

Review of Performance as a Native Title Representative Body: Northern Land Council

Summary Report

March 2021

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This review covered the period from July 2016 to June 2019. Findings relate to this time period unless otherwise stated. Nous conducted the review between January 2020 and July 2020.

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1 About the review

The National Indigenous Australians Agency (NIAA) commissioned this review as part of a series of reviews to assess the efficiency and effectiveness of 14 Native Title Representative Bodies and Service Providers (NTRB-SPs) in carrying out their functions under the *Native Title Act 1993 (Cth)* (herein NTA). The complete Terms of Reference (TOR) provided for the Review are included in Appendix A. The 14 organisations reviewed are listed in Appendix B.

Northern Land Council (NLC) was reviewed in the third and final tranche of NTRB-SPs, between January 2020 to October 2020 in relation to a three-year review period from July 2016 to June 2019. Findings and recommendations represent an assessment of performance at the time of the Review and have not been subsequently amended or updated.

In addition to the individual reports, Nous Group (Nous) has developed a de-identified comparative report which considers the performance of all the organisations across the TORs. The report presents a discussion of systemic issues within each TOR that arose in all or most of the organisations across all tranches of the Review and that are pertinent to the broader native title system.

Nous has used a consistent methodology to support a comparative and transparent assessment of NLC and the other NTRB-SPs. The methodology used a mixed method approach including quantitative data on the progress of claims, future acts and Indigenous Land Use Agreements (ILUAs), performance against milestones, budgetary performance, staffing, and broader social and geographical factors that impact performance. The quantitative analytics was complemented by interviews with selected and available clients, potential clients, staff, the Federal Court, the National Native Title Tribunal (NNTT), NLC Full Council members and the Northern Territory (NT) Government. A list of stakeholders consulted is included in Appendix C.

NLC has been given the opportunity to review the report and provide responses on the recommendations made by the Review and has also provided written responses on actions they are taking in response to recommendations made by the Review, which are included in this summary document. A complete description of the methodology is included in Appendix D.

2 Profile of the NLC

The NLC is based in Darwin and provides services to communities in the Top End of the Northern Territory

Under the NTA, the NLC is the recognised Native Title Representative Body (NTRB) for the Northern Territory representative region (including Tiwi Islands and Groote Eylandt). Native title operations are one function among several carried out by the NLC and comprise approximately 15 per cent of its total activity. The NLC was established in 1974 and, two years later, became an independent statutory authority of the Commonwealth under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA). The NLC has also established the Top End Default Prescribed Body Corporate/Community Living Areas Aboriginal Corporation (TED PBC). This organisation is the agent Prescribed Body Corporate (PBC) for all native title holding groups with positive determinations of native title in the Representative Aboriginal/Torres Strait Islander Body (RATSIB) area.¹



The NLC RATSIB area covers approximately 1,140,323 square kilometres, of which 571,733 square kilometres is land and land waters.^{2,3} 206,513 square kilometres of the NLC's RATSIB area is 'Aboriginal Land' through the ALRA, equating to 18 per cent of the NLC's RATSIB total area and 36 per cent of RATSIB land area.⁴ Of the remaining land in the RATSIB area approximately:

- 175,209 square kilometres of the region has been subject to a positive native title determination – approximately 31 per cent of total land area.
- 45,697 square kilometres of the region have been assessed as non-claimable (44,737 square kilometres) or been subject to a negative determination (960 square kilometres) by the NNTT – approximately eight per cent of total land area.
- 48,539 square kilometres of the region are areas subject to an active claim – approximately 8.5 per cent of the total land area.
- 76,789 square kilometres of the region is currently subject to research under 203(BJ) of the NTA – approximately 13 per cent of the total land area.

Therefore, approximately 25 per cent of the total land area has not yet been determined (excluding land that has been determined to be 'Aboriginal Land' under ALRA).

There have been 72 positive determinations of native title within the NLC RATSIB area since the passage of the NTA, four of which occurred between 2016/17 and 2018/19 (the 'Review period').⁵ The NLC was the solicitor on record for client groups in all these determinations. There were 25 active claims in the NLC RATSIB area awaiting a determination as of 30 June 2019.

¹ NLC Executive Council Meeting Agenda Paper: Legal, Native Title Report (29/04/2020).

² Flood waters, rivers and creeks – not sea water.

³ Map prepared by the NLC for the purpose of this Review (22/05/2020).

⁴ Revised map prepared by the NLC for the purpose of this review (24/09/2020), refers to land claimed under the ALRA.

⁵ NLC Annual Report 2018/19.

3 Findings and recommendations by TOR

The following sections of the report provide a summary of NLC's performance against the TORs for the Review.

3.1 TOR 1.1 | Review and assess each organisation's 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.

Within the three-year period (July 2016 – June 2019), the NLC has achieved four consent determinations of native title and has filed six native title applications. This is a lower output than the NLC has typically delivered over previous years. While the volume of determinations achieved has been modest, a deliberately strategic approach to litigation has supported some determinations that have had a significant impact on native title rights and interests more broadly. The decision to pursue strategic litigation has meant that there have been fewer resources to devote to achieving native title determinations for specific claim groups.

During the Review period, NLC lawyers and anthropologists working in cross-divisional teams stood up in response to specific claims. Legal strategy and operations appear to be working efficiently and collaboratively with the other native title related functions including anthropology to prosecute claims.

The NLC anthropology unit supports native title claims using external expert anthropologists. There were areas identified to improve the quality of anthropological work – including introducing an improved peer review process. There has been significant investment in the organisation and storage of materials; however, policies for the return of cultural and connection materials remains to be clarified.

The NLC's approach to future acts is to refer them to the Aboriginal Sacred Sites Authority, and therefore relies upon the protections provided by the Aboriginal Areas Protection Authority (AAPA); however, this protection is not adequate in all instances. Due to its approach, over the Review period, the NLC has not consistently delivered the notification function under the NTA and therefore may not have achieved benefits for clients in all instances. This has led to a level of stakeholder dissatisfaction as events occur on their country without their prior knowledge. Clearer accountabilities are required to ensure consistent delivery of future act functions – including clearer roles and responsibilities, and handover points both within NLC and to the external parties to ensure benefits are realised for those with native title interests. The NLC has recently made changes to clarify and improve processes around future acts which may address some of these deficits.

NLC has negotiated few ILUAs during the Review period, partly due to few large developments and partly due to its preference for using the right to negotiate through s29 notices. This is a different strategy to the one adopted by other NTRB-SPs, although the Review has no evidence that this has compromised outcomes for native title holders.

While there are some attribution factors for the NLC's performance, collectively these have not significantly inhibited the NLC's ability to achieve native title outcomes for its clients.

Compared to previous periods during the Review, the NLC delivered fewer though more significant determinations

During the Review period, the NLC achieved limited native title outcomes for clients.

Since the introduction of the NTA in 1993, the NLC has achieved 75 positive determinations of native title.⁶ This equates to the NLC supporting an average of eight determinations each three-year period. Within the three-year review period (from 1 July 2016 to 30 June 2019), the NLC's output has been more modest. Over this period the NLC:

- filed six native title applications
- supported achievement of four determinations of native title over township areas (approximately 36 square kilometres in total) for clients, all of which have been achieved through a consent determination
- successfully ran a compensation claim – this was the first successful litigated compensation claim in Australia (litigation has been used strategically to achieve significant native title outcomes, set legal precedents and enhance the rights and interests of native title holders).

When assessing the NLC's performance, the modest output should be balanced against the nature of the determinations delivered. The NLC has reported that several claims were de-prioritised to pursue test cases with wider application.

The NLC's stakeholders, including executive and management staff, and external stakeholders identified that NLC used litigation to achieve higher quality native title outcomes for clients. The positive result of these cases provided significant benefit to clients of the NLC, with this precedent allowing NLC to obtain higher quality native title outcomes for clients within its RATSIB areas. These benefits are yet to be widely realised across native title holders in the RATSIB area.

During the Review period, NLC adopted an approach that prioritised strategically important matters. This coincided with unanticipated developments such as the Federal Court's dismissal of 27 polygon claims and protracted discussion between NLC, the NT Government and pastoral lease holders about the form of determinations of native title over pastoral leases. The combination of these factors has meant that NLC has had a modest output of claims over the Review period. It is interesting to note that claim times for 'active' claims (excluding polygon claims) for NLC are not significantly different to those of other NTRBs, and so the impact of this prioritisation approach has not had a significantly detrimental impact.

While distinct from the approach taken by many other NTRB-SPs, the Review believes this approach was appropriate in the context in which NLC operates. In particular, the benefits that have been secured have broad significance within the NLC RATSIB area, as well as nationally (in the instance of the compensation claim). Additionally, given the NLC's operating context, where native title is not the sole source of land recognition, the strategic decision to prioritise the longer-term benefit of gaining extended rights for many, over gaining immediate rights for a few, is an appropriate strategy.

However, for many native title claimants, this approach has meant the delayed achievement of their native title. The Review spoke with many claimants who indicated they had been waiting a very long time for their native title matters to be finalised. Generally, there was no clear understanding on the reasons for this.

⁶ Over the organisation's history within the RATSIB area, only two clients of the NLC were subject to two determinations that 'native title does not exist'. Neither of these determinations occurred during the three-year review period.

At the end of the Review period there were a large number of active claims in the region – including both ongoing polygon claims and claims aimed at having native title rights recognised

As of the 30 June 2019, the NLC was supporting 25 active claims in the system. This includes 13 'polygon claims' that aim primarily at securing the right to negotiate in response to a projected development. Another 12 more pro-active claims intended to have native title rights recognised.

The presence of polygon claims means the NLC's claims load is significantly older than most other NTRB-SPs

Currently, active claims sit across a range of age profiles. There are a large number of claims that have been active for an extended period of time, with nearly half of the active claims being active for more than eight years. NLC's claim profile is older than most other NTRB-SPs.

The NLC's previous strategy of lodging polygon claims over pastoral land accounts for the number of cases that have not yet been determined.⁷ Though a large number of polygon claims were dismissed in 2017, the court did grant a small number of claims additional time to finalise future act negotiations. These 11 cases remain part of the NLC's active claims caseload and constitute all the claims that are over eight years old.⁸

Stakeholders have reported that prior to 2013, the Federal Court estimated the median time across Australia for claim resolution was 12 years and 11 months. Since 2013, the Federal Court nominated a claim resolution target of five years. Excluding polygon claims, during the Review the NLC had an average claim length of three years, meaning they are already meeting this target.

Recommendations for TOR 1.1

The Review made seven recommendations for TOR 1.1 relating to native title outcomes achieved for clients. These are outlined below, as well as NLC's response to these recommendations.

Recommendation 1

The NLC should consider implementing a formal mechanism to collect client feedback on native title outcomes and processes.

NLC response.

The NLC receives a significant volume of feedback on an ongoing basis about native title outcomes and processes. The NLC is developing more formal mechanisms for collecting this feedback, assessing it, and feeding the results of the assessment back into the NLC's practices.

Recommendation 2

NLC should strengthen, clarify and confirm the processes for peer review and quality assurance for connection reports and anthropological research that supports native title.

NLC response.

The NLC will revisit, strengthen and formalise its processes for peer review and quality assurance of connection reports and anthropological research to ensure that it continues to generate native title connection materials of the highest standard.

Recommendation 3

The NLC should develop a clear policy document for the return of materials to native title holders to ensure there is a clear process to support contested claims and access to materials for newly established PBCs in the RATSIB area.

NLC response.

⁷ NLC (2020) 'Report – Nous Group Review of the NLC's performance as a NTRB'. Prepared for Nous for the purposes of this Review.

⁸ NLC (2020) 'Report – Nous Group Review of the NLC's performance as a NTRB'. Prepared for Nous for the purposes of this Review.

Though they may raise related issues, the NLC regards the orderly post-determination repatriation of claim materials as separate from decisions about providing contesting claimant groups with access to documents. In each case, the NLC is developing formal policy frameworks that will provide NLC officers and external stakeholders with greater clarity. In the interim, all requests received from native title holders to access claim materials will be continue to be handled by NLC lawyers, with the advice and assistance of NLC anthropologists where required.

Recommendation 4

The NLC should take immediate action to remedy its approach to future acts to ensure it is delivering on its legislative responsibilities under the 'Notification Function' of the NTA.

NLC response.

In early 2020, the NLC commenced an internal review of its approach to future act matters including notification and negotiation processes and procedures. The review resulted in the development of a documented workflow for receipt, notification and response to future act functions across the NLC. This has informed the creation of clearly defined handover point and accountabilities for each of the NLC's receipt, notification and response to future act notifications. Relevant members of NLC staff have since received training about the new future act processes and procedures.

Recommendation 5

The NLC should engage with AAPA to confirm respective roles and responsibilities and develop an agreed process for the response to future acts. This will help ensure appropriate protections are optimised through the NTA and Sacred Sites Protection Act.

NLC response.

While respecting each other's complementary but distinct statutory roles, the NLC regularly engages with AAPA in seeking to ensure that both organisations are efficiently applying their resources in relation to sacred site protection. This engagement currently includes discussions about improved future act processes, information access, and sacred site agreements. The NLC will continue to work with AAPA in this regard.

Recommendation 6

The NLC should further improve its future act processes by documenting and implementing a clear process for the receipt, assessment, notification and response to future act notifications. This should include:

- clearly defined role and responsibilities
- clarification of handover points between internal NLC team/roles
- confirmation of who is ultimately accountable for this function.

NLC response.

As stated in response to Recommendation 4, in early 2020, the NLC commenced an internal review of its approach to future act matters including notification and negotiation processes and procedures. The review resulted in the development of a documented workflow for receipt, notification and response to future act functions across the NLC. This has informed the creation of clearly defined handover point and accountabilities for each of the NLC's receipt, notification and response to future act notifications. Relevant members of NLC staff have since received training about the new future act processes and procedures.

Recommendation 7

NLC should finalise and endorse its approach to internal review of native title matters (within its broader complaints policy). This should include clarification of responsibility for internal review and escalation processes available to external review. NLC should ensure this information is published and available to clients in an accessible way (in line with requirements under the NTA).

NLC response.

The NLC intends to complete and operationalise its policy framework regarding internal review of native title matters.

3.2 TOR 1.2 | Review and assess each organisation's 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: whether the organisation's assessment and prioritisation of applications are equitable, transparent and robust.

Summary

NLC has adopted an assessment and prioritisation approach which focuses on strategically important claims. This can be seen as occurring at the expense of progressing a larger number of claims and more complex claims; however, it is an appropriate approach given the specific context of the Northern Territory and because it has been successful in supporting better quality native title outcomes for clients (in the long term).

Compensation claims have also been prioritised over the Review period, with the intentional selection of matters establishing precedent which will be important for future compensation matters in the Northern Territory and nationally. This positions NLC as a leader in this area.

Aside from strategic matters, NLC's approach to claims has been predominately driven by the Federal Court schedule. The removal of polygon claims has further increased pressure to respond to pending developments and limited NLC's ability to progress claims in line with its own assessment and prioritisation approach.

Though NLC has received relatively few requests for assistance during the Review period, its approach is more inclusive and less selective than other NTRB-SPs, including a willingness to fund competing claims where they exist.

Over the Review period a formal prioritisation policy was not in place and it is not clear that key decisions were documented; however, NLC has developed a draft policy for future requests for assistance. This should be finalised and communicated to ensure both staff and clients are aware of the approach taken by NLC.

Recommendations for TOR 1.2

The Review made four recommendations for TOR 1.2 on the organisation's decision making, assessment and prioritisation process. This is outlined below, as well as NLC's response to this recommendation.

Recommendation 8

The NLC should improve the clarity and transparency of its decision-making process through documenting its decisions on the strategic approach it has taken and will take going forward to progressing and directing resources to native title claims. This should clearly outline who is responsible for each level of decision-making.

NLC response.

The NLC will review the manner in which it documents decisions about the strategic direction of the NLC's native title practice. The NLC will develop a workflow document that clearly identifies the roles and responsibilities of governing committees and relevant staff members in the making and implementation of native title decisions.

Recommendation 9

The NLC should further refine and finalise its draft Applications for Assistance policy. This should ensure it outlines factors considered in the initial decision to provide assistance (or not) and considerations related to prioritisation of different claims/matters.

NLC response.

The NLC will finalise its Applications for Assistance policy, having regard to the comments of the Nous Group and other stakeholders it has consulted in the course of preparing the policy.

Recommendation 10

The NLC needs to more clearly communicate its prioritisation process externally to ensure stakeholders have a clear understanding of how claims are assessed and prioritised. This should outline, at a high-level, the key decision-making factors used by NLC.

NLC response.

The NLC regularly meets and communicates with representatives of key external stakeholder groups, including the Federal Court, Northern Territory Government, Northern Territory Cattlemen's Association, Minerals Council of Australia, and Association of Mining and Exploration Companies. These regular communications serve a variety of purposes, including the assistance of stakeholders in their understanding of the basis of the NLC's assessment and prioritisation decisions regarding new claimant applications and other native title matters. The NLC will work on making these communications clearer and more helpful.

3.3 TOR 1.3 | 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: whether the organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with clients, persons seeking assistance and persons refused assistance.

Summary

The NLC has an established approach for how it supports culturally appropriate and respectful engagement through its native title work. Cultural competency practices are embedded into the organisation's practices and policies in a tailored and appropriate manner. The organisation also has a longstanding history of working directly with the community (through native title and more broadly). Stakeholders report that the NLC generally engages respectfully and professionally with clients.

Areas of improvement identified include transparency around claim group meetings and outcomes, the consistent use of translators, consideration of law and customs, and the breadth of stakeholder engagement around important decisions.

Client understanding of native title was relatively low, including with respect to their rights and interests and NLC's approach to decisions. More direct support from NLC in this area would be beneficial for clients.

Recommendations for TOR 1.3

The Review made two recommendations for TOR 1.3 on the organisation's approach to supporting clients. This is outlined below, as well as NLC's response to this recommendation.

Recommendation 11

The NLC should review (and if appropriate formalise) its approach to the use of translators, consideration of law and custom, and breadth of engagement to ensure appropriate practices are in place to support culturally appropriate engagement and all appropriate stakeholders are included in decision making.

NLC response.

The NLC is committed to continually reviewing and improving its approaches to engaging with native title holders, including through the use of translators. The NLC has a long and proud history of working in a culturally-sensitive manner with its diverse Aboriginal constituency. Over the past 45 years, the NLC as a Land Council has been consulting with groups of traditional Aboriginal owners about matters under the ALRA. Most groups have processes under their traditional laws and customs that must be complied with in making decisions about such matters. Similarly, most native title holding groups within the NLC's representative body area have processes under their traditional laws and customs that must be complied with in authorising native title applications and making other decisions under the NTA. Within the NLC, knowledge about and support for traditional decision-making processes is generally very strong.

Recommendation 12

The NLC should assess its approach to informing community about native title. This should include both principles of native title generally, as well as ongoing explanation of the particular rights and interests from specific claims.

NLC response.

In 2020, the NLC began developing a suite of new native title information and consultation materials about subjects such as:

- native title over towns
- native title over pastoral leases

- prescribed bodies corporate
- future act processes
- mineral and petroleum exploration and extraction.

The NLC intends to have materials recorded and translated into relevant Aboriginal languages and make them available on the NLC website.

3.4 TOR 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.

Summary

There are three primary drivers of cost for the NLC – staff costs, consulting costs and costs for claim group meetings. Actions have been implemented by NLC to deliver cost-savings in the delivery of native title functions across these areas – in particular, to deliver claim group meetings in a more cost-effective manner.

The delivery of other functions creates efficiencies for native title funding, with relatively low allocation of management and corporate costs to native title funding. NLC's use of external consultants is very high when compared to other NTRB-SPs over the Review period, in part reflecting the significant focus on litigated matters. There may, however, be opportunities to re-balance this.

The fixed factors that drive costs for the NLC are its vast geography and the proportion of remote land in its RATSIB area necessitating high travel costs. These may decline if regional offices are further developed.

No recommendations were made for TOR 2

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

Summary

In line with NIAA requirements, the NLC reports on progress against agreed milestones. While NLC generally meets these reporting requirements, it has not submitted all reporting to NIAA on time during the Review period.

The NLC does not use other approaches to monitor the performance of its native title functions; however, staff have acknowledged that there may be opportunities to better track and monitor native title performance going forward.

Recommendations for TOR 3

The Review made one recommendation for TOR 3 on the organisation's monitoring of key performance indicators. This outlined below, as well as NLC's response to this recommendation.

Recommendation 13

NLC should develop an approach to more effectively and appropriately monitor its performance in delivering native title functions under the NTA. This should support reporting to Executive Council, Full Council and senior management, and feed into a continuous quality improvement approach.

NLC response.

The NLC is currently updating its approach to internal monitoring of and reporting on performance of native title functions under the NTA. This updated approach will involve:

- significantly increasing education within the NLC about the NTA and the NLC's native title functions
- ongoing, regular reporting to the NLC Full Council, Executive Council and senior staff regarding the NLC's performance of its native title functions
- improving levels of support for strategic decision-making by the NLC Full Council, Executive Council and senior staff
- integrating and automating milestone reporting to NIAA on milestones
- measuring progression towards broader strategic objectives of the organisation
- incorporating client feedback in assessment of performance
- using reporting and performance-monitoring mechanisms to continuously inform and improve the NLC's performance of its functions and delivery of native title outcomes for clients.

3.6 TOR 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.

Summary

The NLC is a corporate Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (PGPA), and as a result the NLC’s Chair and the CEO are the accountable authority who must work together to manage the NLC’s obligations and duties, including performance of its native title functions. Both the Executive Council and Council represent the whole region for a wide range of functions and had limited involvement in native title matters during the Review period. More recently, there are signs that the Executive Council is taking a more active role.

Responsibility for delivery of the native title functions is distributed across different parts of the organisation, but primarily sits with the native title legal team. Recent structural changes have improved the effectiveness of delivery of native title functions, however, there is still some unclear responsibility for future acts and post-determination support. NLC has also put in place a specialised legal practice model, although recruitment challenges have meant this has not yet been fully implemented.

Financial management of NLC’s native title functions is embedded within the organisation’s broader financial management responsibilities and appears appropriate. Conflict of interest processes are also appropriate and have been implemented at a claims level during the Review period due to competing claims.

The NLC had a formal External Complaints Policy in place during the Review period, however, has since developed a new draft policy: there is limited understanding from clients on how to make a complaint. There are opportunities to formalise and finalise key organisational policies to ensure consistent decision-making and implementation across various areas of NLC’s work.

Recommendations for TOR 4

The Review made one recommendation for TOR 4 relating to organisational governance structures, policies and practices. This is outlined below, as well as NLC’s response to this recommendation.

Recommendation 14

The NLC develop, document and implement a formal decision making and escalation process to sit beneath the CEO’s delegations and outline clear responsibilities for each level of management.

NLC response.

As stated in response to Recommendation 8, the NLC will develop a workflow document that clearly identifies the roles and responsibilities of governing committees and relevant staff members in the making and implementation of native title decisions.

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

Summary

The NLC operates a single PBC for all native title holders in its RATSIB area known as the TED PBC. This entity performs the administrative functions required under the NTA for all determined claims at no charge to native title holders. The intention of this is to eliminate the administrative burden for native title holders, many of whom may not have the knowledge and skills to operate a compliant PBC. Most external stakeholders support this approach as appropriate.

The NLC reports that it informs claimants as they approach determination dates of a range of options to fulfil their obligations under the NTA; however, to date no independent PBC has been stood up at determination stage. During the Review period, the NLC has worked with two groups to establish Aboriginal Corporations through the ORIC legislation and it is intended that these will become PBCs. At present, funds generated through ILUAs are paid to the NLC. NLC report that they are encouraging interest holders to develop alternative payment mechanisms. This is an important step in realising the NTA goal of fostering independence.

Most clients contacted by the Review did not have a strong understanding of the functioning of a PBC and native title holders’ legal obligations. Many reported that they had had no contact from the NLC since their determination.

The NLC does not have a systematic or proactive approach to working with native title holders to assess and, where appropriate, develop further capability towards independence. NLC reports that groups are supported by NLC lawyers where they have clear ideas for development. The corollary of this is that those groups without articulated plans receive no support to consider their options and embark on further development if appropriate. The strategy of employing future acts lawyers and anthropologists is unlikely to address this deficit as it is still reactive rather than proactive.

Targeted changes could support an improved approach to supporting native title holders following claim determination. This includes the establishment of a service model to ensure a consistent approach to supporting clients. While self-sufficiency is unlikely to be viable for all native title holder groups, the NLC should more actively consider opportunities for native title holders to transition to self-sufficiency (including through the establishment of a standalone PBC) where appropriate.

Recommendations for TOR 5

The Review made two recommendations for TOR 5 on its PBC support model. This is outlined below, as well as NLC’s response to this recommendation.

Recommendation 15

The NLC should establish a service model for how it will support native title holders following their determinations. The service model should consider opportunities to better support clients’ transition from a claim matter to post determination.

NLC response.

The NLC recognises that, across Australia, the role of NTRBs is evolving with the ongoing growth in the numbers of determined native title claims and appointed PBCs. The NLC is committed to developing and delivering capacity development services to support native title holders in the post-determination environment, whether they nominate the TED PBC or a stand-alone PBC to be their RNTBC. Those services include supporting native title holders to:

- develop and maintain sound corporate governance skills and systems
- make informed native title decisions
- strategically pursue cultural, economic and social goals and aspirations.

Recommendation 16

Ensure the NLC has appropriate structures and staff with the required skill sets and experience to implement the service model.

NLC response.

Drawing on advice from other NTRBs, and having regard its experience in administering the ALRA, the NLC is exploring appropriate structures to deliver services to native title holders consistent with its commitment to post-determination capacity development as set out in response to Recommendation 15.

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

Summary

The NLC's planning for post-determination is immature, with no formal strategy in place for the organisation's role in a post-determination environment and no clear responsibility within the organisation for strategic planning for the native title function. Consideration of this should be included in the NLC's broader future strategic planning activities.

There is also no clear process in place to monitor and assess the maturity of claims.

Conversely, as discussed in TOR 1.1, the NLC is well progressed in developing and leading successful compensation claims.

Recommendations for TOR 6

The Review made one recommendation for TOR 6 on the organisation's strategic planning. This is outlined below, as well as NLC's response to this recommendation.

Recommendation 17

The NLC should ensure that future strategic planning activities actively consider the role (or a set of potential roles) that the NLC will play in a native title post-determination environment.

NLC response.

As stated in response to Recommendations 15 and 16, the NLC is committed to exploring appropriate structures to deliver advice and resources to assist native title holders with post-determination planning, capacity building and community development.

Appendix A Terms of Reference

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 NIAA.
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 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 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 NIAA 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 five individual reports.

Appendix B NTRB-SPs under review

A total of 14 NTRB-SPs were reviewed in three tranches using the same methodology and approach. For each Review tranche, a three-year period was in scope for the review – as presented in Table 1. The efficiency and effectiveness of each NTRB-SP was assessed, and a performance report was prepared for each.

Table 1 | NTRB-SPs review tranches

Tranche	NTRB-SP under review	Scope of review	Timing review conducted
Tranche 1 (2017)	Central Desert Native Title Services	July 2014 – June 2017	June 2017 – March 2018
	First Nations Legal and Research Services		
	Goldfields Land and Sea Council		
	Native Title Services Corporation		
	Queensland South Native Title Services		
Tranche 2 (2018)	Cape York Land Council	July 2015 – June 2018	September 2018 – April 2019
	Carpentaria Land Council Aboriginal Corporation		
	Kimberly Land Council		
	North Queensland Land Council		
	South Australia Native Title Services		
Yamatji Marlpa Aboriginal Corporation			
Tranche 3 (2020)	Central Land Council	July 2016 – June 2019	January 2020 – July 2020
	Northern Land Council		
	Torres Strait Regional Authority		

Appendix C Stakeholders consulted

The Review consulted with over 40 stakeholders in relation to NLC's performance.

Stakeholder groups included:

- clients who have been represented by NLC (including native title holders)
- the Federal Court of Australia
- the NNTT
- representatives of the NT Government
- NLC contractors, including:
 - barristers
 - anthropologists
- NLC Council Members
- NLC staff.

Appendix D Methodology

Nous designed the methodology to assess NTRB-SP performance against the TORs. The method combines qualitative and quantitative performance to account for the unique context within with each NTRB-SP operates. Given the complexity of measuring performance across different NTRB-SPs, the approach involved six steps to ensure that assessment provided a fair and complete picture of current performance for each NTRB-SP:

1. Develop performance and attribution indicators for each TOR.
2. Collect data through desktop research and consultations.
3. Assess efficiency and effectiveness against each TOR.
4. Develop individual NTRB-SP Performance Assessment Reports.
5. Review NTRB-SP feedback on Performance Assessment Report.
6. Create NTRB-SP Comparative Performance Report.

Qualitative and quantitative performance indicators and attribution factors were developed to assess each TOR. Quantitative indicators were integrated into the qualitative examination of performance to ensure the correct inferences were drawn from quantitative metrics. The quantitative performance indicators and attribution factors were selected from a draft list of more than 120 performance and attribution indicators on the basis that they provide good coverage of quantitative indicators for each TOR category. The qualitative performance indicators and attribution factors guided the qualitative data collection. While some qualitative indicators that were selected are capable of being quantified, they cannot be quantified in a meaningful way for comparative performance purposes. For example, while ILUAs can be an effective tool in delivering native title outcomes there are circumstances in which they may not be the best tool. Complaints received by the NIAA and/or each NTRB-SP formed one part of the material considered in the review where it concerned: NTRB-SP activity since 2014, the efficiency and effectiveness with which the NTRB-SP has conducted its business, or the transparency and respectfulness of the relationships the NTRB-SP maintained with its clients, potential clients or persons refused assistance. Both the relevant elements of the complaint, and the way in which the NTRB-SP responded were considered.

The data and information underpinning the assessment of each NTRB-SPs' performance was sourced through five channels; desktop research, preliminary discussions with the NTRB-SPs, two rounds of stakeholder interviews and a qualitative survey. These provided an opportunity for stakeholders to contribute to the development process at different points; with the intention being to generate buy-in and encourage the development of indicators which were applicable and meaningful across the contexts of different NTRB-SPs.

The output from the process included individual NTRB-SP Performance Assessment Reports ('Assessment Reports') along with a separate NTRB-SP Comparative Performance Report ('Comparative Report'). The Assessment Reports provided a standardised framework to understand the context and performance of each NTRB-SP; the Comparative Report brings together the findings of each Assessment Report by TOR and discusses the key drivers of performance.

Appendix E Glossary

Throughout this document, the following terms have the meaning prescribed in Table 2.

Table 2 | Glossary

Term	Meaning
Aboriginals Benefit Account (ABA)	The Aboriginals Benefit Account is legislated under Part VI of the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (ALRA). The Aboriginals Benefit Account receives and distributes monies generated from mining on Aboriginal land in the Northern Territory. Payments into the Aboriginals Benefit Account are based on royalty equivalents which are determined by the estimated value of the statutory royalty payments. The Aboriginals Benefit Account is public money.
<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (ALRA)	The first attempt by an Australian Government to legally recognise the Aboriginal system of land ownership and put into law the concept of inalienable freehold title. The <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> only has jurisdiction in the Northern Territory, and as such, co-exists with the <i>Native Title Act 1993 (Cth)</i> .
Applicant	Any person or persons who have been authorised as the selected representative(s) of a native title claim group in native title or determination proceedings.
Client	Any individual or group being provided assistance by an NTRB-SP (including assistance with claims, research and/or PBC support).
Connection evidence	Evidence to establish connection of the native title group to the area over which they have lodged a claim. This evidence must demonstrate that the group have continued to observe and acknowledge, in a substantially uninterrupted way, the traditional laws and customs that give rise to their connection with the claim area, from the time of the proclamation of sovereignty to the present day.
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i> (the CATSI Act)	The <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i> is the law that establishes the role of the Registrar of Indigenous Corporations and enables Aboriginal and Torres Strait Islander groups to form Aboriginal and Torres Strait Islander corporations.
Determination	A decision by the Federal or High Court of Australia. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination).
Extinguishment	Occurs over a defined area when Australian law does not recognise the existence of native title rights and interests because of legislation or common law precedent. Extinguishment can be whole or partial.
Future act	A legislative or non-legislative act in relation to land or waters that may impact on the ability of native title holders to exercise native title rights; either through extinguishment or creating interests that are wholly or partly inconsistent with the continued existence of native title.
Indigenous Land Use Agreement (ILUA)	A voluntary, legally binding agreement governing the use and management of land or waters over which native title exists or might exist. The conditions of each Indigenous

Term	Meaning
	Land Use Agreement are determined by way of negotiations between native title holders and other interest holders (such as a state or mining company). These negotiations are often facilitated by Native Title Representative Bodies or Service Providers.
National Native Title Tribunal (NNTT)	<p>An independent statutory body established under s107 of the <i>Native Title Act 1993 (Cth)</i> to assist people in resolving native title issues by:</p> <ul style="list-style-type: none"> • mediating between the parties of 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 Indigenous Land Use Agreements. <p>The National Native Title Tribunal maintains three registers relating to native title applications, determinations and Indigenous Land Use Agreements. It also maintains databases regarding future act matters and geospatial tools.</p>
Native title	The communal, group or individual rights and interests of Aboriginal and Torres Strait Islander people 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 (s223 <i>Native Title Act 1993 (Cth)</i>).
<i>Native Title Act 1993 (Cth)</i> (NTA)	The <i>Native Title Act 1993 (Cth)</i> 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 (Cth)</i> .
Native Title Service Provider (NTSP)	Organisations funded by the Australian Government to perform all or some of the same functions as Native Title Representative Bodies in areas where Native Title Representative Bodies have not been recognised.
Native Title Representative Body and Service Provider (NTRB-SP)	The Review uses Native Title Representative Body or Service Provider to refer collectively to Native Title Representative Bodies and Native Title Service Providers. This term is used when referring to all organisations that deliver functions under the <i>Native Title Act 1993 (Cth)</i> .
National Indigenous Australian's Agency (NIAA)	National Indigenous Australian's Agency is a Commonwealth Government agency who is committed to improving the lives of all Aboriginal and Torres Strait Islander peoples.
Northern Land Council (NLC)	The Northern Land Council is an independent statutory authority of the Commonwealth. It is responsible for assisting Aboriginal peoples in the Top End of the Northern Territory to acquire and manage their traditional lands and seas.
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.
Polygon claims	Polygon claims are claims that reflect the boundaries of mineral and petroleum exploration. The boundaries of polygon claims do not correlate either with the areas over which native title rights and interests may exist or with the boundaries of the

Term	Meaning
	pastoral leases which they may partially cover.
<i>Pastoral Land Act 1992</i> (Northern Territory)	The <i>Pastoral Land Act 1992</i> (Northern Territory) is an Act to make provision for the conversion and granting of title to pastoral land and the administration, management and conservation of pastoral land, and for related purposes.
Post-determination	At a claim level, refers to the period following a determination that native title exists. At an Native Title Representative Body or Service Provider life cycle level, refers to the period following the resolution of all active claims within a Representative Aboriginal/Torres Strait Islander Body area.
Prescribed Body Corporate (PBC)	A body, established under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i> , 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.
<i>Public Governance, Performance and Accountability Act 2013</i> (PGPA)	The <i>Public Governance, Performance and Accountability Act 2013</i> is administered by the Department of Finance and applies to all officials of Commonwealth entities. It establishes rules not only for financial management but also for the broader governance, performance and accountability for the Commonwealth public sector.
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 and is able to exercise the procedural rights stipulated in the future act provisions of the <i>Native Title Act 1993 (Cth)</i> .
Representative Aboriginal/Torres Strait Islander Body area (RATSIB area)	The area over which a Native Title Representative Body or Service Provider holds jurisdiction.
Terms of Reference (TOR)	Refers to the Terms of Reference provided by National Indigenous Australian's Agency which govern the scope of the project. These can be found in Appendix A.
Top End Default PBC (TED PBC)	The Top End Default Prescribed Body Corporate/Community Living Areas Aboriginal Corporation is the default Prescribed Body Corporate for a large number of native title determinations in the Northern Land Council Representative Aboriginal/Torres Strait Islander Body area and acts as agent for those native title holders.
Traditional Owners	Individuals of Aboriginal and/or Torres Strait Islander descent who identify as being a descendant of persons that occupied a particular area prior to European settlement.