful in many long-standing disputed matters.

The Federal Court has established a register of skilled mediators and there is a need for more First Nations mediators. Some NTRB-SPs reported that finding suitable mediators is extremely difficult. To enhance this pathway, there may be merit in the NIAA considering schemes to incentivise First Nations people to participate in mediation training with a view to working in the native title sector. While this idea is not new, consideration of it has become more pressing in light of the increasing complexity of claims.

There is also an opportunity to consider the introduction of community healing initiatives which might go beyond formal mediation. These kinds of mechanisms that encourage ways for Traditional Owners to seek resolution outside of the Federal Court could be introduced within the dispute resolution functions undertaken by NTRB-SPs.

A more collegiate approach will support learning and development across the sector

Several stakeholders who worked closely with NTRB-SPs mentioned that during the Review period there seemed to have been a decline in NTRB-SPs working together to develop overarching regional strategies. There were fewer NTRB-SPs making decisions about their future direction collectively and the sector had therefore been more fragmented and less effective in its ability to advocate to government.

Stakeholders reported that rather than having a broad, long-term view, it was more common to find a protective mentality among senior executives. The reasoning behind this was likely twofold, partly due to ongoing resource constraints but more often attributed to the lack of opportunities or clear responsibility

for senior NTRB-SP staff to meet together regularly and understand each other's issues. Several stakeholders suggested that prior to the Review period, the regular meetings of senior staff had built knowledge and collaboration and had been important vehicles to build capacity and strategic thinking in the sector. Similarly, stakeholders suggested that reintroducing a program of induction for CEOs new to the native title sector would have significant benefit.

The sector needs to agree on a strategy for what NTRB-SPs will look like moving forward

Given the post-determination environment has already arrived for a significant part of the sector, it is timely for the sector as a whole – including representatives from both NTRB-SPs and PBCs – to work together on how NTRB-SPs should or could best support PBCs in the future, as discussed above. This would include how the organisations will be funded in upcoming decades and what key performance indicators should be met by NTRB-SPs.

A vehicle to achieve this consultative approach could be the development of a whole of sector strategic plan for the post-determination environment. The strategic consideration needs to include what, if any, funding will continue to be provided and under what terms. Without this strategic guidance, individual NTRB-SPs are likely to continue to fill the void themselves with their own interpretation of their role in this new space. A more overarching approach would allow for a more consistent and aligned response across the country.

Appendix A Project Terms of Reference and performance indicators for individual reports

The methodology for the Review was developed by Nous against the TORs, as discussed in the Scope of the Review, see section 2. For each TOR the methodology listed a number of performance indicators and external factors to ensure a consistent approach across all the NTRB-SP reviews and to enable a comparison of performance. The TOR and associated performance indicators and external factors are listed below.

1. Focussing on the period 1 July 2019 to 30 June 2022 and addressing developments since the previous Review of each organisation the Service Provider will:

- a. Review and assess the extent to which each organisation:

- a. Has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19.

Performance indicators:

- Native title outcomes including from facilitation and assistance, certification, notification, dispute resolution and other relevant functions.
- Anthropological research.
- Future Acts and ILUAs.
- Number of claims resulting in a determination of native title or ILUA settlement as a proportion of total filed claims.
- Number of claim groups the NTRB-SP has acted for or assisted via brief out arrangements in a native title determination application during the Review period.
- Proportion of claimable land within the RATSIB area not subject to a registered claim or a determination.
- Average time between filing an application for a determination of native title to the date a determination is made.
- Number of common law native title holders/RNTBCs the NTRB-SP has acted for in a native title compensation application proceeding.

External factors:

- State government policy and legislation.
- Complexity of remaining claims.
- History of previous claims.
- Complexity of land use and tenure.
- COVID-19.
- Amount of funding.

- b. Assesses and prioritises applications for assistance in a manner that is equitable, transparent and robust and is well publicised and understood by clients and potential clients.

Performance indicators:

- Equity, transparency and robustness of assessment and prioritisation process.
- Client and potential client awareness of the process.
- Traditional Owner satisfaction with the assessment and prioritisation process and its outcome.

External factors:

- Number of claims relative to NTRB-SP size and resourcing.

- c. Deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints.

Performance indicators:

- Respectful and transparent engagement.
- Culturally appropriate engagement.
- Complaints.
- Internal review.
- Use of cultural materials.

External factors:

No external factors have been identified for TOR 3.

- d. Performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation.

Performance indicators:

- Expenditure on salaries (legal, anthropological, Board, CEO, HR, etc.), operations (travel, legal, offices, etc.) or other relevant items.
- Cost-saving actions, strategies and/or discussions.
- Appropriate processes for claim group meetings.
- Annual yearly expenditure per claimant group.
- Travel assistance policies for claim group meetings.
- Appropriate rationale for use of external consultants.

External factors:

- Size of RATSIB area.
- Remoteness of RATSIB area.
- Average number of people within a claim group.
- Interpreters.

- e. Has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery.

Performance indicators:

- Breakdown of roles, responsibilities and decision making between the organisation's Board, Chairperson, CEO and senior staff.
- Board integrity and capability.
- Conflicts of interest.
- Culture and values.
- Financial management.
- Training and professional development.

- Level of staff turnover.

External factors:

No external factors have been identified for TOR 5.

- f. Is adequately supporting Prescribed Body Corporates towards self-sufficiency.

Performance indicators:

- Satisfaction of PBCs/RNTBCs supported by the NTRB-SP.
- Percentage of PBCs/RNTBCs supported by the NTRB-SP who have had intervention from ORIC or other regulator.
- Progress towards self-sufficiency for PBCs/RNTBCs supported by the NTRB-SP.
- NTRB-SP's progress in returning cultural materials to PBCs/RNTBCs and Traditional Owners.
- Percentage of PBCs/RNTBCs supported by NTRB-SP with formal service agreements in place with NTRB-SP.
- Satisfaction of PBCs/RNTBCs with the process of negotiating service agreements between the NTRB-SP and the PBC/RNTBC.

External factors:

- Extent to which self-sufficiency for PBCs/RNTBCs is achievable.

- g. Has developed its planning for a post-determination environment.

Performance indicators:

- Adequacy of post-determination strategic planning.

External factors:

- Progress towards a post-determination environment.

2. The Service Provider will provide the following reports, reflecting the Service Provider's independent views, to assist with Agency decision-making:

1. An individual report for each organisation reviewed, including recommendations on what changes, if any, the organisation could make to improve its performance against each of the criteria listed in 1(a) above.
2. A comparative report comparing the performance of the organisations and outlining incidental findings on systemic issues.
3. A de-identified summary of the comparative report.

Appendix B Glossary

Throughout this document, the following terms have the meaning prescribed in Table 20.

Table 20 | Glossary

Term	Meaning
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (ALRA)	The <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> established a system in the Northern Territory where Aboriginal people could make traditional land claims to unalienated Crown land and alienated Crown land in which all estates and interests are held by Aboriginal people. The system was sunsetted in 1997 and no new grants and claims can be made. Land rights granted under the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> can co-exist with native title rights and interests.
<i>Northern Territory Aboriginal Sacred Sites Act 1989</i>	The <i>Northern Territory Aboriginal Sacred Sites Act 1989</i> provides protections over Aboriginal sacred sites across the Northern Territory. Protection measures include penalties for entering, working on, or desecrating a sacred site. Under the <i>Northern Territory Aboriginal Sacred Sites Act 1989</i>, any person who is proposing to conduct works on an area where there may be a sacred site is expected to apply for an Authority Certificate.
Applicant	Any person or persons who have been authorised as the selected representative(s) of a native title claim group in native title or determination proceedings.
Client	Any individual or group being provided assistance by a Native Title Representative Body and Service Provider (including assistance with claims, research and/or PBC support).
Connection evidence	Evidence to establish connection of the native title group to the area over which they have lodged a claim. This evidence must demonstrate that the group have continued to observe and acknowledge, in a substantially uninterrupted way, the traditional laws and customs that give rise to their connection with the claim area, from the time of the proclamation of sovereignty to the present day.
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) (the CATSI Act)	The <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) is the law that establishes the role of the Registrar of Indigenous Corporations and enables Aboriginal and Torres Strait Islander groups to form Aboriginal and Torres Strait Islander corporations.
Determination	A decision by the Federal Court or High Court of Australia. A determination is made either when parties have reached an agreement (consent determination) or following a trial process (litigated determination). In the context of the Review, a “positive” determination is where the court finds that native title exists and a “negative” determination is a finding that native title has been extinguished or does not exist.
Extinguishment	Occurs over a defined area when Australian law does not recognise the existence of native title rights and interests because of legislation or common law precedent. Extinguishment can be whole or partial.
Future Act	A legislative or non-legislative act in relation to land or waters that may impact on the ability of native title holders to exercise native title rights; either through extinguishment or creating interests that are wholly or partly inconsistent with the continued existence of native title.
Indigenous Land Use	A voluntary, legally binding agreement governing the use and management of land

Term	Meaning
Agreement (ILUA)	or waters over which native title exists or might exist. The conditions of each Indigenous Land Use Agreement are determined by way of negotiations between native title holders and other interest holders (such as a state or mining company). These negotiations are often facilitated by Native Title Representative Bodies and Service Providers.
National Native Title Tribunal (NNTT)	An independent statutory body established under section 107 of the <i>Native Title Act 1993</i> (Cth) to assist people in resolving native title issues by: a) mediating between the parties to native title applications at the direction of the Federal Court b) acting as an arbitrator in situations where the people cannot reach agreement about certain Future Acts c) helping people to negotiate Indigenous Land Use Agreements. The National Native Title Tribunal maintains three registers relating to native title applications, determinations and Indigenous Land Use Agreements. It also maintains databases regarding Future Act matters and geospatial tools.
Native title	The communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area which is recognised under Australian law (section 223 of the <i>Native Title Act 1993</i> (Cth)).
<i>Native Title Act 1993</i> (Cth) (the NTA)	The <i>Native Title Act 1993</i> (Cth) established the procedure for making native title claims and is the primary piece of Australian Government legislation allowing Indigenous Australians to seek rights over land and waters arising from their original ownership under traditional law and custom.
Native Title Representative Body (NTRB)	Recognised organisations which are funded by the Australian Government to perform functions to assist native title groups in a specific region, according to the provisions in Part 11 of the <i>Native Title Act 1993</i> (Cth).
Native Title Service Provider (NTSP)	Organisations funded by the Australian Government to perform all or some of the same functions as Native Title Representative Bodies in areas where Native Title Representative Bodies and Service Providers have not been recognised in law.
Native Title Representative Bodies and Service Providers (NTRB-SPs)	Native Title Representative Bodies and Service Providers refers to the cohort of Native Title Representative Bodies and Native Title Service Providers that are being evaluated by the Review.
Non-claimant application	An application made by a person who does not claim to have native title but who seeks a determination that native title does or does not exist.
<i>Pastoral Land Act 1992</i> (NT)	The <i>Pastoral Land Act 1992</i> (NT) provides Aboriginal peoples in the Northern Territory with access to pastoral land, regardless of whether they hold native title or not. It does not permit Aboriginal peoples to erect or use a structure on the leased land that would serve as a permanent shelter for human occupation, other than at the place on the leased land where they ordinarily reside.
Pastoral leases	A pastoral lease is a title issued for the lease of an area of Crown land to use for the limited purpose of grazing of stock and associated activities. It is a limited property right and does not provide the leaseholder with all the rights that attach to freehold land. Native title rights often co-exist with pastoral lease rights.
Post-determination	At a claim level, refers to the period following a determination that native title exists. At a Native Title Representative Body and Service Provider life cycle level, refers to the period following the resolution of all active applications within a Representative

Term	Meaning
	Aboriginal/Torres Strait Islander Body area.
Prescribed Body Corporate (PBC)	A body, established under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth), nominated by native title holders which will manage their native title rights and interests once a determination that native title exists has been made.
Registration test	The registration test is a set of conditions applied to the claims made in native title determination applications. The Native Title Registrar, or the Registrar's delegate, applies the test. If a claim satisfies the conditions of the registration test, details of the application are entered on to the Register of Native Title Claims. Once an application is registered, applicants can exercise the procedural rights stipulated in the Future Act provisions of the <i>Native Title Act 1993</i> (Cth).
Representative Aboriginal/Torres Strait Islander Body (RATSIB) area	The area over which a Native Title Representative Body and Service Provider holds jurisdiction.
Terms of Reference (TOR)	Refers to the Terms of Reference provided by the National Indigenous Australians Agency which govern the scope of the project. These can be found in Appendix A.
Traditional Owners	Individuals of Aboriginal and/or Torres Strait Islander descent who identify as being a descendant of persons that occupied a particular area prior to European settlement.

This document refers to the functions of NTRB-SPs outlined under the NTA and captured in Table 21.

Table 21 | NTRB-SP functions under the NTA

Reference	Function	Detail
s203BB	Facilitation and assistance	NTRB-SPs provide assistance to native title interest holders in relation to native title applications, Future Acts, agreements, rights of access and other matters.
s203BF	Certification	NTRB-SPs certify applications for native title determinations and certify the registration of ILUAs.
s203BF	Dispute resolution	NTRB-SPs promote agreement and mediate disputes between native title groups.
s203BG	Notification	NTRB-SPs ensure that people with a possible native title interest are informed of other claims and of Future Acts and the time limits for responding to these.
s203BH	Agreement making	NTRB-SPs can be a party to ILUAs or other agreements.
s203BI	Internal review	NTRB-SPs have a process by which clients can seek a review of decisions and actions they have made and promote access to this process for clients.
s203BJ	Other functions conferred by the <i>Native Title Act 1993</i> (Cth) or by any other law	These are largely concerned with cooperation between NTRB-SPs, consulting with Aboriginal and Torres Strait Islander communities, and providing education to these communities on native title matters.



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75

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