



Comparative Performance of fourteen Native Title Representative Bodies

National Indigenous Australians Agency

31 March 2021

Nous Group acknowledges Aboriginal and Torres Strait Islander peoples as the First Australians and the traditional custodians of the land.

We pay respect to Elders past, present and future in maintaining the culture, country and their spiritual connection to the land.



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Terms of Reference for the reviews

1. Review and assess each organisations' efficiency and effectiveness in performing the functions of a native title representative body over the past three years (with the main focus on recent performance) including:
 - Native title claim outcomes achieved for clients.
 - Whether the organisation's assessment and prioritisation of applications are equitable, transparent and robust.
 - Whether the organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with clients, persons seeking assistance, and persons refused assistance.
2. Review and assess each organisation's cost effectiveness in performing the functions of a native title representative body, including the key cost drivers for each organisation.
3. Review and assess each organisation's strategies for driving and tracking its achievement against key performance indicators in its funding agreement with the Department.
4. Review and assess the extent to which each organisation's governance structures and organisational policies and practices support efficient and effective project delivery including:
 - The breakdown of responsibilities between the organisation's Board, Chairperson, Chief Executive Officer and senior staff.
 - Its financial management.
 - The standard to which it manages and resolves any conflicts of interest.
 - The standard to which it manages and resolves any complaints.
5. Review and assess each organisation's strategies for and progress in developing self-sufficient Prescribed Bodies Corporate (PBCs), so PBCs have appropriate capacity and capability to manage their own responsibilities and aspirations.
6. Review and assess the adequacy of each organisation's strategic planning for a post determination environment.
7. Examine and report on other relevant issues as identified by the Department (NIAA) or in the course of the review, which may be specific to particular organisations.
8. Develop a meaningful set of benchmarks to assess individual and comparative efficiency and effectiveness of organisations.
9. Provide written draft and final reports to the Department on the work undertaken for each review and the review findings, making recommendations on what changes, if any, each organisation could make to improve its efficiency and effectiveness. There will be an overarching comparative report and individual reports.

Representative body functions

The *Native Title Act 1993 (Cth)* (NTA) is a law passed by the Australian Parliament that recognises the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs. Native title representative bodies (NTRBs) and native title service providers (NTSPs) (collectively NTRB-SPs) perform functions under Part 11 of the NTA for the benefit of persons who hold or may hold native title.

The functions of NTRB-SPs are summarised in Table 1.

Table 1 | Representative body functions under the Act

| 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 native title 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 NTA 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. |

Executive Summary

This Comparative Report has been commissioned by the National Indigenous Australians Agency (NIAA) to compare the performance of the 14 Native Title Representative Bodies and Native Title Service Providers (NTRB-SPs) who perform functions under Part 11 of the *Native Title Act 1993* (NTA) for the benefit of persons who hold or may hold native title. The 14 individual NTRB-SPs were reviewed by Nous Group (Nous) between 2017 and 2021. The reviews were carried out in three tranches, with each review examining a three-year time period.

The individual reviews were an opportunity to ensure that taxpayer money is being well spent by assessing the extent to which the NTRB-SPs are achieving positive and sustainable outcomes for people who hold or aspire to hold native title. In line with the Terms of Reference (TORs), the reviews examined various factors that impact on good performance – including NTRB-SP's efficiency and effectiveness in performing their functions under the NTA, their cost effectiveness, governance arrangements, support for the organisations that hold native title and the future of the NTRB-SPs in a post-determination world.

Individual Summary reports have been prepared for each of the individual reviews. Those Summary reports include a response from the organisation as to how it has responded to the review's recommendations.

Drawing on those individual reviews, this comparative report provides a high-level overview of the comparative findings of the performance of those organisations. It should be read in conjunction with the individual Summary reports.

The reviews were conducted in three tranches, resulting in the time periods under review differing between the tranches to allow more recent data to be used. The organisations reviewed are set out below. NIAA did not include the South West Aboriginal Land and Sea Council in the organisations to be reviewed because it would be transitioning to new organisational arrangements under the South West Settlement.

First tranche (Undertaken in 2017 and covering FY2014-15 to 2016-17)

- Central Desert Native Title Services (CDNTS)
- Goldfields Land and Sea Council (GLSC)
- First Nations Legal and Research Services (FLNRS)
- NTSCORP
- Queensland South Native Title Services (QSNTS)

Second tranche (undertaken in 2018 and covering FY2015-16 to 2017-18)

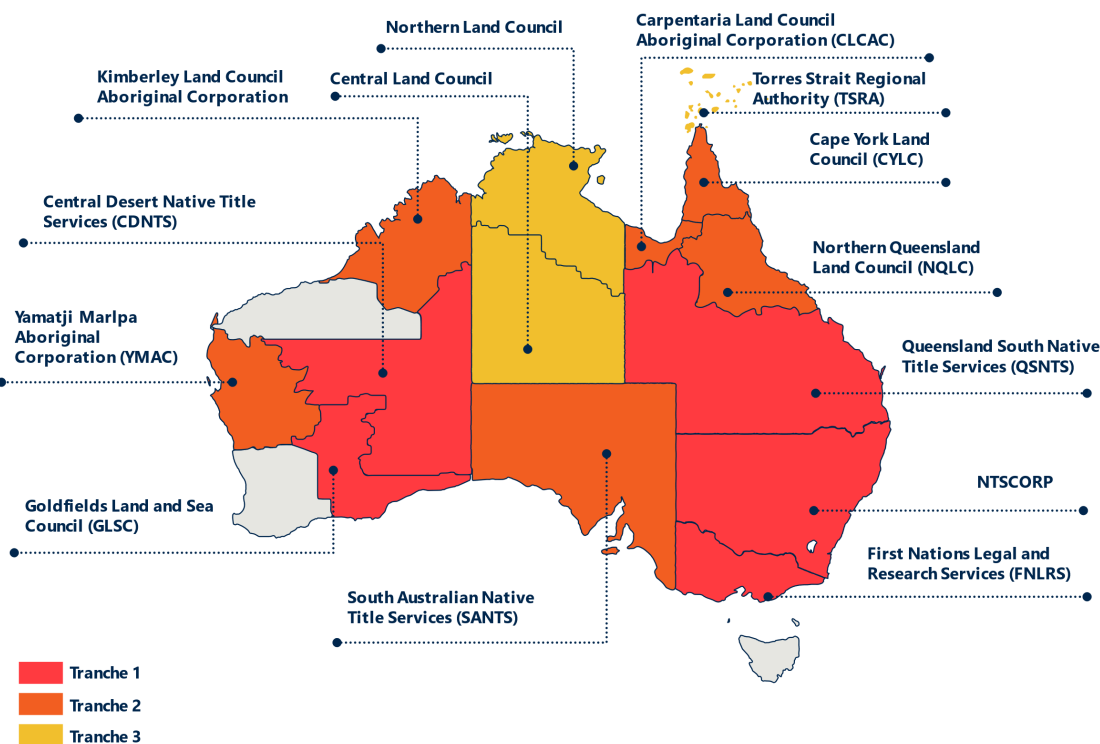
- Cape York Land Council (CYLC)
- Carpentaria Land Council Aboriginal Corporation (CLCAC)
- Kimberley Land Council (the KLC)
- North Queensland Land Council (NQLC)
- South Australia Native Title Services (SANTS)
- Yamatji Marlpa Aboriginal Corporation (YMAC)

Third tranche (undertaken in 2020-21 and covering FY2016-17 to 2018-19)

- Central Land Council (CLC)
- Northern Land Council (NLC)
- Torres Strait Regional Authority (TSRA)

Figure 1 illustrates each of the NTRB-SP's Representative Aboriginal/Torres Strait Islander Body (RATSIB) areas that were reviewed.

Figure 1 | RATSIB areas of the NTRB-SPs reviewed by Nous¹



1

The methodology facilitated comparative review

A consistent methodology for assessing performance against the TORs was developed by Nous for the first tranche of reviews and subsequently used for all the reviews. This has enabled a comparative lens to be applied across all the organisations. Each of the 14 individual reviews was provided to the relevant organisation in draft, to allow it an opportunity to comment, before the final reports were provided to the NIAA.

The method combines qualitative and quantitative performance indicators and drew on documentary review as well as extensive consultations with a range of stakeholders, including Traditional Owners. Consultations were conducted by Nous on a confidential basis.

The methodology accounts for the unique context within which each NTRB-SP operates, and the way in which that impacts on performance, through the use of 'attribution factors'. This has allowed the reviews to understand the extent to which factors beyond the control of the NTRB-SP, such as the history of colonisation, or the attitude of the state or territory government, have impacted on the performance of each NTRB-SP. These factors have been considered in assessing performance both individually and comparatively.

The comparative ratings presented in this report were developed by the members of the Nous review, including expert advisers. Each NTRB-SP was individually rated out of a score of five for each TOR. In addition, an 'attribution factor' was assessed for some TORs where the review's methodology recognised that factors outside of the control of the NTRB-SP had an impact on performance. The attribution factors were assessed on a three-point scale of 'easier' (meaning this factor made it easier for the NTRB-SP to achieve outcomes), 'limited impact' (meaning this factor did not make a significant difference to the NTRB-

¹ This map does not include the portion of relevant RATSIB areas that are in the sea.

SPs achievement of outcomes) and 'harder' (meaning that this factor made the achievement of outcomes more difficult).

These 'attribution factor' scores are intended to be read separately to the performance scores – for example a performance rating of three and an attribution factor of 'easier' means an organisation performed reasonably well **and** did so within a relatively easy environment. A performance score of five and an attribution factor of 'harder' means the organisation performed very well, despite a very challenging environment. The reliability of the ratings was reinforced by senior team members who were involved across all review tranches and considered the ratings across all the organisations.

Systemic Issues

Part B of the report provides a discussion of systemic issues that arose in the course of conducting the reviews and are pertinent to the broader native title system. These issues have a current or potential future impact on NTRB-SP efficiency and effectiveness in achieving native title outcomes now and into the future. They provide an opportunity for the Government and NTRB-SPs to consider reforms supporting sector wide or organisational level improvements. Some issues are also raised as they may otherwise inform NIAA's planning as the funder of most NTRB-SPs. The systemic issues discussed in Part B include:

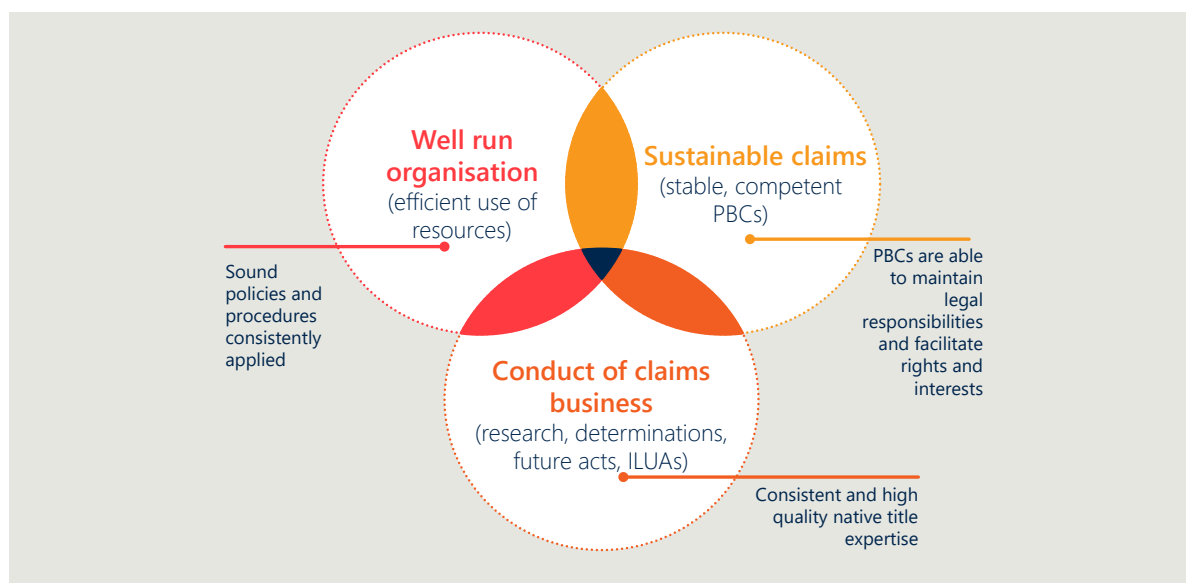
- Ongoing Support for PBCs is fundamental to achieving positive outcomes from native title
- There is a need for a nationally coordinated and strategic approach to native title in the post-determination environment
- Complaints about dis-enfranchisement need a system wide response
- As claims activity decreases NTRB-SPs will need to consider how to resource and sustain their activities in the future
- Solutions are required to ensure the return of cultural materials at the end of the claim period
- Claims that cross RATSIB boundaries or state borders are complex and expensive, and will be more prevalent in coming years
- Funding issues remain a challenge.

Overall findings

The reviews found that the majority of the 14 NTRB-SPs were identified as performing in a generally effective and efficient manner and are providing valued assistance to clients and delivering value for money for the Australian Government, with different areas of strength and opportunities for improvement.

The reviews have identified three key areas of functioning that impact on the extent to which an NTRB-SP provides 'value of money'. Organisations deliver value for money by targeting their spending on a good balance of activity across these three areas and sustaining high quality delivery over time.

Figure 2 | Factors through which NTRB-SPs provide value for money



Overall, the majority of the organisations deliver value for money by targeting their spending on a good balance of activity across these three areas and sustaining high quality delivery over time.

The majority of the 14 NTRB-SPs were identified as performing in a generally effective and efficient manner, facilitating the determination of native title rights for Traditional Owners across Australia, with sound and transparent policies in place to guide decision-making. The organisations draw on a depth of capability in native title law and anthropology, with differences in the extent to which legal and anthropological work is undertaken in-house or contracted out to private native title lawyers and anthropologists. This was often the result of the size of the organisation, the ability to attract experienced staff and the existence of conflicting claims which require separate representation.

The assistance the NTRB-SPs provide to their clients is generally respectful and valued. Most interact in a fair and respectful manner with persons who hold or may hold native title. The task of assessing potential claims and determining which claims should receive priority is always fraught but most organisations have a clear policy which is publicly available and adhered to.

The support NTRB-SPs provide to the PBCs that hold native title varies quite widely. While this is sometimes due to the context within which individual PBCs operate, it is also a result of different organisational policies, priorities and resourcing decisions.

Each organisation has different areas of strength and opportunities for improvement. The opportunities for improvement have been captured in the individual reports as recommendations. A comparison of performance against each TOR is set out in the body of this report. The graphical representations for each TOR provide an indication of the diversity of performance, noting the degree of difficulty each faces (captured by the attribution factors).

The level of difficulty encountered by each organisation differed widely

The reviews found that the level of difficulty encountered by the 14 organisations in dealing with the external factors in their environment differed quite widely. The most challenging environments resulted from a combination of state government policies and legislation, levels of mining and other commercial activity, and the lack of cohesion within and across potential/existing claim groups. In one or two cases the review team identified additional challenges based on its assessment that the level of funding available was more constrained than for the other organisations reviewed. NIAA has since advised that the level of funding for these organisations has been adjusted.

Another factor that impacts on comparisons between the 14 is the size and remoteness of each NTRB-SP's RATSIB area. Some cover densely populated areas that are well connected with road infrastructure and relatively small. By contrast many others cover large regions which are poorly serviced and very remote.

Other RATSIB areas cover a range of remoteness classifications. Nearly all the RATSIB areas also cover large areas of sea.

These factors impact both the ease and extent to which native title may be demonstrated and the ease of providing services to native title claimants in these regions. The range of settlement histories and resultant ease of demonstrating connection to Country add further confounding factors. Many land areas face a complex web of land tenure, forced movement of people and diaspora and some NTRB-SPs were particularly impacted by these issues. In some of the organisations under review, the complexity of overlapping claims is likely to increase in future, as the less complex claims have been settled first.

Overall Performance scores

An overall perspective of the range of assessments of performance for each NTRB-SP against each TOR can be seen in the summary of performance in Figure 3. For the purposes of this overall perspective, the degree of difficulty (attribution factors) has not been included. A score of one indicates limited achievement against the TOR and five indicates very substantial achievement against the TOR. Most organisations scored well for their performance in achieving native title outcomes.

Figure 3 | NTRB-SP performance scores against each TOR

| Terms of Reference | NTRB-SPs | | | | | | | | | | | | | |
|--|----------|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | A | B | C | D | E | F | G | H | I | J | K | L | M | N |
| TOR 1.1 – native title claim outcomes | 5 | 4 | 4 | 4 | 4 | 2 | 4 | 4 | 3 | 4 | 2 | 4 | 4 | 4 |
| TOR 1.2 – assessment and prioritisation | 4 | 3 | 4 | 2 | 4 | 2 | 2 | 3 | 3 | 4 | 2 | 5 | 2 | 4 |
| TOR 1.3 – respect, equity and transparency | 4 | 3 | 4 | 4 | 5 | 1 | 2 | 3 | 5 | 4 | 1 | 4 | 1 | 4 |
| TOR 2 – cost effectiveness | 4 | 3 | 5 | 4 | 4 | 2 | 3 | 3 | 3 | 4 | 2 | 4 | 4 | 4 |
| TOR 3 – tracking achievement | 4 | 4 | 5 | 2 | 4 | 4 | 4 | 4 | 4 | 4 | 3 | 5 | 4 | 3 |
| TOR 4 – governance and policies | 4 | 3 | 4 | 2 | 4 | 2 | 3 | 3 | 4 | 4 | 1 | 4 | 2 | 3 |
| TOR 5 – PBC self-sufficiency | 3 | 3 | 4 | 3 | 4 | 1 | 3 | 2 | 4 | 4 | 3 | 5 | 3 | 3 |
| TOR 6 – post-determination planning | 3 | 4 | 5 | 2 | 5 | 2 | 3 | 2 | 4 | 3 | 3 | 3 | 4 | 3 |

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

| | | | | |
|------------------------------|-------------------------|----------------------|------------------------------|------------------------|
| 1 = very limited achievement | 2 = limited achievement | 3 = good achievement | 4 = considerable achievement | 5 = strong achievement |
|------------------------------|-------------------------|----------------------|------------------------------|------------------------|

1 Profile of the Organisations reviewed

The 14 organisations reviewed differ significantly in their governance arrangements.

There are three main types of legal entities:

- Five organisations are *Corporations Act 2001* corporations limited by guarantee and registered with the Australian Charities and Not-for-profits Commission.
- A further six organisations were created as Aboriginal corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).
- Three organisations are Australian Government corporate entities. The CLC and NLC are established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA), while the TSRA was established under the *Aboriginal and Torres Strait Islander Commission Act 1989*, today known as the *Aboriginal and Torres Strait Islander (ATSI) Act 2005*.

All but one of the organisations are allocated funding by the NIAA for the purpose of carrying out their native title functions. TSRA funds its native title functions from within its general appropriation.

2 The methodology was designed to allow the comparative assessment of performance

The methodology for assessing performance for each of the organisations was designed in 2017 based on the TOR for the first tranche of reviews. Nous used a mixed method approach to complete the analysis.

Quantitative analysis included: data on the progress of claims, future acts and Indigenous Land Use Agreements (ILUAs), performance against milestones, budgetary performance, staffing metrics, and broader social and geographical factors that impact performance. Only data that was capable of being consistently applied across all organisations were used for comparative purposes.

The quantitative analysis was complemented by qualitative data generated through interviews with clients, potential clients, persons refused assistance, staff, contractors and Board members. Interviews were also conducted with external stakeholders including the Federal Court, the National Native Title Tribunal (NNTT), state government representatives, the Office of the Registrar of Indigenous Corporations (ORIC) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). Once again, the questions asked in these interviews were consistent across all reviews.

The weight given to the views of various stakeholders was assessed by the review team and was based on the team's judgement about the credibility, integrity and motivation of the individuals or organisations with whom the review engaged, as well as the volume of similar issues raised across the stakeholder group. NTRB-SPs were asked to provide information about the reviews to staff and stakeholders. In some cases, stakeholders who heard about the reviews contacted the team to ensure their issues were heard. In the majority of cases, information was provided confidentially or 'off the record' and it has therefore not been possible to identify individual stakeholders, or the category to which they belong, in the report.

The data gathered was used to judge not only performance, but contextual factors beyond the control of the organisation that either hindered or aided achievement. These factors were labelled as 'attribution' factors and broadly considered as making the organisations task relatively easier or more challenging. Together, the quantitative and qualitative data and the attribution factors created a detailed and nuanced picture of performance for each organisation.

Framing accurate and fair comparisons relied on data as well as on analysis and insights drawn out from a variety of sources. For example, the review team needed to assess relative performance on the effectiveness of native title outcomes across organisations that had achieved several determinations, but over a small geographic area, or had several determinations over a large area and some that had no determinations, with a number of claims progressing through the determination process. The process for comparing performance involved thorough examination of the evidence and robust debate among the review team.

The reviews encountered a number of stakeholders who were concerned that a valid comparison across the organisations was challenging and perhaps not possible due to the nature and degree of differences in factors beyond the control of NTRB-SPs. The review team acknowledges, and to some extent shares, these concerns. However, the team believes the methodology developed for the reviews, including the use of the attribution factors, does indeed enable valid comparisons of performance to be drawn. Many factors build to an effective and efficient overall operation and the reviews have sought to identify and analyse these through the use of performance indicators.

A scoring process was used to determine relative performance against each TOR

The quantitative and qualitative data and the attribution factors created a detailed and nuanced picture of performance for each organisation. The task of comparison was facilitated by generating scores out of five for each organisation for their performance against each TOR. Scores ranged from five which signalled significant achievement and substantially superior performance, stepping down to one for very limited achievement and substantially inferior performance.

While Nous was able to draw several comparative insights into performance across the organisations, the methodology deliberately did not provide an overall ranking for each organisation as a whole. This is because the external or environmental factors that impact on performance (the attribution factors) are

different for each NTRB-SP and make an overarching ranking too simplistic. Nevertheless, the combination of scores and attribution factors produce a picture of efficiency and effectiveness that the review team believes is sound.

3 Comparative performance

3.1 TOR 1.1 | Native title claim outcomes – Review and assess each organisations' efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with a main focus on recent performance) including native title claim outcomes achieved for clients.

The individual assessment of performance and attribution for each organisation against this ToR is captured in the individual Performance Summary Reports.

The majority of organisations stand out as having made considerable progress in achieving native title outcomes, with numerous claims determined during the relevant three-year review period and multiple other claims in progress.

Overall, 12 of the 14 organisations were assessed as having engaged with the full range of functions under the NTA, applying energy and focus to move claims forward to determination. They have demonstrated strong legal and anthropological capability and the ability to be decisive and make difficult calls that result in progress. Out of these 12 organisations, 11 were given a score of four or five out of five for this TOR, with one scoring a three out of five. Four of the NTRB-SPs have each achieved 10 or more determinations over the course of the relevant three-year period.

While this strong performance has generally been enabled by experienced and/or high-quality legal work and anthropological research, there are still aspects that could be improved across most organisations.

Some NTRB-SPs have historically achieved strong native title outcomes for clients, but their output during the relevant review period has been more modest. This more modest output has been due to a number of reasons – including timing associated with a relatively small claims load, the strategic prioritisation of a single unified claim, a broader slowing in achieving native title outcomes and a decision to focus on strategically valuable litigation.

Two organisations were assessed as performing relatively poorly over the relevant review period, largely due to a lower level of internal capability resulting in poor decision making, inefficient use of resources and a dearth of native title outcomes for clients.

The volume of agreement making through future act and ILUA work varied across the organisations, depending on the particular circumstances in the RATSIB area. Most organisations have been diligent in managing these functions but there are a small number of NTRB-SPs who did not consistently deliver their notification function under the NTA. NTRB-SPs have also delivered varying levels of benefit and compensation to their clients through assisting with ILUA negotiations.

Most NTRB-SPs use a variant of a functional division between researchers and lawyers to support operations. Typically progress of claims includes a balance between internal legal and anthropological resources and external consultants in these fields. The larger NTRB-SPs tend to have more highly qualified and experienced native title lawyers and anthropologists on staff. Some smaller organisations struggle to attract staff with sufficient expertise and instead rely on contracting external consultants for much of the work. The use of external legal representation is also driven by the existence of conflicting or overlapping claims. There is variation in the internal capability of these organisations to monitor and quality assure the work done by external consultants.

All the organisations reviewed were experiencing pressure due to the heightened expectations of the Federal Court. Timelines have been escalated and this has created high workload and stress for staff. Prior to 2013, the Federal Court estimated the median time across Australia for claim resolution was 12 years and 11 months. The Court then proposed a claim resolution target of five years. The reviews found that the median length of time for a determined claim during the relevant review period was approximately seven years.

NTRB-SPs who achieved positive native title outcomes for clients generally received positive feedback from a range of stakeholders – including Traditional Owners, staff, state governments and stakeholders across the legal system. Some disaffected Traditional Owners were vocal in their dissatisfaction with their NTRB-SP. At the other end of the scale the reviews found very little dissatisfaction amongst Traditional Owners with performance for some NTRB-SPs.

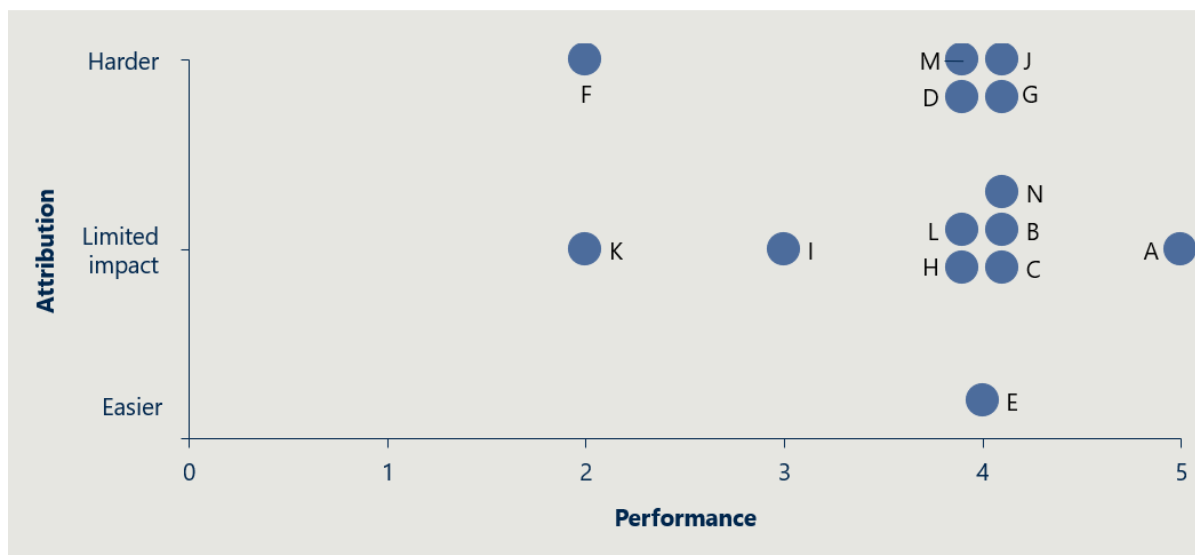
Specific areas of concern that were raised typically related to:

- historical delays in the progression of claims (at times over many decades)
- broader scepticism or distrust of the organisations
- processes for resolving intra-Indigenous disputes
- perceptions of a conflict of interest between the NTRB-SP and holders of native title
- lack of transparency and a perceived lack of independence around the internal review process.

As noted above and in the individual reports, each organisation faces particular challenges arising primarily from the attitude of state or territory governments and cohesion within the Indigenous groups in the area it services. Each organisation has been given an attribution score that recognises the extent of the challenges in their environment.

Figure 4 presents the performance scores and attribution rating for each organisation.

Figure 4 | Comparative performance for TOR 1.1: Native title claim outcomes



3.2 TOR 1.2 | Assessment and prioritisation – Review and assess each organisations’ efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with a main focus on recent performance) including whether the organisation’s assessment and prioritisation of applications are equitable, transparent and robust.

The individual assessment of performance for each organisation against this ToR is captured in Individual Performance Summary Reports.

Across the four tranches of reviews, most organisations had formal processes in place for the assessment and prioritisation of applications. For some NTRB-SPs, this was a formally documented internal policy which sets out clearly the relative importance of factors or considerations on which assessment and prioritisation is based. Other NTRB-SPs adopted more informal practices such as long-standing Board positions, or practices that are informed by professional judgement as opposed to clearly defined prioritisation considerations.

While across all NTRB-SPs there was significant variation in the breadth of factors that informed assessment, NTRB-SPs consistently considered the likely complexity and prospects for success of the claim as the primary considerations. This was followed by other external factors – namely budget availability, industry activity and timeframes defined by existing court dates.

Tensions between the assessment and prioritisation functions of NTRB-SPs

Under the NTA, there is a requirement for NTRB-SPs to provide representation and support to groups ‘who have *or may have*’ native title interests. There is significant variation in how this is interpreted, and how NTRB-SPs balance their responsibilities for assessing and prioritising requests for assistance. Some take a highly selective approach, while others have less stringent requirements and provide support to a broader range of applicants who ‘*may have*’ native title interests.

Some NTRB-SPs accept almost all applications for assistance, identifying that it is not their role to determine who has native title interests. This is based on a philosophical view that this is the fundamental responsibility of the Federal Court. In cases where the Federal Court has agreed to join Indigenous persons as respondents, the NTRB-SP feels obliged to fund the claim. The more inclusive approach is also used where an organisation receives a relatively small number of new requests for assistance. Based on the outcomes where this more inclusive assessment process has been used, this approach has been effective for the organisations involved.

Other organisations have interpreted the NTA as requiring it to assess the merit of claims to a higher degree and therefore take a more selective role in determining which groups may or may not have native title interests. This highly selective approach has resulted in several stakeholders (clients, potential clients and other stakeholders) suggesting that this approach is not delivering on its duty to support those ‘who *have or may have* native title interests’. It is interesting to note that the organisations who use a more selective approach have, perhaps not surprisingly, significant numbers of dissatisfied and unhappy clients and potential clients.

It may be that the more inclusive approach adopted by some NTRB-SPs is possible due to the strong connection evidence in their RATSIB areas. This non-selective approach may not be possible for other NTRB-SPs, where connection evidence is less strong and there is a greater requirement to assess the prospects for claims that it supports. Therefore, while a high threshold for claims may result in dissatisfied clients, the very nature of disputatious areas may mean that some NTRB-SPs are more likely to have to make hard decisions on which claims they are able to support. Ongoing consideration of the relative balance is necessary for each NTRB-SP. In areas where the decision-making process is more difficult the NTRB-SPs need strong communication skills to give potential claimants very difficult messages.

Clear policies on the role of the NTRB-SP in assessing and prioritising requests for assistance are important to support improved consistency. Many NTRB-SP policies conflate the initial assessment and subsequent prioritisation of applications, without distinguishing between the assessment of whether they should provide support to the applicant and whether they are able to (based on resource availability and other factors) or the relative priority of this application to existing claims. Others have a strong process with a clear separation of the assessment, consequent resource allocation and clear communication to clients so that claimant groups understand the timeline for the assistance they will receive.

Variation on public communication of assessment and prioritisation factors

There is significant variation across NTRB-SPs on the extent to which information about prioritisation factors and decisions are outlined publicly or communicated to clients. At the time of the respective reviews around half of all NTRB-SPs did not have their process publicly available (either in full or in summary forms). Some organisations publish their full decision factors online and communicate these fully to clients in a transparent manner, while others provide a briefer outline of some of the considerations of whether the NTRB-SP will support and prioritise an application for assistance to progress native title. Some others do not provide any indication of the factors that informed the decision on their websites.

On the one hand, transparency of decision factors can open up the NTRB-SPs to increased scrutiny from clients. This was identified as a concern by some NTRB-SPs that were not transparent about their processes. On the other hand, it is important that clients can have an understanding of the factors that impact the decision made by the NTRB-SP. Putting in place a consistent approach is likely to deliver more consistent and equitable experiences for persons that may hold native title interests across the country. Clearly this is not an issue for those NTRB-SPs who accept all requests for assistance.

Funding for competing and overlapping claims

NTRB-SPs across the sector have also adopted significantly different approaches to how they provide support for and manage overlapping and/or competing claims. Some NTRB-SPs will not provide the full range of services to claim groups if there are competing claims over an area of land or if a proposed claim would overlap other claims. This policy has been formally adopted by some organisations although it is not always followed in practice.

Many of the policies outline that where there are conflicting or overlapping claims the NTRB-SP will only provide dispute resolution services, bring in an independent mediator, or undertake further research. One organisation's policy outlines that, until the dispute is addressed, it will only provide 'dispute resolution' services.

In contrast other NTRB-SPs are prepared to fund multiple competing claims and will facilitate alternate legal representation through private lawyers. In some cases, this readiness to fund competing claims may have acted over the review period as a disincentive to claimants working together.

Some organisations do not have a formal policy in place for funding respondents or alternate applicants and do not typically support these groups. This means that where overlaps emerge through the assessment and prioritisation process an organisation might fund all potentially impacted groups to resolve the overlaps, by way of seeking additional funding. On other occasions they refuse funding requests.

In practice most NTRB-SPs take a flexible approach and provide mediation services where there is a chance of success and fund competing claims where this is not possible.

Traditional Owner satisfaction

Although there was significant variation in the processes used by the various NTRB-SPs, the reviews found that the primary factor that influenced the satisfaction of Traditional Owners was the transparency around how each organisation communicated their assistance and prioritisation policies and processes and their resulting decisions. A number of organisations stood out as performing really well in applying and communicating their policies to clients.

While it should be acknowledged that there is likely to always be some level of dissatisfaction with the services provided by NTRB-SPs due to their very nature, clients of higher performing organisations generally:

- reported that the NTBR-SP actively communicated their assessment and prioritisation process to them through formal and informal channels throughout the process (i.e. during initial stages, at request for assistance)
- had a strong understanding of the process for applying for assistance and the factors the NTRB-SP considered in coming to its decision
- felt that the process was consistent (and therefore fair) and reported factors in place that supported a strong understanding of the process.

Overall, client awareness of the process was generally tied to client satisfaction (or at least lower levels of client dissatisfaction). There was greater respect for the assessment and prioritisation process, even if it did not deliver favourable outcomes, when it was understood and well communicated to clients. Consistency of process and factors supported stronger understanding and was correlated with a sense of fairness among clients.

In contrast, clients of the lesser performing organisations:

- demonstrated low awareness of the assessment and prioritisation process
- had a greater level of misunderstandings and dissatisfaction with decisions that were made, which may have resulted from poor communication processes
- often did not believe there was an equitable or transparent process in place and were suspicious of decisions made
- often demonstrated a poor understanding of the available appeals process (internal and external).

Figure 5 presents each organisation's score against this TOR. There are no attribution factors for this TOR.

Figure 5 | Comparative performance for TOR 1.2: Assessment and prioritisation



* Note that 1.2 TOR does not have an attribution rating.

3.3 TOR 1.3 | Respect, equity and transparency – Review and assess each organisations' efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with a main focus on recent performance) including whether the organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with clients, persons seeking assistance, and persons refused assistance.

The individual assessment of performance for each organisation against this ToR is captured in Individual Performance Summary Reports.

The reviews see performance against this TOR as a crucial contributor to achieving positive and sustainable native title outcomes, particularly in the medium to longer term. Organisational performance varied markedly. A small number of organisations stand out in the manner the organisation supported positive working relationships – through engaging in a culturally informed and respectful manner with clients, persons seeking assistance and persons refused assistance. Effective organisations engage respectfully and have a range of mechanisms in place to identify and respond to complaints quickly and effectively.

While there were differences across the NTRB-SPs performance, key themes characterised the organisations that performed well and did not perform well on this performance indicator. The NTRB-SPs that performed well on this TOR generally:

- were able to establish and maintain constructive and mutually respectful relationships with Indigenous communities in the RATSIB area
- were able to maintain respect among the client group through delivering consistently positive interactions, and by identifying and addressing complaints effectively and efficiently
- were seen as open, transparent and impartial by the clients and broader stakeholders they were working with – often due to well publicised policies and procedures that make the organisation accountable
- supported genuine, respectful and culturally informed relationships across all levels of the organisation – including Board members, Executive staff and operational staff
- had Indigenous staff members across a range of positions, which supports culturally appropriate engagement with members of the community.

In contrast, the NTRB-SPs that did not perform strongly typically:

- had processes and policies that were not transparent and there was less certainty about how NTRB-SP decisions are made
- had clients that were concerned about potential conflicts of interest or biases in decision making
- were seen as disrespectful or difficult to engage with, often relying on jargon-laden communication, a general internal focus that prioritises the needs of the organisation over the needs of the client and at times demonstrated poor cultural competence
- regularly didn't communicate vital information, so Traditional Owners were surprised at activity occurring on their country.

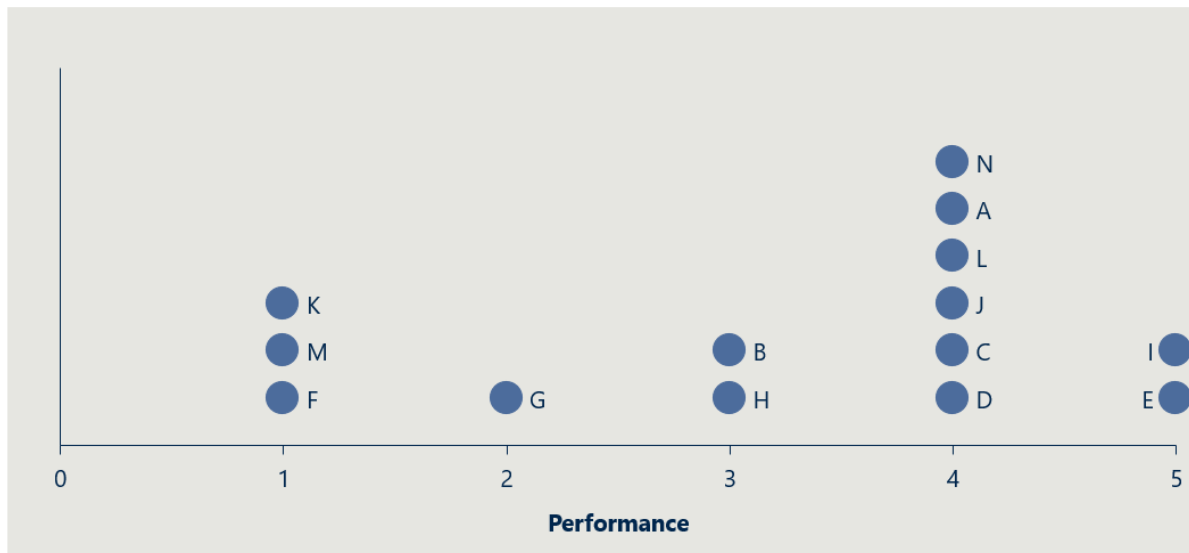
The manner in which the NTRB-SPs ran claim group meetings was identified as a particular indication of the way the NTRB-SP operates. While these meetings can be challenging to manage, the reviews generally

received feedback about chaotic or disrespectful meetings in relation to the organisations with lower scores.

Conflicts between NTRB-SPs and clients or potential clients arose in all the organisations. However, in the higher scoring NTRB-SPs, there was a tone of respect and a shared acknowledgment that relationships needed to endure in the long term. This meant that more constructive solutions could be found. In lower scoring organisations there was entrenched negativity and an absence of trust.

Figure 5 presents the individuals scores for each organisation. There were no attribution factors for this TOR.

Figure 5 | Comparative performance for TOR 1.3: Respect, equity and transparency



* Note that 1.3 TOR does not have attribution factors.

3.4 TOR 2 | Cost effectiveness – Review and assess each organisation’s cost-effectiveness in performing the functions of a native title representative body, including the key cost drivers for each organisation.

The individual assessment of performance for each organisation against this ToR is captured in the Individual Performance Summary Reports.

All the NTRB-SPs that have been part of the reviews have experienced cost pressures. Every organisation has reported they have attempted to reduce costs associated with delivery of native title functions and have actively developed a range of strategies to manage them. None of the organisations showed evidence of financial irresponsibility. However, the different NTRB-SPs did vary in the extent to which they had developed constructive strategies for balancing their operating costs while still achieving outcomes.

The reviews identified a range of key cost drivers for each individual organisation – these included the use of external consultants, policies and procedures for cost-effective travel and meetings, and staff costs. These collectively accounted for a substantial proportion of total NTRB-SP expenditure. Each is discussed in turn.

External consultants

External consultants were a key cost driver across the NTRB-SPs reviewed – on average accounting for around 13% of total expenditure. All organisations use external expert consultants (legal and anthropological) to support delivery of native title outcomes for clients. The expertise and independence delivered by external consultants was identified as important by all NTRB-SPs. However, external consultants were used to varying degrees by the NTRB-SPs.

The reviews assessed that the expenditure on external consultants was cost effective for most organisations given their native title requirements – with a perceived appropriate balance between internal and external resources and responsibility. Some organisations, particularly small ones or those with conflicting or overlapping claims, have adopted a model where all native title related matters are briefed out to external consultants. In some cases the reliance on external consultants was seen as excessive and not cost-effective.

Most organisations were fully aware of the need to reduce expenditure on external consultants and reconsider the balance between internal and external resources. Some had active processes and strategies in place to achieve this. In other cases the reviews identified that consultant expenditure could be reduced and greater value for money achieved, by more pro-active management of consultant contracts. In one case increased use of external consultants was seen by the reviews as a way to strengthen value for money and deliver improved native title outcomes.

A balanced and fit for purpose approach to the use of external consultants – neither exclusive use nor blanket avoidance – has produced the most cost effective and value for money outcomes. Regular consideration of the balance is an important feature of efficient and effective delivery that all NTRB-SPs should bear in mind.

Costs related to travel and native title meetings

Costs related to travel and claim group meetings were a key cost driver for all NTRB-SPs. Payment of travel expenses has potential to absorb significant funds and most organisations had well communicated and consistently implemented policies to limit costs. Almost all NTRB-SPs reviewed had active policies in place to try to limit their expenditure on line-items such as travel for on country meetings. This included through reducing available travel allowance, policies on the use of cost-effective travel options, or aligning multiple meetings where travel (particularly to remote locations) was required.

Although all NTRBs were conscious of the need to contain costs, the reviews found significant disparity between the travel policies of some NTRB-SPs. Some organisations had a comparatively generous travel allowance for claimant members relative to others. Many of the organisations reviewed outlined the balance that existed between cost-effectiveness and supporting equitable participation in important meetings such as authorisation and claim group meetings. It was seen as important by many that personal or community financial barriers should not inhibit participation in the native title process. Many NTRB-SPs outlined that they set their policies with this in mind.

Some significant differences can be seen between the policies. For example, the policy adopted by one organisation formally restricts travel to authorisation and claim group meetings only, with travel for applicant, working group or community meetings only claimable at the CEO's discretion. In another, there are no formal travel funding limits in place for named applicants. This creates a significantly different experience for applicants and differential financial burden depending on which NTRB-SP is supporting the group's claim. It is also notable that many complaints the NTRB-SPs receive from their clients relate to travel allowance issues.

Staff travel is also an issue for NTRBs to manage. The adoption of a regional based work team model has assisted some organisations to improve service delivery and client engagement. These stronger relationships and deeper localised knowledge reduce the number of hours staff need to spend establishing knowledge and relationships across vast geography and many cultural groups. The regional approach has also reduced the amount of travel required out to regions. Most stakeholders noted that this has reduced costs including for native title functions (and achieved better outcomes in terms of engagement with the community).

Ensuring native title meetings are productive is also important to ensure they are cost-effective. Generally, the reviews found that native title meetings were used effectively and resulted in cost-effective progress of claims.

Staff costs

Staff costs related to salaries and employee benefits was identified as the final key cost driver for the organisations. This included ensuring that senior staff were delivering responsibilities at an appropriate level and that resources were appropriately utilised. The measure also took account of the fact that NTRB-SPs will have to pay similar employees at different rates to attract and retain talent, depending on their location. The median wage as a percentage of the national median wage for the locations where NTRB-SPs are situated across Australia² varied from 62.2% to 126.2%.

Several of the organisations reviewed have made active efforts to reduce their staff costs. This includes through implementation of policies to avoid overtime costs associated with weekend work as well as significant structural changes to ensure that staff numbers and salary levels were not too high given current and future funding levels. Importantly, the appropriate costs and roles for staff will increasingly become a consideration based on the changing requirements clients have of their NTRB-SPs in a post determination context.

Relative funding levels

Funding levels are set by NIAA across the 13 of the 14 NTRB-SPs that have been reviewed. The level of funding for TSRA's native title functions is determined by TSRA. Variability in expenditure requirements across the organisations can be attributed to a range of factors, including the volume of claims and research underway, the size and/or remoteness of the RATSIB areas and other contextual factors that can mean an NTRB-SP may need to expend more to achieve native title outcomes.

Other Income

Some organisations have also actively begun to consider self-generated or activity-generated income. For example, one organisation has adopted a policy of deriving activity-generated income based on cost-

² ABS (2018), 'Estimates of Personal Income for Small Areas 2011-2016 -employee income', published June 2018, available at: <http://www.abs.gov.au/ausstats/abs@.nsf/cat/6524.0.55.002>

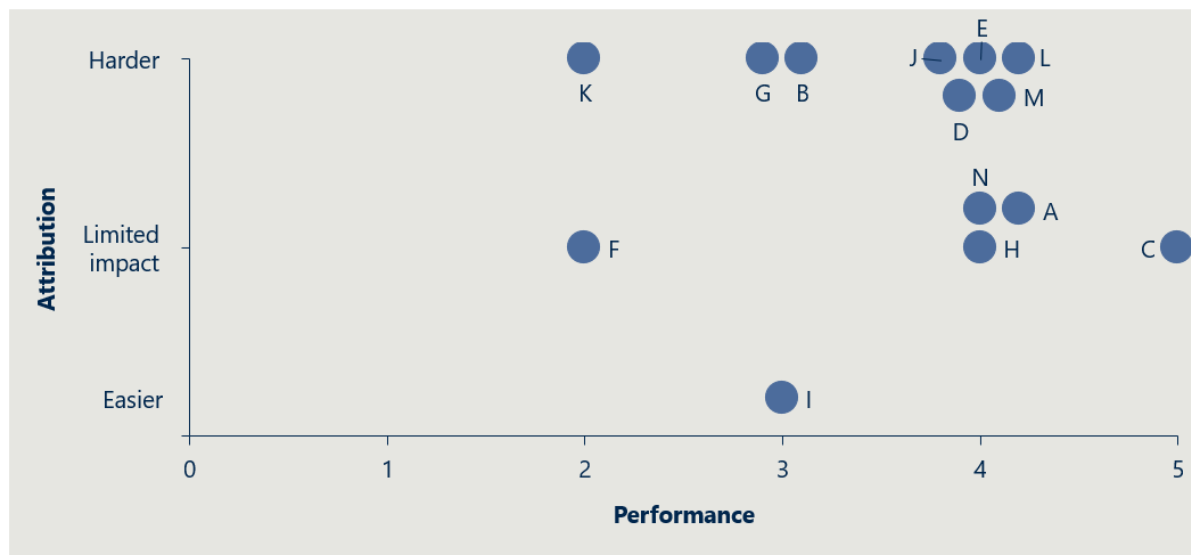
recovery from native title activities, as well as revenue generated from activities that do not fall under the NTA. In contrast, other organisations have taken a position that this risks competing with PBCs for opportunities to build income, which is something that they do not wish to do.

Broadly, the reviews made a positive assessment of most organisations and their ability to manage their key cost drivers. The organisations identified as being highest performing had been able to establish a culture of cost-minimisation with a comprehensive approach to managing costs. The majority of other NTRB-SPs also demonstrated good or considerable performance.

During the course of the reviews, a small number of organisations were found to have funding levels that were a challenge to management of their claims activity. The reviews found that adjustment to their operational funding would allow these organisations to undertake more work internally and thus reduce the higher costs of outsourced work, resulting in more cost-effective outcomes

Figure 6 presents the individual scores and attribution rating for each organisation.

Figure 6 | Comparative performance for TOR 2: Cost Effectiveness



3.5 TOR 3 | Tracking achievement – Review and assess each organisation’s strategies for driving and tracking its achievement against key performance indicators in its funding agreement with the Department.

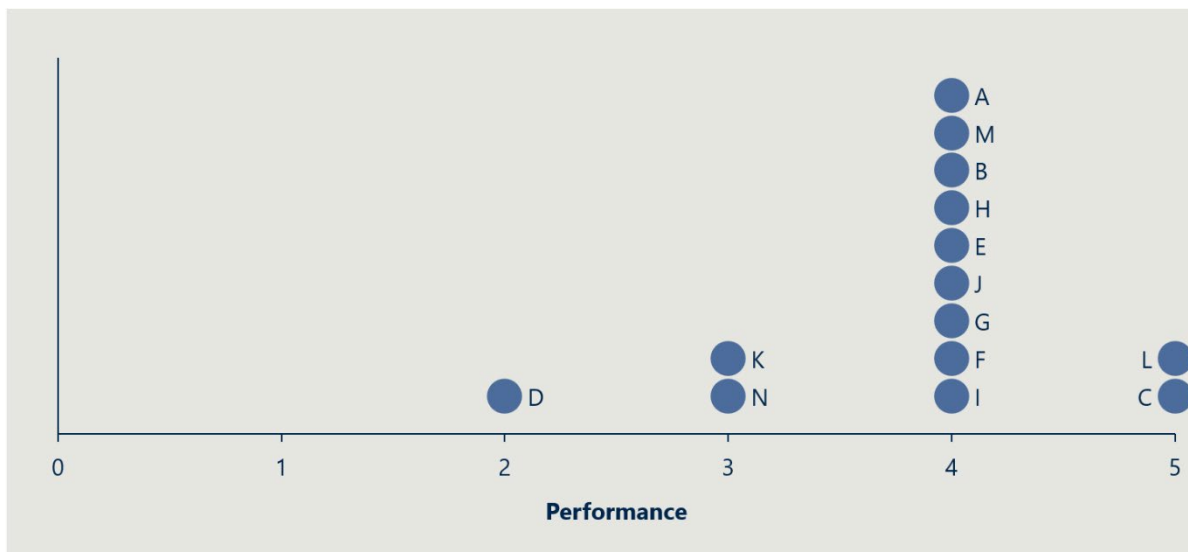
The individual assessment of performance for each organisation against this ToR is captured in the Individual Performance Summary Reports.

All the organisations funded by NIAA had adequate strategies for driving and tracking achievement against the requirements put in place by NIAA. Timeliness of reporting and design of reporting systems were the key differentiating features of performance.

The best organisations have embedded reporting into their broader operational approach and have clear strategies in place for driving and tracking achievement against KPIs in funding agreements with the NIAA. In some cases organisations have integrated numerous systems to ensure that performance reporting delivered to NIAA was comprehensive and represented the breadth of activities. Others embedded NIAA milestones into their tracking of organisational performance, through including the milestones in internal practice and/or using them to monitor the performance of external consultants.

Figure 7 presents the individual scores for each organisation. There were no attribution factors for this TOR.

Figure 7 | Comparative performance for TOR 3: Tracking achievement



3.6 TOR 4 | Governance and policies – Review and assess the extent to which each organisation’s governance structures and organisational policies and practices support efficient and effective project delivery including: the breakdown of responsibilities between the organisation’s Board, Chairperson, Chief Executive Officer and senior staff; its financial management; the standard to which it manages and resolves any conflicts of interest; and, the standard to which it manages and resolves any complaints.

The individual assessment of performance for each organisation against this ToR is captured in Individual Performance Summary Reports.

There is a wide range of governance structures, quality of governance and quality of organisational policies and procedures among the organisations reviewed.

Appropriate policies

Most NTRB-SPs have a broad range of appropriate organisational policies (see TOR 1.2 above in relation to assessment and prioritisation policies). While there are some areas for improvement and consistent implementation, on the whole existing policies and procedures are appropriate. NTRB-SPs vary in how well they communicate these to their clients, particularly with regards to complaints and conflicts of interest. Transparency on processes could be improved by most NTRB-SPs.

Implementation of NTRB-SPs policies and procedures varied. The reviews found that some organisations had policies that they didn’t follow in practice, while others implemented their policies in a highly legalistic manner, which created some challenges in their relationship with stakeholders including clients and potential clients.

Breakdown of responsibilities

The breakdown of responsibilities between the Board and the Executive (or Senior management) was appropriate and understood across most NTRB-SPs reviewed. Board members were generally able to clearly delineate the respective roles of the Board and the Executive. This was often described in terms such as ‘separation of powers’ or a respective focus on the strategic or operational elements of the organisation. In some instances, particularly for smaller organisations, Board members collectively or individually could become involved in more operational matters outside their purview as a NTRB-SP Board Director.

In organisations with a broader remit than NTA functions the Board generally played a rather more distant role in relation to native title, but in all cases was kept informed of key developments and had the opportunity to make strategic decisions. Decision making about native title matters tended to be lower down in these organisations than for other NTRB-SPs.

Broadly most organisations also had an effective breakdown of roles and responsibilities within the Executive or senior management teams. This typically included a clear functional basis for the senior roles and clarity on the respective responsibilities as they relate to the organisation’s native title functions. For some organisations this was identified as an area for improvement with current breakdown of roles and responsibilities across senior staff roles not clear.

In some smaller organisations senior management, including the CEO, often become involved in lower level decision making and operational and logistical activities. While this is to some extent understandable given the small nature of the organisations and limited staff base, there is an opportunity to re-consider

the most appropriate roles and ensure senior management are primarily focusing on strategic decision-making.

Board performance

There is significant variation in both the sizes of the NTRB-SP Boards as well as the Board models adopted by the NTRB-SPs reviewed. Most organisations had a representative Board in place. Only two organisations had a fully skills-based Board. One was distinct in having a skills-based Board with a constitutional requirement for an Aboriginal majority Board membership. Two others had a mixed model of a representative Board with some independent directorships.

Broadly Board performance was identified as strong across most organisations. Only one instance was identified across the reviews where Board members were alleged to be playing an inappropriate role in relation to the progress of individual claims.

In some organisations the potential benefits in moving to a professional Board were identified by stakeholders. Concerns were expressed by some stakeholders that a representative Board creates challenges with regards to confidentiality and conflicts of interest. There are strengths and weaknesses of the different governance approaches (representative, skills-based, or mixed) and it is important each approach is appropriately aligned to the requirements of the local region.

In the organisations that are Commonwealth corporate entities³, uncertainties have arisen over whether the CEO is able to perform the certification function for ILUAs or whether the organisation itself (i.e. the Board) needs to certify. The Federal Court ruled⁴ that the full Board must certify, but the High court has overturned that ruling⁵ so that the CEO may be delegated this function.

Complaints

The number of complaints received by each of the organisations differs widely. In a small number of reviews the review team was contacted by many complainants who were aggrieved by their perception that an NTRB-SP preferences some claimant groups above others and cannot be relied upon to represent the best interests of its clients and potential clients. There were also widespread concerns about incorrect identification of claim group membership and resulting dis-enfranchisement.

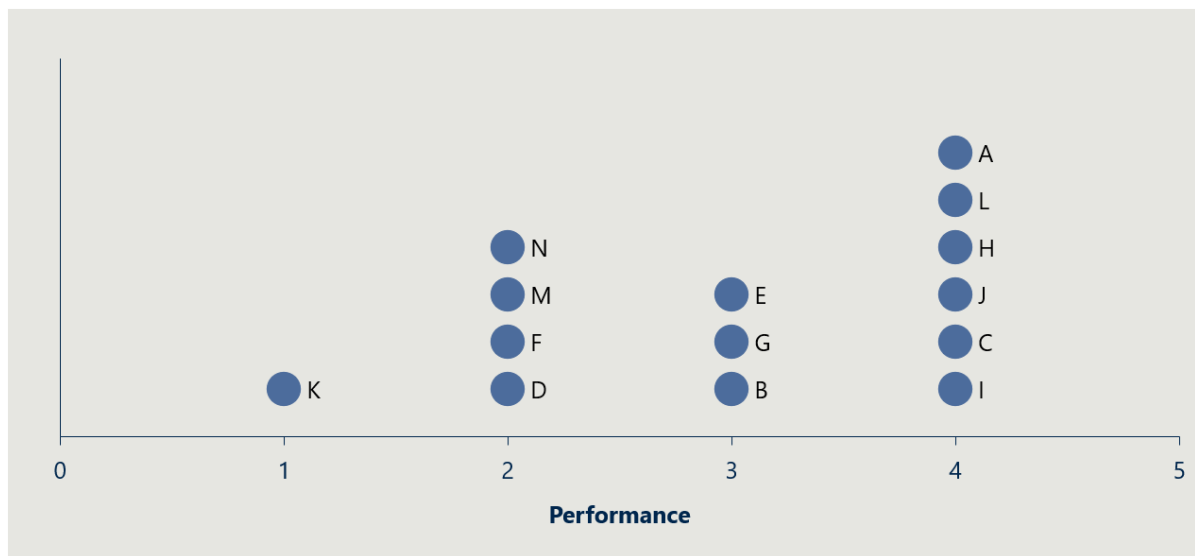
Comparative performance of the NTRB-SPs against TOR 4 is outlined in Figure 8.

³ Under the Public Governance, Performance and Accountability Act 2013.

⁴ Northern Land Council v Quall [2019] FCAFC 77.

⁵ Northern Land Council v Quall [2020] HCA 33.

Figure 8 | Comparative performance for TOR 4: Governance and policies



3.7 TOR 5 | PBC self-sufficiency – Review and assess each organisation’s strategies for and progress in developing self-sufficient Prescribed Bodies Corporate (PBCs), so PBCs have appropriate capacity and capability to manage their own responsibilities and aspirations.

The individual assessment of performance and attribution for each organisation against this ToR is captured in Individual Performance Summary Reports.

A significant number of PBCs in the RATSIB areas of the NTRB-SPs reviewed were not supported by the relevant NTRB-SP. The percentage of PBCs in the relevant RATSIB area supported by the relevant NTRB-SP varied from 47% to 100%. The reasons a PBC might choose to receive assistance from outside the NTRB-SP vary considerably and include loyalty to long-established relationships with law firms that supported their claim process, loyalty to their own peak body and suspicion of the NTRB-SP’s motives, greater capability and financial security to manage the group’s own affairs or the lure of seemingly superior services provided elsewhere.

While it is not necessarily a sign of poor service from the NTRB-SP for a PBC to look elsewhere for support, the delivery of appropriate support to develop greater capacity and capability within PBCs is a key aspect of NTRB-SP performance. Poor performance may well lead to the PBC choosing to seek support elsewhere. There is also a risk that it will inhibit the potential for the PBC to develop greater self-sufficiency in managing its own affairs.

There was a wide range in the sophistication of strategies to progress self-sufficient PBCs. The highest level of performance involved initial identification of maturity and need, through to the provision of tailored support services. Organisations that were assessed highly by the reviews were able to demonstrate appropriate support services that enabled PBCs to develop, with an ongoing focus on self-sufficiency (to the extent this is possible). Several organisations have identified the increasing importance of PBC support and have made recent efforts to direct increasing levels of resources to this function within their organisations.

High performing organisations typically provided PBC support that, despite the range in maturity of PBCs, was tailored and able to add value to organisations across all levels. This included:

- the use of a self-assessment tool
- strong PBC relationships
- a ‘PBC Camp’ which brought together all PBCs to learn from each other
- formal strategic discussions on performance and capability and
- mapping the future strategic direction of the PBC organisations.

High performing organisations also typically provided or facilitated support that related to emerging economic development opportunities. The reviews highlighted the potential benefit of a standardised assessment tool being used across all NTRB-SPs (see Systemic Issues in Part B).

Organisations varied in their structural arrangements for delivering support. Some have dedicated PBC support units. Others have teams which transfer with the PBC when the claim is determined and continue to support the PBC. This latter approach may be more susceptible to the retention of any pre-existing tensions and may be less conducive to the development of PBC independence from the NTRB-SP.

In one case a significantly different approach has been established with the intent to provide an alternative to standalone PBCs where the administrative burden of operating a PBC is high relative to the likely benefits from it. In this case a single administering body acts for all native title determinations in the

RATSIB area through a service agreement with the Traditional Owner groups. This arrangement was seen as appropriate by many stakeholders, although some native title holder groups now want to begin to establish their own PBCs.

A further development seen by the reviews is the formation by all PBCs in one region of their own PBC peak body which seeks to manage their own affairs. While the success of any such development requires adequate resourcing and clarity of responsibilities, it nevertheless represents an option for future consideration.

The organisations who performed less effectively in relation to PBC support provided non-tailored support services and did not account for the variation of maturity and/or needs across the PBC cohort. These organisations also did not typically have a well-developed plan to identify how they would increase or improve the support provided going forward. While all reviewed organisations were often required to provide quite low level and administrative support to some PBCs due to their level of maturity, often the poorer performing organisations did not move beyond this to provide more strategic advice. Clients expressed dissatisfaction with the services NTRB-SPs provided when the service did not align with their needs, was insufficiently flexible, or where the NTRB-SP exhibited tight control and did not appear to support the development of the PBCs.

Most NTRBs noted that resourcing PBC support is difficult within current resourcing parameters and the pressure to achieve native title determination outcomes. Some NTRB-SPs have been active in tapping into alternate funding sources for additional capability building, economic development and engagement activity – these include through state governments and other federal government sources (for example, the Indigenous Advancement Strategy or the Commonwealth Department for Environment).

Figure 9 presents the scores and attribution for each NTRB-SP.

Figure 9 | Comparative performance for TOR 5: PBC Self Sufficiency



3.8 TOR 6 | Post-determination planning – Review and assess the adequacy of each organisation’s strategic planning for a post-determination environment.

The individual assessment of performance and attribution for each organisation against this ToR is captured in Individual Performance Summary Reports.

A number of organisations demonstrated substantial achievement in planning for a post-determination environment. These organisations had a clear strategy in place to become self-sufficient in a post-determination environment. This included a clear strategy to respond to the decreased availability of funding through becoming a smaller organisation, particularly where the organisation does not have wider functions or responsibilities than under the NTA. Strong performers were considering how to re-pivot towards whatever needs might arise across the region in relation to land use, and the adoption of a holistic approach to land rights, management and development.

Other organisations have had an initial consideration of the role they would play in a post-determination environment. This was not always as far along as would be expected by the high number of PBCs established. There is variation across the spectrum of what development is possible within the individual economic environments. In some cases there is a strong focus on business opportunities in the post-determination world, either on the NTRB-SPs own account and in some cases in partnership with PBCs.

The distinguishing factors that many of the more advanced organisations have demonstrated are:

- changes to their organisational structures to facilitate a ‘business arm’ that can operate on a more commercial basis
- strong investment of time and resources into developing the capabilities of the PBCs.

Across the reviews it was apparent that these factors tend to have been driven by strong Boards who provide high quality strategic direction for the future. Increasingly, other NTRB-SPs are considering these models as they transition to a post-determination environment. This is particularly the case for the ‘service provider’ organisations, that may not have the same historical connection to the community as the Land Councils.

The adequacy of planning for a post determination environment tended to correlate with the amount of progress made in determining claims in the RATSIB area. Organisations that still had significant years ahead for native title claims in their region did not have formal strategies in place for native title post determination. Although it was often an emerging priority, the reviews encountered some examples where there was limited planning alongside significant progress in native title.

Figure 10 presents the scores and attribution for each organisation.

Figure 10 | Comparative performance for TOR 6: Post-determination planning



4 Part B: Systemic issues identified across the reviews

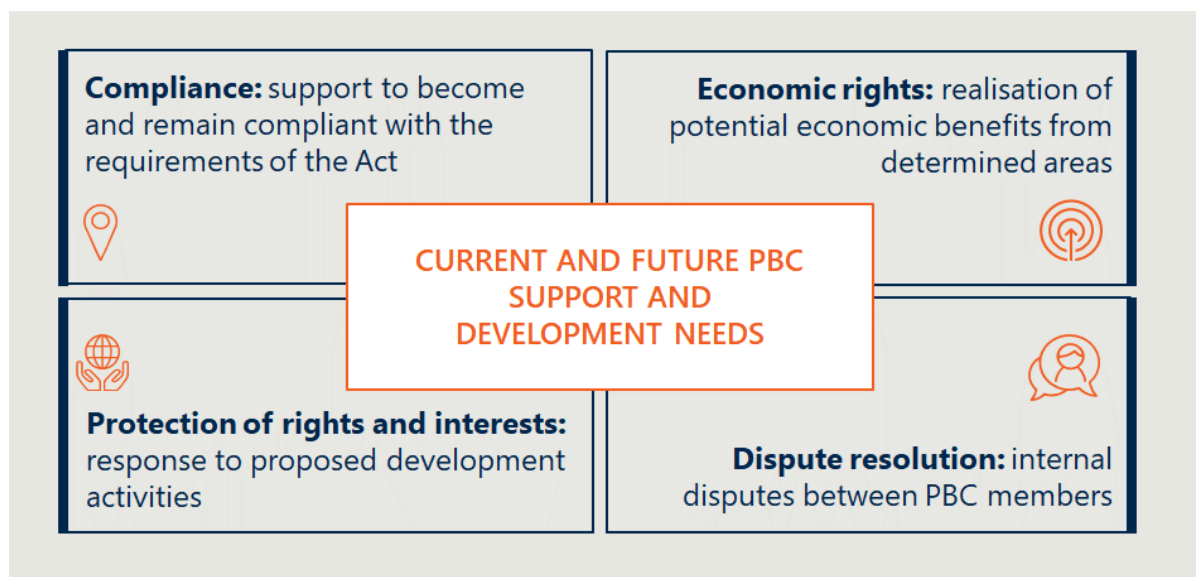
These reviews of the performance of the NTRB-SPs across Australia have provided an opportunity to ensure that taxpayer money is being well spent by assessing the extent to which the NTRB-SPs are achieving positive and sustainable outcomes for people who hold or aspire to hold native title. It has also been an opportunity to identify systemic issues that are present across the whole native title sector and that will be important in shaping outcomes achieved in the future. The issues pertain to native title holders, NTRBs and government.

The issues identified here have been informed through discussion with the NTRBs and their stakeholders as well as an understanding of good practice as it is occurring across individual organisations.

Ongoing Support for PBCs is fundamental to achieving positive outcomes from native title

PBCs are one of the key outcomes of the native title process. The corollary of this is that for the benefits of native title to be realised PBCs must be able to function at a level where they can both meet their requirements and respond to opportunities and threats to their determined areas. This is a complex set of needs – PBCs vary enormously in their ambitions, capacities, capabilities, opportunities and threats. Their need for support is correspondingly complex and multi-faceted. Figure 11 presents the key areas where PBCs need support both now and into the future.

Figure 11 | Areas in which PBCs need ongoing support to maximise the benefits of native title



The demand for PBC support services and the extent to which each NTRB-SP meets that demand varies considerably. On one side of the spectrum, there are PBCs who have very little reliance on the NTRB-SP in their region as they are able to draw in private assistance when they require it. The PBCs who require less government funded support tend to be those with more resources – although that is not always the case. The level of maturity and experience is also key to the extent to which PBCs are able to manage future acts and ILUA negotiations without support from the NTRB-SP.

At the other end of the spectrum are organisations who struggle to comply with their ORIC governance obligations and are not seeking out opportunities to grow and develop – often due to a lack of knowledge and experience. These organisations tend to be those who are least able to respond to any threats posed by proposed developments across their determined areas. These PBCs tend to rely entirely on support from their NTRB-SPs. They are also likely to be the PBCs with few to no resources. An ongoing source of

support and guidance will continue to be a requirement into the future to enable them to develop the capacity and capability to function effectively – and perhaps independently in time.

Between these two extremes are many PBCs who have some resources and ambitious dreams for what they would like to achieve. These organisations are fertile ground for provision of support towards realising their native title rights and interests.

Across the sector a number of models have evolved to respond to PBCs' development needs:

- The PBCs in one region have formed their own peak body to facilitate working together on key regional issues, seek funding and draw in the support they require. This requires a level of engagement and organisation that is well developed.
- Some NTRBs offer fee-for-service arrangements for PBCs within their RATSIB area. These services can range from operating compliance activities, to assistance in the response to future acts and negotiation of ILUAs. This model places more responsibility on PBC members to decide the supports they need and how to purchase them.
- A combined approach to PBC management and compliance activities across a number of determined claim groups.
- Some PBCs receive no support and do not remain in regular contact with their NTRB or any other service provider. The needs of this group are hard to ascertain.

Within this range of models of support there is an ever-present risk that PBCs who need support to protect their rights and interests may not receive services in an appropriate and timely manner. The consequences of this could range from mildly to extremely damaging.

All of these models have merit and the most appropriate future model is likely to be determined by local need and supportive relationships. It became clear during the reviews, however, that NTRB-SPs cannot expect PBCs to automatically use their services. In fact, there were accusations that some NTRB-SPs exploited their relative position of power to ensure that PBCs use the NTRB-SP's services. Other PBCs are grateful for the relationship they have built with the NTRB-SP and are extremely keen to retain their services. Yet others use private services who may or may not provide value for money.

Apart from the question of how PBC support is provided, there is also a question of how it is funded. Through the period of the reviews, the NIAA had a policy of providing around \$50,000 per PBC. Some NTRB-SPs passed these funds directly to the PBCs; others retained the money to fund the support they provide to PBCs through NTRB-SP staff and operations. It would be timely for NIAA to clarify the appropriate use of the PBC support funding – and to better understand the level of support required – to ensure its support is targeted towards activities that support PBC maintenance and development, across the range of capabilities and desired outcomes.

Differences in the requirements of PBCs make prescribing a consistent approach that delivers in line with stakeholder expectations across the sector challenging. There are, however, promising initiatives and practices referred to in the individual reports that can be a source of further insight and inspiration. There is also genuine interest within the sector to clarify the optimal pathways to successful PBCs whatever their aspirations for protection and realisation of other potential benefits.

AIATSIS has been working on describing and advocating for PBC support needs for some years. It has convened workshops with members of PBCs to explore support needs and run a PBC Support Officer network. In 2019 AIATSIS ran a PBC survey to get a broad understanding of support needs as they evolve. The Nous reviews found that many NTRB-SPs are not well connected with this work. The dissemination of guidance to PBCs and their support organisations could be improved, and the level of guidance could be built upon further. For example, AIATSIS have developed a good practice guidance to PBCs,⁶ and this could be more actively communicated to PBCs (including via NTRB-SPs).

⁶ The Prescribed Body Corporate (PBC) website provides information and resources for native title groups and corporations. See <https://nativetitle.org.au/>

Despite AIATSIS resources, observations across all the NTRB-SP initiated activities encountered through the review process suggests that a high proportion of support activities are focused on compliance with ORIC corporate requirements. Whilst this is important, it does not contribute to building skills in the core business of PBCs – proactive development and responding to future acts. The compliance activities therefore have a limited contribution to realising the benefits of native title.

A consolidated good practice guide could present a typology of PBCs and associated needs for each group. It could add to AIATSIS’s work in this space, by presenting a discussion of:

- principles for providing support
- a standardised assessment tool
- how to provide support for each type of support requirement (as presented in Figure 11)
- a pathway towards independence for different types of organisations.
- Such a guide would need to be developed through a consultation and co-design process.

There is a need for a nationally coordinated and strategic approach to native title in the post-determination environment

The work on realising the benefits of native title has well and truly begun. The reviews have demonstrated that the claims process is largely being well executed, with numerous learnings along the way. However, the post-determination phase is less well understood – at both the individual organisation and national levels. There are a range of specific issues that currently need attention. Figure 12 presents a summary of these issues.

Figure 12 | Issues that need a nationally focused strategic response



Further details on the strategic issues identified are as follows:

- Possible future amendments of the CATSI Act to remove barriers to smooth operation of PBCs.
- How to identify and implement good practice on big strategic issues like compensation and/or the prospect of applications for revised determination, including inserting additional members into the group with a successful claim.
- How native title interacts with state-based heritage protection legislation to generate specific environments in which agreements are made. The extent to which local agreements protect high-value sites covered by native title and an ILUA is a national issue. The destruction of Juukan Gorge is an example of how the interaction of state and federal legislation failed to protect a site of national and international significance. The agreement making for this specific example shows how *local*

circumstances can combine to leave specific sites vulnerable. It is clear that the Department of Agriculture, Water and the Environment is responsible for the implementation of the Environmental Protection and Biodiversity Conservation Act and the Aboriginal and Torres Strait Islander Heritage Protection Act. However the role of native title and the supporting mechanisms provided by NTRB-SPs and NIAA in this arena is not clearly articulated.

- The ongoing funding and role of NTRB-SPs in the post-determination era needs to be visualised, articulated and implemented. The reviews tend to suggest that NTRB-SPs are not only vital to achieving the rights and interests of native title but also after claims have been determined. They fill the gap where PBCs do not have the capability to respond to future acts, maintain compliance for many PBCs and troubleshoot for many PBCs as they progress towards independence. At present they also choose to progress specific sector-wide issues that are relevant to a post-determination environment – even where the claim has highlighted issues such as the need for compensation following circumstances where native title has been extinguished. Timber Creek is an example of this. These roles will continue to be needed for the foreseeable future. It is therefore important to develop a model and associated funding for how NTRB-SPs will be supported to continue to achieve these functions, even though they are not pursuing further determinations.
- The successful compensation claim at Timber Creek⁷ raises a key strategic issue for the sector going forwards. While there is still uncertainty about the nature and success of future compensation claims, the prevalence and extent of such claims is very likely to affect the demand for NTRB-SP core statutory services and require NTRB-SPs to broaden their traditional competencies. This also raises questions of the scale of funding required to perform native title services. Compensation claims depend on the past act, intermediate act and future act activity within each determined area and whether determinations are accompanied by ILUAs that address compensation matters. With analysis, forward thinking NTRB-SPs ought to be in a position to have a general idea of demand for compensation claim related services within their RATSIB area, noting that this could be an onerous task for large RATSIB areas or claims. Considering this issue during the tenure analysis phase of a determination would be most efficient, but it is not always a priority during such an intense period of work in a resource constrained operating environment.
- Changing legal precedents will continue to have an impact on the whole sector. An example of the potential influence of developing legal precedent on systemic issues in the native title context is the 2020 High Court Case *Northern Land Council & Anor v. Quall & Anor [2020]*. This case posed questions around whether the ILUA certification function of the NTA can be delegated from the Board of an NTRB to their Executive Officer. This could have far reaching impacts on the native title context.⁸ While the High Court overturned the Full Federal Court Decision that the Board of the NTRB-SP had to perform the certification function, the uncertainty about this function caused unrest for a significant period in the native title stakeholder community. Another example is the Lake Torrens determination⁹, where the Judge found that the court was not able to review anthropological research material as it undermined existing evidence from a previous determination. This decision has since caused inconsistencies in how NTRB-SPs engage external anthropologists. It is particularly unclear if an NTRB-SP can best represent the interests of its client(s) if it restricts research that could demonstrate traditional connection to Country. Given this dichotomy, a system response may be required.
- Variations or revocations of determinations are an uncertain feature of the post-determination landscape that will affect demand in the post-determination environment. There are many potential drivers and considerable uncertainty with both litigated and consent determinations likely to be susceptible. Consent determinations are more likely to contain errors if they have not been put through the rigours of trial evidence. This is particularly the case where state governments or territory take a more cooperative approach to consent determinations. In either consent or litigated cases new

⁷ *Griffiths v Northern Territory of Australia [2016] FCA 900*.

⁸ <https://www.ashurst.com/en/news-and-insights/legal-updates/high-court-says-yes-to-delegation-of-ilua-certification-function/>

⁹ *Starkey (on behalf of the Kokatha People) v South Australia; Anderson (on behalf of the Adnyamathanha People) v South Australia; Paige (on behalf of the Barnjarla People) v South Australia [2018] FCAFC 36*

evidence may come to light that support a variation. Changes in the common law may inspire applications. Compensation claims could also play a role.

These issues need to be managed at the national level. The current ad hoc approach allows the risk that some important issues will not be identified and acted upon.

Complaints about dis-enfranchisement need a system wide response

The most common and concerning complaint about NTRB-SPs the reviews encountered was the belief that the wrong people had been included in claim groups. The complainants reported that they had been left out and were therefore dis-enfranchised. While some claimants achieve recognition of their rights, for others the process is deeply disturbing, resulting in a public renouncement of the connection they believe they have with the land and their ancestors.

This dis-enfranchisement is perhaps a consequence of the NTA that was not foreseen but needs to be acknowledged. Throughout the reviews the team observed that for many complainants and NTRB-SPs the process is now at a stalemate. Many complainants are pursuing their issues directly through the NIAA. However, no constructive way forward has been identified. NTRB-SPs generally have evidence to back their decision while the complainants sincerely believe that they have been dis-enfranchised.

The reviews found that NTRB-SPs have varying policies for assistance and facilitation. While many assistance and facilitation decisions that NTRB-SPs made were appropriate, this was another way in which clients could be dis-enfranchised. There is an inherent conflict between the NTRB-SPs incentives to achieve native title outcomes efficiently and the time it takes to negotiate the complexities of who should be recognised as Traditional Owners of land under the NTA. A consistent approach to assistance and facilitation policies would be useful but would have to be developed carefully to avoid gaps in outcomes for particular clients, resulting in further dis-enfranchisement.

NTRB-SPs, the relevant state governments and NIAA need to work together to explore a way forward that recognises the genuine interests of the disenfranchised.

As claims activity decreases NTRB-SPs will need to consider how to resource and sustain their activities in the future

As the post-determination landscape draws near NTRB-SPs need to plan for future changes. No proactive action means they are likely to remain reliant on what is likely to be smaller allocations of government funding with changing requirements. Another option is to consider how to position themselves for future functioning on a fee-for-service basis. Where NTRB-SPs decide not to pursue commercialisation they also need to plan for down-sizing. Many NTRB-SPs are not actively considering their business interests in a post-determination environment and others are working in direct competition to PBCs.

Some organisations have created separate corporate entities to conduct commercial activities. This allows for a clear separation between native title and non-native title activities and provides a transparent avenue for pursuing business interests. Others clearly state preferred supplier arrangements through which they pass work to other Indigenous controlled organisations. Still others conduct all their business from the NTRB entity. This latter approach can have the effect of compounding suspicion of the organisation, particularly where there is a lack of transparency.

Some NTRBs are deliberately refraining from developing a strong economic base for the post-determination era because it would place them in competition with PBCs. This is particularly playing out in the provision of heritage services. Where the NTRB gets the work, it means that the relevant PBC has not got the work. This is an important issue to be considered by the government in determining how it will require the NTRB-SPs to build capability among PBCs.

Solutions are required to ensure the return of cultural materials at the end of the claim period

There is no consistent or easy process to return cultural material and connection evidence to PBCs at the conclusion of native title claims. This was identified by many stakeholders to the reviews reporting frustration at the refusal of an NTRB-SP to return research materials.

This is a complex area of law and there are numerous considerations concerning repatriation of information, especially where content is sensitive and personal in nature. Some stakeholders noted that many who request information about claims are not the Elders who assisted to develop the evidence, but the younger generation 'with questionable motives'.

An associated issue is the storage of documents under the care of NTRB-SPs. Most have large holdings of documents that need to be archived and stored so they do not deteriorate. At present no NTRB-SP has the resources to fulfil this function to a standard that ensures the documents are safe or protected from weather events. Ideally records need to be stored in physically secure spaces that are environmentally controlled within archival specifications.

In addition to physical infrastructure, NTRBs also need to build and sustain organisational capability to arrange and describe the records as well as creating a system of access that recognises and protects individual and group rights to the materials.

Steps have been taken by NIAA in partnership with the NTRB-SPs to address this issue, with one NTRB-SP receiving Australian Government funding to work with two PBCs to find the most appropriate way to return and manage the files, records and cultural materials collected during the native title claim process. This is an issue faced by all NTRB-SPs and it needs strong leadership across the whole sector if a common solution or set of solutions is to be found.

AIATSIS has also conducted preliminary work on the issue, publishing 'Managing Native Title Information'¹⁰ in 2015 with some ongoing work on the issue since then. However, no clear and consistent approach has been developed and adopted.

Claims that cross RATSIB boundaries or state borders are complex and expensive, and will be more prevalent in coming years

Traditional boundaries do not align with modern jurisdictional boundaries, meaning Aboriginal and Torres Strait Islander communities are unable to 'easily' submit a claim that covers the entirety of eligible land. Several NTRB-SPs noted it is difficult to advance claims that straddle inter-state or inter-RATSIB area boundaries where there is limited collaboration between the relevant NTRB-SPs. An NTRB-SP can only act for a claim covering multiple RATSIB areas when it has a written agreement with the other relevant NTRB-SPs, and agreements must be made around the use of intellectual property and meeting the cost of advancing the claim.¹¹ Additionally, for interstate claims, negotiations must be held within each jurisdiction and face two respondent states – each with their own standard for evidence. Organisations are reluctant to participate in this negotiation due to its complexity and already intense competition for funding.

Funding issues remain a challenge

Particular recurrent issues that are seen to create barriers to effective outcomes include:

- Short funding cycles that create uncertainty and make strategic planning more difficult.
- Concerns from NTRB-SPs that the way funding is allocated does not properly account for demand and cost variables. Demand is impacted by size of the RATSIB area, number of active claims, number of claims yet to be lodged, number of PBCs to service and level of future act activity. Notable factors that affect cost of service delivery include remoteness of land within a RATSIB area, cohesion of intra-indigenous disputes, state government policy and state legislation. Over the medium- to long-term the lack of strategic development in stretched organisations will mean that post-determination issues receive less attention and are therefore likely to be less successfully designed and implemented.
- There is an opportunity for performance reporting to the NIAA to focus more strongly on the outcomes achieved for clients, as opposed to focusing primarily on outputs (such as the registration of a particular claim or the number of claims briefed out). This output focus means that there does not appear to be a mechanism through which either the NTRB-SPs or NIAA can readily assess the extent to

¹⁰ McGrath, Dinkler, Andriolo, 2015 Managing Native Title Information, AIATSIS.

¹¹ NTA s 203BD.

which the outputs reported in NTRB-SP Operational Plans and performance reports are achieving the overall aims of the program for native title holders.

5 Glossary

Throughout this document, the following terms have the meaning prescribed here.

| Term | Meaning |
|--|---|
| Applicant | Any person or persons who have been nominated as the selected representative(s) of a native title claim group in native title or future act determination proceedings. |
| Client | Any individual or group being provided assistance by an NTRB-SP (including assistance with claims, research and/or PBC support). |
| Connection evidence | Evidence to establish 'connection' held by 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 assertion of sovereignty by the British 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 allows Aboriginal and Torres Strait Islander groups to form Aboriginal and Torres Strait Islander corporations. |
| Determination | A decision by an Australian court or other recognised body that native title does or does not exist. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination). |
| Extinguishment | Occurs when Australian law does not recognise native title rights and interests because of legislative or common law precedent. Extinguishment can be whole or partial. |
| Future act | A legislative or non-legislative act in relation to land and/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. |
| IAS | Indigenous Advancement Strategy, the grant funding round of the Indigenous Affairs portfolio within the Department of the Prime Minister and Cabinet. |
| 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 ILUA are determined by way of negotiations between native title holders and other interest holders (such as the state). These negotiations are often facilitated by NTRB-SPs. |
| Intramural disputes | Disputes over native title land already determined. |
| National Native Title Tribunal (NNTT) | <p>An independent statutory body established under s 107 of the <i>Native Title Act</i> to assist people in resolving native title issues by:</p> <ul style="list-style-type: none"> • 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 • helping people to negotiate ILUAs. <p>The NNTT also maintains a database of native title applications and determinations (including information on future acts and ILUAs).</p> |

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| 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 (<i>NTA</i> s 223). |
| <i>Native Title Act 1993</i> (Cth) (NTA) | The <i>Native Title Act 1993</i> (Cth) (NTA) established the procedure for making native title claims and is the primary piece of Commonwealth 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> . |
| Native Title Service Provider (NTSP) | Organisations funded by the Australian Government to perform the same functions as NTRBs in areas where NTRBs have not been recognised. |
| 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. |
| Post-determination | At a claim level, refers to the period following a determination that native title exists. At an NTRB-SP life cycle level, refers to the period following the resolution of all active claims within a RATSIB 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 represent them and 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. This means that the application becomes a registered claim. |
| Representative Aboriginal/Torres Strait Islander Body area (RATSIB area) | The area in which an NTRB-SP performs its functions. |
| Terms of Reference (TOR) | Refers to the Terms of Reference provided by PM&C which govern the scope of the project. |
| Traditional Owners (TOs) | Individuals of Aboriginal or Torres Strait Islander descent who have certain rights and responsibilities in relation to an area of land or sea. |