

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

Summary Report

March 2021

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This Review covered the period from July 2015 to June 2018. Findings relate to this time period unless otherwise stated. Nous conducted the Review between September 2018 and April 2019. This summary document was prepared in 2020 and includes responses to recommendations by the NTRB-SP in 2020.

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1 About the Review

The Department of the Prime Minister and Cabinet¹ 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.

The Kimberly Land Council (KLC) was reviewed from September 2018 to April 2019 in relation to the previous three-year period (July 2015 to June 2018). This document contains a summary of the Review's overarching findings and recommendations for KLC. It also includes KLC's responses to the recommendations made by the Review.

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 for all the Reviews to support a comparative and transparent assessment of the KLC 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 clients, potential clients, staff, the KLC's Board Directors, the Federal Court, the National Native Title Tribunal (NNTT), and the Western Australian (WA) Government. A list of stakeholders consulted is included in Appendix C.

KLC was given the opportunity to review the full report in 2019 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.

¹ Note in July 2019 the National Indigenous Australians Agency (NIAA) was established to lead Indigenous Affairs Policy for the Australian Government. NIAA has commissioned subsequent NTRB-SP Reviews.

2 Profile of the KLC at a glance

The Kimberley Land Council (the KLC) is based in Broome, Kununurra and Derby, and provides services in the Kimberley region of Western Australia.

The KLC, established in 1978 and registered in July 1979, is the Native Title Representative Body for the Kimberley Representative Aboriginal/Torres Strait Islander Body (RATSIB) Area in WA. The KLC has been providing native title services since the passing of the *Native Title Act 1993 (NTA)* but was officially recognised as the region's native title representative body in 2000.

The KLC's RATSIB area is pictured right. The land area covered approximately 423,000 square kilometres of land², accounting for 16% of Western Australia.

At the time of the Review, there had been 41 determinations of native title within the Kimberley region since the passage of the *Native Title Act 1993 (NTA)*, 15 of which have occurred since 1 July 2015. The KLC represented 13 of these 15 determinations; acting as the solicitor on record for all 13. They briefed out one native title matter that was litigated and acted for the applicant in another litigated matter. These litigated matters resulted in the first litigated determinations in the Kimberley in over a decade.

As of June 2018, there were 24 active claims in the KLC's RATSIB area, with 20 of them being represented by the KLC. A further five new claims were filed after 1 July 2018 up to the time the Review took place. Four of these were represented by the KLC.

There were 16 Prescribed Bodies Corporate (PBCs) within the RATSIB area at the time of the Review, and four yet to be established after achieving determinations in late-2018. The KLC secured funding to support 13 PBCs for the year ending 30 June 2018.³

The KLC's grant funding fluctuated over the review period with a slightly upward trend. In 2015/16 the organisation received \$11,165,574 in NIAA NTA grant funding, which increased to \$12,339,972 in 2016/17 (largely due to a variation which granted a large early milestone payment). This amount fell again to \$11,306,288 in 2017/18.⁴

The KLC holds one share representing 100% ownership in the company Kimberley Sustainable Development Pty Ltd, which acts solely as a trustee for the Kimberley Sustainable Development Charitable Trust. The KLC has no rights to income or capital held by this trust fund⁵. The KLC also maintains informal relationships with the Ambooriny Burru Foundation, which owns Kimberley Regional Economic Development (KRED) Enterprises and its three subsidiary companies; Environmental Heritage Social Impact Services (EHSIS), Arma Legal (formerly KRED Legal) and the Kimberley Agriculture and Pastoral Company. The partnership for the Ambooriny Burru Foundation was originally facilitated by KLC through bringing together Traditional Owners from various native title claim groups.

At the time of the Review, the KLC had three offices: their headquarters in Broome and two site offices in Kununurra and Derby. The KLC's board is member based, with two-year terms. The board of Directors can have a maximum of 32 members, including four cultural advisors who are responsible for working with Directors, members and Traditional Owners to provide expert cultural advice and support. As of 30 June



² KLC Land and Sea Overview, <<https://www.klc.org.au/land-and-sea-overview/>>.

³ Annual Report 2018.

⁴ KLC Operational Plans 2015-16, 2017-18, 2018-19.

⁵ Information provided to the Review by the KLC in response to the first draft report. This relationship is disclosed in the 30 June 2018 audited financial statements at note 14: Related Party Transactions.

2018, the KLC board had 26 Directors, including four cultural advisors. In September 2018, three new members were elected to the board at the KLC annual general meeting.

The KLC had an unusual organisational structure, with the heads of all six of its business unit reporting to the Deputy CEO, who reports to the CEO. The CEO then reports to the Board. The KLC employed 65 staff (excluding those in the Land and Sea Management Unit and Indigenous rangers) as at 30 June 2018; of these 45% are Indigenous. This is an increase from the 51 staff they employed in 2015/16.⁶ Of the total of 65 staff, 37 (57%) work directly on native title issues and 28 (43%) are executive, corporate and financial staff. The KLC report that part of the increase since 2015 is due to a number of staff on maternity leave who have been replaced by temporary staff, and this raises their total number of staff employed.

⁶ Annual Report 2018.

3 Findings and recommendations by Terms of Reference

The following sections of the report provide a summary of the KLC's performance against the Terms of Reference 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 3 years (with the main focus on recent performance) including: native title claim outcomes achieved for clients.

The KLC has a history of achieving native title outcomes for clients, representing 15 determinations since 1 July 2015, briefing out one native title matter that was litigated and acting for the applicant in another litigated matter. This success is the result of strong and collaborative internal legal and anthropological capability and effective management of native title matters. The KLC takes a proactive and forceful approach in initiating actions to protect clients' rights and interests.

The management of successful outcomes has occurred in a challenging environment with external impacts including court pressures and high levels of future act workload.

There is some mixed feedback from clients about their satisfaction with native title outcomes. While many perceive the KLC as an organisation that has a strong focus on land rights and highly representative of the community there were others, particularly in the East Kimberley region, who believed they could improve their communication and approach to resolving intra-Indigenous disputes.

The KLC has been successful in delivering native title outcomes for clients during the review period.

There have been 41 determinations of native title within the Kimberley region since the passage of the *Native Title Act 1993 (NTA)*, 15 of which have occurred since 1 July 2015. As described above the KLC represented 13 of these 15 determinations; acting as the solicitor on record for 13 of them, briefed out one native title matter that was litigated and acted for the applicant in another litigated matter. These litigated matters resulted in the first litigated determinations in the Kimberley in over a decade.

Five of the 15 claims which have occurred since July 1, 2015 have been determined in the final few months of 2018 and early in 2019. These claim groups do not yet have PBCs.

The KLC's average time from filing to determination for the 15 determined claims it has represented since 1 July 2015⁷ was 6 years, 46 weeks. The KLC also progressed a varied mix of new and old claims to determination since 1 July 2015, with its longest claim taking 20 years, 17 weeks to reach determination and its shortest taking only 39 weeks.

Both internal and external stakeholders expressed a view that the KLC has made a significant contribution to achieving native title outcomes. This includes playing a facilitative role for claimants that were not formally represented by the KLC.

⁷ Figure includes the Jabirr Jabirr/ Ngumbarl and Bindunbur claims which the KLC represented during the review period before briefing out for litigation.

As of June 2018, there were 24 active claims in the KLC's RATSIB area, with 18 of them being represented by the KLC. Since 1 July 2018 a further five new claims have been filed, four of which are represented by the KLC and one of which has been briefed out. Furthermore, there have been five additional determinations in that time. This brings the KLC's current total of active claims to 17.

Much of the Kimberley is now determined (approximately 80-85%) as is shown in the figure above. The undetermined areas (and many of the active claims) are boundary areas. These claims generally require more extensive research and carry a higher risk of intra-group conflict than those already determined.

Stakeholders acknowledged that achieving high quality native title outcomes will become increasingly difficult. The KLC's approach to progressing claims and other matters has always been to prioritise matters with the least complexity first to achieve native title outcomes quickly and establish favourable legal precedent. This is not unlike other NTRB-SPs as is discussed in detail in TOR 1.2 below.

The KLC has very clear policies and procedures for managing each step of the claim process. These are described in the Guidelines for Assistance in Native Title Claims.⁸ Staff follow these closely so that their process is predictable and defensible to their community. This is done primarily as good practice, but also to provide a solid basis for managing any real or perceived conflicts of interest.

Nine of the thirteen claims represented by the KLC since 1 July 2015 have been determined by consent.

⁸ KLC Guidelines for Assistance in Native Title Claims.

Figure 1 | Kimberley region NTA determinations as at 30 June 2018⁹



Recommendations for TOR 1.1

The Review made two recommendations for TOR 1.1 on native title outcomes achieved by clients. These are outlined below, as well as the KLC’s response to these recommendations.

Recommendation 1

The KLC should continue to communicate with all its stakeholders on the nature of its relationships with Arma Legal and KRED.

KLC response.

KLC’s annual reports for the past two years have included the following information.

- a) Identification and explanation of the relationship between KLC and KRED.
- b) Identification of Arma Legal as KLC’s preferred external advisor on commercial matters, and the reasons for that (expertise, cost-competitiveness, and superior outcomes for native title parties).

⁹ Annual Report 2017-18. Note that one of the areas shown as “future claims” on the map is subject to a determination of native title – this is the Prince Regent Nature Reserve, subject to a finding in *Neowarra v State of Western Australia* [2003] FCA 1402 that the reserve was a previous exclusive possession act. Note that another area depicted on this map was subject to a claim at the time of the review - *Birriman-gan*, lodged on 22 November 2018.

When engaging Arma Legal or KRED as its agent or external advisor on matters, KLC also ensures that the native title party client is aware of the reasons for the engagement. The exception to this is a small number of minor scale future act matters where either:

- a) KLC historically engaged Arma Legal as its agent in late 2017 during a period when KLC was significantly short staffed; or
- b) where a strategic, region-wide approach is taken to particular tranches of future acts and Arma Legal may already be acting on some of the matters within the tranche by direct appointment from the affected native title party. In such cases, it is reasonable, expedient, cost-effective, and strategic to ensure consistent representation occurs across all matters in the tranche.

KLC also engages EHSIS (a subsidiary of KRED) for heritage clearance activities because the cost of KLC undertaking this activity inhouse is prohibitive for both the KLC and proponents.

KLC continues to be aware of the need to provide clarity to its members, clients, constituents and other stakeholders about the relationship (structural and working), between KLC, KRED, and Arma Legal. KLC takes every opportunity to provide clarity

and correct misconceptions, misunderstandings, and incorrect information.

Recommendation 2

Wherever possible the KLC should prioritise taking a pro-active stance to deliver mediation as early as possible in conflict situations.

KLC response.

KLC strongly supports mechanisms for mediation of disputes, and recognises its obligations, both cultural and under the NTA. In the period since the review, KLC has:

- a) continued to apply and support culturally appropriate mechanisms for dispute resolution and management, which may include separate meetings for disputants arranged on the basis of country, family, gender, or cultural authority;
- b) used alternative and novel arrangements for dispute resolution;
- c) supported PBCs with developing their own capacity for dispute management; and
- d) increasingly relied on formal mediation mechanisms provided under the NTA and through the Federal Court of Australia.

In the context of native title, in particular and increasingly within the internal operations of PBCs, it is important to acknowledge that native title as recognised and implemented under the NTA is an external system which is, in part, coercive and controlling in the everyday lives of Aboriginal people in the Kimberley. Furthermore, it operates within a subject matter that is inherently subject to strongly held competing perspectives (country, home, family, history, identity). Mediation is but one mechanism for assisting Traditional Owners to manage and live with the disputes and differences which will continue arise over time. KLC is committed to continuing to provide assistance to Traditional Owners in this regard.

The KLC continues to advocate strongly to Federal and State governments on initiatives and opportunities to invest and support Traditional Owners to manage, live with and transform the trauma that exists for Aboriginal people. Including from the lateral violence experienced through the system of Native Title and the socio-economic impact from intergenerational trauma and disadvantage. The KLC's continuing recognition and support of informed systems and practices conducive to self-determination of Traditional Owners and Aboriginal communities is central and fundamental to the values, membership and governance of the KLC.

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 3 years (with the main focus on recent performance) including: whether the organisation's assessment and prioritisation of applications are equitable, transparent and robust.

The KLC has a clear and documented policy and process in place for assessing and prioritising applications for assistance. The policy and processes are made publicly available through several channels.

All but one application for assistance received funding over the review period. The one application that was denied was funded through private sources. This is a direct consequence of the KLC's overarching philosophy that it is the responsibility of the Federal Court rather than the NTRB-SP to determine who has a right to native title. The KLC therefore accepts applications for assistance unless they directly contravene the guidelines. Its success rate indicates that the guidelines are working appropriately in the context of the Kimberley region. Priorities are determined on the basis of resource availability.

Clients report awareness within the community of how to lodge a claim and exhibited a strong understanding of the KLC's process for assessing and prioritising applications for assistance.

No recommendations were made for TOR 1.2.

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 3 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.

The KLC is closely connected to its community. Its mandate is to support community and ensure that clients enjoy their native title rights and interests above all else. This guiding philosophy, together with the KLC's history in advocating for the community, translates to a largely respectful and culturally appropriate relationships with clients.

Feedback from clients suggests that the KLC is mostly seen as dealing equitably and transparently. Most clients appear to be confident that the KLC has their best interests at heart. The Review received no complaints from clients that they had been excluded from receiving support from the KLC.

The perception of respect, cultural appropriateness, equity and transparency is more pronounced in the western area of the RATSIB. In the eastern region around Halls Creek and Kununurra relationships are more contentious. The relationship between clients and the KLC is less cohesive, and there is a higher level of criticism of the KLC's conduct.

Recommendations for TOR 1.3

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

Recommendation 3

The KLC should continue to improve its communication with the eastern part of its RATSIB area, including through the implementation of the East Kimberley Engagement Strategy.

KLC response.

KLC endorses and supports this recommendation and has undertaken a comprehensive survey to better inform the extent and nature of the views and opinions of the KLC from Kimberley Aboriginal people on the work we do and how we do it. The survey was initiated in the East Kimberley during the AGM's of KLC, Kimberley Language Resource Centre, Kimberley Law and Culture Centre and Aarnja with a further 8 weeks on the ground in communities along with social media promotion and participation in the survey face to face and on-line. The survey participation rate provided statistically reliable data capturing approximately 10% of KLC's membership participating in the survey which comprised approximately 75% of the survey responses. Survey results were published in KLC's newsletter and are available on KLC's website. The results have informed the KLC on the strategies and extent of resources needed for managing client and member relationships. And has also been an important source informing the KLC board in developing KLC's Strategic Plan 2020-2024.

The implementation of the East Kimberley Engagement Strategy was significantly impacted by the restrictions on movement that apply in the Kimberley region as a response to the COVID pandemic. KLC has continued to work with its members, constituents and clients in the region, relying in particular on resources such as the publication *The Native Title Story* and communications via social media. KLC also continued to engage with native title applicants and PBC boards via technology during the early stage of

the pandemic, and in person as soon as the lifting of pandemic control measure made this possible. Communities in the east Kimberley region, as well as the rest of the Kimberley, remain subject to Remote Communities Direction No. 3 (unless an exemption has been granted) and KLC is acutely aware of the need to comply with all pandemic controls particularly those that safeguard communities.

KLC notes that its relationship with some members and claimants in the east Kimberley will not be assisted by the lack of face to face engagement with broader claim groups and native title holder groups during 2020 and large meetings which are scheduled to commence from early 2021 will need to be planned and managed to allow re-engagement of complex and difficult issues.

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.

The KLC has significantly improved its cost effectiveness over the review period, exhibiting year on year improvement against budget. This includes improved performance against the organisation's three most significant cost drivers: staff salaries, consulting costs and claim group meeting costs. These improvements have been driven largely by a considered effort to lower operational costs and tighten financial governance by reviewing policies, procedures and procurement contracts. The use of external consultants to respond to pressure from the Federal Court appears cost effective. This improvement in cost effectiveness by the KLC has been achieved within an environment that presents significant challenges to cost efficiencies, including its very remote nature and the attitude of the state government in not providing funding for robust and inclusive agreement making for heritage matters. This stance increases the costs of PBC support.

Recommendations for TOR 2

The Review made two recommendations for TOR 2 on the organisation's cost effectiveness. These are outlined below, as well as KLC's response to these recommendations.

Recommendation 4

The KLC should continue to investigate ways to cut its corporate overspend through finding efficiencies across its corporate function.

KLC response.

The KLC notes the findings of the review of its increasing cost efficiencies in an environment that presents significant costs challenges external to the organisation and beyond its control. The KLC also notes the findings that it has improved performance against the three most significant cost drivers.

In relation to the recommendation relating to a corporate overspend the KLC disagree with the recommendation to manage corporate overspend through finding efficiencies across its corporate function. Corporate function is already significantly lean and run as efficiently as is possible. Any further reduction in corporate function poses risks to the operations of corporate functions (financial, corporate and executive) including compliances of the organisation. The budget allocation of corporate function expenditure to total operational expenditure comprised approximately 17% in 2015/16, 22% in 2016/17 and 19% in 2017/18. The expenditure on corporate budgets in 2016/17 and 2017/19 was within 2% of budget however in 2015/16 there was a significant budget overspend due to an unrealistic budget being set (the budget in that year equated at 13% of KLC revenue). It is noted that almost two thirds of large not for profit organisations spend approximately 40% or more on overheads.

Recommendation 5

The KLC should continue to develop and implement its new policy defining cost recovery on PBC service provision, as well as explore further opportunities to recover costs on native title services.

KLC response.

The KLC's 2020-2024 Strategic Plan provides a pathway for the organisation to ensure its operating relationship with PBCs grows and develops consistent with a native title system where (in the Kimberley at least) PBCs now outnumber native title claim groups. The implementation of the 2020-2024 Strategic Plan provides for partnership with PBCs and aligning the operations of the KLC in supporting and developing

cultural based systems, structures and organisations. The KLC recognise the misalignment of western corporate structures with traditional owner governance and the limitation of that structure under Corporation and PBC regulations.

The KLC recognises the current and historical under resourcing of the sector in general and specifically with the emergence of PBCs. With PBCs relying on government and non-government entities to value the cost of engagement with Traditional Owners but with no leverage or regulated mechanism to enforce government and non-government entities to pay for the cost of doing business that impacts native title. The lack of recognition around the authority of Traditional Owners to charge for the cost of doing business is further impacted by government and non-government entities determining the parameters and value of traditional owner engagement which further disadvantages and disenfranchises Traditional Owners native title and rights to self-determination.

The KLC also continues to advocate with external stakeholders, in particular at a Commonwealth level, on the need for legislative reform and policy guidance to ensure the current system of cost-shifting from proponents to native title parties in the future act system is reformed. Cost recovery against PBCs for future acts will also remain nominal and problematic if the costs which are sought to be recovered arise because of third party proponent activity and the cost of the activity is never internalised to the commercial beneficiary of it.

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.

The Review found the KLC's performance reporting to be of a high quality and compliant with the terms of its funding agreement. The KLC has submitted all reports to the NIAA on time throughout the review period. The KLC uses recognised human resource and financial information systems to effectively track its achievement against its KPIs and its funding agreement with the NIAA. As a result, the organisation can be very transparent in its use of resources allocated to native and non-native title activities.

Recommendations for TOR 3

The Review made one recommendation for TOR 3 on the organisation's achievement. This is outlined below, as well as KLC's response to this recommendation.

Recommendation 6

The KLC should consider implementing a time sheeting system based on codes for different functions. This would enable accurate billing of staff-related activity-based expenses and improve cost recovery.

KLC response.

While KLC continues to rely on manual timesheets for matters involving specific funding or cost recovery from third parties, KLC is also actively investigating options to allow activity-based cost recovery across the organisation. These options will be developed further after new file management systems are in place.

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.

The KLC has a large representative Board which provides clear and independent guidance to the organisation. The size of the Board creates transparency in the management of any conflicts of interest arising. The Board is a key part of the KLC's credibility within its community and acts as a conduit between the organisation and its key stakeholders. The Board is well supported through training and high-quality communication from its senior staff.

The KLC's Strategic Plan has been developed with input from all staff and the Board and helps to drive a remarkably cohesive organisational culture. This culture is supported by strong supervisory structures, proactive talent development and career pathways and good internal communication. The KLC is active in developing its Indigenous staff. There is a marked difference in the experience of some staff which should be noted.

The KLC has a clear complaints process which is actively promoted to all clients. There have been seven formal complaints during the Review period with six of these escalated to the Board. Informal complaints are successfully resolved over the phone, or through conversations.

Recommendations for TOR 4

The Review made one recommendation for TOR 4 on support provided by organisational governance structures, policies and practices. This outlined below, as well as KLC's response to this recommendation.

Recommendation 7

KLC could consolidate policies and procedures in order to make them more accessible to staff.

KLC response.

This recommendation has been implemented. KLC's internal policies and procedures are available on the staff intranet. Updates and staff communications on new policies or changes to existing policies are managed through Human Resources.

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.

The KLC is very active in its support of PBCs towards self-sufficiency. It has developed a capability assessment tool that assesses each PBC's current state of development and the services they need to develop further. There is some frustration among both the KLC and the PBCs that there are currently insufficient resources to deliver the services needed.

The KLC offers a suite of support services that aim to ensure solid legal foundations and responses to future acts. Staff also regularly provide governance training, assistance with running meetings, financial management, legal representation, and support with specific skills. The KLC runs a range of initiatives that aim to develop and support the PBC community in the Kimberley. The aim of these support initiatives is to realise the PBC's potential to maximise the input of the native title community in to the development of the region.

PBCs are largely satisfied with the services they receive from the KLC though some are frustrated that they cannot move more quickly to independence. Approximately half of those receiving support are actively moving towards self-sufficiency.

No recommendations were made for TOR 5.

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

The KLC is aware of the likelihood of a potential decrease in grant funding as a high proportion of claims are determined, with the Executive estimating that there are ten years of claim work remaining. However, the KLC is also aware of potential future challenges in the native title environment. These include supporting PBCs with no independent sources of income generation and the potential for compensation claims to arise. The KLC's primary response to this future scenario is that it will adapt as these issues become clearer, with a possible outcome that it may become a smaller organisation. The KLC does not have a priority on actively building business activities as a way of rendering it able to withstand decreasing grant revenue. The KLC's ethos is to promote the rights and interests of the native title community. This includes their economic development. Seeking to promote the KLC's own economic development would place it in competition with PBCs and other organisations whose interests the KLC seeks to promote. KLC's economic development initiatives are focused on developing concepts and networks in which PBCs can engage. Within this clear orientation, there is capacity for the KLC to be more active in pursuing cost recovery work from those PBCs who can pay for services.

Recommendations for TOR 6

The Review made two recommendations for TOR 6 on the organisation's strategic planning. These are outlined below, as well as KLC's response to these recommendations.

Recommendation 8

The KLC should create a system through which services to PBCs can be costed, and PBCs routinely charged for services rendered to those organisations that are assessed as able to pay.

KLC response.

This recommendation is in the process of being implemented through the KLC 2020-2024 Strategic Plan. For example, KLC is working with external stakeholders to develop and roll out formal service agreements with PBCs that are fit for purpose for the needs and capacity of PBCs across the region. It is noted that this recommendation is dependent on assessing the ability of a PBC to pay for services. As discussed under recommendation 5 significant reform is required to support the recognition of traditional owners' authority of their native title and their right to self-determination including when engaging with government and non-government on activities that impact native title. Without reform the mechanisms for PBCs to levy government and non-government entities to value engagement with Traditional Owners will continue to fail or fall short resulting in PBCs continuing to rely on ongoing support and services without the means to pay for them.

Recommendation 9

The KLC should ensure that future strategic planning activities actively consider the role (or a set of potential roles) that the KLC will play in a post-determination environment, and how to fund these activities.

KLC response.

This recommendation has been implemented in the content of the KLC's 2020-2024 Strategic Plan. The KLC is now in the process of implementing the strategic plan, with a key focus being the future role of the organisation and its relationship with PBCs in the region. The KLC also continues to support the ongoing dialogue on reforms that provide greater opportunity for Traditional Owners and PBCs to manage, protect and engage the rights and interests recognised in native title. The KLC board governance structure

includes representation from 16 PBCs in the region and the KLC recognise the close alignment between members of the KLC and members of PBCs.

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 3 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 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 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 Native Title Representative Bodies and Service Providers (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	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	July 2016 – June 2019	October 2020 – March 2021

Appendix C Stakeholders consulted

The Review consulted with over 40 stakeholders in relation to the KLC's performance. This was directly through interviews, as well as a qualitative survey conducted as part of the Review.

Stakeholder groups included:

- clients who have been represented by the KLC (including members of PBCs)
- Board Directors
- staff
- contractors, including:
 - barristers
 - anthropologists
- Federal Court of Australia
- The National Native Title Tribunal
- representatives of WA State Government.

Appendix D Methodology

Nous designed a detailed methodology to assess NTRB-SP performance against the TORs. The method combines qualitative and quantitative performance to account for the unique context within which 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. Attribution factors refer to factors outside the control of the NTRB-SP (external factors) that have a significant impact on the efficiency or effectiveness of their native title operations. 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 Indigenous land use agreements 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
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) (the CATSI Act)</i>	The <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) is the law that establishes the role of the Registrar of Indigenous Corporations and enables Aboriginal and Torres Strait Islander groups to form Aboriginal and Torres Strait Islander corporations.
Determination	A decision by the Federal 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 ILUA 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 NTRB-SPs.
<i>Mining Act 1978 (WA)</i>	The <i>Mining Act 1978</i> (WA) outlines WA's law as it relates to mining, and for incidental and other purposes.
National Native Title Tribunal (NNTT)	An independent statutory body established under s 107 of the NTA to assist people in resolving native title issues by: <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

Term	Meaning
	The NNTT maintains three registers relating to native title applications, determinations and ILUAs. It also maintains databases regarding future act matters and geospatial tools.
Native title	The communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area which is recognised under Australian law (s 223 NTA).
<i>Native Title Act 1993 (Cth) (NTA)</i>	The <i>Native Title Act 1993</i> (Cth) 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 all or some of 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 and is able to exercise the procedural rights stipulated in the future act provisions of the NTA.
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 the NIAA which govern the scope of the project. These can be found in Appendix A.
Traditional Owners (TOs)	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.
Kimberley Land Council (the KLC)	The KLC, established in 1978 and registered in July 1979, is the Native Title Representative Body for the Kimberley Representative Aboriginal/Torres Strait Islander Body (RATSIB) Area in WA. The KLC has been providing native title services since the passing of the <i>Native Title Act 1993</i> (NTA) but was officially recognised as the region's native title representative body in 2000.

Term	Meaning
Ambooriny Burru Charitable Foundation	The Ambooriny Burru Charitable Foundation was originally set up by the KLC in December 2010. It is not wholly operated by members of the Bardi Jawi, Karajarri, Ngurrara, Nyikina Mangala, Tjurabalan, Jaru, Yi-martuwarra Ngurrara and Koongie-Elvire claim groups. Ambooriny Burru is responsible for social distribution and KRED Enterprises is responsible for income generation for the foundation.
Kimberley Regional Economic Development Enterprises (KRED)	KRED Enterprises is a Broome-based charitable trust committed to independent Aboriginal economic development, owned by the Ambooriny Burru Charitable Foundation. KRED Enterprises has two wholly-owned subsidiary companies: Arma Legal and EHSIS, as well as a third recently established venture, the Kimberley Agriculture and Pastoral Company.

This document refers to the functions of NTRB-SPs outlined under the NTA and captured in Table 3.

Table 3 | NTRB functions under the Act

Reference	Function	Detail
s203BB	Facilitation and assistance	NTRB-SPs provide assistance to those that hold or may hold native title 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 that may hold native title 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 claimants can seek a review of decisions and actions they have made, and promote access to this process for claimants.
s203BJ	Other functions conferred by the Act 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.