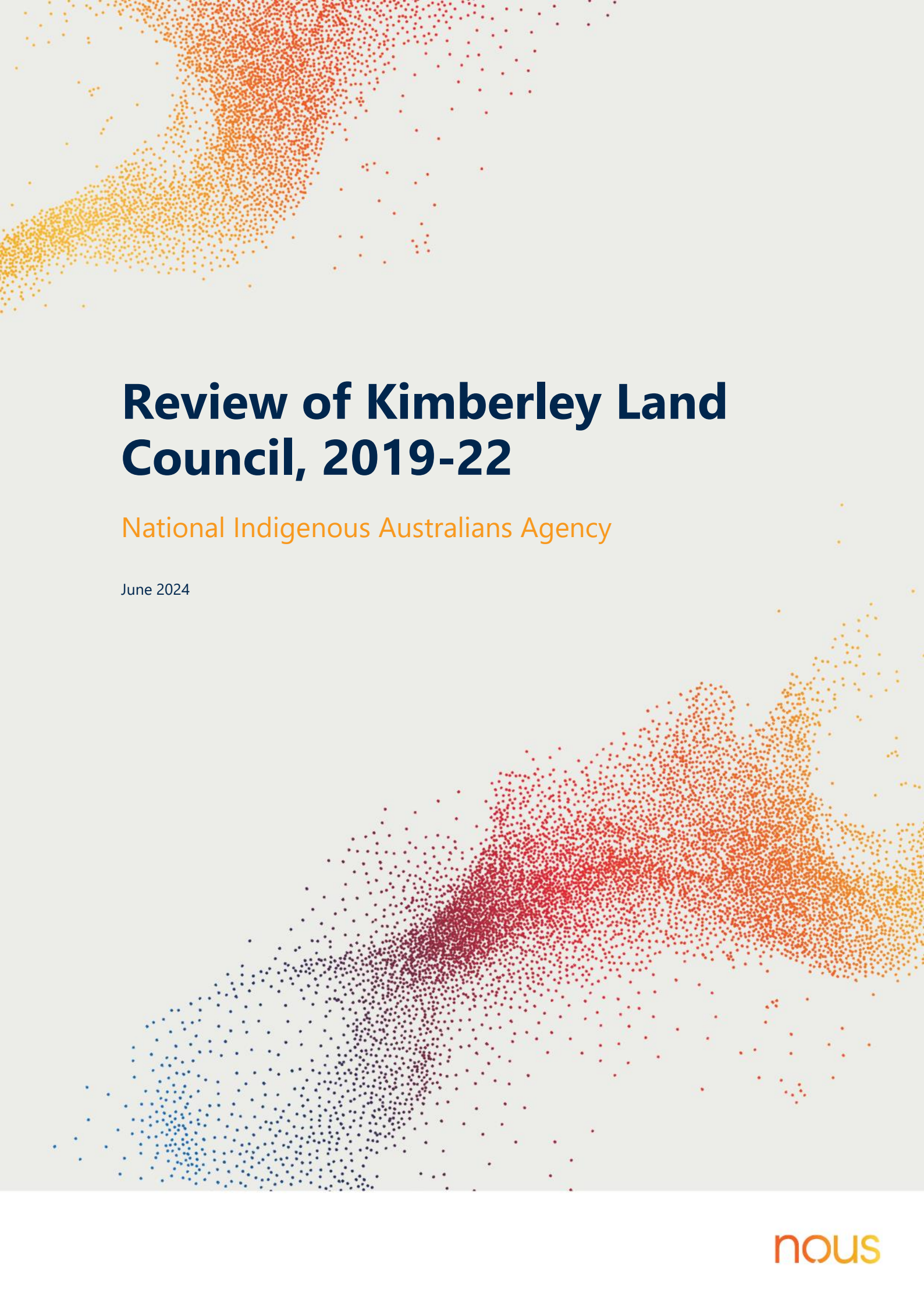




Review of Kimberley Land Council, 2019-22

National Indigenous Australians Agency

June 2024

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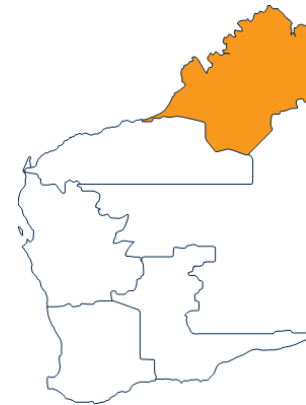
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1 Profile of the Kimberley Land Council

The Kimberley Land Council (KLC) has offices in Broome (main office) and in Kununurra (East Kimberley), providing services to native title claimants and holders

The KLC is the Native Title Representative Body (NTRB) for the Kimberley region. It was established in 1978 and registered in 1979. KLC has performed representative body functions since the *Native Title Act 1993* (Cth) (the NTA) commenced and was recognised as the NTRB for the Kimberley Representative Aboriginal/Torres Strait Islander Body (RATSIB) area in 2000, shortly after the requirement for representative bodies to be recognised was introduced. It has been continuously recognised as the NTRB for its RATSIB area since that time. Its current recognition period commenced in July 2023 and runs to June 2026.

The KLC's RATSIB area (pictured right) covers approximately 423,000 square kilometres of land, which accounts for 16 per cent of Western Australia. Between 1 July 2019 to 30 June 2022 (the Review period) the KLC operated a main office in Broome and a regional office for the eastern part of its RATSIB area in Kununurra. The KLC also has multiple offices for Land and Sea Management Unit (LSMU) activities. These activities are carried out by the KLC in addition to the performance of native title functions and delivery of native title services. KLC's Legal and research staff were located in the main office in Broome, with Native Title Services staff in both its Broome and Kununurra offices.



There have been 60 determinations of native title in the Kimberley RATSIB area since commencement of the NTA and there were 31 Prescribed Body Corporates (PBCs) at the time of the Review. Thirteen claims were determined during the Review period.

The KLC received relatively consistent levels of native title funding from NIAA during the Review period. It received approximately \$11.6 million in financial year (FY) 2019-20, \$12 million in FY2020-21 and \$10.7 million in FY2021-22.

The KLC has a representative Board which was restructured during the Review period to streamline representation by creation of a 12-member Executive Board and a larger Representative Council, with two members nominated from every PBC or claim group in the KLC RATSIB area. During the Review period, the Executive Board passed several significant resolutions, including to ratify the KLC's Strategic Plan 2020-2024 and to convene a special general meeting of members at which members voted to amend the KLC's Rule Book to incorporate a Representative Council at the commencement of FY2022-23.

In addition to its native title functions the KLC supports 18 Aboriginal Ranger groups through the Kimberley Ranger Network and conducts a range of land and sea management activities. These activities leverage off the native title funding for corporate governance, support and administration. Approximately 60 per cent of the KLC's staff are employed in relation to its native title functions. Across the Review period First Nations staff comprised approximately half of the staff primarily delivering native title services.

Senior management roles at the KLC comprised a Chief Executive Officer (CEO), Deputy CEO and five divisional heads, being a Principal Legal Officer (PLO), Native Title Services Unit (NTSU) Manager, Business Operations Manager, Human Resources (HR) manager, and the LSMU Manager (who does not undertake functions under the NTA). The KLC has a wholly owned subsidiary, Kimberley Sustainable Development Pty Ltd (KSD), which manages native title funds from mining and exploration agreements for native title holders across the region in the Kimberley Sustainable Development Charitable Trust (KSDCT)). The KLC is also affiliated with Ambooriny Burru, a charitable foundation established by eight native title groups/PBCs

in the Kimberley, that supports social and economic wellbeing and independence, including through its subsidiary KRED Enterprises.

2 Scope of the Review

The National Indigenous Australians Agency (NIAA) has engaged Nous Group (Nous) to undertake an independent review of 13 Native Title Representative Bodies and Service Providers (NTRB-SPs).

The purpose of this Review was to assess the individual and comparative performance of NTRB-SPs in delivering native title outcomes for Aboriginal and Torres Strait Islander people and communities under the NTA over a time period of 1 July 2019 to 30 June 2022.

The Review is an opportunity to assess all the organisations over a consistent time period to understand performance during and post the COVID-19 pandemic and the extent to which organisations have addressed recommendations from previous organisational performance reviews.

The Terms of Reference (TOR) provided by the NIAA for the Review are to determine the 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
- 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
- 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
- performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation
- has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery
- is adequately supporting PBCs towards self-sufficiency
- has developed its planning for a post-determination environment.

The complete TOR are included in Appendix A.

Methodology

Nous originally designed the methodology for the previous round of Reviews conducted from 2017 to 2021, which was reviewed at that time by NTRB-SPs and the NIAA. The methodology has been modified to incorporate lessons learned, streamline some previously repetitive elements, reflect current context and be consistent with the current TOR.

The method draws on a defined set of performance indicators under each TOR. These indicators combine qualitative and quantitative performance assessment and include external factors to account for the unique context within which each NTRB-SP operates, based on broader social and geographical factors that impact performance.

Nous used a mixed method approach to undertaking this Review, including an analysis of quantitative data on the progress of claims, Future Acts and Indigenous Land Use Agreements (ILUA), performance against milestones, budgetary performance and staffing. A list of the data and documents that informed the Review can be found at Appendix C.

The quantitative analysis was complemented by stakeholder interviews. As required by the NIAA, and in accordance with the TOR, this Review involved consultations with persons affected by the activities of each NTRB-SP, including Traditional Owners, PBCs, staff of the NTRB-SP, state governments, NIAA, the Federal Court and legal stakeholders. A list of the stakeholder consultations undertaken for this Review is set out in Appendix B.

A full description of the methodology and the performance indicators under each TOR was provided to each NTRB-SP. Nous used a variety of methods to contact stakeholders, including Traditional Owners, for feedback. The approach to stakeholder consultation for the Review was set out in the Consultation Plan, which was also provided to each NTRB-SP at the outset.

Limitations

Nous acknowledges that, despite best efforts to seek broad feedback:

- only a limited number of stakeholders provided feedback (see Appendix B for further detail)
- stakeholders who responded to the call for feedback were, in the main, those who were dissatisfied with the process or outcome of their native title claim.

Accordingly, Nous appreciates that the views of the consulted stakeholders may not be representative of the views of most stakeholders who actually interacted with, or used the services of, each NTRB-SP.

As part of the consultation process, Nous listened to the views of Traditional Owners across all regions of Australia, including Traditional Owners who were dissatisfied with the process or outcome of their native title claim.

These concerns and complaints have been acknowledged and reported (as communicated to Nous) as part of this Review.

It is acknowledged that Nous has not investigated or assessed the merits of these concerns, as part of this Review. This falls outside the scope of Nous' role and the TOR. Accordingly, no statement is made regarding the legitimacy of these concerns or complaints.

NTRB-SPs have been given the opportunity to view the draft reports and to provide feedback to Nous about the issues raised in them. They will also be given the opportunity to make a formal response at the time of publication.

3 List of abbreviations

Abbreviation	Meaning
AGM	Annual general meeting
Assistance Guidelines	Guidelines for Assistance in Native Title Claims
CEO	Chief Executive Officer
FAN	Future Act notification
FTE	Full time equivalent
FY	Financial year
HR	Human resources
ILUA	Indigenous Land Use Agreements
KLC	Kimberley Land Council
KSD	Kimberley Sustainable Development Pty Ltd
KSDCT	Kimberley Sustainable Development Charitable Trust
LSMU	Land and Sea Management Unit
MOU	Memorandum of understanding
NIAA	National Indigenous Australians Agency
NNTT	National Native Title Tribunal
Nous	Nous Group
NTRB	Native Title Representative Body
NTRB-SP	Native Title Representative Body and Service Provider
NTSU	Native Title Services Unit
ORIC	Office of the Registrar of Indigenous Corporations
PBCs	Prescribed Body Corporates
PLO	Principal Legal Officer
RASTIB	Representative Aboriginal/Torres Strait Islander Body
RNTBC	Registered native title bodies corporate
The CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
The NTA	<i>Native Title Act 1993 (Cth)</i>

Abbreviation	Meaning
The Review period	1 July 2019 to 30 June 2022
TOR	Terms of Reference

4 Executive summary of performance and recommendations

The summary and recommendations for each TOR are reproduced here as an overall summary. The detailed performance assessment against each performance indicator follows in section 5.

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.

The KLC made significant progress in achieving native title determinations despite the challenges posed by COVID-19, with 12 consent determinations and one litigated determination during the Review period. The KLC additionally supported nine ILUAs, including one that resulted in the surrender of native title. At the end of the Review period, the KLC was pursuing five active native title claims and one compensation claim, with additional compensation claims in early scoping. Ninety-seven per cent of the claimable land within the RATSIB area was subject to a registered native title claim or determination.

The KLC had a high-performing legal team despite the challenges of recruitment and retention. The KLC's anthropology team remained relatively stable throughout the Review period, supporting the maintenance of corporate knowledge. Under the overall direction of the PLO, legal and anthropological staff were allocated to each region and each claim, with a Senior Anthropologist position providing support and guidance to the internal anthropology staff.

In the six cases where KLC-employed lawyers acted for one party and a professional conflict arose, representation of another party to a claim was briefed out to external lawyers. Through an independent process, the KLC established a panel of lawyers with relevant expertise in native title litigation. If a funded party appointed a lawyer from the panel, the KLC would enter into a funding agreement with that lawyer. If the funded party appointed a lawyer who was not on the panel, the KLC PLO would confirm that person had relevant expertise in native title matters before the KLC would enter into a funding agreement with that lawyer. External anthropologists were used for the preparation of connection reports in most cases.

A number of Traditional Owners who contacted the Review were dissatisfied with the outcomes achieved for their family. Their concerns generally related to differences between their own understanding of their history and the composition of their claims, which they attributed to the KLC. The Review understands that the composition of claim groups is a highly sensitive and potentially divisive issue that can cause enormous distress for the parties, with some Traditional Owners describing outcomes as like "a second dispossession". The unwavering views of parties involved in disputes is challenging and can complicate mediation processes, adding to the difficulty of achieving acceptable outcomes for all claimants. The KLC noted, however, that claims (including claim group composition) were authorised by claim groups (not the KLC) and determined by the Federal Court following rigorous testing of evidence, with KLC staff indicating that "we can only do what the evidence tells us".

The Review notes the complexity of recent and remaining claims, with as many as five different groups asserting interests in some claim areas. The challenges increase as the amount of claimable land that can be subject to determination decreases.

The composition of historical claims, including claim group boundaries, has compounded the dissatisfaction felt by some Traditional Owners, presenting challenges for governance of the resulting PBCs and for the KLC in managing ongoing relationships with Traditional Owners.

RECOMMENDATION

1

The KLC should develop a document with options available to Traditional Owners who are concerned about the governance of their PBC to address the dissatisfaction of Traditional Owners where significant tensions between groups have arisen as a result of the claim process or determination.

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.

The KLC had a clear and well-documented policy in place for assessing and prioritising applications for assistance that it applied to all applications for assistance. The policy was made publicly available to clients through several channels. A Committee of the Board, the NTRB Grants Committee, assessed applications to determine if they met the criteria for assistance, including their legal merit and the factors that influenced a claim's relative priority.

The policy clearly stated that applicants would be informed of the decision and the reasoning behind it in writing. The Review saw no evidence that this policy was not followed however a very small number of clients who had applications refused reported to the Review that they were unclear as to the grounds for their rejection.

A small number of Traditional Owners and other stakeholders associated with KLC also expressed a concern to the Review that the prioritisation process may be influenced by Board members or senior staff with ties to relevant claim groups. The Review was not provided with any evidence of specific cases and notes that the KLC has a clearly documented conflict of interest policy which appears to be consistently applied in practice.

The large volume of work in the post-determination space continues to grow and compete with resources available for claims. This places a constraint on the ability of the KLC to prioritise increasingly complex claims. Staff consistently held the view that funding had not kept up with workload over the Review period.

RECOMMENDATION

2

Ensure that where applications for assistance are refused, the applicants are always provided with an explanation of the prioritisation process and clearly articulated reasoning for the decision including an accurate plain English record of the decisions made and the reasoning behind them.

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.

The KLC had an established approach toward respectful and culturally appropriate engagement in its native title work that remained in place throughout the Review period. Cultural competency and respectful practices were embedded into the organisation's practices through induction programs and cultural immersion. The strong component of Indigenous staff with ties to the Kimberley, including those in leadership positions, meant that the KLC had strategic and operational insight into cultural appropriateness throughout all levels of the organisation.

These positive engagement practices could be enhanced by the development of more explicit documentation, such as protocols and guidelines.

Some Traditional Owners noted that there could be greater transparency in communication and improvements to the cultural appropriateness of meetings, particularly regarding the right way for men and women to meet and make decisions. There was also a view that more attention could be paid to helping Traditional Owners understand legal jargon, by having more Indigenous staff present at meetings. Given the sensitivity around the use and return of cultural materials, there is a need to pay particular attention to culturally appropriate ways of conveying decisions around handling of this material.

The KLC had a complaints policy available on its website with detailed information about how complaints are processed. Information about how decisions regarding assistance could be reviewed was available in the applications for assistance guidelines.

Across the Review period, the KLC received ten complaints related to native title. The KLC reported that all the complaints were examined and addressed, noting that this was not always to the satisfaction of the complainant.

RECOMMENDATION

3

Develop written protocols and guidelines to document the KLC's culturally appropriate engagement strategies, including protocols by which meetings will be run.

RECOMMENDATION

4

Develop more culturally sensitive approaches to advising Traditional Owners on privacy considerations which may limit access to genealogical information.

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.

The KLC adopted cost effective practices over the Review period, showing year-on-year improvement against budget. This achievement in cost effectiveness has been against an environment that presented significant challenges to cost efficiencies, including the very remote nature of the region.

Staff salaries made up the greatest item of spending for the KLC, with competition from the mining sector in particular impacting on salary costs. Unfilled vacancies led to a need to contract some work out, leading to spending on corporate consultants significantly exceeding budgeted amounts.

The KLC's policies and processes for claim group meetings balance considerations of cost-effectiveness with the importance of supporting equitable participation.

The use of external anthropology and legal consultants appears cost effective and has generally been on budget. These costs and other costs related to field work were impacted during the Review period by the COVID-19 pandemic and public health restrictions.

The KLC used a range of cost-saving measures during the Review period, including reducing travel costs through improved coordination, negotiating discounts through bigger professional contracts and effectively managing IT infrastructure.

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.

The KLC's governance structure underwent significant reform towards the end of the Review period, with the introduction of a more streamlined Executive Board of 12 Directors and Cultural Advisers together with

a large 60-member Representative Council. This restructure, introduced at the 2022 annual general meeting (AGM), was strongly supported across the Kimberley and has led to a more manageable governance structure for the KLC.

The restructure will need careful ongoing management however, as it was seen by some Traditional Owners as diminishing decision-making power for regional representatives across the Kimberley and a way of entrenching what they perceived as “a small core of influential powerbrokers within the KLC”. Cross-membership of individuals on various related Boards was also highlighted by some commentators as an over-concentration of power in too few people. The Review found that KLC adopted consistent use of conflict of interest policies and processes.

Despite the upheaval caused by the early termination of the newly appointed CEO in early 2021, the KLC has maintained strong executive leadership and its organisational structure and financial management continued to be sound.

Concerns were raised by some Directors in May 2021 about potential fraudulent mismanagement of the KSDCT, which is managed by a wholly owned subsidiary of the KLC, KSD. These concerns led to the KLC commissioning an independent inquiry into the KSDCT. The high-profile inquiry found no evidence of wrongdoing by the KSDCT, or by the KLC, in the management of the native title funds held by native title holders in the region.

RECOMMENDATION

5

Monitor and develop strategies to mitigate the risk that the restructured Board arrangements may be seen by Traditional Owners to be a means of centralising influence in a small number of representatives.

RECOMMENDATION

6

Communicate regularly to Traditional Owners about the implementation of recommendations made by the inquiry into the KSDCT.

RECOMMENDATION

7

Develop a policy and communication materials to demonstrate to the community the separation between KLC and its wholly owned subsidiary KSD.

TOR 6 | Extent to which each organisation is adequately supporting PBCs towards self-sufficiency.

The KLC supported 29 of the 31 PBCs in the Kimberley region with either a formal service agreement for transitioning PBCs or a legal retainer with the PBCs who engaged KLC to provide legal representation. No PBCs required formal intervention from Office of the Registrar of Indigenous Corporations (ORIC) during the Review period. Most of the supported PBCs (22 PBCs) relied on the KLC for basic funding and support, including for meetings, financial administration, corporate governance and compliance. PBC Director awareness of responsibilities was generally appropriate, with many PBCs in the region requiring significant support from the KLC Legal Unit to remain compliant. Some PBCs who engaged with the Review were conscious of their need for more help to keep up with legislative changes.

Support was mainly provided through the KLC’s NTSU, which comprised two regional managers and a team of project and field officers. However, the NTSU for the East Kimberley, based in Kununurra was significantly understaffed during the Review period, which limited the KLC’s ability to provide support in

that region. In addition, Future Act officers handled Future Act notifications (FANs) for PBCs and native title applicants.

The KLC had a three-category system for monitoring the capability of PBCs: emerging, for PBCs which relied heavily on the KLC for basic support; transitioning; and independent, for PBCs which largely did not require the KLC's support. Staff reported that PBCs often "boomerang" back from the higher levels of self-sufficiency to lower levels due to lack of sustainability in internal capacity.

Like other NTRB-SPs, the KLC was funded by NIAA during the Review period to provide only basic support to PBCs and to allocate the funding as it believed appropriate, based on need. Some PBCs advised that they would prefer to receive their funds directly from NIAA and were concerned that they were not receiving "the full value" of their NIAA funding. PBC members who spoke with the Review reported that the cost of activities needed to remain compliant absorbed the available funds, leaving capability development and sustainability unfunded. They wanted broader support from the KLC to develop an economic base for their organisation so they could become more self-sufficient. The Review notes that the PBC funding provided to KLC (and other NTRB-SPs) by the NIAA did not include this kind of support.

Many Traditional Owners contacted the Review to express their dissatisfaction with the governance of their PBC. Smaller family groups reported having little say when decisions were made by a majority vote. The Review notes that these are structural matters relating to native title and not matters where the KLC has any powers to intervene unless formally requested.

The KLC has had a Transfer of Native Title Materials policy in place since 2016 and has been returning materials to PBCs across the Review period. KLC anthropologists advised that the policy needs to be updated subsequent to a Federal Court ruling during the Review period.

There was significant resources activity in the Kimberley region leading to the overwhelming majority of FANs received being exploration licences. The number of FANs received is higher than comparable RATSIB areas examined during the Review period. However, this activity was concentrated in specific locations and the Review assessed that external factors had a moderate impact on the ability for PBCs to be self-sufficient.

RECOMMENDATION

8

Ensure ongoing mechanisms to collect feedback from client PBCs through a formal, regularly conducted process.

RECOMMENDATION

9

Ensure the Return of Cultural Materials Policy is updated in line with the Tommy on behalf of the Yinhawangka Gobawarra v State of Western Australia (No 2) [2019] FCA 1551 ruling.

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

The KLC is aware that more and more of its native title work will sit in the post-determination space with only three per cent of its area left to be determined. This is a key consideration in its 2020-24 Strategic Plan, with PBC capacity building and self-sufficiency addressed under each of its four objectives of empowerment in nation building, native title rights and recognition, partnerships and relationships, and financially sustainable operations. The latter two objectives also focus more on the role KLC will play in the post-determination space and how its operations will be supported financially as grant funding for native title claims reduces.

The 2020-24 Strategic Plan was developed with Traditional Owner input and includes measures of success for each objective. There is scope for the KLC to provide greater clarity on how objectives and targets will specifically be achieved.

The KLC used its platform to consult with and advocate for PBCs in reform of matters related to native title across the Review period, in line with its commitment to influence in the post-determination period.

Some native title holders raised concerns that the KLC’s need for long-term financial sustainability risks putting it into economic competition with PBCs, therefore potentially limiting their progress towards autonomy.

RECOMMENDATION	10
Consider how indicators of the KLC development in a post-determination environment can be more clearly documented and communicated, and assign responsibility for tracking and monitoring progress.	
RECOMMENDATION	11
Seek ways to better communicate the role of the KLC in the post-determination world in supporting, and not competing, with PBCs.	

5 Performance assessment

This section assesses performance against the relevant performance indicators for each TOR. See Appendix A for the performance indicators.

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.

Summary

The KLC made significant progress in achieving native title determinations despite the challenges posed by COVID-19, with 12 consent determinations and one litigated determination during the Review period. The KLC additionally supported nine ILUAs, including one that resulted in the surrender of native title. At the end of the Review period, the KLC was pursuing five active native title claims and one compensation claim, with additional compensation claims in early scoping. Ninety-seven per cent of the claimable land within the RATSIB area was subject to a registered native title claim or determination.

The KLC had a high-performing legal team despite the challenges of recruitment and retention. The KLC's anthropology team remained relatively stable throughout the Review period, supporting the maintenance of corporate knowledge. Under the overall direction of the PLO, legal and anthropological staff were allocated to each region and each claim, with a Senior Anthropologist position providing support and guidance to the internal anthropology staff.

In the six cases where KLC-employed lawyers acted for one party and a professional conflict arose, representation of another party to a claim was briefed out to external lawyers. Through an independent process, the KLC established a panel of lawyers with relevant expertise in native title litigation. If a funded party appointed a lawyer from the panel, the KLC would enter into a funding agreement with that lawyer. If the funded party appointed a lawyer who was not on the panel, the KLC PLO would confirm that person had relevant expertise in native title matters before the KLC would enter into a funding agreement with that lawyer. External anthropologists were used for the preparation of connection reports in most cases.

A number of Traditional Owners who contacted the Review were dissatisfied with the outcomes achieved for their family. Their concerns generally related to differences between their own understanding of their history and the composition of their claims, which they attributed to the KLC. The Review understands that the composition of claim groups is a highly sensitive and potentially divisive issue that can cause enormous distress for the parties, with some Traditional Owners describing outcomes as like "a second dispossession". The unwavering views of parties involved in disputes is challenging and can complicate mediation processes, adding to the difficulty of achieving acceptable outcomes for all claimants. The KLC noted, however, that claims (including claim group composition) were authorised by claim groups (not the KLC) and determined by the Federal Court following rigorous testing of evidence, with KLC staff indicating that "we can only do what the evidence tells us".

The Review notes the complexity of recent and remaining claims, with as many as five different groups asserting interests in some claim areas. The challenges increase as the amount of claimable land that can be subject to determination decreases.

The composition of historical claims, including claim group boundaries, has compounded the dissatisfaction felt by some Traditional Owners, presenting challenges for governance of the resulting PBCs and for the KLC in managing ongoing relationships with Traditional Owners.

5.1.1 TOR 1: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Native title outcomes including from facilitation and assistance, certification, notification, dispute resolution and other relevant functions

The KLC was effective in progressing native title determinations during the Review period

During the Review period the KLC:

- legally represented **13 determinations**, one by litigation and the remainder by consent
- **provided funding for external legal representation for two further determinations** and for a further five claims
- **supported 29 of the 31 PBCs in its RATSIB area** to varying degrees including in relation to corporate compliance, notification and agreement-making functions
- **registered nine ILUAs**, one of which resulted in the extinguishment of native title in return for other benefits
- **filed seven new claims**
- represented one claim (Balanggarra #3) where native title was found not to exist.

At the end of the Review period, there were **six active claims**: five for native title and one for compensation.

The details of the determinations supported by the KLC during the Review period are presented in Table 1. All except one of these were legally represented by the KLC.

Table 1 | Determinations supported by the KLC during the Review period¹

PBC	Case name (shortened)	Date filed (first application)	Determination date	Representative	Judgement	Status commentary
Bunuba Dawangarri Aboriginal Corporation registered native title bodies corporate (RNTBC)	Bunuba #2 Part B	10/04/2012	25/07/2019	KLC	Native title exists in parts of the determination area.	The claim was determined by consent and covers an area of 284.6715 square kilometres of land and waters in the vicinity of Fitzroy Crossing.
Mayala Inninalang Aboriginal Corporation RNTBC	Mayala #2	11/01/2018	25/07/2019	KLC	Native title exists in parts of the determination area.	The claim was determined by consent and covers an area of 0.0343 square kilometres of land and waters in the vicinity of Derby.
Yanunijarra Aboriginal Corporation RNTBC	Ngurrara D1	19/07/2018	9/08/2019	KLC	Native title exists in the	The claim was determined by consent

¹ National Native Title Tribunal. Native Title Applications, Registration Decisions and Determinations. 2023. Accessed June 2023. <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>

PBC	Case name (shortened)	Date filed (first application)	Determination date	Representative	Judgement	Status commentary
					entire determination area.	and covers an area of 1,574.1318 square kilometres of land and waters in the vicinity of the Great Sandy Desert.
Yawuru Native Title Holders Aboriginal Corporation RNTBC	Edarrbur (Rubibi #18) (on behalf of the Yawuru Community)	11/11/2015	4/11/2019	KLC	Native title exists in parts of the determination area.	The claim was determined by consent and covers an area of 113.2305 square kilometres of land and waters in the vicinity of Broome.
Gogolanyngor Aboriginal Corporation RNTBC, Nimanburr Aboriginal Corporation RNTBC	Bindunbur Part B	18/12/2015	13/11/2019	KLC	Native title exists in the entire determination area.	The claim was determined by litigation and covers an area of 303.5491 square kilometres of land and waters in the vicinity of Broome.
Indigenous Land and Sea Corporation	Birriman-gan	6/06/2019	19/12/2019	KLC	Native title exists in the entire determination area.	The claim was determined by consent and covers an area of 2,191.7091 square kilometres of land and waters in the vicinity of Broome.
Balanggarra Aboriginal Corporation RNTBC	Balanggarra #3 Part B	3/07/2000	20/04/2020	KLC	Native title does not exist	The claim was determined by consent and covers an area of 0.0907 square kilometres of land and waters in the vicinity of Wyndham. The determination occurred two months after an ILUA settlement resulting in the extinguishment of native title.
Yanunijarra Aboriginal Corporation RNTBC	Ngurrara D2	6/08/2019	11/05/2020	KLC	Native title exists in the entire determination area.	The claim was determined by consent and covers an area of 34.7217 square kilometres of land and waters in the vicinity of the Great Sandy Desert.
Ngarrawanji Aboriginal Corporation RNTBC	Ngarrawanji Part B	29/10/2019	8/07/2020	KLC	Native title exists in the entire	The claim was determined by consent and covers an area of 80.0983 square kilometres of land and

PBC	Case name (shortened)	Date filed (first application)	Determination date	Representative	Judgement	Status commentary
					determination area.	waters in the vicinity of Halls Creek.
Malarngowem Aboriginal Corporation RNTBC	Malarngowem Part B	29/10/2019	11/08/2020	KLC	Native title exists in the entire determination area.	The claim was determined by consent and covers an area of 4.5024 square kilometres of land and waters in the vicinity of Halls Creek.
Madanaa Nada Aboriginal Corporation RNTBC	Warrwa Mawadjala Gadjidgar	7/04/2011	1/12/2020	KLC	Native title exists in parts of the determination area.	The claim was determined by consent and covers an area of 1,244.48 square kilometres of land and waters in the vicinity of Derby.
Madanaa Nada Aboriginal Corporation RNTBC	Warrwa Combined Part A	4/07/2014	1/12/2020	KLC	Native title exists in parts of the determination area.	The claim was determined by consent and covers an area of 1,006.6405 square kilometres of land and waters in the vicinity of Derby.
Joombarn-buru Aboriginal Corporation RNTBC	Joombarn-Buru	3/03/2020	13/10/2021	KLC	Native title exists in parts of the determination area.	The claim was determined by consent and covers an area of 940.2256 square kilometres of land and waters in the vicinity of Broome.
Walalakoo Aboriginal Corporation RNTBC	Boorroola Moorrool Moorrool Part A	23/12/2016	30/11/2020	Arma Legal (funded by KLC)	Native title exists in parts of the determination area	The claim was determined by consent and covers an area of 1,032.13 square kilometres of land and waters in the north-west of the Kimberley region.

As of 30 June 2022, the KLC had a case load of five active claims, one compensation claim and provided financial assistance to five claims represented by external legal teams

The six active native title claims that KLC was providing legal representation for as of 30 June 2022 consisted of five claimant applications and one compensation application. Table 2 details these active claims, the last three of which had been determined by the time of writing in November 2023.

Table 2 | Active claims legally represented by the KLC as of 30 June 2022

Claim	Application type	Date filed	Status
Warrwa Combined	Claimant	16/09/2010	Accepted for registration.
Malarngowem Aboriginal Corporation RNTBC	Compensation	02/09/2021	No registration decision.
Jaru People #2	Claimant	17/12/2021	Native title determined to exist in the entire determination area as of 15/12/2022.
Purnululu	Claimant	21/12/1994	Native title determined to exist in parts of the determination area as of 19/12/2022.
Purnululu #2	Claimant	06/09/2018	Native title determined to exist in parts of the determination area as of 19/12/2022.

The KLC also undertook further preparations for potential future claims and a native title application that was not registered during the Review period. This included preservation work for potential future compensation claim applications and the registration of a revised native title claimant application (on behalf of the Walalakoo Aboriginal Corporation RNTBC) in the post-Review period. The KLC advised that the revised Nyikina Mangala native title determination came about because of omitted apical ancestors².

In addition, at the end of the Review period, the KLC was providing financial assistance to external legal teams in relation to the following active claims:

- Koongie-Elvire
- Gajangana Jaru
- Boorroola Moorrool Moorrool
- Warlangurru.

Funding had also been secured from NIAA for the Ngarrawanji #3 (Yarlil) claim but had not been drawn on during the Review period.

The Review received positive feedback about the KLC's legal performance despite the challenges of recruitment and retention

Legal stakeholders generally commented very positively on the quality of the KLC's legal process and representations. The KLC legal team was relatively stable through the Review period, with the PLO highly experienced and in the role since 2018. The legal staff were seen to have a proactive and positive interaction with the Federal Court. The willingness of KLC staff to facilitate alternative legal representation where conflicts arose was highlighted by some stakeholders as a strong positive.

Like other NTRB-SPs, the KLC had challenges recruiting and retaining legal (and anthropological) staff during the Review period. The KLC adopted effective strategies to ensure that recruitment and retention of legal staff did not delay claim proceedings. KLC staff reported that due to the intense competition for senior lawyers, the KLC had not been able to recruit an external senior lawyer to the organisation since 2018. Rather than having constant recruiting campaigns, the legal team's strategy was to promote from within the organisation. While hiring internally provided an effective means of meeting claim deadlines,

² See *Walalakoo Aboriginal Corporation RNTBC v State of Western Australia* [2023] FCA 1181 [26] – [51]

KLC staff reported that this approach constrained the overall professional legal experience level of the team.

During the Review period the legal team comprised on average 11 people, with a team of four senior legal officers and the PLO, supported by paralegals. They worked closely with the anthropology team, which comprised about 4.6 full time equivalent (FTE) anthropologists. While the anthropology team reported to the PLO, in-practice staff reported that they operated as a sub-unit.

The satisfaction of Traditional Owners with the role of the KLC tended to depend on the success or otherwise of their particular claim

Understandably, the majority of clients or potential clients who contacted the Review were those who were dissatisfied with the composition or other outcome of their claim. Many approached the Review in the hope that the process of the Review might address their specific concerns. As noted elsewhere, it was not the role of the Review to investigate complaints.

Clients who expressed satisfaction with the outcome of their native title application largely focussed on a general appreciation for having native title determined for their Country and the helpfulness of KLC staff. Satisfied clients routinely mentioned the potential to uplift those in their community through the opportunities that native title determinations provided.

The majority of clients who contacted the Review were distressed that the evidence gathered by the KLC and the associated claim strategy presented for the claim group's consideration did not support their own understanding of their history.

Feedback from some Traditional Owners indicated significant unhappiness with the composition of claim groups and internal claim delineations

Dissatisfied clients were primarily unhappy with the perceived inaccuracy of their claim group description and their ability to exercise their rights over particular areas of the claim. Traditional Owners reported distress at their inclusion in claim groups they felt they did not belong to or being forced to accept others who they felt did not belong. Traditional Owners indicated this resulted in feelings of a severed connection to their Country. Many of the Traditional Owners who spoke to the Review team described the process as very divisive and created a feeling of second dispossession.

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. The KLC acknowledged that the unwavering views of parties involved in disputes was challenging and could complicate mediation processes, adding to the difficulty of achieving acceptable outcomes for all claimants. However, the KLC noted that claims (including claim group composition) were authorised by claim groups (not the KLC) and determined by the Federal Court following rigorous testing of evidence, with KLC 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 Kimberley communities, and for the most part were not attributable to the way the KLC performed its functions under the NTA.

In response to the concerns of Traditional Owners, the KLC has provided the following statement:

The KLC goes to great lengths to engage with claimants regarding how research is gathered for a native title claim. Claimant groups are given many opportunities to contribute to the research. The KLC also goes to great efforts to explain how evidence is gathered for a particular purpose. There can be diverging interests and points of view on how evidence is presented to the [Federal] Court by an expert anthropologist and/or by expert witnesses. As well as the potential of a differing understanding and awareness by an individual particularly where an individual might not have been actively involved in all aspects of the claim process. Additionally, the KLC works with the group,

and in particular the senior knowledge holders of the group, to identify those individuals that might give witness evidence; these tend to be senior and knowledgeable individuals. There may be many further stories and understandings of a group's history, this might be in conflict or in contradiction to an individual's own understanding of their history. It may be that the evidence gathered has not necessarily expressed all points of view but has presented the strongest evidence to support the claim. Particularly robust evidence which can stand up to the rigor and often harsh examination from the state, the Commonwealth and a litany of respondent interests who assert native title does not exist.

Traditional Owners were particularly concerned by the impact of claim group composition on the resultant governance of PBCs

A substantial proportion of the Traditional Owners who participated in interviews for the Review considered that they were disadvantaged because of the composition of their claim and thus their PBC. Typically, their claim included several family groups, each speaking for different areas of Country within the claim boundary. Grievances arose when one family group was much larger and was seen as taking control of PBC functioning through having more members. This then disenfranchised the smaller group, making it difficult to resist perceived attempts by the larger group to speak for the smaller group's Country. This caused a great deal of distress.

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

Traditional Owners tended to put the blame for these circumstances on the KLC and the original claim composition. The Review acknowledges that the KLC was not responsible for the structural injustices of the native title system and the tendency to blame the KLC for these matters did not necessarily indicate a failure to perform its functions under the NTA. The Review additionally recognises that the claim group architecture was only part of the picture, as the rules governing PBCs were also a key driver of PBC functioning. Issues relating to PBCs are discussed in more detail under TOR 6.

The Review acknowledges that within claim boundaries, many further delineations were possible depending on the perspectives of relevant stakeholders. The KLC pointed to the highly contested nature of native title claims as 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.

Observations on the KLC's communication and engagement regarding anthropological research, such as those relating to transparency and the return of cultural materials, is provided under TOR 3.

The complexity and length of some claims was recognised by the KLC and the Federal Court as contributing to less-than-optimal outcomes

KLC staff and the Federal Court both recognised that judgements in line with relevant native title legislation in complex cases did not satisfy all claimants. This was especially true for determinations where a lengthy claim process saw changes in membership due to the passing of claimants since the initial filing of the application, consequently affecting evidentiary completeness.

A clear example of this was demonstrated in the Purnululu and Gajangana Jaru determination, in which KLC lawyers represented the Purnululu Applicant and the KLC funded external legal representation for the Gajangana Jaru Applicant. The first of these applications was filed in 1994, with boundary disputes

identified as having occurred as early as 1992. The Federal Court decision in this case was very unpopular with many Traditional Owners.

In this separate question proceeding, the Court has been required to make findings about people's families, about their family relationships and histories, and about matters central to their lived experience and their sense of who they are: that is, their connection to Country. Some might see this as the negative side of the native title system. It is certainly an invidious task for a Court.

Due to the passage of more than 25 years since the Native Title Act's processes were first engaged about the [Purnululu Disputed Area], parties and their legal representatives have had to prepare their cases without the presence of many senior people who had the most complete and direct knowledge of these matters. The evidentiary record is therefore less complete than it should have been. There can be nothing but regret it has taken this long. Despite the difficulties, the claimants, their witnesses and their legal representatives, the officers of the State and its legal representatives, and the KLC, have invested a tremendous amount of effort, resources and dedication into this separate question proceeding. The Court is grateful for all the assistance it has received.

Then Justice Mortimer J, proceedings for the Purnululu and Gajangana Jaru determination (22 October 2020)³

Anthropological research

The KLC's anthropological research model incorporated a mix of internal and external capability, with overall direction from the PLO

The KLC's internal anthropology staff were part of the Legal Unit and were allocated by the PLO to a region of the Kimberley. Although anthropological research was directed by the PLO, a Senior Anthropologist position supported the research staff and reported to the PLO. Throughout most of the Review period there was a team of one Senior Anthropologists and three anthropologists, providing relative stability and good corporate knowledge against the greater churn of legal staff. Anthropology staff primarily conducted research for native title claimant applications, although some research was also undertaken for ILUAs and later, compensation applications.

External consultants were contracted for the preparation of connection reports for the majority of the KLC's native title claims, collaborating with and receiving support from internal anthropologists. In addition to providing third-party independence in research, the use of external anthropologists assisted with challenges in recruiting experienced anthropological staff, as observed across the native title sector.

Anthropological research for recent and remaining claims is challenging, primarily as a result of border disputes

With less than three percent of the Kimberley yet to be subject to a determination, ongoing and remaining native title claims are regarded by KLC staff, the Federal Court and Traditional Owners from the Kimberley as highly complex. This complexity is primarily the result of these claims sharing borders with areas previously or soon-to-be determined and related intra-Indigenous disagreements. KLC staff also commented to the Review on the complexity of some of the claim groups, with up to five different groups involved.

³ Drill on behalf of the Purnululu Native Title Claim Group v State of Western Australia (No 2). 2022. FCF WAD536/2018, WAD401/2018, WAD65/2019. Federal Court of Australia, FCA 1538.

Future Acts and ILUAs

The KLC conducted its Future Acts and ILUA functions well during the Review period

Under the NTA, the KLC is required to carry out functions related to notification (section 203BG) and agreement-making (section 203BH), which include notification of Future Act matters and the negotiation of ILUAs. During the Review period the average number of FANs received was 183 per year, as presented in Table 3.

Table 3 | Number and types of FANs received the National Native Title Tribunal (NNTT)⁴

Financial year	FANs			
	All notifications	Section 29 notifications (expedited)	Section 29 notifications (not expedited procedure) ⁵	Other FANs (including right to comment)
2019-20	145	113	16	16
2020-21	175	133	5	37
2021-22	229	217	1	11

The KLC filed objections to all section 29 expedited FANs throughout the Review period, except where the proponent had already agreed to a heritage protection agreement or the KLC was not instructed to act for the relevant native title party. KLC staff explained that the reason for this was the Western Australian Government's practice of applying the "expedited procedure statement" to all exploration licences. This was done regardless of the status of the land covered. For example, the NNTT may have previously found that it did not apply in the area of the notice, the notice covered registered sites, or the activities proposed would have an obvious significant impact.⁶

For native title and Future Act matters that were not objected to and were negotiated, ILUAs and other agreements (for example, Cultural Heritage Protection Agreements) were used by the KLC to achieve benefits for their clients. The KLC performed certification functions and, where requested by the native title party, facilitation and assistance functions for nine ILUAs during the Review period, as indicated in Table 4. One ILUA settlement resulted in the extinguishment of native title.

Table 4 | ILUAs registered with the NNTT during the Review period

ILUA name	Date registered	ILUA type	Primary subject matter	Other subject matter(s)
Balanggarra #3 Indigenous Land Use Agreement	14/02/2020	Area Agreement	Surrender	Government, Native Title Settlement, Tenure resolution
Yi-Martuwarra Ngurrara Larrawa	25/08/2020	Body Corporate	Pastoral	Access

⁴ Kimberley Land Council. Annual Report 2019-20.

⁵ Notices originally issued with the expedited procedure statement, and for which the statement is subsequently withdrawn, are counted only under section 29 notifications (expedited).

⁶ Kimberley Land Council. Annual Report FY2021-22.

ILUA name	Date registered	ILUA type	Primary subject matter	Other subject matter(s)
Pastoral Access Agreement				
Great Sandy Desert Project ILUA – Exploration and Production	23/11/2020	Body Corporate	Mining	Access, Exploration
Great Sandy Desert Project ILUA – Infrastructure	23/11/2020	Body Corporate	Infrastructure	Access, Exploration, Mining
Gooniyandi Warlibirri Parks ILUA	15/06/2021	Body Corporate	Government	Co-management, Tenure resolution
Bardi Jawi Conservation Estate Indigenous Land Use Agreement	9/06/2021	Body Corporate	Co-management	Access, Government
Dambimangari Country Marine Park Indigenous Land Use Agreement	9/06/2021	Body Corporate	Co-management	Access, Government
Mayala Country Marine Park Indigenous Land Use Agreement	9/06/2021	Body Corporate	Co-management	Access, Government
Wanggil ILUA	14/01/2022	Area Agreement	Government	Mining

Overall, the Review believes the outcomes support the KLC’s own view, noted in their FY2020-21 Annual Report, that they were “extremely successful at negotiating positive agreements on behalf of Traditional Owners.”⁷

With only a few exceptions, Traditional Owners who were consulted generally indicated that the KLC was effective regarding Future Act matters and associated agreement-making. Concerns that were raised with the Review by some Traditional Owners demonstrated low awareness of the Future Act system and notification processes. The KLC responded that there was “a very high level of awareness of the Future Act system, in particular the expedited procedure and heritage agreements, amongst native title holders generally and PBC directors in particular in the Kimberley region”.

Number of claims resulting in a determination of native title or ILUA settlement as a proportion of total filed claims

The KLC supported 15 determinations in the RATSIB area during the Review period

As noted earlier, the KLC supported 15 determinations (13 as the representative and two through providing funding for external legal representation) during the Review period. As shown in Table 5, the

⁷ Kimberley Land Council. Annual Report 2021-22.

KLC filed seven new claims, supported nine ILUAs, with one ILUA settlement resulting in the extinguishment of native title in return for other benefits.

Table 5 | Number of claims resulting in determination of native title or ILUA settlement for the KLC during the Review period⁸

Total number of claims filed-	Number of ILUAs resulting in extinguishment of native title or settlement	Number of determinations of native title
7	1	15

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

The KLC referred applicants for assistance to external legal counsel in six instances during the Review period

The KLC provided funding for a native title party to receive external legal representation in six cases during the Review period. KLC staff advised that the use of the brief out support was due to the KLC representing another party in the same proceedings.

The KLC had processes in place to ensure the legal firms it funded had relevant expertise

The KLC ensured that the external legal firms it funded to represent native title parties had relevant expertise in native title litigation. This was assisted by a tender process that established a panel of legal firms whose expertise in native title matters was confirmed through an independent process. KLC staff advised that a funded party could appoint a lawyer who was not on the panel, however funding would not be provided by the KLC until the PLO confirmed that the lawyer had the requisite expertise.

Proportion of claimable land within the RATSIB area not subject to a registered claim or a determination

Approximately three per cent of the claimable land within the RATSIB area was not subject to registered claim or determination

The Kimberley RATSIB area is approximately 423,517 square kilometres of land and waters. KLC staff advised the Review team at the time of consultation (August 2023) that three percent, or approximately 12,706 square kilometres, was not at that time subject to a registered claim or determination (although KLC staff advised that some of these areas have been the subject of a registered claim in the past). This reflects the maturity of native title in the Kimberley region and the extent to which the KLC works in the post-determination space.

⁸ National Native Title Tribunal. Native Title Applications, Registration Decisions and Determinations. 2023. Accessed June 2023. <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>

Average time between filing an application for a determination of native title to the date a determination is made

The KLC’s average time between filing an application for determination of native title was generally favourable against Federal Court benchmarks

The Federal Court has set a claim resolution target of five years for all claims lodged since 2011. For claims lodged before 2011, the target was ten years.

A total of 12 of the 13 applications determined within the Review period were lodged post-2011 and the average time between the KLC filing the application and the determination being made was 3.18 years. This is considerably less than the target of five years set by the Federal Court. The one application determined within the Review period that was lodged prior to 2011 took 19.81 years from filing to determination, almost double the applicable benchmark. KLC staff and legal stakeholders noted that this extended timeframe reflects the complex nature of this particular claim, Balanggarra #3 Part B.

The ages of the KLC’s four active claimant applications and one compensation application at 30 June 2022 are shown in Table 6.

Table 6 | Age of active claims supported by the KLC as of 30 June 2022⁹

Less than 1 year	1 to 3 years	3 to 5 years	5 to 15 years	More than 15 years
1	1	1	1	1

The Review notes that 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 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’.”¹⁰ Nevertheless, an impact of claims that take many years to determine is that membership of claim groups change as claimants pass away.

Number of common law native title holders/RNTBCs the NTRB-SP has acted for in a native title compensation application proceeding

The KLC submitted its first application for native title compensation in 2021 and is preparing for more claims in the future

In its 2021-22 Annual Report, the KLC reported that since the Timber Creek native title compensation claim decision in March 2019, the KLC has worked with a number of PBCs to research and identify areas where a native title compensation claim could be made.

In September 2021, the KLC lodged its first native title compensation claim for the PBC Malarngowem Aboriginal Corporation RNTBC in relation to an exploration tenement held by Kimberley Granite Holdings Pty Ltd on Malarngowem determined lands. The claim pertained to 45.24 square kilometres of land located in north and north easterly portions of the Halls Creek Shire. The claim is currently still active and

⁹ National Native Title Tribunal. Native Title Applications, Registration Decisions and Determinations. 2023. Accessed August 2023. <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>
¹⁰ Submission by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Australian Law Reform Commission, Efficient resolution of native title claims. 2015. Accessed March 2024.

is for compensation for the impacts of exploration activities, including significant damage to sites such as Garnkiny and Jawaren.

Since February 2022, the KLC has also been preparing a compensation claim over the Yampi Defence Lands for the PBC Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC.

It is likely that the number of compensation claims will continue to grow in the future. The KLC has initiated work to record evidence from senior Traditional Owners who have significant knowledge of their lands so that it will be available as evidence if needed for future compensation claims. Staff have also developed plans for more future preservation evidence work throughout the region.

5.1.2 TOR 1: External factors

This section presents an analysis of factors that impacted on performance that were beyond the KLC's control.

State government policy and legislation

The Western Australian Government had a strong desire to settle and determine all claims in the region under Closing the Gap priorities

The Western Australian Government's position during the Review period was to achieve consent determinations with an increased willingness to progress native title claims more quickly under Closing the Gap priorities and the Western Australian Implementation Plan.¹¹ It is important to note that this stance has evolved from the historically adversarial approach taken by the Western Australian Government, which was a strong theme that impacted the KLC's ability to deliver native title outcomes during the previous Review period (FY2015-16 to FY2017-18).

While the Western Australian Government's positive attitude towards achieving consent determinations is on balance a positive indicator, KLC staff emphasised the importance of continuing due diligence to ensure that claims are strongly backed by research and that claim groups are functional and inclusive.

State policy and legislation have had some impact over both native title land determinations and compensation claims

A range of state legislation was directly or adjacently related to the KLC's native title activities such as native title land determinations and compensation claims, as outlined in Table 7.

Table 7 | Relevant state legislation

Legislation	Description	Impact
<i>Aboriginal Cultural Heritage Act 2021 (WA)</i>	There has been significant commentary on the Western Australian Government's <i>Aboriginal Cultural Heritage Act 2021 (WA)</i> . In response, the Western Australian Government has decided to repeal the <i>Aboriginal Cultural Heritage Act 2021 (WA)</i> (despite it only coming into effect on 1 July 2023) and revert back to the	High – The re-design and subsequent repeal of the <i>Aboriginal Cultural Heritage Act 2021 (WA)</i> caused confusion across communities, with KLC often being required to explain these adjacent policy changes during native title processes.

¹¹ Western Australian Government. 2021. Closing the Gap Western Australia Implementation Plan. Accessed October 2023.

Legislation	Description	Impact
	previously repealed <i>Aboriginal Heritage Act 1972</i> (WA) with some amendments.	
<i>Mining Act 1978</i> (WA)	The Western Australian Government asserts that the expedited procedure applies to all exploration tenement applications lodged under the <i>Mining Act 1978</i> (WA), such as Exploration and Prospecting Licences.	Moderate – Western Australian Government policies around the expedited procedure imposed some pressures on KLC but did not substantially act as a barrier to achieving outcomes for native title parties.
<i>Land Administration Act 1997</i> (WA)	The <i>Land Administration Act 1997</i> (WA) includes provisions for land use planning and development, which should consider native title rights and interests, the acknowledgement and registration of native title rights and interests in the state, and the mechanisms for granting land tenures.	Moderate – <i>The Land Administration Act 1997</i> (WA) provisions for land use planning and development may have impacted the ability of KLC to focus its resources on native title outcomes.
<i>Environment Protection Act 1986</i> (WA)	The <i>Environment Protection Act 1986</i> (WA) includes provisions for the protection, preservation and management of Indigenous cultural heritage. It establishes mechanisms for the identification and registration of significant Aboriginal sites and places, and outlines obligations for their protection during development and land management activities that could impact native title.	Low – The <i>Environment Protection Act 1986</i> (WA) provisions diverted some KLC resources from progressing native title claims.
<i>Public Works Act 1902</i> (WA)	The <i>Public Works Act 1902</i> (WA) provides mechanisms for negotiation and agreement on compensation for native title holders affected by public works and grants powers to the government to acquire land for public purposes, including infrastructure projects.	Low – The <i>Public Works Acts 1902</i> (WA) provisions diverted some KLC resources from progressing native title claims.
<i>Conservation and Land Management Act 1984</i> (WA)	The <i>Conservation and Land Management Act 1984</i> (WA) provides for the establishment of joint management or co-management arrangements between government agencies and native title holders or Traditional Owners for the management of conservation reserves or protected areas. This allows for shared decision-making, consultation and participation of Traditional Owners in the planning and management of land and natural resources.	Medium – The <i>Conservation and Land Management Act 1984</i> (WA) allowed for the negotiation and registration of ILUAs related to the management and use of conservation lands, diverting resources to supporting Traditional Owners with the management of ILUAs.

Complexity of remaining claims

Remaining native title claims in the Kimberley are highly complex, requiring significant resources and investment from the KLC

KLC staff advised that the undetermined and yet to be registered claims in the Kimberley RATSIB area were highly complex due to overlapping boundaries and related disputes. KLC staff indicated that these claims are resource-intensive and can require determination through litigation, rather than through consent, when mediation attempts are unsuccessful. These complexities mean that these claims can require similar staff and funding levels to claims that are larger in area yet have minimal overlapping boundaries and disputes.

History of previous claims

The Review found no evidence that the history of previous claims was a significant source of challenge to KLC's performance during the Review period, despite some claimants reporting they had lost trust in the KLC as a result of outstanding grievances.

COVID-19

The KLC adapted well to accommodate operational changes caused by COVID-19, despite some staff turnover and shifting of goals and timelines

KLC staff and annual reports confirmed that the COVID-19 pandemic "had a significant impact on KLC operations"¹², however, the KLC was markedly effective in overcoming this impact. The KLC described the impact of COVID-19 on delivery of native title services in its 2019-20 Annual Report:

- Face-to-face meetings for native title claims were delayed or shifted to virtual forums where possible.
- Meetings and compliance activities for client PBCs were delayed.
- Legal proceedings were rescheduled by the Federal Court.
- A two-month moratorium was instituted by the Western Australian Government on FANs for expedited procedures.
- Office closure and staff working from home, noting that a roster was introduced so that select staff could work in the Broome office on a rotational basis when needed.¹³

In addition, staff noted that COVID-19 contributed to a number of staff in legal and anthropology roles leaving the organisation. This was specifically attributed to these staff feeling isolated from family members as a result of imposed travel restrictions.

In line with public health restrictions, the KLC swiftly implemented a number of policies and practices to work effectively through operational changes and mitigate transmission of the virus, including through:

- a COVID-19 response plan
- COVID-19 updates for internal use
- a process for staff and consultants to minimise the risk of transmission while travelling into the Kimberley
- proof-of-vaccination requirements.

¹² Kimberley Land Council. Annual Report 2019-20.

¹³ Kimberley Land Council. Annual Report 2019-20.

While the most intense effects of the pandemic on the KLC's operations were felt early in the Review period, these effects persisted to a lesser extent throughout the entire period. The Review notes that in spite of the operational challenges caused by COVID-19, the KLC delivered considerable native title outcomes for clients throughout the Review period.

KLC staff recognised that lower meeting and travel expenditure as a result of travel restrictions had an indirect benefit on operations by conserving funding. Staff noted that some practices adopted during the pandemic, such as holding virtual meetings, had continued to have positive impacts. For example, the KLC conducted its Special General Meeting virtually in May 2021, with Traditional Owners dialling in from across locations in Broome, Fitzroy Crossing, Halls Creek and Kununurra.

Amount of funding

The amount per claim rose markedly from the previous Review period, reflecting the complexity of the claims

Total funding that the KLC received from the NIAA across FY2019-20 to FY2021-22 was \$30.4 million, excluding funding for PBC support. This was comparable to the total funding for similar NTRB-SPs. Funding relative to RATSIB area (see Table 8) was similar to the figure from the previous Review.

However, when considering determinations achieved within the Review period, as well as active matters still to be determined, the KLC received on average about \$1.6 million per claim, almost three times the amount in the previous Review. This is likely indicative of the increasingly challenging nature of current claims.

Table 8 | Total funding relative to factors of interest¹⁴

Factor of interest (denominator)	Ratio
KLC's total land area: 423,517 square kilometres	\$71.77 per square kilometres
Number of active claims (five) and determinations (13) at 30 June 2022: 13	\$1,688,888.88 per claim

5.1.3 TOR 1: Recommendations

RECOMMENDATION

1

The KLC should develop a document with options available to Traditional Owners who are concerned about the governance of their PBC to address the dissatisfaction of Traditional Owners where significant tensions between groups have arisen as a result of the claim process or determination.

¹⁴ These estimates are calculated based on the total funding received from the NIAA excluding PBC support during the Review period, which was \$22.8 million.

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.

Summary

The KLC had a clear and well-documented policy in place for assessing and prioritising applications for assistance that it applied to all applications for assistance. The policy was made publicly available to clients through several channels. A Committee of the Board, the NTRB Grants Committee, assessed applications to determine if they met the criteria for assistance, including their legal merit and the factors that influenced a claim's relative priority.

The policy clearly stated that applicants would be informed of the decision and the reasoning behind it in writing. The Review saw no evidence that this policy was not followed however a very small number of clients who had applications refused reported to the Review that they were unclear as to the grounds for their rejection.

A small number of Traditional Owners and other stakeholders associated with KLC also expressed a concern to the Review that the prioritisation process may be influenced by Board members or senior staff with ties to relevant claim groups. The Review was not provided with any evidence of specific cases and notes that the KLC has a clearly documented conflict of interest policy which appears to be consistently applied in practice.

The large volume of work in the post-determination space continues to grow and compete with resources available for claims. This places a constraint on the ability of the KLC to prioritise increasingly complex claims. Staff consistently held the view that funding had not kept up with workload over the Review period.

5.2.1 TOR 2: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Equity, transparency and robustness of assessment and prioritisation process

The KLC had a clear process for assessing and prioritising applications for assistance

The KLC's Guidelines for Assistance in Native Title Claims (Assistance Guidelines) is a written policy governing the KLC's assessment and prioritisation of applications for assistance. The Assistance Guidelines clearly outline:

- roles and responsibilities under the NTA
- claims assessment policy and process
- conflict resolution process
- procedures for ensuring confidentiality and avoiding conflicts of interest
- processes for internal reviews and complaints, which are described in greater detail under TOR 3.

According to the Assistance Guidelines, all new applications for assistance go before the KLC's Board. They are assessed by a Board subcommittee known as the NTRB Grants Committee, consisting of the CEO or his nominee and not less than two other Board members who are nominated by the broader Board during a

Board meeting. The Assistance Guidelines state that the KLC will only provide assistance if the KLC NTRB Grants Committee is satisfied that:

- the matter relates to land or waters wholly or partly within the KLC RATSIB area; and
- the matter has legal merit; and
- the matter has sufficient priority for funding to be extended to the applicants in the current financial year.

The Assistance Guidelines also include a comprehensive list of the factors influencing the relative priority of claims:

- external pressures
- whether the claim raises test case issues
- claim area overlaps
- number of people who will benefit from the claim
- satisfactory resolution of disputes among claimant groups.

KLC staff were familiar with the assessment process and reported that the assessment policy was adhered to consistently. Compensation claims which come to the KLC go through the same process.

The Review considered the KLC's Assistance Guidelines against the criteria developed by the Review for equitable resourcing and defensible decisions. The criteria were established prior to commencement of the Review and are based on the identification of good practice throughout the previous Review. They are set out in the Review's methodology and are shown in Table 9 alongside the relevant corresponding extract from the Assistance Guidelines. All criteria were adequately addressed by KLC.

Table 9 | KLC prioritisation policies

Prioritisation policy criteria	Relevant Assistance Guidelines extract
Considerations such as Court-imposed timelines and the service of section 29 notices that require the lodgement of claims within four months are expected to be built into the relevant prioritisation policies.	<i>Section 3.2.3 Relative priority of applications for assistance</i> "A higher priority will be given to an application which satisfies a greater number of the following criteria... the area sought to be claimed is subject to development pressures; the applicants do not have secure land tenure to the land they wish to claim."
Clear description of the specific decision-makers for assessment and prioritisation decisions (for example, Board, Board sub-committee, CEO and/or Executive).	<i>Section 3.3 Application assessment process</i> "Applications for assistance will be considered by the NTRB Grants Committee."
Clear description of processes and decision-makers for the conduct of internal reviews of prioritisation decisions (when requested).	<i>Section 3.4 Review of NTRB Grants Committee Decision</i> "Members of the NTRB Grants Committee are excluded from being members of the NTRB Review Committee and from any discussion or determination regarding the application for review of the original decision."
Clear description of the circumstances in which matters may be briefed out prior to decision-making.	<i>Section 3.6 Resolution of conflicts</i> "Prior to offering any assistance for a native title matter, the KLC will offer to mediate in any dispute relating to native title land... in particular, Kimberley Aboriginal Law and Culture Centre may be asked to assist in the resolution of such disputes."

Prioritisation policy criteria	Relevant Assistance Guidelines extract
	<i>Section 3.8 Briefing out policy</i> "The KLC will only brief out in exceptional circumstances... the KLC will not pay fees or costs incurred prior to the date of the grant of assistance."

The KLC's annual reports provided some additional practical factors that influenced the prioritisation process of existing claims. They included:

- resourcing considerations
- Federal Court case management priorities
- availability of suitably qualified consultants such as anthropologists.

KLC staff reported that after an application for assistance was accepted, practice was consistent with these terms and any adjustments were driven primarily by external factors beyond their control.

As shown in Table 10, all applications for assistance received during the Review period were considered by the KLC NTRB Grants Committee. The KLC did not report on whether applications received were accepted or rejected.

Table 10 | Number of applications received and considered by KLC¹⁵

Financial year	Number of applications received during financial year	Number of applications considered during financial year	Number of applications considered in next financial year
2019-20	6	1	5
2020-21	9	5	4
2021-22	6	6	0

Client and potential client awareness of the process

The KLC had steps in place to ensure clients and members were aware of its assessment, prioritisation and internal review processes

The KLC assessment, prioritisation and internal review processes were publicly available across several mediums, including:

- The "Native Title Role and Functions" chapter of each KLC Annual Report, which is available online and outlines the KLC's responsibilities under the NTA and the right of clients to request an internal review, and summarises the types of criteria against which potential claims are assessed and prioritised.
- The KLC website "complaints" page and form, which provides a plain language outline of the assessment and prioritisation process at a high level, explains the right to request an internal review and the opportunity to submit a complaint via a dialogue box.¹⁶

¹⁵ KLC. Annual Report 2019-20 to 2021-22.

¹⁶ KLC. Complaints. 2022. Available at <https://www.klc.org.au/complaints>, accessed 15 August 2023.

During consultations, clients who spoke with the Review appeared well-aware of the processes involved in applying for assistance and lodging claims.

Traditional Owner satisfaction with the assessment and prioritisation process and its outcome

Some Traditional Owners expressed concerns with the prioritisation process

Traditional Owners who were assisted in their claims and received successful determinations were generally very positive in their view of the process. However, a small number of Traditional Owners who lodged applications for assistance which were ultimately declined advised the Review that they were unhappy with the decision, which is unsurprising. They also advised they were unclear about the reasoning behind the decision. Section 3.39 of the Assistance Guidelines document clearly states that applicants will be informed of the decision and the reasoning behind it in writing. The KLC informed the Review that all applicants were informed of the outcome of the decision and that no applicants requested a review of the outcome during the Review period.

Some Traditional Owners and other stakeholders perceived bias in the prioritisation of claims and the consideration of evidence

There was a perception among some Traditional Owners who engaged with the Review that there was a willingness to favour the prioritisation of certain claim groups with connections to influential members of the Board. This was not an uncommon perception across Traditional Owners in other RATSIB regions and reflects the challenges of operating in highly contested and challenging environments. There was similar feedback from individuals who had been involved with the KLC in a range of roles that the claims of senior staff, Board members and their families were given priority. The Review notes these concerns but was not provided with any evidence to demonstrate their validity. The KLC was clearly aware of relevant risks and mitigated them through its policies: Section 3.10 of the Assistance Guidelines includes KLC's conflict of interest policy which states that, "...a member of the Board [who] is an applicant or has any interest in the land or waters the subject of the proposed claim...must declare their interest and absent themselves from any meeting where the application is discussed."

5.2.2 TOR 2: External factors

This section presents an analysis of factors that impacted on performance that were beyond the KLC's control.

Number of claims relative to NTRB-SP size and resourcing

The KLC has a small number of challenging claims on hand that need to be balanced with its post-determination work

While the KLC had five active claims at the end of the Review period, these remaining claims are of increasing complexity and may inevitably take longer to resolve. Further, the Kimberley's first ever compensation claim is new ground for the KLC and staff reported that the compensation claims process is onerous and challenging.

Legal staff at the KLC typically work across a broad range of work in native title, from claims to FANs and PBC governance. The large volume of work in the post-determination space continues to grow and compete with other claims for resources. Staff consistently held the view that KLC resourcing had not kept up with workload over the Review period.

The Review considers that the number of claims relevant to KLC's size and resourcing had a small impact on its performance in achieving native title outcomes.

5.2.3 TOR 2: Recommendations

RECOMMENDATION

2

Ensure that where applications for assistance are refused, the applicants are always provided with an explanation of the prioritisation process and clearly articulated reasoning for the decision including an accurate plain English record of the decisions made and the reasoning behind them.

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.

Summary

The KLC had an established approach toward respectful and culturally appropriate engagement in its native title work that remained in place throughout the Review period. Cultural competency and respectful practices were embedded into the organisation's practices through induction programs and cultural immersion. The strong component of Indigenous staff with ties to the Kimberley, including those in leadership positions, meant that the KLC had strategic and operational insight into cultural appropriateness throughout all levels of the organisation.

These positive engagement practices could be enhanced by the development of more explicit documentation, such as protocols and guidelines.

Some Traditional Owners noted that there could be greater transparency in communication and improvements to the cultural appropriateness of meetings, particularly regarding the right way for men and women to meet and make decisions. There was also a view that more attention could be paid to helping Traditional Owners understand legal jargon, by having more Indigenous staff present at meetings. Given the sensitivity around the use and return of cultural materials, there is a need to pay particular attention to culturally appropriate ways of conveying decisions around handling of this material.

The KLC had a complaints policy available on its website with detailed information about how complaints are processed. Information about how decisions regarding assistance could be reviewed was available in the applications for assistance guidelines.

Across the Review period, the KLC received ten complaints related to native title. The KLC reported that all the complaints were examined and addressed, noting that this was not always to the satisfaction of the complainant.

5.3.1 TOR 3: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Respectful and transparent engagement

Respectful engagement was highlighted in KLC's Code of Conduct¹⁷

The KLC employee Code of Conduct requires all employees to comply with engagement expectations including:

- Respect the cultural values and protocols of Kimberley Aboriginal peoples.
- Behave honestly and professionally, be impartial, efficient and act with integrity.
- Treat everyone with respect and courtesy, with consideration and sensitivity, and without harassment.
- Provide timely, unbiased and professional advice.

¹⁷ KLC Code of Conduct.

- Treat all information gained in the course of their employment as confidential and not disclose any information without authority, or for personal benefit.
- Disclose, and take reasonable steps to avoid, any conflict of interest (real or perceived).
- Not make improper use of the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- Maintain the ethical standards, or codes of conduct relevant to their particular disciplines or professions.
- Abide by and comply with corporate policies and procedures.

The expectations set within this employee Code of Conduct broadly guide the KLC's approach to respectful and transparent engagement.

Culturally appropriate engagement

KLC staff were supported to engage appropriately through training, induction and mentoring

As part of the induction process, KLC staff engaged during the Review period undertook learning that broadly covered the history of Indigenous peoples in Australia. In addition, any staff assigned to work on specific areas of Country received cultural immersion specific to that Country. This occurred whenever staff began to work in an area of Country, regardless of their tenure with the KLC. This cultural immersion aimed to develop knowledge relating to the culture, history and customs of the community being engaged.

The KLC placed strong emphasis on mentoring of non-Indigenous staff by local Indigenous staff. Importantly, organisation leadership included a large proportion of Indigenous staff with the CEO, Deputy CEO, NTSU Manager, and Land and Sea Manager all Indigenous Australians with ties to the Kimberley. As a result, the KLC had strategic and operational insight on cultural appropriateness throughout all levels of the organisation, allowing for robust oversight. Non-Indigenous staff underscored the importance of Indigenous staff guidance in matters of cultural appropriateness. In addition to cultural orientation to support culturally appropriate engagement, the KLC built staff skills through providing two workshops on trauma-informed engagement during the Review period, with an additional four training sessions having been conducted by the time of consultations for the Review in August 2023. This training was compulsory for all KLC native title staff.

Strategies reported to the Review by research staff in conducting meetings included ensuring that safe places were always provided for people to ask questions or voice their views by holding separate meetings wherever possible.

Written documentation and guidelines could enhance consistent application of culturally appropriate engagement

While the Review observed that the KLC did undertake culturally appropriate engagement across its work, its approach was not necessarily recorded in policies or written procedures to guide consistent implementation.

The KLC had an opportunity to enhance its engagement with Traditional Owners through formalising existing and co-designing new policies and procedures related to cultural appropriateness alongside Kimberley Traditional Owners.

Traditional Owners identified opportunities for the KLC to improve the cultural appropriateness of meetings

Cultural appropriateness was generally perceived positively, with a particular strength being the use of interpreters for meetings. The use of interpreters provided the understanding needed to make informed decisions.

Traditional Owners consulted as part of the Review also highlighted some opportunities for the KLC to refine the way meetings are conducted. Some were concerned that meeting processes did not always follow culturally appropriate customs and protocols regarding the right way for men and women to meet and make decisions, including no space for men and women to break into gender groups to discuss the issues at hand. Some stakeholders felt that this reinforced power dynamics through which men dominate meetings.

A further comment made to the Review was that KLC staff at claim meetings did not always help the community understand legal jargon. Some clients suggested this might be mitigated by more Indigenous staff being present at meetings.

Traditional Owners in remote areas shared the view that it would be appreciated if the KLC could hold meetings in areas closer to them, however they appreciated that remoteness poses a challenge given funding considerations.

Complaints

The KLC had a complaints policy available on its website

The KLC had a complaints policy for dealing with complaints from members and the public regarding decisions or actions of the KLC or its staff, including:

- a decision of a KLC Executive Director
- a decision of the Executive Committee or a sub-Committee
- a decision made by someone who had been given authority by the Executive Committee
- any action or behaviour of a member of the KLC staff.

The KLC website had links to access the policy and mechanisms through which to make a complaint, including the submission of an online form in the complaints section or writing a complaint addressed to the CEO. The KLC's complaints policy acknowledged that KLC members and the public have a right to make a complaint. It also encouraged prospective complainants to first speak to KLC staff before making a complaint.

Traditional Owners were not necessarily aware of the KLC's complaints policy

Despite the complaints policy being on the KLC website, Traditional Owner survey responses indicated a low degree of awareness of this policy. This suggests that there may be an opportunity for the KLC to consider whether the information about how to make a complaint could be communicated in a more effective, culturally appropriate way.

The Review also notes that the complaints policy and submission form may not be immediately obvious on its website. The complaints policy and submission form is placed at the bottom of each page on the website and within the "Contact Us" section, through a link that is not prominently displayed and is far down the page.

KLC received ten formal complaints through the Review period

Ten formal complaints were made directly to the KLC, as shown in Table 11.¹⁸ The complaints concerned actions of the KLC or its staff, or decisions related to actions of the NTRB Grants Committee of the Board. NIAA did not receive any formal complaints regarding KLC throughout the Review period.

Table 11 | Number of formal complaints received by the KLC, July 2019 to June 2022

FY2019-20	FY2020-21	FY2021-22
2	4	4

Information provided to the Review by the KLC indicated that the substance of the complaints included:

- A request to not run certain claim meetings (two complaints).
- An issue with the KLC staff's facilitation of claim meetings, including a perceived failure of duty of care which saw affected Traditional Owners feeling unfairly treated by staff (one complaint).
- The failure to establish accurate connection to apical ancestors (one complaint).
- A matter relating to onboard amenities for a bus service used during member travel (one complaint).

According to the KLC, all complaints were addressed in line with the KLC's complaints policy.

Traditional Owners who complained were mostly unsatisfied with complaint responses

In surveys and through consultations, some Traditional Owners who had lodged complaints regarding the KLC reported that they felt the KLC's response did not appropriately respond to the subject of the complaint. Most complainants also noted delays in receiving responses from the KLC regarding their complaint and, in one instance, reported that the KLC did not respond to them directly or at all. Ensuring that responses to complaints are prompt and direct should continue to be a priority for the KLC.

Internal review

The KLC's internal review process was available on its website, under the Complaints heading

Section 203BI of the NTA provides that:

The internal review functions of a representative body are:

- a) to provide a process for registered native title bodies corporate, native title holders and persons who may hold native title to seek review by the representative body of its decisions and actions, made or taken in the performance of its functions or the exercise of its powers, that affect them; and*
- b) to publicise that process appropriately.*

The KLC's internal review process was displayed publicly on its website and stated that actions taken by staff could be reviewed if requested. The website advised that if a request for review was made, a Review Committee would be assembled, consisting of the KLC Chairperson and four Executive Board members (who could not be part of the original NTRB Grants Committee that was the subject of the internal review).

¹⁸ KLC Annual Report 2019-20, 2020-21, 2021-22.

Internal review processes were not well understood by both Traditional Owners and staff

The majority of survey responses from Traditional Owners and a small number KLC staff members recorded that their knowledge was limited regarding the internal review process at the KLC.

The KLC received no requests for internal review during the Review period

The KLC did not receive any requests for internal review of decisions during the Review period.

Use of cultural materials

The approach to use of cultural materials could be more sensitively communicated to Traditional Owners

The Review notes that the return of cultural materials is a difficult issue for all NTRB-SPs. Affected Traditional Owners want to see the evidence relied on for their claims, but there are privacy implications as well as the potential to create disruption within communities. Several Traditional Owners reported concerns with the way their cultural connection material was used or held, notably genealogies that included information on other claimants' connection to apical ancestors, which could be used to determine "rightful" connection to Country. Some Traditional Owners reasoned that since the information pertains to their heritage, native title claims and governance of land and waters post-determination, they should have access to it in some form.

KLC staff acknowledged this concern but noted that the release of the genealogies of other claimants is not possible due to privacy issues. Given the distress that this issue can cause to Traditional Owners, the Review suggests that communication to Traditional Owners about the reasons for not sharing such materials may require additional sensitivity in approach. Information on the KLC's progress in returning cultural materials to Traditional Owners is under TOR 6.

5.3.2 TOR 3: External factors

No external factors have been identified for TOR 3.

5.3.3 TOR 3: Recommendations

RECOMMENDATION

3

Develop written protocols and guidelines to document the KLC's culturally appropriate engagement strategies, including protocols by which meetings will be run.

RECOMMENDATION

4

Develop more culturally sensitive approaches to advising Traditional Owners on privacy considerations which may limit access to genealogical information.

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.

Summary

The KLC adopted cost effective practices over the Review period, showing year-on-year improvement against budget. This achievement in cost effectiveness has been against an environment that presented significant challenges to cost efficiencies, including the very remote nature of the region.

Staff salaries made up the greatest item of spending for the KLC, with competition from the mining sector in particular impacting on salary costs. Unfilled vacancies led to a need to contract some work out, leading to spending on corporate consultants significantly exceeding budgeted amounts.

The KLC's policies and processes for claim group meetings balance considerations of cost-effectiveness with the importance of supporting equitable participation.

The use of external anthropology and legal consultants appears cost effective and has generally been on budget. These costs and other costs related to field work were impacted during the Review period by the COVID-19 pandemic and public health restrictions.

The KLC used a range of cost-saving measures during the Review period, including reducing travel costs through improved coordination, negotiating discounts through bigger professional contracts and effectively managing IT infrastructure.

5.4.1 TOR 4: Assessment of performance

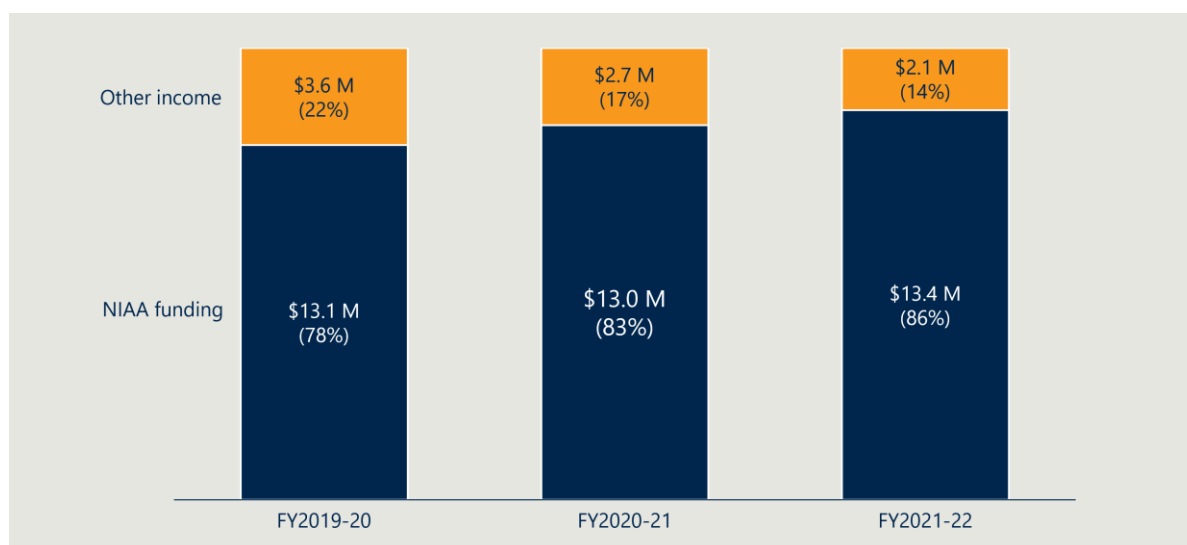
This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Expenditure on salaries (legal, anthropological, Board, CEO, HR, etc.), operations (travel, legal, offices, etc.) or other relevant items

NIAA funding for the KLC was consistent over the Review period

The KLC received relatively consistent levels of funding from the NIAA between FY2019-20 to FY2021-22, at approximately \$13 million each year, as shown in Figure 1. There was little discrepancy between the budgeted and actual figures for NIAA income. The KLC received about 15 to 20 per cent of its income from other sources, including interest and Future Act negotiations.

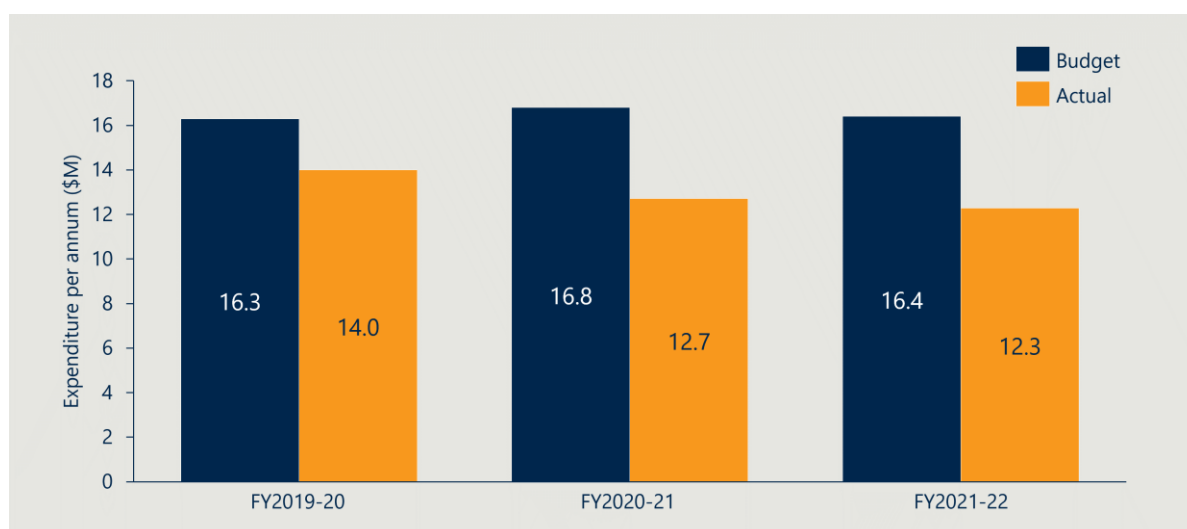
Figure 1 | KLC income, FY2019-20 to FY2021-22¹⁹



Total expenditure reduced over the Review period

Total KLC expenditure (excluding GST) in FY2019-20 was about \$14 million but dropped almost ten per cent in FY2020-21 to \$12.7 million, then reduced again to \$12.3 million in FY2021-22. As shown in Figure 2, expenditure was under budget every year of the Review period and has also decreased from year to year.

Figure 2 | KLC expenditure, FY2019-20 to FY2021-22²⁰



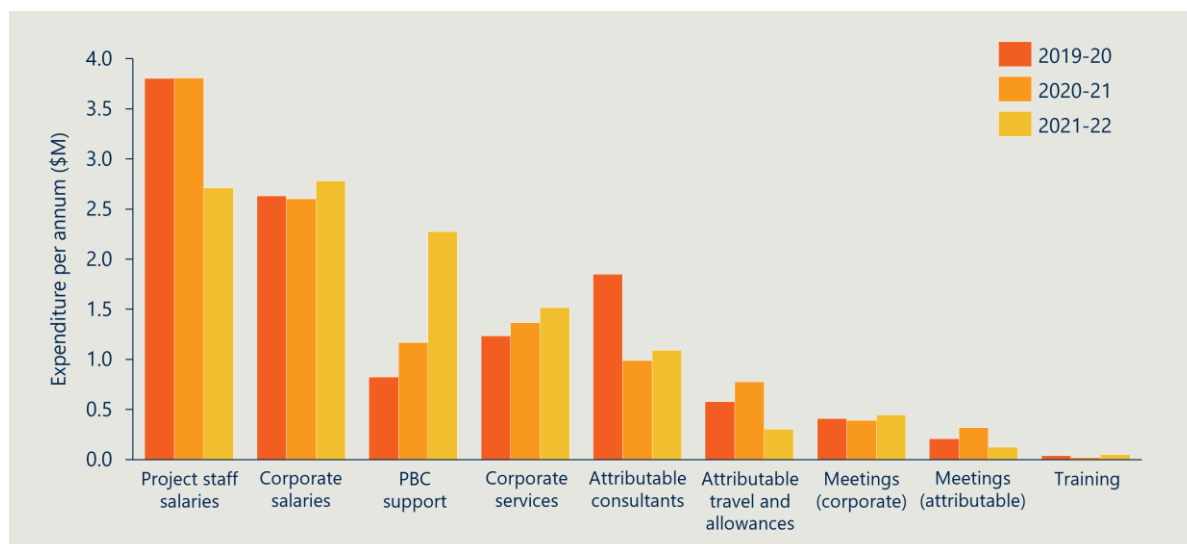
As shown in Figure 3, the relative breakdown of key line items fluctuated across the Review period, in some instances due to the limiting effects of COVID-19 on certain travel and research engagements. For example, attributable costs for project consultants including legal and anthropological consultants decreased sharply after FY2019-20. The sharp drop in project staff salaries and sharp increase in PBC support expenditure for FY2021-22 seen in Figure 3 is due to a change in the way the KLC allocated salaries in their accounting for PBCs.

¹⁹ KLC. Financial Report 2019-20 to 2021-22 (unpublished).

²⁰ KLC. Financial Report 2019-20 to 2021-22 (unpublished).

Salaries consistently made up the greatest cost for the KLC. Many senior staff recognised that the level of staff salaries reflected the difficulty in recruiting and maintaining staff with professional native title expertise in the very competitive market, especially in a regional area like the Kimberley. The KLC also faced strong competition from the resources sector for skilled professionals.

Figure 3 | Select KLC expenditure, FY2019-20 to FY2021-22²¹



Total corporate expenditure was generally on budget, though costs for consultants considerably exceeded budget

The KLC kept corporate expenditure to budget. The previous Review recommended that the KLC should continue to investigate ways to cut its corporate overspend through finding efficiencies across its corporate function, and as shown in Table 12, corporate expenditure was within budget for all years of the Review.

Table 12 | KLC corporate expenditure, 2019-20 to 2021-22

Financial year	Budget	Actual	Variance (\$)	Variance (%)
2019-20	\$4,624,846	\$4,586,083	\$38,763	-0.8%
2020-21	\$5,055,851	\$4,772,882	\$282,969	-5.6%
2021-22	\$5,554,285	\$5,179,613	\$374,672	-6.7%

The largest discrepancy between budget and actual values was for consultants, as shown in Table 13. The KLC advised that its budget for corporate consultants throughout the Review period had limited or no contingency for unforeseen events, in recognition of the pressure to maintain low overhead expenditure. In FY2019-20 the increase resulted from unforeseen costs relating to the negotiation of an Enterprise Agreement. In the latter two years the increase was due to using consultants/contractors to manage work for unfilled staff vacancies, particularly given the impact of COVID-19 on staff retention and attraction. The KLC had underspends in corporate staffing of \$200K in FY2020-21 and further underspends of \$500K in FY2021-22, resulting in the need to draw upon corporate consultant services.

²¹ KLC. Financial Report 2019-20 to 2021-22 (unpublished).

Table 13 | KLC expenditure on corporate consultants, 2019-20 to 2021-22

Financial year	Budget	Actual	Variance (\$)	Variance (%)
2019-20	\$30,000	\$53,076	(\$23,076)	+76.9%
2020-21	\$30,000	\$82,471	(\$52,471)	+174.9%
2021-22	\$20,000	\$142,949	(\$122,949)	+614.7%

Cost-saving actions, strategies and/or discussions

Savings measures were implemented in all parts of the KLC's business

In its 2020-24 Strategic Plan, the KLC stated that it would continue to "build and implement measures and structures for efficient and effective KLC operations" as part of its broader objective of achieving financially sustainable operations. Staff who spoke with the Review identified a number of savings measures the KLC implemented during the Review period. These included:

- Reducing travel costs where possible through improved coordination – including arranging meetings at one location to be on the same day.
- Leveraging support from private corporations across the native title and Land and Sea Management programs.
- Arranging for funding from proponents where relevant and possible.
- Using the fleet coordinator role to manage the availability of vehicles, maintain vehicle servicing and extend the useful life of vehicles.
- Negotiating discounts through bigger professional contracts – including for finance and payroll systems, the local fuel service provider, shared business mobile phone plans and airlines to ensure credits could be recovered when travel is cancelled.
- Reducing use of chartered flights.
- Enforcing upper limits for client travel and not paying travel allowances for Board meetings until after meetings when attendance was accounted for.
- Consolidation of physical records into one location to reduce the considerable physical support and cataloguing required.
- Self-managing a new software upgrade in-house, which brought in savings of about \$15,000.
- Managing IT infrastructure efficiently and keeping a close eye on particulars such as hardware warranties.

Staff also particularly highlighted their negotiations with an airline's Frequent Flyer division and the KLC's partnership with a program that facilitates Frequent Flyers donating to fund the KLC's conservation programs (although this was not directly related to KLC's native title functions).

Staff were aware of costs and tried to minimise them wherever possible

Staff across the KLC appeared to be cognisant of costs for the organisation and actively tried to minimise these wherever possible. They noted that certain cost drivers were essential for business and beyond their control. These included:

- Staff salaries.

- Compliance requirements, including work health and safety, risk mitigation and governance. Staff commented that the latter was increasingly expensive, in line with the increasing complexity and sophistication of relevant legislation.
- Maintenance of up-to-date and contemporary information management systems and IT infrastructure.

Appropriate processes for claim group meetings

Claim group meeting processes were generally appropriate despite some client concerns

In its annual reports the KLC noted that holding on-Country meetings and providing travel and accommodation arrangements for Traditional Owners, Directors and staff continued to be challenging, particularly when working in very remote parts of the Kimberley.

The KLC reported that it employed a number of strategies to enhance the effectiveness and efficiency of claim group meetings, including:

- Having its own internal notification process for informing native title holders and claimants of claim group meetings through maintaining extensive and up-to-date claim group member lists and contact details. Native title holders and claimants were notified of meetings through posted and hand-delivered letters, emails, phone calls, the posting of notices on public boards throughout the Kimberley, Facebook, posting of notices on the KLC website and advertising in local newspapers.
- Trying to coordinate meetings so that attendees only had to travel once and that cost-savings were made on venue bookings. Having an open meeting calendar has helped this be successful.
- Trying to make as much claim progress as possible during meetings. For example, wherever possible, resolving disputes relating to native title applications by consultation at claimant meetings.

The Native Title Update section of each annual report provides a brief summary of outcomes or decisions forthcoming from authorisation and claim group meetings.

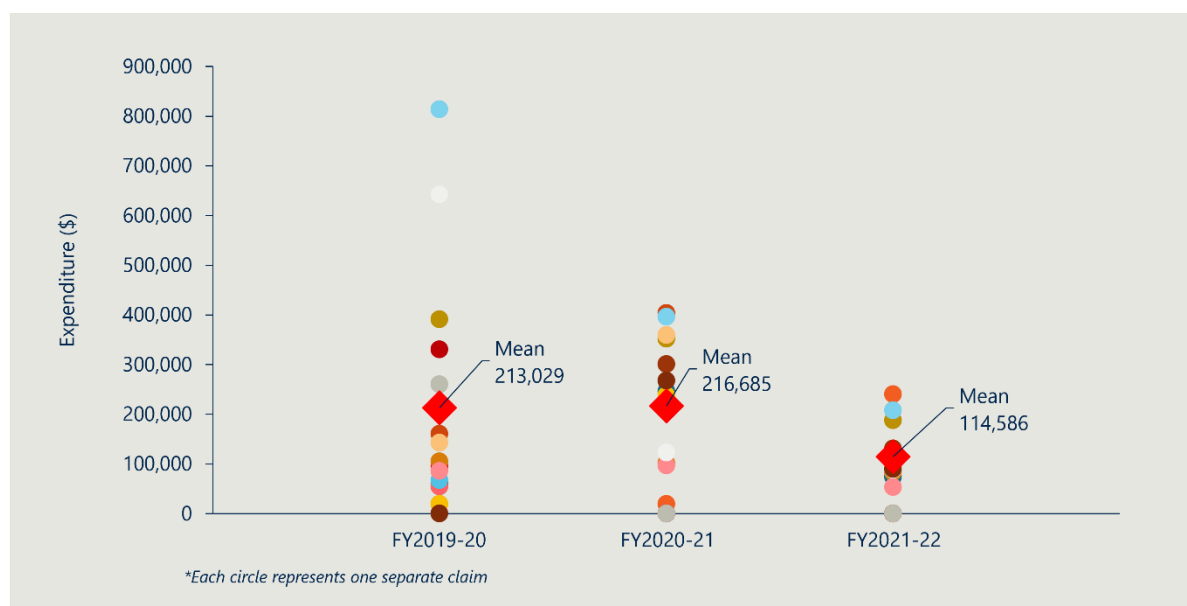
A small number of Traditional Owners criticised the way in which the KLC conducted claim group or authorisation meetings. These cases centred around a view that the KLC did not make processes such as travel reimbursement for attending meetings understandable to the community, therefore creating a barrier to attendance. As noted later, the Review found that the KLC had clearly written travel assistance guidance that was made available to Traditional Owners.

Annual yearly expenditure per claimant group

Annual expenditure varied greatly between claimant groups but was consistently below budget

Over the Review period, costs between claims and for the same claim from year to year were highly variable, with the progress of some also impacted by COVID-19 and flooding (see Figure 4).

Figure 4 | Annual yearly expenditure per claimant group²²



As shown in Table 14, actual expenditure for claims and claims related matters was consistently below budget during every year of the Review period.

Table 14 | KLC claims related costs over the Review period²³

Financial year	Agreed budget	Actual expenditure	Variance against budget (\$)	Variance against budget (%)
2019-20	\$7,156,311	\$5,578,304	\$1,578,006	-22.1%
2020-21	\$6,596,281	\$5,008,880	\$1,587,400	-24.1%
2021-22	\$6,642,877	\$3,001,824	\$3,641,054	-54.8%

Travel assistance policies for claim group meetings

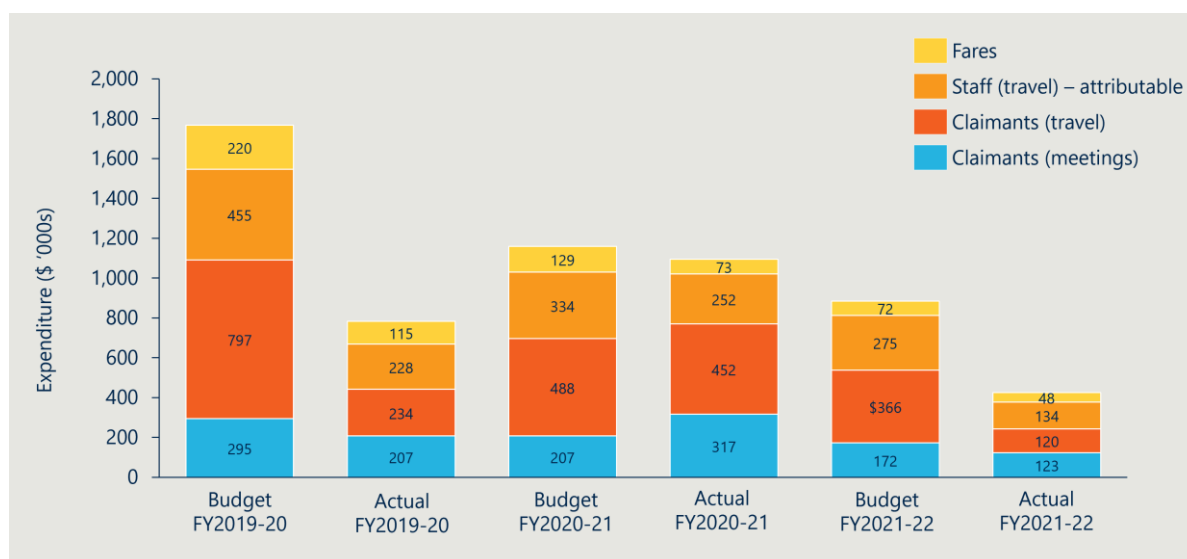
The KLC had a detailed travel and travel expenses policy that applied to all staff. It also had a separate document containing information regarding travel assistance for claim group or native title related meetings that was shared with Traditional Owners. This document was written in plain language and clearly detailed the circumstances in which the KLC would fund travel, transport, accommodation and meals, and when payments would be made. It contained information on who to contact in case Traditional Owners required assistance.

Over the Review period, budgeted claim group meetings and associated travel costs for the KLC reduced from year to year, as shown in Figure 5. Actual spending was even lower due to the effects of the COVID-19 pandemic, public health lockdowns and travel restrictions, particularly in FY2019-20 and FY2021-22 where actual expenditure was less than half of the sum budgeted.

²² KLC. Performance Report 2019-20 to 2021-22 (unpublished).

²³ KLC. Performance Report 2019-20 to 2021-22 (unpublished).

Figure 5 | KLC claim group meeting expenditure²⁴



Appropriate rationale for use of external consultants

The KLC was appropriately careful in its use of external consultants

The KLC's brief out policy is provided in Section 3.8 of the Assistance Guidelines document:

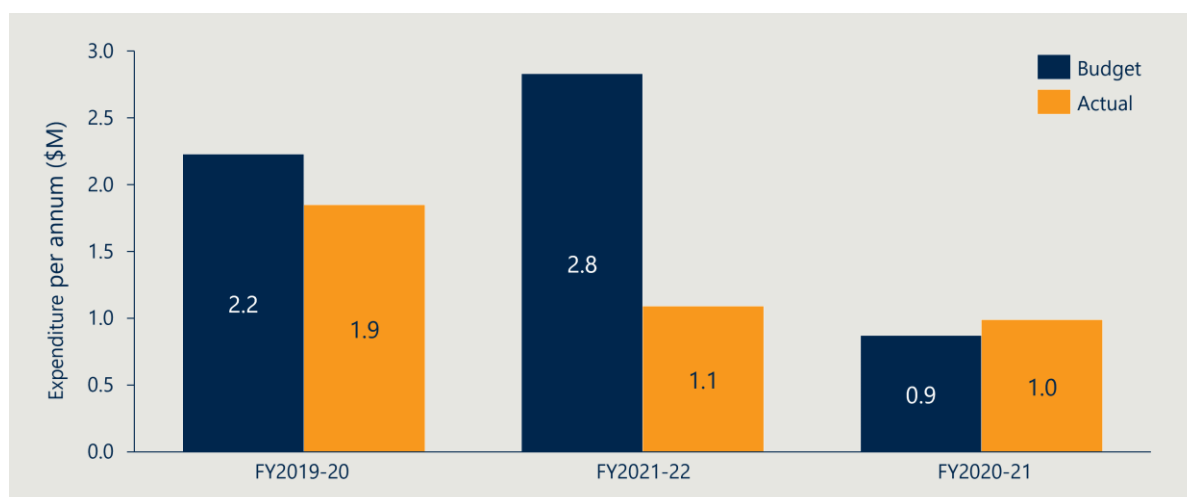
The KLC will only brief out in exceptional circumstances. There must be urgent matters to justify consideration by the KLC of briefing out. If the KLC is unable to act for the applicants because of lack of staff or lack of resources or for any other reason and the KLC has sufficient funds, then the Board may decide that all or part of the claim should be briefed out to private lawyers, consultants or researchers.

KLC staff reported that when matters were briefed out to external legal firms (due to KLC lawyers representing another party to the claim) the KLC had limited input into the cost of a claim or how efficiently work was done. However, this use of external firms was unavoidable in some native title work. The KLC recognised this issue was also faced by other NTRB-SPs and had discussed it frequently with the NIAA. In these cases, the KLC tried to contain costs where possible by establishing 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.

Projected consultant expenditure (attributable to native title work) varied significantly between years, from less than \$1 million in FY2020-21 to almost \$3 million in FY2021-22. Actual expenditure also varied significantly from budgeted amounts, as shown in Figure 6.

²⁴ KLC. Financial Report 2019-20 to 2021-22 (detailed, unpublished).

Figure 6 | KLC consultant expenditure (attributable to native title work)²⁵



The KLC noted that the reason for the variation in consultant expenditure included the impact of COVID-19 restrictions on consultant field work, in addition to the cancellation of some consultant commitments due to Federal Court scheduling.

5.4.2 TOR 4: External factors

This section presents an analysis of factors that impacted on performance that were beyond the KLC's control.

Size of RATSIB area

The KLC's RATSIB area is moderate in size and can be subject to extreme weather

The KLC RATSIB land area covers approximately 423,000 square kilometres, which accounts for about 16 per cent of the land area of the state of Western Australia. This area is comparable to other RATSIB areas in Western Australia and Queensland in size. The terrain is rugged and the climate monsoonal, which impacts travel time and costs, particularly during the wet season.

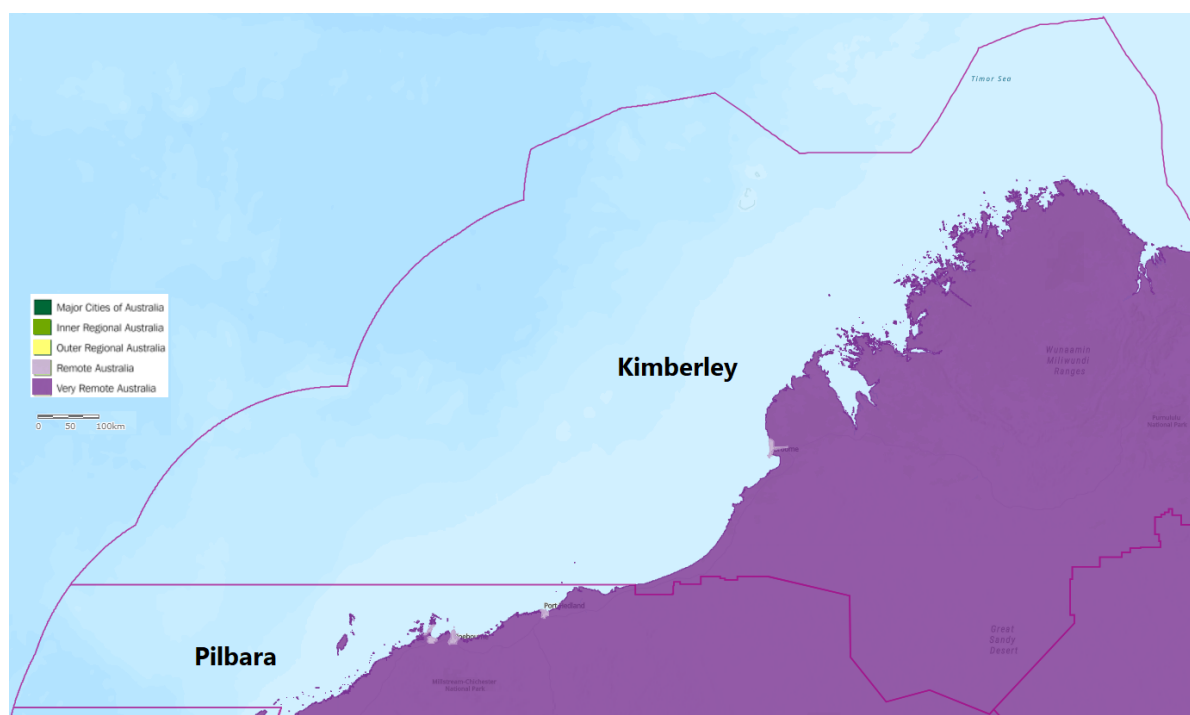
Remoteness of RATSIB area

The high level of remoteness has a significant impact on organisational cost-effectiveness

Under the Australian Bureau of Statistics remoteness classifications (ASGS 2016), with the exception of Broome which is classified as "remote", the whole KLC RATSIB area is classified as "very remote", as shown in Figure 7.

²⁵ KLC. Financial Report 2019-20 to 2021-22 (detailed, unpublished).

Figure 7 | Remoteness of KLC RATSIB area²⁶



Remoteness impacts the cost-efficiency of an NTRB-SP's operations, as some costs are higher in remote areas than in regional or metropolitan areas, including:

- claim meeting costs because of high claimant travel expenses, high accommodation costs and the inflated price of food and other incidentals in remote areas
- field costs for staff travel in remote areas
- vehicle maintenance costs and items such as GPS systems or satellite phones for ensuring staff safety
- training costs, such as regular refresher courses on first aid for staff working in remote areas
- recruitment costs generated by difficulty in sourcing and retaining skilled candidates.

For this reason, the Review assesses that the remoteness of the region has had a significant impact on the ability of the KLC to achieve native title outcomes in a cost-effective manner.

Average number of people within a claim group

It was not possible to report the average number of people within a claim group as this is not recorded during the claim process and native title identity is not part of the current Australian Census. The KLC reported that the size of native title claim groups varied greatly and averaging across all native title groups in the Kimberley (even if this data was available) would not provide any real indication of the number of people in each native title holding group.

²⁶ Native Title Vision. Western Australia RATSIB areas with ARIA16 remoteness levels. 2023. Accessed August 2023. <https://nntt.maps.arcgis.com/apps/webappviewer/index.html?id=c57f0e996a7c485480570c38c823398c>

Interpreters

Interpreter services had limited effect on cost effectiveness for the KLC

The KLC included language interpreters at native title meetings where needed, particularly in the East Kimberley region. Expenses related to having an interpreter totalled approximately \$19,000 over the Review period. This is less than 0.5 per cent of total consultant expenditure for the KLC during that time.²⁷

²⁷ KLC. Consultant Expenditure Report 2019-20 to 2021-22. (Unpublished)

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.

Summary

The KLC's governance structure underwent significant reform towards the end of the Review period, with the introduction of a more streamlined Executive Board of 12 Directors and Cultural Advisers together with a large 60-member Representative Council. This restructure, introduced at the 2022 AGM, was strongly supported across the Kimberley and has led to a more manageable governance structure for the KLC.

The restructure will need careful ongoing management however, as it was seen by some Traditional Owners as diminishing decision-making power for regional representatives across the Kimberley and a way of entrenching what they perceived as "a small core of influential powerbrokers within the KLC". Cross-membership of individuals on various related Boards was also highlighted by some commentators as an over-concentration of power in too few people. The Review found that KLC adopted consistent use of conflict of interest policies and processes.

Despite the upheaval caused by the early termination of the newly appointed CEO in early 2021, the KLC has maintained strong executive leadership and its organisational structure and financial management continued to be sound.

Concerns were raised by some Directors in May 2021 about potential fraudulent mismanagement of the KSDCT, which is managed by a wholly owned subsidiary of the KLC, KSD. These concerns led to the KLC commissioning an independent inquiry into the KSDCT. The high-profile inquiry found no evidence of wrongdoing by the KSDCT, or by the KLC, in the management of the native title funds held by native title holders in the region.

5.5.1 TOR 5: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Breakdown of roles, responsibilities and decision making between the organisation's Executive Board, Chairperson, CEO and senior staff

The KLC's governance structure underwent significant reform at the end of the Review period

While the KLC's organisation structure was stable throughout most of the Review period, top-level governance was re-structured to streamline the Board and create an Executive Board and a Representative Council, with effect from August 2022.

At the start of the Review period, the Board consisted of 32 Directors. Of these, 26 Directors were elected by the KLC's members to represent most of the native title claim groups and PBCs across the Kimberley, each for a term of two years. In addition, there were four cultural advisors who provided expert cultural guidance to Directors, members and Traditional Owners. The CEO was also on the Board. While the principle of regional representation was important, it produced a large Board which could be difficult to manage effectively and to keep focussed on the organisation itself. The previous Review of the KLC noted that this structure gave KLC a very large Board which could be unwieldy and make governance of the organisation difficult.

The restructure was agreed with strong approval at a Special General Meeting held in May 2022. The KLC CEO and Executive Board explained that the restructure aimed to provide greater clarity in the governance of the organisation by reducing the number of Directors to make it more manageable, to focus it more on the organisation itself and on native title, and less on regional matters. The Representative Council is intended to take up consideration of regional matters.

The reform produced a smaller Executive Board

After the restructure, the Executive Board comprised 12 Directors, seven of whom were chosen from the Representative Council, together with four Cultural Advisors (two men and two women) and the CEO.

General responsibilities for the different roles of the Executive Board included:

- **Executive Director** | Setting the strategic direction of the KLC in line with Representative Council and related client PBC objectives and undertaking specific responsibilities under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act).
- **Chairman** | In addition to their general Executive Director capacity, oversee Executive Board tri-annual Board meetings and bi-annual Representative Council meetings, ensuring effective meeting governance and related oversight of management and setting of organisational objectives.
- **Deputy Chairman** | In addition to their general Executive Director capacity, assist the Chairman in their duties, stand in for the Chairman in the event of their absence and conduct specific committees or initiatives as designated by the Board.
- **Cultural Advisor** | Inform the Executive Board of cultural implications of its strategic decisions, assuring strategy alignment with traditional values and practices.
- **CEO** | Act as the interface between the Executive Board and KLC staff, translating strategy to the KLC operational contexts and assisting organisation management in planning for attainment of objectives.

Board Directors were appointed for a four-year term. In addition to their specified duties, the restructure provided for Executive Board Directors to form sub-committees for specific pieces of work, notably for decision-making related to Applications for Assistance. As mentioned earlier under TOR 2, the KLC NTRB Grants Committee considered individual or group requests for assistance in a native title matter. This sub-committee of the Board was made up of not less than two nominated Board members and the CEO or their delegate, who met as needed to make decisions in line with the Assistance Guidelines documentation.

The Representative Council was intended to provide a voice from across the Kimberley

The Representative Council was made up of two nominated members from every PBC, eligible corporation and claim group that the KLC supported, totalling 60 members at the time of Review consultations in August 2023. It has been referred to as the “Voice of the Kimberley”²⁸, and was intended to meet bi-annually to table regional issues and give guidance on matters important to PBCs and the Kimberley Aboriginal people.

Further work remained to be undertaken at the end of the Review period to define the position and decision-making powers of the Representative Council in relation to the operations of the KLC. This work included demarcating the responsibilities of the Representative Council as distinct from the Executive Board.

²⁸ KLC. KLC Annual Report 2021-22.

The restructure of the Board was generally viewed as positive but is not without risk

Although the reform was in its early stages during the Review period, stakeholders in the KLC and the Board itself were of the view that the reform of governance had reinvigorated members of the Representative Council and the Executive Board alike.

Conversely, a number of Traditional Owners who engaged with the Review were concerned that the reform would have the effect of diminishing decision-making power for regional representatives across the Kimberley, with a prospect that only those on the Executive Board (and their groups) would hold influence within the KLC. Some Traditional Owners viewed the creation of the Representative Council as tokenistic and detracting from appropriate cultural practices. This will be a risk for the KLC to manage as the reform is further bedded down. A meaningful role for the Representative Council is central to ensuring that the Representative Council and, by extension, Kimberley Aboriginal people can have their voices heard and are confident in the KLC serving their native title interests.

Roles and responsibilities for decision making between the Board and Executive were clear

During the Review period the Executive Board set the strategic direction for the KLC through the KLC's strategic priorities. KLC Board Directors, Executives and staff who engaged with the Review reported that the roles and responsibilities were generally clear, with overarching governance being distinct from management of the KLC's operations. This separation of roles and responsibilities was clearly articulated in corporate documentation, including the KLC's Constitution, role descriptions and the Corporate Governance section in annual reports.

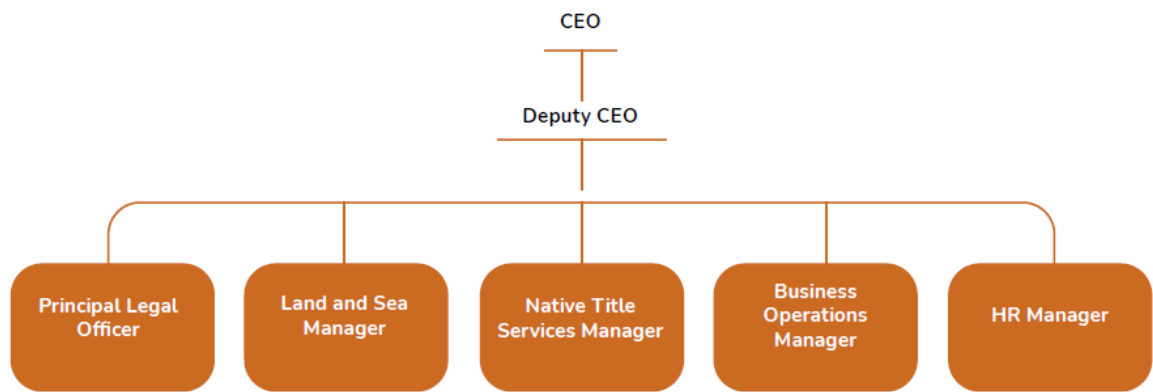
Despite the upheaval caused by the early termination of the newly appointed CEO in early 2021, the KLC has maintained strong executive leadership

After the departure of its long-time CEO in November 2020, the Board appointed a new CEO in January 2021. However, the new CEO was terminated by the Board after some three months in the role. The Board acted swiftly to appoint a new CEO by July 2021. The new CEO brought continuity from his previous roles as Deputy CEO and Acting CEO during six years of previous employment at the KLC. This has ensured stability in the organisation and has solidified the KLC's strong connections with the region.

Internal roles and responsibilities were clearly structured

Within the KLC, roles and responsibilities between the CEO, Deputy CEO and five business units were clearly articulated, as illustrated in Figure 8, which shows the KLC's organisational structure as at 30 June 2022.

Figure 8 | KLC organisation structure at 30 June 2022²⁹



Board integrity and capability

Responsibilities of Executive Board Directors were delineated in the KLC’s Rule Book and Code of Conduct

With the restructure of the Board towards the end of the Review period, a new Rule Book was approved and registered by ORIC.

Directors undertook an induction program and robust governance training to ensure they understood their responsibilities as Board Directors.

Some Traditional Owners commented to the Review that they were pleased to see turnover among Board Directors as they had been concerned that some Directors had been embedded for too long, which had contributed to their concerns about excessive influence of some Directors.

In their interactions with the Review, Board Directors demonstrated their deep understanding of the benefits and flaws of the native title system and their thoughtful consideration of the challenges for the future. There was a consistent theme from Board members about “How do we make change for our people”.

Conflicts of interest

The KLC had policies in place that aimed to address conflicts of interest across the organisation

The KLC’s documentation relating to declaring and managing conflicts of interest is outlined in Table 15.

Table 15 | Conflict of Interest documentation

Documentation	Description
Disclosure of Interest Policy	Outlines the procedures for declaring any potential conflicts of interest that arise as a result of participation in Executive Board Director or staff duties.
Handling of Conflicts of Interest Policy	Details the steps and processes for managing any conflicts of interest that arise.

²⁹ KLC. Annual report 2021-22.

Documentation	Description
Directors' Declaration Form	A formal document for Executive Board Directors to declare any conflict of interests.
Directors' Declaration of Private Interests Form	Allows Executive Board Directors to declare private interests that could potentially conflict with their organisational roles.

At the time of consultation in August 2023, KLC staff and Executive Board Directors indicated that these policies had been strictly followed during the Review period; this was supported by documentation received by the Review. However, it is not possible to identify whether any undeclared conflicts were identified.

Some Traditional Owners raised concerns about how well these policies limit inappropriate influence in decision-making

Despite the existence of these policies and processes, a fairly common theme in conversations with Traditional Owners who contacted the Review was that Executive Board members appeared to them to exert significant inappropriate influence over operational decisions of the KLC. There was a general concern among these Traditional Owners that decisions made by the KLC were influenced by favouritism towards those with close ties to Executive Board Directors or staff. These Traditional Owners held the view that a core of powerful and influential people swayed the KLC's decisions to benefit themselves or those close to them. When this had been raised by them with KLC staff, these Traditional Owners felt that staff had been reluctant to rectify these matters. The Review notes that these concerns were voiced by Traditional Owners who were dissatisfied with decisions made by KLC and as noted elsewhere in this report, the Review did not verify the validity of these concerns. Nevertheless, the existence of these perceptions reinforces the ongoing need for decisions made by the Board and by KLC staff to be as transparent and open as possible and communicated in a culturally appropriate manner.

A further concern raised with the Review by some Traditional Owners was the cross-over of Board membership with other related organisations, including the KSDCT, KRED and PBC Boards, which was seen by these commentators to concentrate too many interests in key players. While these interests would be covered by the KLC's conflict of interest policies and processes, the perceptions nevertheless lingered amongst some Traditional Owners.

Traditional Owner concerns led to an independent investigation into the KLC's trustee subsidiary, the KSDCT, which found no evidence of wrong-doing

The KSDCT was established over 20 years ago as a low-cost alternative to commercial for-profit trustees. Its primary purpose is to ensure that funds under management (native title funds from mining and exploration agreements) are preserved – and where possible grown – and spent on beneficiaries of the trust rather than on operating expenses. The KSDCT is administered by a corporate trustee, KSD, which is a wholly owned subsidiary of the KLC. The KSD administers the funds on behalf of native title holders. The trustee is governed by an independent Board and the KLC does not directly manage either KSD or the administration of the KSDCT.

As referenced earlier, Traditional Owners shared concerns that there may have been conflicts of interest resulting from the overlap of KLC and KSDCT Board membership. While KLC has conflict of interest processes in place, some Traditional Owners were unsatisfied that all decisions made by the KSDCT were truly free of any conflicting interest.

The KSDCT became the subject of controversy in 2021 when the newly appointed CEO of the KLC was terminated by the KLC Board. Questions raised by the new CEO about the management of the KSDCT

sparked questions around the KSDCT's transparency. The CEO's termination then prompted a number of KLC's Directors to take their concerns to the Western Australia Attorney-General. This also prompted the KLC to commission an independent inquiry into the KSDCT by high-profile barrister Tony Power, in May 2021.³⁰ The inquiry made recommendations about management of the KSDCT but found no evidence of wrongdoing. The inquiry found the KSDCT had discharged its primary roles and obligations remarkably well, and that its trustee acted independently of the KLC and in the best interests of the KSDCT and its beneficiaries, Kimberley Aboriginal people.

The Review acknowledges that there is a difficult balance to be achieved between maintaining sufficient control of the subsidiary and concerns about cross-membership as discussed above. It would be appropriate for the KLC to review membership of its subsidiary to ensure the balance is appropriate.

Some Traditional Owners who spoke to the Review remained concerned about the transparency of the KSDCT's arrangements

Some Traditional Owners were unsure as to how the KSDCT funds were being reinvested in the community and were unclear whether there was a documented strategy for the reinvestment of funds from the KSDCT. This led some of those who spoke to the Review to wonder (without evidence) whether the KLC was accruing assets for itself instead of for the PBCs they support. Some PBC Directors noted that the financial benefits gained from the fund (provided to individuals who were members of relevant PBCs) were small in value, effectively reducing the amount received from the fund "to a pittance". They saw a lost opportunity in that KSDCT funds could be better used for PBC development. In response, the KLC noted that the funds could be used for this purpose although the authorisation of the common law holders may be required if the funds were native title trust funds.

Multiple Traditional Owners highlighted that releasing more detailed KSDCT financial statements would go a long way in establishing transparency and consequently confidence in KLC, especially considering that the trust is for the benefit of the community. However, KLC staff felt that providing more detailed financial reports might breach the privacy of trust beneficiaries.

Traditional Owners were also keen for the KLC to provide ongoing reports on progress towards the adoption of recommendations made by the independent inquiry.

Culture and values

KLC staff showed commitment to their common mission

The KLC organisational culture is centred on the KLC's mission of "Get back Country, look after Country and get control of our future"³¹. The high rate of retention of 40 per cent for KLC staff who have been with the organisation for at least five years is a testament to staff commitment to the organisation.³²

KLC staff who responded to the Review survey commented that working conditions were favourable. These staff indicated they had high confidence in the effectiveness of the organisation's management and observed that the KLC performed highly in delivering its strategic objectives. They also indicated that the KLC has generally flexible directive or collaborative leadership approaches that are applied proactively most of the time.

³⁰ The Inquiry was conducted over the course of 14 months and looked at more than 24,000 documents and included 78 interviews.
<https://www.klc.org.au/ksdct-report>

³¹ <https://www.klc.org.au/about-the-klc>

³² KLC Annual Report 2020-21.

The Review notes that Individual Performance Plans were undertaken every year for all staff, with a new electronic system for managing performance implemented during the Review period. Performance Plans were linked to pay bands for staff salary increases.

Where poor behaviour was identified, disciplinary actions ranged from a formal warning to termination of employment. Confidentiality was respected as far as possible.

Instances of bullying were rarely noted, with only one past and one current staff member advising that they had been the subject of alleged bullying at the KLC across the Review period.

Financial management

KLC had robust financial governance policies and procedures in place

Consistent with findings from the previous Review, the Review observed the KLC's financial management to be of high quality. The KLC published financial statements for each financial year in its annual reports, which were available on its website. Independent audit reports were provided for the three years of the Review period. Additionally, the KLC submitted bi-annual performance reports of budgeted and actual operational expenditure to the NIAA across the Review period.

Financial staff commented that the organisation had become a great deal more sophisticated in its financial systems over the Review period. The Governance manual had been updated during the Review period, the delegations modernised and a new policy adopted in relation to remuneration for Board Directors. The KLC had an internal system in place for the allocation of corporate costs across the different functions and funding streams it manages. This allocation process was intended to ensure that native title funding and other sources of funds were appropriately allocated across the KLC's functions.

Level of staff turnover

KLC experienced moderate staff turnover during the Review period

About two thirds of the KLC's staff was directly or indirectly involved with native title work. Across the Review period, the KLC experienced a moderate level of turnover in staff who helped deliver this work, particularly during FY2020-21, as shown in Table 16. This was partly due to the impact of COVID-19 which led to feelings of isolation and a desire to return to distant homes. Despite this turnover, KLC staff appeared to have managed their workloads without major stress.

Table 16 | FY2019-20 to FY2021-22 staff turnover^{33,34}

Financial year	Total permanent staff at end of financial year	Total staff (excluding LSMU) at end of financial year	Staff turnover (excluding LSMU)
2019-20	103	61	15%
2020-21	95	61	41%
2021-22	98	60	28%

³³ Total staff numbers from Kimberley Land Council Annual Report 2019-20 to 2021-22.

³⁴ All other data provided directly by the KLC; data excludes LSMU staff (that is, staff that do not directly provide services related to the delivery of native title outcomes).

Indigenous staff comprised about half of all staff at the KLC across the Review period

The proportion of permanent Indigenous staff was generally stable, making up about half of all KLC's permanent staff during the Review period, as shown below in Table 17.

Table 17 | FY2019-20 to FY2021-22 Indigenous staff numbers ³⁵

Financial year	Total permanent staff at end of financial year	Indigenous staff	Proportion of Indigenous staff
2019-20	103	57	55%
2020-21	95	41	43%
2021-22	98	38	47%

Recruitment of staff remained an ongoing challenge

Like many other NTRB-SPs based in regional and remote locations, the KLC had difficulty recruiting and retaining professional staff. As noted earlier, staff turnover reduced total native title experience and expertise within the organisation, and turnover was a particularly challenging issue during the years of the COVID-19 pandemic.

However, KLC staff noted that junior staff were willing to step up into roles where needed, and recruitment had improved since the removal of COVID-19 lockdown restrictions. Recruitment for roles in the native title domain remains difficult.

5.5.2 TOR 5: External factors

No external factors were identified for TOR 5.

5.5.3 TOR 5: Recommendations

RECOMMENDATION

5

Monitor and develop strategies to mitigate the risk that the restructured Board arrangements may be seen by Traditional Owners to be a means of centralising influence in a small number of representatives.

RECOMMENDATION

6

Communicate regularly to Traditional Owners about the implementation of recommendations made by the inquiry into the KSDCT.

RECOMMENDATION

7

Develop a policy and communication materials to demonstrate to the community the separation between KLC and its wholly owned subsidiary KSD.

³⁵ Indigenous staff numbers from KLC NTRB Staffing Report 2019-20 to 2021-22 (unpublished).

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

Summary

The KLC supported 29 of the 31 PBCs in the Kimberley region with either a formal service agreement for transitioning PBCs or a legal retainer with the PBCs who engaged KLC to provide legal representation. No PBCs required formal intervention from ORIC during the Review period. Most of the supported PBCs (22 PBCs) relied on the KLC for basic funding and support, including for meetings, financial administration, corporate governance and compliance. PBC Director awareness of responsibilities was generally appropriate, with many PBCs in the region requiring significant support from the KLC Legal Unit to remain compliant. Some PBCs who engaged with the Review were conscious of their need for more help to keep up with legislative changes.

Support was mainly provided through the KLC's NTSU, which comprised two regional managers and a team of project and field officers. However, the NTSU for the East Kimberley, based in Kununurra was significantly understaffed during the Review period, which limited the KLC's ability to provide support in that region. In addition, Future Act officers handled FANs for PBCs and native title applicants.

The KLC had a three-category system for monitoring the capability of PBCs: emerging, for PBCs which relied heavily on the KLC for basic support; transitioning; and independent, for PBCs which largely did not require the KLC's support. Staff reported that PBCs often "boomerang" back from the higher levels of self-sufficiency to lower levels due to lack of sustainability in internal capacity.

Like other NTRB-SPs, the KLC was funded by NIAA during the Review period to provide only basic support to PBCs and to allocate the funding as it believed appropriate, based on need. Some PBCs advised that they would prefer to receive their funds directly from NIAA and were concerned that they were not receiving "the full value" of their NIAA funding. PBC members who spoke with the Review reported that the cost of activities needed to remain compliant absorbed the available funds, leaving capability development and sustainability unfunded. They wanted broader support from the KLC to develop an economic base for their organisation so they could become more self-sufficient. The Review notes that the PBC funding provided to KLC (and other NTRB-SPs) by the NIAA did not include this kind of support.

Many Traditional Owners contacted the Review to express their dissatisfaction with the governance of their PBC. Smaller family groups reported having little say when decisions were made by a majority vote. The Review notes that these are structural matters relating to native title and not matters where the KLC has any powers to intervene unless formally requested.

The KLC has had a Transfer of Native Title Materials policy in place since 2016 and has been returning materials to PBCs across the Review period. KLC anthropologists advised that the policy needs to be updated subsequent to a Federal Court ruling during the Review period.

There was significant resources activity in the Kimberley region leading to the overwhelming majority of FANs received being exploration licences. The number of FANs received is higher than comparable RATSIB areas examined during the Review period. However, this activity was concentrated in specific locations and the Review assessed that external factors had a moderate impact on the ability for PBCs to be self-sufficient.

5.6.1 TOR 6: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Satisfaction of PBCs/RNTBCs supported by the NTRB-SP

PBCs were looking for a wider range of support

PBC Directors who spoke to the Review commented that the main services they received from the KLC related to holding meetings to meet corporate compliance obligations and attending the KLC's AGM. Some also received bookkeeping for PBC finances. For PBCs in the emerging category, and for some PBCs in the transitioning category, KLC held the corporate books at its offices.

There was some feedback that there were long delays in providing minutes back to the PBCs. Relevant members of the KLC acknowledged that these wait times could be improved but suggested that limited staff capacity and low funding levels for meeting the increasing PBC client demand had made this challenging.

PBC Directors noted that the KLC's advice and decisions relating to Future Acts and ILUAs generally had clear reasoning behind them and were well-understood.

Several PBC members commented that they would like more support from the KLC to develop an economic base for their organisation so they could be more self-sufficient. The Review notes that NIAA basic support funding did not include funds for economic development and only limited funding for capability development, which the KLC allocated to activities such as governance training for Directors and regional PBC forums. The Review notes that in future, compensation claims are also likely to benefit PBC members and potentially fund capability development for economic initiatives.

The KLC executives who spoke to the Review additionally indicated that they were exploring options for the divestment of program management such as Ranger programs. The suggested benefit would be to enable the empowerment of established PBCs to manage their own programs, allowing the KLC to focus their resourcing towards PBCs that need additional support.

There was widespread feedback to the Review that PBCs would like to receive PBC support funds directly from the NIAA with the hope that this might increase the level of funds they received. PBCs noted that the cost of running the meetings needed to remain compliant with corporate obligations absorbed most of the available funds, which meant they had nothing to fund any moves towards sustainability. The Review notes that the level of PBC support funding provided by NIAA to all NTRB-SPs, including the KLC, only covered basic support and that funds for economic sustainability were not provided.

The Review received feedback, as noted under TOR 5, that some PBCs would like better access to the funds held in trust in the KSDCT. One PBC commented: "Our PBC is supported but it is the actual access to funds held in trust for PBCs that is difficult to obtain for establishing the ongoing functions of our PBCs independence going forward." The Review notes that funds can only be released by the KSDCT for charitable purposes and access to the funds is governed by those purposes.

The Review notes that the KLC has collected formal feedback from PBCs in the past to identify improvements in service delivery and that this would be a useful ongoing process to adopt.

A number of PBCs were concerned about the internal governance of their PBCs

The Review received significant feedback that the composition and governance of some PBCs results in some family groups within the PBC being excluded from decision making so that members from smaller family and country groupings were effectively disenfranchised. This typically occurred when membership of PBC Boards was chosen through voting which resulted in members from large families being selected.

The Review notes that, despite many Traditional Owners believing that this problem had been caused by the KLC, it is in fact a structural issue with the native title system. The KLC has no powers to intervene in a

PBC's internal arrangements. However, if requested by the PBC, the KLC could support a PBC towards amending its Rule Book in an attempt to address this issue.

Some individuals within PBCs were frustrated that they could not access legal assistance from the KLC to prosecute their issues within the PBC. The Review notes that while this is a function of NTRB-SPs, it may not be within the scope of native title grant funding and the KLC was acting appropriately in the performance of its prioritisation obligations in not providing legal assistance. While there may be scope for the KLC to exercise its dispute resolution functions to assist with disputes between PBCs and their members, this would require the PBC's consent and might not be considered a priority for the NTRB-SP's resources. This means that minority/oppressed members of PBCs have no source of support other than pro bono advice from lawyers who usually have no background in native title and PBCs. Senior KLC leaders were aware of these challenges and noted that solutions lay beyond their control.

Percentage of PBCs/RNTBCs supported by the NTRB-SP who have had intervention from ORIC or other regulator

None of the KLC's client PBCs required formal intervention from ORIC during the Review period. This suggests that while some PBCs would like further support from the KLC, the services provided did at a minimum result in them remaining compliant.

Progress towards self-sufficiency for PBCs/RNTBCs supported by the NTRB-SP

The KLC provided support to 29 of the 31 PBCs in its RATSIB area

Of the 31 PBCs that the KLC supports, most relied on the KLC for basic support funding. Other service providers such as Paperbark Corporation Services were involved in providing fee-for-service support for some of the PBCs across the region.

The KLC described its role in supporting PBCs as to "expand [PBC] capacity and capability, as well as economic development opportunities and activities"³⁶. This involves the provision of the following services:

- meeting support
- financial support
- expert advice on a range of matters
- governance and compliance
- administrative assistance
- skills training
- legal representation – primarily with governance support and responses to FANs.

The KLC consistently provided support to PBCs involved with development proposals in the negotiation of ILUAs. More detail on this is provided under TOR 1. In future, compensation claims are also likely to benefit PBC members.

The NTSU was the primary vehicle for support to PBCs across the region

Within the KLC, PBCs were primarily assisted through the NTSU. This included five NTSU positions based in the Kununurra office (largely vacant during the Review period) who looked after eight PBCs in the East Kimberley region and seven NTSU positions based in the Broome office looking after the remaining 18

³⁶ KLC. KLC Annual Report FY2021-22.

PBCs in the West Kimberley region. Staff in the Broome office were also responsible for responding to FANs.

Throughout the Review period, NTSU consisted of the following positions:

- **Native Title Service Manager** | Provided oversight and direction for the operations of the whole unit.
- **Region Managers** | There was one Region Manager for the West Kimberley and one for the East Kimberley, who oversaw PBC support operations of KLC offices in their respective locations.
- **(Senior) Project Officers** | Conducted PBC-related compliance and governance support for client PBCs.
- **Project Support Officers** | Provided administrative support to other NTSU staff.
- **Field Officers** | Acted as liaison between Traditional Owners and KLC, engaging frequently with Traditional Owners in Eastern Kimberley or Western Kimberley.

There were also two Future Act positions that dealt extensively with PBCs. These were the Future Acts Officer and the Future Acts Administration Support roles. The KLC reported that support for PBCs comprised approximately 60 per cent of the work of the NTSU.³⁷

Consistent PBC self-sufficiency development has been limited given NTSU staff shortages and funding constraints

KLC staff who spoke to the Review reported a shortage of staff in the NTSU and limited PBC support funding as barriers to a consistent PBC development approach.

The East Kimberley NTSU based in Kununurra was severely restricted during the Review period, with the Kununurra office significantly under-staffed. Since the Review period the KLC has been working to recruit five new staff to the Kununurra office.

NTSU staff noted that they had been actively seeking out external assistance for PBCs so that PBCs could develop their own strategic plans and increase internal PBC capability.

Assisting PBCs to manage their governance and statutory functions remained a core body of work for NTRB-SPs, to ensure compliance with ORIC regulatory requirements. In the post-Review period, the KLC is looking to create two Governance Officer positions to focus on supporting PBCs to remain compliant. The Governance Officer roles will also act as a point of contact with ORIC for East and West Kimberley, respectively.

PBC Director awareness of responsibilities was generally appropriate, although some PBCs sought more help with legislative changes

PBC Directors who spoke to the Review were generally aware of their responsibilities as a Director under the CATSI ACT and NTA, and understood PBC regulations, their rule book and existing Future Act agreements. With the Australian Government changes to the CATSI Act and NTA in March of 2021, the KLC provided notice to PBCs that their rule books required changing to be in line with the new requirements. Some Directors commented that they would have liked additional help from the KLC to implement these ORIC requirements. KLC staff indicated that this assistance was provided to all the PBCs it had a general retainer with and it was up to PBCs who did not have a general retainer with the KLC to make a request for assistance. No requests had been received from other PBCs to support this implementation.

³⁷ KLC. KLC Annual Report FY2020-21.

KLC staff noted to the Review that there is a need to consider who is best placed between ORIC and NTRBs to undertake the workload emanating from changed ORIC requirements. KLC staff communicated concern with the lack of transparency from ORIC in regard to notifications of PBC non-compliance.

Most PBCs in the Kimberley region need significant support to remain compliant

The KLC had a policy to provide a basis for KLC staff and PBCs to understand the type of support the KLC could provide and how it provided that support. This policy had three categories:

1. **Emerging** | PBCs do not have staff and require the KLC assistance with all levels of governance and administration to ensure basic compliance.
2. **Transitioning** | PBCs that have been able to establish a moderate degree of independence (for example have an office space), yet still go through the KLC for basic support funding.
3. **Independent** | PBCs that largely do not require support from the KLC.

Of the 26 PBCs supported by the KLC at the end of the Review period, 18 (64 per cent) were classified as emerging, with the remaining concentrated heavily in the transitioning category and a small number falling under the independent category.³⁸ NTSU staff who spoke to the Review team noted that client PBCs routinely boomerang back from the higher levels of self-sufficiency to lower levels signalling a lack of sustainable inbuilt capacity in these PBCs.

NTRB-SP's progress in returning cultural materials to PBCs/RNTBCs and Traditional Owners

The KLC began the process of returning cultural materials during the Review period

The KLC holds a significant collection of material from many years of undertaking native title claim work, as well as community-based research that was done prior to the commencement of the NTA³⁹. KLC annual reports and staff noted the KLC's commitment to the return of cultural materials to their rightful custodians.

At the start of the Review period, the KLC used a Transfer of Native Title Materials Policy, released in 2016, to inform their return of materials process. The policy included information on:

- guiding principles
- types of native title materials
- differing priorities for different types of materials (for example, "First Priority materials", which were the focus of return for the KLC)
- the process for returning materials
- further considerations and resources for the return process.

Using this policy, the KLC initiated the return of materials process in FY2019-20 through a pilot project for the Karajarri Traditional Lands Association RNTBC (Karajarri PBC), who received their first determination in 2002. In the same financial year, the KLC also began the transfer of certain materials for land and waters management and protection purposes to the Yanunijarra Aboriginal Corporation RNTBC, who received their first determination in 2007⁴⁰.

³⁸ KLC. KLC Annual Report 2021-22.

³⁹ KLC Annual Report 2019-20.

⁴⁰ The Ngurrara Part A (WCD2007/005) determination occurred in 2007, however, the determination date of effect was in 2010, and hence the Yanunijarra Aboriginal Corporation RNTBC was also registered in the year of effect.

A Federal Court ruling hastened the return process

The KLC prioritised work on the return of cultural materials in response to a Federal Court decision⁴¹. The outcome to the case is as follows:

*As a consequence of Justice Mortimer's findings in the present judgment, her Honour overruled Yamatji Marlpa Aboriginal Corporation (YMAC)'s objections to the production and inspection of the documents under the second subpoena. As such, the Jurruru applicant was granted leave to inspect and copy the reports.*⁴²

KLC began returning materials to PBCs across the Review period, initially working with groups who requested the return of their materials. Where a PBC Board advises that it wishes materials to be returned, the KLC staff anthropologist meets with the Board to outline the materials that are the property of the PBC. The Board then makes a decision on whether it wants some or all of the materials. Some PBCs are only keen to receive their Connection Report or a summary of it, as it contains useful material explaining connectivity to Country. Each PBC is at a different stage of requesting or managing materials. Family meetings may take place to consider what is involved in managing the returned materials.

The Federal Court ruling meant that the KLC's Transfer of Native Title Materials Policy was out of date by the end of the Review period given the obligation to return materials upon request. The KLC advised that the Policy would be updated. Further information on the KLC's communication related to cultural materials matter is provided earlier under TOR 3.

Percentage of PBCs/RNTBCs supported by NTRB-SP with formal service agreements in place with NTRB-SP

The KLC had formal service agreements or legal retainers with all the PBCs it supports

The KLC had established service agreements or legal retainers with all its client PBCs. The service agreements provided a clear indication of services provided free of charge by the KLC. The service agreements also included expectations of the PBCs and details on the termination of the agreement.

Satisfaction of PBCs/RNTBCs with the process of negotiating service agreements between the NTRB-SP and the PBC/RNTBC

The Review received no complaints about the process of negotiating service agreements or legal retainers.

5.6.2 TOR 6: External factors

This section presents an analysis of factors that impacted on performance that were beyond the KLC's control.

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

Level and nature of industry activity effect on PBCs in the Kimberley is varied

The level and nature of industry activity in a given RATSIB area is a key indicator of the extent to which self-sufficiency is achievable. Resources derived from the available natural resources and associated mining and tourism activity generates strong potential financial benefits for some PBCs in the Kimberley

⁴¹ Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia (No 2) [2019] FCA 1551.

⁴² Ibid.

region. However, and as highlighted earlier on under TOR 6, 22 of the KLC’s supported PBCs rely solely on basic support funding, indicative of a lack of sustainable income sources in these areas.

Future Act activity in the Kimberley RATSIB area was markedly high relative to comparable RATSIB areas examined in the Review, as shown in Table 2, though this activity was concentrated in areas impacted particularly by mining, benefitting only a handful of the KLC’s client PBCs. The significant number of expedited FANs impacted the resourcing of KLC, reducing their ability to focus resourcing on other NTA activities. This is an issue that would benefit from further discussions between the Australian and Western Australian Governments.

5.6.3 TOR 6: Recommendations

RECOMMENDATION	8
Ensure ongoing mechanisms to collect feedback from client PBCs through a formal, regularly conducted process.	
RECOMMENDATION	9
Ensure the Return of Cultural Materials Policy is updated in line with the Tommy on behalf of the Yinhawangka Gobawarra v State of Western Australia (No 2) [2019] FCA 1551 ruling.	

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

Summary

The KLC is aware that more and more of its native title work will sit in the post-determination space with only three per cent of its area left to be determined. This is a key consideration in its 2020-24 Strategic Plan, with PBC capacity building and self-sufficiency addressed under each of its four objectives of empowerment in nation building, native title rights and recognition, partnerships and relationships, and financially sustainable operations. The latter two objectives also focus more on the role KLC will play in the post-determination space and how its operations will be supported financially as grant funding for native title claims reduces.

The 2020-24 Strategic Plan was developed with Traditional Owner input and includes measures of success for each objective. There is scope for the KLC to provide greater clarity on how objectives and targets will specifically be achieved.

The KLC used its platform to consult with and advocate for PBCs in reform of matters related to native title across the Review period, in line with its commitment to influence in the post-determination period.

Some native title holders raised concerns that the KLC's need for long-term financial sustainability risks putting it into economic competition with PBCs, therefore potentially limiting their progress towards autonomy.

5.7.1 TOR 7: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Adequacy of post-determination strategic planning

The KLC has a strategic plan in place for a post-determination environment

The KLC does not have a specific post-determination plan, however a large part of its 2020-24 Strategic Plan relates to the post-determination environment. The 2020-24 Strategic Plan provides a high-level framework to guide the organisation's direction as claims activity decreases and PBCs develop in the RATSIB area.⁴³

The emphasis the KLC places on supporting PBCs is clear from the 2020-24 Strategic Plan which states:

Collectively these objectives are seen as the driving force to empowering PBC's capacity and capability for all PBCs to be in a position to run themselves and benefit from opportunities through their ownership, partnership and engagement in economic development, strategic partnerships and joint ventures.

Strategic plan objectives and related initiatives and services relating to the post-determination period are summarised in Table 18.

⁴³ KLC. Strategic Plan 2020-2024.

Table 18 | KLC's 2020-24 Strategic Plan objectives relevant to post-determination⁴⁴

Objective	Description	Key services and projects	Key performance indicators
Empowerment in nation building	To redress the impact and imbalance from the erosion of Traditional Owner values and structures created from a historical legacy of colonial culture and western society.	- Facilitates, fosters and advocates First Nations building with Traditional Owners, their PBCs and peak Kimberley organisations. - Works with Traditional Owners to build their PBCs aligned to their constitutional objectives. - Provides opportunity for Kimberley PBCs to engage regionally in collaborative forums. - Provides support to PBCs in developing their strategic plans and corporate governance. - Formalises the responsibilities and accountabilities that the KLC and PBCs have to Traditional Owners through memorandum of understandings (MOUs) and service agreements.	- Number of economic opportunities for PBCs and Traditional Owner groups facilitated by the KLC. - Number of MOU/service agreements with PBCs. - Number of PBCs who have the capacity to run themselves. - Number of PBCs and Traditional Owner groups with strategic partnerships and joint ventures driving economic development. - Level of engagement of Traditional Owners in KLC nation building activities.
Native title rights and recognition	To protect and continue to access and build our rights and interests, culture and values that are central to our relationships, connections and responsibilities to land and native title.	- Represents Traditional Owners in filing strong and successful compensation claims. - Represents PBCs and claim groups on Future Acts and negotiating contracts through agreement making. - Provides support for Traditional Owners' decision making with integrity to cultural protocols and the principles of free prior and informed consent. - Co-design dispute and conflict management and mediation processes, and creates opportunity for resolution.	- Understanding of and profile of the importance of compensation to members. - Initiatives that strengthen and protect the exercising of native title rights and interest, and the cultural, social, environmental and economic resources and heritage values derived from Traditional Owner rights and interests. - Traditional Owner understanding of and exercising of native title rights and interests.
Partnerships and relationships	To have the power and influence to lead and effect change for Traditional Owners and Kimberley Aboriginal people.	- Strongly advocates on critical legislation, policy and issues affecting Traditional Owners. - Strengthens opportunities for PBC's to support their members. - Builds and supports Kimberley leadership to drive and facilitate social and economic development. - Fosters regional advocacy through an integrated focus with	- Impact of policy papers presented by the KLC. - Profile and use of the body of knowledge and information that the KLC has invested in over the past 40 years to effect change. - Acknowledgement and strong partnership profile that adds value to the KLC as the KLC provides value to those partners.

⁴⁴ KLC. Strategic Plan 2020-2024.

Objective	Description	Key services and projects	Key performance indicators
		Kimberley Aboriginal organisations and community collaborations.	
Financially sustainable operations	To have a strong organisation that can continue to support KLC into the future.	- Builds resources within the KLC to support independent advocacy for members' needs. - Continues to build and implement measures and structures for efficient and effective KLC operations. - Continues to attract and grow recurrent and new sources of funding. - Continues to attract and grow philanthropic support.	- The KLC continuing to be financially sustainable and delivering on its objectives. - An increase in KLC funding overall and in diversification of sources of funding. - The KLC continuing to be compliant and practice sound governance. - The KLC strengthening its member engagement and satisfaction.

The future environment and 2020-24 Strategic Plan are consistent features of the KLC's annual reports. It is evident that the post-determination issue is firmly acknowledged by the organisation given the high percentage of determinations in the RATSIB area.

The KLC recognised in its annual reports that objectives of the 2020-24 Strategic Plan influence the operation plans for each business unit and filter down into staff work plans. In order to provide a coordinated approach to monitoring output and key milestones, the KLC reported in its 2020-21 Annual Report that it had identified a change management process needed to provide it with the structure, resources, processes and capabilities (structural and operational) to best enable the organisation to drive and deliver its functions for the future.

The 2020-24 Strategic Plan was developed through a comprehensive process with input from members and a Board subcommittee

The 2020-24 Strategic Plan was developed over an 18-month period by KLC Executive staff and the Executive Board with engagement with the KLC membership.

Between September to November 2019, KLC members and Kimberley Traditional Owners were surveyed about what was important to them about the KLC's role and their expectations of the KLC in the future. The survey was sent to all KLC members, posted online and taken to communities by staff members for people to complete.

According to the 2019-20 KLC Annual Report, the KLC received an overwhelming response to the survey. The results were reviewed by a ten-person subcommittee established by the KLC Executive Board specifically to look at the 2020-2024 Strategic Plan. The subcommittee also reviewed the achievements of the KLC to date, assessed best practice against other NTRB-SPs and talked with PBCs about the strategic challenges faced by Kimberley Traditional Owners.⁴⁵

The 2020-24 Strategic Plan has key performance indicators for monitoring progress

The 2020-24 Strategic Plan includes a page dedicated to how the KLC will measure success against each of its objectives. Those relevant to the post-determination environment are summarised in Table 18 above. Some of these are very discrete and can easily be quantified, while others are more intangible and may be

⁴⁵ KLC. Annual Report 2019-20. 2020.

difficult to measure. There was also limited reference during consultations about who is responsible for tracking indicators and monitoring the KLC's progress in the post-determination space.

The KLC used its platform to advocate for PBCs in reform of matters related to native title

As part of the KLC's broader policy and advocacy role it frequently engaged PBCs to understand Traditional Owner sentiment on topics that concern Aboriginal affairs in the Kimberley. During the Review period the KLC leveraged its status as a prominent voice for political change to advocate for reforms to the Western Australian Government's original *Aboriginal Heritage Act (1972)* and amended *Aboriginal*

"In November 2019 the KLC made a written submission... on the critical importance of regulatory and policy change to ensure that PBCs can recover costs incurred in responding to third party initiated Future Acts processes."

KLC Annual Report 2019-20.

Cultural Heritage Act (2021). The KLC also campaigned for the Western Australian Government to protect the nationally heritage-listed Martuwarra (Fitzroy River), the largest registered Aboriginal cultural heritage site in Western Australia. The KLC's advocacy saw it hold consultations with Traditional Owners across the Kimberley, collaborate with the Western Australia Alliance of NTRB-SPs and the National Native Title Council, and engage with state representatives on these important issues.

In addition, the KLC championed reform of relevant Australian Government legislation, notably in response to the Senate Standing Committee Inquiry into the Native Title Legislation Amendment Bill 2019.

Some Traditional Owners and PBCs are concerned that there is a conflict between the KLC's reason for being and its own future financial sustainability

The KLC acknowledges the importance of its own financial sustainability in achieving its post-determination objectives. However, some native title holders reported that this need for improved financial sustainability has impeded progress of PBCs towards autonomy and led the KLC to drift from its core native title purpose.

Since its establishment, the KLC's mission has been to advance the interests of the Kimberley Aboriginal community through land rights, including native title. Over the last 15 years, KLC has been involved in the creation of several local companies, including KRED and KRED's subsidiaries. Some Traditional Owners were concerned about the KLC's established links with these organisations, which they felt could potentially be in competition with PBCs.

KLC describes its model as stimulating the development of economically sustainable enterprises for the community – not running businesses themselves to compete with PBCs for the limited opportunities in the region. KLC has encouraged PBCs to undertake their own business, including handing management of Ranger programs solely back to the PBCs running them.

While there are complexities to the financial sustainability of both PBCs and the KLC, the concerns of some Traditional Owners highlight the need to guard against any perception that there is economic competition between the KLC and the PBCs in the region.

5.7.2 TOR 7: External factors

This section presents an analysis of factors that impacted on performance that were beyond the KLC's control.

Progress towards a post-determination environment

The KLC has an ongoing claims load, but also a significant number of established PBCs in the region

Ninety-seven per cent of the land regions within the KLC RATSIB area has already been determined. As described under TOR 6, there are also large number of PBCs established in the region, of which a significant number require the KLC's support. Future compensation claims have the potential to improve PBC resources. This suggests that the region is well progressed towards a post-determination environment.

5.7.3 TOR 7: Recommendations

RECOMMENDATION

10

Consider how indicators of the KLC development in a post-determination environment can be more clearly documented and communicated, and assign responsibility for tracking and monitoring progress.

RECOMMENDATION

11

Seek ways to better communicate the role of the KLC in the post-determination world in supporting, and not competing, with PBCs.

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:

- 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.

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.

- 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.

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.

- 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.

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.

- iv. 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.

- v. 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.

- vi. 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.

- vii. 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:
 - a. 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.

Appendix B Stakeholders consulted

The Review held consultations in person and virtually with a range of stakeholders in relation to the KLC's performance. The Review's approach to consultations was documented in the Consultation Plan, provided to all NTRB-SPs in advance of the Review. Nous used various approaches to engage with stakeholders who might wish to be involved with the Review. Surveys were distributed on behalf of the Review by the KLC to all staff and to Traditional Owners. Where feasible, notices were placed in relevant newspapers and other media to inform Traditional Owners of the opportunity to speak to the Review.

Consultations were in-person in Broome and virtual across the Kimberley, commencing in late July 2023 and extending across a three-to-four-week period. All consultations were conducted in confidence and with the full consent of participants.

Those consulted included:

- twenty-eight Traditional Owners including:
 - clients who have been represented by the KLC (including members of PBCs)
 - potential clients in the KLC's RATSIB area/people who have engaged private legal representation to register a claim in the KLC's RATSIB area
- the Federal Court of Australia
- the NIAA
- representatives of the Western Australia Government
- KLC Board Directors
- KLC CEO and senior staff
- current KLC staff.

Appendix C Documents reviewed

Category	Description
Annual reports	KLC Annual Report 2021/22
	KLC Annual Report 2020/21
	KLC Annual Report 2019/20
Policies	Recruitment and selection policy
	Policy on the provision of legal services to PBCs
	Transfer of materials policy
	Interim policy on PBC support 2021
	Application for assistance guidelines
	Disclosure of interest policy
	Handling of conflicts of interest policy
Financial, operational and performance documents	Performance and Financial Report July 2021 – December 2021
	Performance and Financial Report July 2020 – June 2021
	Performance and Financial Report July 2019 – June 2020
	Operational Plan July 2019 – June 2020
	Operational Plan July 2020 – June 2021
	Operational Plan July 2021 – June 2022
	KLC employment report July 2019 – June 2020
	KLC employment report July 2020 – June 2021
	KLC employment report July 2021 – June 2021
	Staff turnover and demographics 2019 – 2023
COVID-19	COVID-19 Response Plan 2022
	COVID-19 Response home page
	COVID-19 Sharepoint pages 2020-21
	Process for travellers from outside the Kimberley 2022
	Proof of vaccination requirements
Other	KLC Executive Board Governance manual
	KLC consolidated rule book July 2022
	KLC organisational chart
	KLC Strategic Plan 2020-24
	Board meeting minutes (redacted) 2019-2023

Appendix D Glossary

Throughout this document, the following terms have the meaning prescribed in Table 19.

Table 19 | Glossary

Term	Meaning
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 Agreement (ILUA)	A voluntary, legally binding agreement governing the use and management of land 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: - mediating between the parties to native title applications at the direction of the Federal Court - acting as an arbitrator in situations where the people cannot reach agreement about certain Future Acts

Term	Meaning
	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.
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 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.

Term	Meaning
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 20.

Table 20 | NTRB 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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