

Deloitte Access Economics

Review of the Roles and Functions of Native Title Organisations



March 2014

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Glossary

DETERMINATION	A decision by the Federal Court of Australia that native title does or does not exist in a particular area of land or waters.
FUTURE ACT	A legislative or non-legislative act in relation to land and/or waters that may affect native title, by extinguishing it or creating interests that are wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title. Examples of future acts include the grant of pastoral leases, creation of national parks, the establishment of public works including roads and pipelines, grant of mining or exploration rights and the compulsory acquisition of native title.
FUTURE ACT AGREEMENT	Future act agreement generally refers to an agreement made under the right to negotiate provisions of the <i>Native Title Act 1993</i> , but may also refer to an Indigenous Land Use Agreement that consents to a future act.
INDIGENOUS LAND USE AGREEMENT (ILUA)	An ILUA is a voluntary agreement about the use and management of an area of land or waters where native title exists or might exist. The agreement is made between one or more native title groups and others. ILUAs can be either certified or non-certified. An NTRB/NTSP may certify that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the area covered by the ILUA have been identified; and that all of the persons so identified have authorised the making of the agreement. Once registered by the National Native Title Tribunal (NNTT), an ILUA is legally binding not only on the people who are parties to the agreement but also on all native title holders for that area.
NATIVE TITLE CLAIMANT	The group of people who are identified on the claim application as claiming native title through the Federal Court process under the Act.
NATIVE TITLE GROUP	Either a native title claimant or a native title holder.
NATIVE TITLE HOLDER	The group of people who hold native title, regardless of whether this native title has been determined. In a post-determination context, where a RNTBC holds the native title on trust, the native title holder is the RNTBC. Where a RNTBC is an agent for the native group, then the native group themselves will be the native title holder.
NATIVE TITLE REPRESENTATIVE BODY (NTRB)	NTRBs are organisations recognised by the Minister and funded by the Australian Government to perform functions to assist native title groups in a specific region pursuant to Part 11 the <i>Native Title Act 1993</i> .

NATIVE TITLE SERVICE PROVIDER (NTSP)	NTSPs are funded under the Program Funding Agreement to do the same work as NTRBs in areas where NTRBs have not been recognised.
POST-DETERMINATION	Period following a determination that native title exists.
PRE-DETERMINATION	Period leading up to a determination.
PRESCRIBED BODIES CORPORATE (PBC)	A corporation established under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> , nominated by native title holders to hold and/or manage their native title once a native title determination is made. PBCs are created prior to determination or as soon as practicable after determination. Following a native title determination, PBCs are registered on the National Native Title Register and become RNTBCs.
PROGRAM FUNDING AGREEMENT (PFA)	NTRBs/NTSPs (other than the Torres Strait Regional Authority) are funded by the Department of Prime Minister and Cabinet under terms and conditions set out in a Program Funding Agreement. The terms of these agreements are identical across NTRBs/NTSPs and relate to use of funds, management of funds, management of debt and assets, record keeping, reporting requirements and other operational and administrative requirements.
REGISTERED NATIVE TITLE BODIES CORPORATE (RNTBC)	RNTBCs are prescribed bodies corporate whose name appears on the National Native Title Register as the bodies which hold and/or manage native title on behalf of traditional owners once native title has been determined to exist. They are regulated by the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations).

Acronyms

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALR (NT) Act	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
ALR (NSW) Act	Aboriginal Land Rights (New South Wales) Act 1983 (Cth)
ATSI Act	Aboriginal and Torres Strait Islander Act 2005 (Cth)
BSFA	Basic Support Funding Agreement
CATSI Act	Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)
CDNTS	Central Desert Native Title Services
CLC	Central Land Council
CLCAC	Carpentaria Land Council Aboriginal Corporation
CSC	Central Services Corporation
CYLC	Cape York Land Council
GLSC	Goldfields Land and Sea Council
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
ILUA	Indigenous Land Use Agreement
KLC	Kimberley Land Council
KRED	Kimberly Regional Economic Development Enterprises
MCA	Minerals Council of Australia
NLC	Northern Land Council
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NQLC	North Queensland Land Council
NTRB	Native Title Representative Body
NTSCORP	NTSCORP Limited
NTSP	Native Title Service Provider
NTSV	Native Title Services Victoria
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
PFA	Program Funding Agreement
PM&C	Department of Prime Minister and Cabinet
QSNTS	Queensland South Native Title Services
RNTBC	Registered Native Title Body Corporate
SANTS	South Australian Native Title Services
SWALSC	South West Aboriginal Land and Sea Council
TOS Act	Traditional Owner Settlement Act 2010 (Vic)
TOCE	Traditional Owner Corporate Entity
TSRA	Torres Strait Regional Authority
YMAC	Yamatji Marlpa Aboriginal Corporation

Executive Summary

- The *Native Title Act 1993* (the Act) establishes the regulatory and legal framework for the operation of native title organisations – namely, Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs), Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs)¹.
- In the 20 years since the Act was passed, the native title system has evolved considerably. This makes it timely to review the appropriateness of the roles and functions of NTRBs/NTSPs, especially their support for native title holders and their Registered Native Title Bodies Corporate (RNTBCs) in managing and using native title.
- In doing so, it is important to consider the native title system as a whole, as changes in any part of the system can impact elsewhere.² It is also important to consider the appropriateness of the roles and responsibilities of NTRBs/NTSPs in the context of Australian governments' overarching commitment to close the gap on Indigenous disadvantage.
- Native title is an important instrument available to governments to support these goals. However, if it is an instrument that is not functioning well it has the potential to detract from the achievement of broader policy objectives.

Review findings

- Nearly all NTRBs/NTSPs continue to be heavily involved in supporting native title holders with the complex work of native title claim resolution and associated activities relating to future acts and agreements prior to the determination of native title. For many NTRBs/NTSPs, this work is not expected to slow down in the next five to ten years. It will be critical for the native title system as a whole that the due process of determining native title continues. This means that demands on the system from these activities are not expected to reduce significantly in the near future.
- At the same time, NTRBs/NTSPs are beginning to respond to areas of growing demand associated with the rising number of RNTBCs being established and seeking to use their native title for economic and community development purposes.
- The Review expects that NTRBs/NTSPs will continue to play a central role in the native title system in both pre- and post-determination contexts. The future efficiency and effectiveness of the native title system will be strengthened to the extent that it makes use of the considerable strengths that NTRBs/NTSPs have developed to date, by working closely with native title holders and their RNTBCs.

¹ For the purposes of this report, the term PBC is used interchangeably with RNTBC (see Glossary).

² The 'system' can be loosely defined to include the activities of native title holders (including RNTBCs), NTRBs/NTSPs, Federal Government (particularly PM&C and Attorney General's), state and territory governments, the Federal Court, NNTT, AIATSIS, ORIC, ILC, IBA and private agents delivering a range of services to the system.

RNTBC capacity

- RNTBCs have both statutory responsibilities and, typically, aspirations to be effective instruments for strengthening communities and local decision-making. However, most RNTBCs struggle with the capacity to meet their regulatory responsibilities and pursue wider community aspirations. It may be that their native title aspirations have been unduly raised by the time and effort taken to achieve a native title determination.
- Nevertheless, this gap between capacity and aspirations continues to be a source of considerable frustration and distress among native title holders.
- The limited capacity of RNTBCs seriously constrains their ability to give effect to the Act. This has significant adverse implications for the smooth management of native title land. Where RNTBCs are unable to effectively engage in negotiations on matters such as the establishment of government facilities, resource development and infrastructure, the success of these projects can be compromised.
- For the native title system to deliver meaningful benefits for Indigenous Australians, the system must provide scope for RNTBCs to develop their capacity. Well-functioning RNTBCs could play an important role empowering Indigenous communities and provide tangible benefits linked to:
 - stronger communities underpinned by improved community decision-making, governance structures and the devolution of responsibility to local people;
 - a greater ability to make agreements reflective of native title holders' preferences, with the associated cultural, social and economic benefits; and
 - the prospect of pursuing opportunities linked to native title, including income and employment-generating activities in areas such as culture, heritage and land management and other enterprises.
- At the end of 2013, there were 118 RNTBCs. Future determinations of native title will see this number expand further over the next decade. For some, native title will bring with it income-generating opportunities; for others, such opportunities will be limited. Without some initial capacity-building support, many RNTBCs may never have a chance to ascertain what their options are.
- Thus, in order to be in a position to function effectively at the core of the native title system, RNTBCs need (i) initial support to identify how they would like, and could feasibly, use their native title, and (ii) a base level of support to meet their compliance and governance obligations under the Act.

RNTBC funding for sustainable future pathways

- In the early post determination stage, temporary funding would empower RNTBCs to consider their options and make informed decisions about their future direction, consistent with the principles of the Act. It is envisaged that this would facilitate the development of a high level strategy and assessment of available opportunities for income generation and partnerships, within the context of the aspirations of the native title holder group.
- Following this, native title holders should have the opportunity to pursue a future pathway that might range from an independent RNTBC which undertakes a range of activities and develops income streams, to an RNTBC which chooses to delegate its day-to-day responsibilities to a third party.

- Subject to the outcome of these decisions, there may also be a role for government to provide basic support funding on an ongoing basis, to allow RNTBCs to fulfil their core compliance and governance responsibilities, such as bookkeeping, reporting and the facilitation of general meetings.
- While some transitional, capacity-building support may be needed to get RNTBCs to a position to effectively make use of the temporary funding designed to identify their future paths, it is considered that any ongoing, direct government support should be limited, to promote long-term responsibility for future activities, rather than perpetuating dependence.
- The additional funding needs to be structured in such a way that it has relative administrative simplicity, tied with a corresponding greater responsibility assumed by native title holders for the appropriate application of the funding. The government may opt to impose eligibility criteria including means tests, basic RNTBC accountability and identification of permissible areas of expenditure, as well as allowances for the differences between RNTBCs.
- Depending in part on how developed individual RNTBCs are, the funding could either be provided directly to the RNTBC or indirectly through the NTRB/NTSP. The aim would be to have the RNTBC in a position to choose which services the funding is applied to. The necessary funding envisaged is modest in the context of the native title system and could be found through re-prioritisation of existing programs, including the native title program managed by PM&C or consideration of activities of other parts of the native title system such as the Indigenous Land Corporation (ILC). RNTBC resource needs should also be recognised in the settlements reached with state and territory governments.

Implications for NTRBs/NTSPs

- For many NTRBs/NTSPs, the significant claims work and agreement making will continue to be their primary focus for the next decade. However, NTRBs/NTSPs will also have an increasingly important role working in close partnership with RNTBCs and other groups in pursuing broader social, cultural and economic development activities in their region.
- This assistance will involve a mix of in-kind support based on NTRB/NTSP resources, as well as fee-for-service assistance based on cost-recovery.
- That said, it is considered that the provision of a base level of support for NTRBs/NTSPs to maintain their core capabilities in legal services for future acts and agreement negotiation, as part of their PFAs, would be appropriate. This would be supplemented by additional cost-recovery through fee-for-service arrangements.
- Given that the Act ultimately grants native title holders the right to determine how their native title is used, the evolution of the services provided by NTRBs/NTSPs will be based on the strength of relationships with native title holders developed through the claims process, but within an overarching context of a contestable market.
- This will see a shift, over time, in the NTRBs/NTSPs being more accountable to their native title holder stakeholders and less directly accountable to the Commonwealth. It is important that this transition process be carefully managed to ensure that the current capabilities of NTRBs/NTSPs are retained.

- Ideally, NTRB/NTSP support will involve both assisting capacity-building in the lead up to determinations as well as being in a position to provide post-determination support should RNTBCs choose to access it.

Rationalisation and recognition

- The 15 NTRBs/NTSPs differ in their approaches to providing native title services. This reflects their different histories and, especially, differences in the circumstances faced by the native title holders in their region. Given the number of RNTBCs that will be looking for services in the future, regional-based support will be desirable on an ongoing basis. The NTRBs/NTSPs were seen to be of a broadly appropriate scale to balance scale efficiencies with the potential to form and maintain effective relationships. These considerations, along with recognition of the transitional costs seen when NTRBs/NTSPs had to amalgamate in the past, argues against any rationalisation of NTRBs/NTSPs.
- Recognition status, which is given to NTRBs by the Minister on the basis of certain criteria, is a defining feature of NTRBs and distinguishes them from NTSPs. However, the two types of entity face essentially the same regulatory environments and are empowered to undertake identical roles and functions. The additional administrative burden associated with recognition needs to be weighed against the view of at least some NTRBs that the recognition process provides an imprimatur of legitimacy that can assist in supporting native title holders.
- Two options arise. The recognition process could be streamlined so that the additional administrative costs over and above those associated with funding applications are minimised. If this is not feasible, the recognition provision of the Act could be removed. It is expected that both options would require some legislative changes.

Private agents

- The availability of services provided by private agents, including lawyers, anthropologists and commercial advisers, is indispensable to a well-functioning native title system. However, tensions in the dispute resolution process can be exacerbated by private agents in some determination processes.
- It is anticipated that as the knowledge base of native title holders and other system participants builds through experience, the uncertainties currently surrounding dispute resolution will ease, potentially lessening but not fully removing some areas of dispute.
- Given that private agent issues predominantly stem from the complexity of the issues being dealt with, the Review favours reforms which would encourage greater accountability and transparency without adding to the complexity of the system. The Review considers that this can be achieved with moderate administrative and legislative change.

Responses to the Terms of Reference

- The Review's findings, as they relate to the Terms of Reference, are provided in the Conclusion of this report.

1 Introduction

It is over 20 years since the *Native Title Act 1993* (the Act) was introduced, establishing the initial legal and regulatory framework for the operation of native title organisations across Australia. In recognition of changes in the native title system, the Australian Government commissioned Deloitte Access Economics to undertake a review of the roles and functions of native title organisations – those being native title representative bodies (NTRBs) and native title service providers (NTSPs).

The Review of Native Title Organisations' (the Review) Terms of Reference were initially established by the then Minister for Families, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP. These were subsequently modified by the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion to specify that the Review should present options (rather than specific recommendations). The Terms of Reference and the Review's findings are outlined at Appendix A.

The Review was commissioned as a *policy review*, addressing policy issues relevant to the roles and functions of NTRBs/NTSPs, and is not intended as a detailed analysis of legal issues associated with the native title system.

The Review has examined whether the roles and statutory functions of NTRBs/NTSPs continue to meet the evolving needs of the system, particularly the needs of native title holders after claims have been determined.³ In doing so, the Review identified the increasing significance of Registered Native Title Bodies Corporate (RNTBCs) in shaping the experiences of native title holders and other stakeholders to the system. As such, the Review has paid particular attention to the challenges faced by these organisations.

Approach

The Review team was led by Dr Ric Simes and included Bill Gray AM and Dr Jeff Harmer AO, Roland Breckwoldt, and Deloitte Access Economics staff. The Review has been supported with input from the Reference Group (the membership of which is reported in Appendix B). It was conducted over the calendar year of 2013 and reported in March 2014.

The Review consisted of the following steps:

- development of a discussion paper;⁴
- public consultation, the schedule of which is included in Appendix D, and included:
 - native title holders representing 50 RNTBCs;
 - each of the 15 NTRBs/NTSPs;
 - representatives of each of the mainland state and territory governments; and
 - industry representatives.

³ Note that the term native title holder refers to the group of people who hold native title, regardless of whether this native title has been determined (i.e. it includes native title claimants).

⁴ Available at www.deloitteaccess economics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf

- public submissions – 58 submissions that were received are summarised in Appendix E and are available online.⁵

Report structure

The remainder of the report is structured as follows:

- Section 2 outlines the current native title system;
- Section 3 outlines the features of a well-functioning future native title system;
- Section 4 sets out the pathways and options for the development of functional RNTBCs in a future native title system;
- Section 5 sets out the roles and responsibilities of NTRBs/NTSPs in the future native title system;
- Section 6 sets out the options in relation to private agents in the future native title system; and
- Section 7 provides a brief conclusion and summarises the findings relative to the Review's Terms of Reference.

The contents of this report are supported by the following Appendices:

- Appendix A lists the Terms of Reference for the Review;
- Appendix B provides supplementary background material on the native title system;
- Appendix C lists the organisations represented in the Reference Group for the Review;
- Appendix D summarises the consultation schedule for the Review; and
- Appendix E lists the public submissions received over the course of the Review.

⁵<http://www.deloitteaccessseconomics.com.au/our+services/economic+analysis+and+policy/native+title/submissions>

2 The native title system

The preamble to the Act states that one of its aims is “to ensure that native title holders [are] able to enjoy fully their rights and interests”. While the Act details the requirements of NTRBs/NTSPs in supporting native title holders to make claims, the support native title holders can draw on to “enjoy fully” their rights and interests following the recognition of native title is less clear. Providing clarity on the role of NTRBs/NTSPs in this process is an important objective of the Review. In addition, presenting a clear picture of the appropriate role of, and support for, RNTBCs is equally critical.

Further, when considering the roles and responsibilities of the NTRBs/NTSPs and the nature of their support for RNTBCs, it is important to consider the native title system as a whole, as changes in any part of the system can impact elsewhere. The ‘system’ can be loosely defined to include the activities of native title holders including RNTBCs, NTRBs/NTSPs, Federal Government (particularly PM&C and Attorney Generals), state and territory governments, the Federal Court, NNTT, AIATSIS, ORIC, ILC, IBA and private agents delivering a range of services to the system.

Native title is widely viewed as an important asset which can be leveraged by Indigenous Australians to deliver tangible social, cultural and economic outcomes. Warren Mundine, Chair of the Government’s Indigenous Advisory Council, reflects this potential in a recent remark:

“There is also a great opportunity for Indigenous people to participate in the real economy through their land and Native Title rights and the funds built up through royalties or compensation for loss of land. These assets can and should be used to generate commercial and economic development for Indigenous people through a real economy, real jobs and real for-profit businesses owned and operated by Indigenous people” (Mundine, 2014).

A properly functioning native title system, in which NTRBs/NTSPs and RNTBCs are appropriately oriented to support native title holders manage and use their native title, is an important instrument to achieving these benefits, particularly in the broader context of Australian governments’ overarching commitment to close the gap on Indigenous disadvantage.

This section is supported by further background material provided in Appendix B.

2.1 Native Title Representative Bodies and Service Providers

The 15 NTRBs/NTSPs play a central role in the native title system. This role reflects the statutory roles and functions set out in Section 203B of the Act and outlined in Section B.2.1 of Appendix B. In addition, NTRBs/NTSPs are bound by their Program Funding Agreements (PFAs), which stipulate the nature of support that can be provided to RNTBCs and PBCs.

Each of the NTRBs/NTSPs has emerged from or exists within Indigenous organisations, some of which predate the Act and have been significant institutions in the representation of Indigenous Australians for decades. With the exception of the Torres Strait Regional Authority (TSRA), all NTRBs/NTSPs are funded by the Native Title Programme located in PM&C (formerly FaHCSIA) to provide relevant services to specific regions identified in Figure B.1. Many of the NTRBs/NTSPs provide services outside of the Native Title Program using other sources of funds.

NTRB/NTSP activities

NTRBs/NTSPs undertake a wide range of activities based on their legislative roles and functions and in response to emerging demands from RNTBCs.⁶ While these activities are interrelated, for simplicity they can be grouped as follows:

- claims resolution;
- future acts and agreement making;
- managing native title;
- supporting the use of native title to achieve cultural, social and economic outcomes; and
- other activities related to their broader regional functions unrelated to native title.

Reflecting the initial goal of achieving recognition of native title and the process of securing the associated interests, the main focus of NTRB/NTSP activity over the past 20 years has been on claims activity, future acts and agreements. However, with the growing number of successful determinations, nearly all NTRBs/NTSPs are increasingly providing the broader services relevant to managing and using native title.

As such, NTRBs/NTSPs are being asked to perform an increasing volume of work with fixed resources. NTRBs/NTSPs report challenges both in relation to their overall level of funding and the flexibility with which they are able to deploy these resources. A number of NTRBs/NTSPs maintain that the details of their PFAs limit their ability to support native title holders in this context. Other stakeholders with an interest in the functionality of the native

⁶ This wide range of NTRB/NTSP activities is commonly grouped in terms of the 'pre' and 'post' determination stages – i.e. before or after the legal determination of a group's native title by the Federal Court of Australia. Pre-determination activities are necessarily centred on the claims process to achieve a successful determination. In contrast the post-determination phase is focused on native title management following a successful determination. Both stages entail work supporting native title holders with the management of future acts and agreements as they arise. Likewise, both stages can include work which supports the use of native title to achieve community benefits but this work is typically of considerably more significance in a post-determination context. Though there is overlap between the types of activities undertaken 'pre' and 'post' determination, these categories provide a useful shorthand.

title system confirmed the challenges of NTRB/NTSP resourcing (including a number of state and territory government representatives, corporations and industry peak bodies, the Federal Court and native title holders), as does recent research.⁷

NTRBs/NTSPs are also increasingly undertaking activities designed to support the use of native title to achieve social, cultural and economic outcomes. This work centres on the role of NTRBs/NTSPs in delivering programs in culture, heritage and land management, as well as support for strategic planning and supporting the development of enterprises. NTRB/NTSP activities in these areas are not funded by the native title program but are typically met through other government programs or grant funding, cost-recovery activities, cross-subsidisation from other activities or through funding associated with other statutory functions.

Further details and examples of these types of activities are provided in Section B.2.2 of Appendix B.

Fundamental to facilitating effective management and use of native title anticipated in the Act is the development of the appropriate capacity among native title groups and their corporations. This involves supporting native title holders to understand the responsibilities and opportunities associated with native title and building the skills necessary to decision-making and exercising their rights. Consideration must also be given to developing the appropriate governance structures and decision-making processes relevant to managing native title and the associated benefits.

The process of capacity-building is central to the enjoyment of native title and relevant to both the pre- and post- determination context. The extent to which different NTRBs/NTSPs focus on this element of their responsibilities varies significantly across regions.

Profile of NTRBs/NTSPs

Although all NTRBs/NTSPs are funded to undertake the same set of roles and functions, there are marked differences in the mix of activities undertaken by each of them. These differences reflect the extent to which claims work has been resolved in the region, the policy and legislative context of each state and territory, the history of the particular NTRB/NTSP, and other local circumstances.

Table 1.1 summarises the position of each of the NTRBs/NTSP in relation to the claims work in their region and the extent of their focus on post-determination activity. As captured in the middle column of Table 1.1, in a small number of regions, such as the Torres Strait Islands, there are no or very few outstanding claims. In contrast, other regions, such as the QSNTS and NTSCORP, have a large number of outstanding claims which may take a decade or more to resolve. These differences have implications for the focus and activity mix of NTRBs/NTSPs.

In particular, in regions where a significant number of claims have been resolved, there has been a strong shift towards post-determination activity. Table 1.1 shows that NTRBs/NTSPs such as the CDNTS, CYCLC, NTSV, KLC and TSRA now have a strong focus on post-

⁷Strelein & Regan (forthcoming)

determination activities. For these groups, non-native title activities and responsibilities have proven to be useful platforms for supporting native title groups. These NTRBs/NTSPs tend to have a significant focus on supporting the use of native title through the programs identified above, providing scope for a range of ongoing associations with native title holders. Those NTRBs/NTSPs that are yet to develop significant capacities in these areas tend to have a significant amount of claims work to be resolved over the next 5 to 10 years but should look to develop these capacities and develop a broader platform of activity over that time.

Table 1.1: NTRB and NTSP profile

NTRB/NTSP	State / Territory	Estimated period for claims to completed*	Level of post-determination activities, relative to pre-determination, activities**
Carpentaria Land Council Aboriginal Corporation (CLCAC)	Qld	Medium	High
Torres Strait Regional Authority (TSRA)	Qld	Short	High
Cape York Land Council (CYLC)	Qld	Medium	High
North Queensland Land Council (NQLC)	Qld	Long	Low
Queensland South Native Title Services (QSNTS)	Qld	Long	Low
NTSCORP Limited (NTSCORP)	NSW	Long	Low
Native Title Services Victoria (NTSV)	Vic	Medium	High
South Australian Native Title Services (SANTS)	SA	Medium	Medium
South West Aboriginal Land and Sea Council (SWALSC)	WA	Short	Low
Goldfields Land and Sea Council (GLSC)	WA	Long	Low
Central Desert Native Title Services (CDNTS)	WA	Medium	High
Yamatji Marlpa Aboriginal Corporation (YMAC)	WA	Long	Medium
Kimberley Land Council (KLC)	WA	Medium	High
Northern Land Council (NLC)	NT	Medium	High
Central Land Council (CLC)	NT	Medium	High

*Short: approx. five years or less; Medium: approx. five to ten years; Long: approx. ten or more years

** Based on consultations with each organisation

2.2 Native title holders

Under the Act, native title holders are the main intended beneficiaries of the native title system. Following a successful determination of native title, the Act requires that native title holders must establish a RNTBC, or nominate an existing one, to act as trust or agent for their native title.

The statutory functions of RNTBCs identified in the Act are expanded upon by the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (the Regulations),⁸ creating a significant list of RNTBC obligations. These are set out in Section B.3.1 of Appendix B and are directed at:

- protecting and managing, and in some cases holding, determined native title in accordance with the wishes of the broader native title holding group; and
- ensuring certainty for governments and other parties with an interest in accessing or regulating native title lands and waters by providing a legal entity through which to conduct business with the native title holders.

In addition to native title specific legislation, RNTBCs must comply with a range of regulatory requirements associated with their corporate structure and activities undertaken. Of particular note, this includes:

- the regulatory requirements of the legislation under which they are incorporated, the *Corporations Aboriginal and Torres Strait Islander (CATSI) Act 2006*, under which Aboriginal and Torres Strait Islander corporations are incorporated;
 - The CATSI Act requires that, among other things, RNTBCs meet certain organisational requirements, such as a minimum number of members, Indigenous membership requirements and governance standards for the organisation's constitution.
- heritage legislation, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and various state-based heritage requirements; and
- legislative frameworks pertaining to certain states and territories, such as the *Aboriginal Land Rights (Northern Territory) Act 1976* or the *Traditional Owner Settlement Act 2010* (Victoria).

RNTBC activities are also driven by the aspirations of native title holders to pursue activities which support their enjoyment of their native title. Given their status as the representative of native title holders following recognition of native title and associated group appropriate decision making process, RNTBCs have the potential to serve as important vehicles for the broader aspirations of native title holders.

Together these aspirations and various pieces of legislation create a substantial and challenging list of statutory roles and functions for RNTBCs.

⁸ See Part 2 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

In response to their statutory functions under the Act, RNTBCs are required to undertake a set of 'core' activities which can be grouped as:

- basic compliance activities;
- future act management, negotiations and agreements;
- monitoring and implementation of agreements; and
- management and distribution of benefits to their members.

Further, in response to the aspirations of their members and other forces, RNTBCs and their associated entities (such as separately established enterprise arms) often undertake or seek to undertake a broader range of activities which offer income and employment-generating opportunities. These include:

- culture and heritage management;
- land management activities;
- enterprise development;
- service delivery; and
- advocacy on behalf of their native title holders.

These activities are described in further detail in Section B.3.2 of Appendix B.

RNTBCs which are able to effectively undertake these activities can contribute to meaningful benefits for Indigenous Australians. These include:

- **stronger communities** underpinned by improved community decision-making, governance structures and the devolution of responsibility to local people;
- a greater ability to **make agreements** reflective of native title preferences, with the associated cultural, social and economic benefits; and
- the prospect of **pursuing opportunities linked to native title**, including income and employment-generating activities in areas such as culture, heritage and land management and other enterprises.

Together, these benefits have the potential to drive enhanced social and economic outcomes for Indigenous Australians. This is considered in more detail in Section B.3.3 of Appendix B.

"There is also a significant social and political trend towards supporting Aboriginal people to break free of welfare dependence and engage in Australia's mainstream economy, including in remote areas such as Cape York. Realising the economic potential of native title and Aboriginal land is considered one of the main mechanisms to achieve this outcome. CYLC is ahead of this trend through its support for the Cape York Welfare Reform agenda, advocacy for policy reform to support economic participation, and working in partnership with organisations such as Balkanu Cape York Development Corporation. Functional RNTBCs are critical to this outcome." (Cape York Land Council Submission to the Review, 2013:8.)

However, the Review has established that *in the complex and demanding environment in which they operate, most native title holders are unable to effectively meet their obligations or leverage their native title to pursue outcomes aligned with their aspirations*. It may be that the native title aspirations have been unduly raised by the time and effort taken to

achieve a native title determination. Nevertheless, this gap between capacity and aspirations continues to be a source of considerable frustration and distress among native title holders.

RNTBC resourcing and capacity

The challenges faced by most RNTBCs largely reflect their limited capacity. RNTBC capacity in turn is constrained by factors including the limited relevant skills and experience among native title holders, as well as challenges in relation to governance and group disputation (often occurring in circumstances in which families and other groupings seek ways of monopolising control of the RNTBC and benefit distribution).

A particularly pressing barrier is the limited resources available to most RNTBCs. There is minimal funding to support RNTBCs to undertake their activities. This partly reflects differing opinions on where responsibility for supporting RNTBCs resides between federal and state governments. It also relates to the interrelated nature of the native title system and where the current focus on claims work necessarily lies.

Section B.3.4 of Appendix B provides more detailed examples on the constrained capacity of RNTBCs.

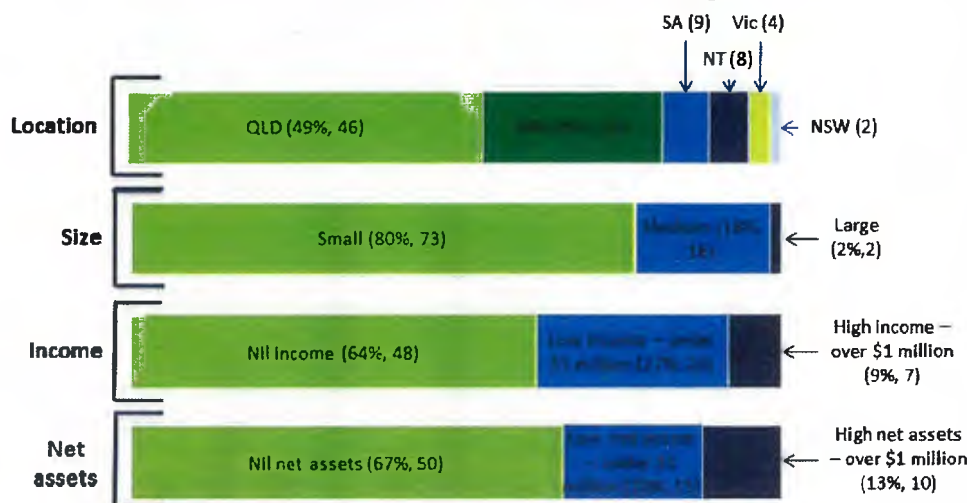
Since 2007, the Commonwealth's Native Title Unit has made some funding available to RNTBCs.⁹ This funding is administered through NTRBs/NTSPs. As at February 2013, of the almost 100 RNTBCs identified, 39 were funded by the Native Title Program. At that time, annual funding per RNTBC provided with basic support funding averaged approximately \$50,000 and totalled a little under \$2 million for 2012-13.

In addition, along with money from their settlements, some RNTBCs have been successful in generating income through activities such as land management and other commercial enterprises outlined earlier. However, though aspirations for income generation in this manner are high, the current scale of such activities remains small. The 2013 PBC Survey conducted by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) found that 59% of participating RNTBCs did not have access to a regular income stream.

Indeed, data provided by ORIC (2013) indicates that while a small number of RNTBCs had annual income of over \$1 million, 64% and 67% reported no income and no assets respectively. Further, as reflected in Chart 1.1, 75% of RNTBCs were classified as 'small' based on the CATSI Act definition of meeting at least two of the following three criteria:

- less than \$1 million in annual income;
- less than \$1 million in assets worth; or
- fewer than five employees.

⁹ These arrangements do not include the RNTBCs in the Torres Strait, which are funded by the Torres Strait Regional Authority.

Chart 1.1: Selected characteristics of current RNTBCs (Percentage, number of RNTBCs)

Source: ORIC (2013)

Note: The statistics used in this figure include only RNTBCs for which sufficient information was available. Information was available in relation to 98 RNTBCs, but in relation to size - only 91 RNTBCs, income - only 75 RNTBCs, net assets - 75 PBCs. The size classifications are based on the CATSI Act categories which include reference to the number of employees, value of consolidated gross operating income and value of consolidated gross assets.

Some caution is needed in interpreting these data as they only cover the income, assets and staff directly related to the RNTBC (for example they may not include the income, assets and staff associated with related trusts or enterprise arms controlled by the RNTBCs).

This caveat aside, the information provided here highlights the significant financial resources of a minority and the limited means of the vast majority of RNTBCs. Overall, the limited capacity of RNTBCs inhibits the negotiation process for projects that affect native title land, as well as the ability of native title holders to pursue broader objectives.

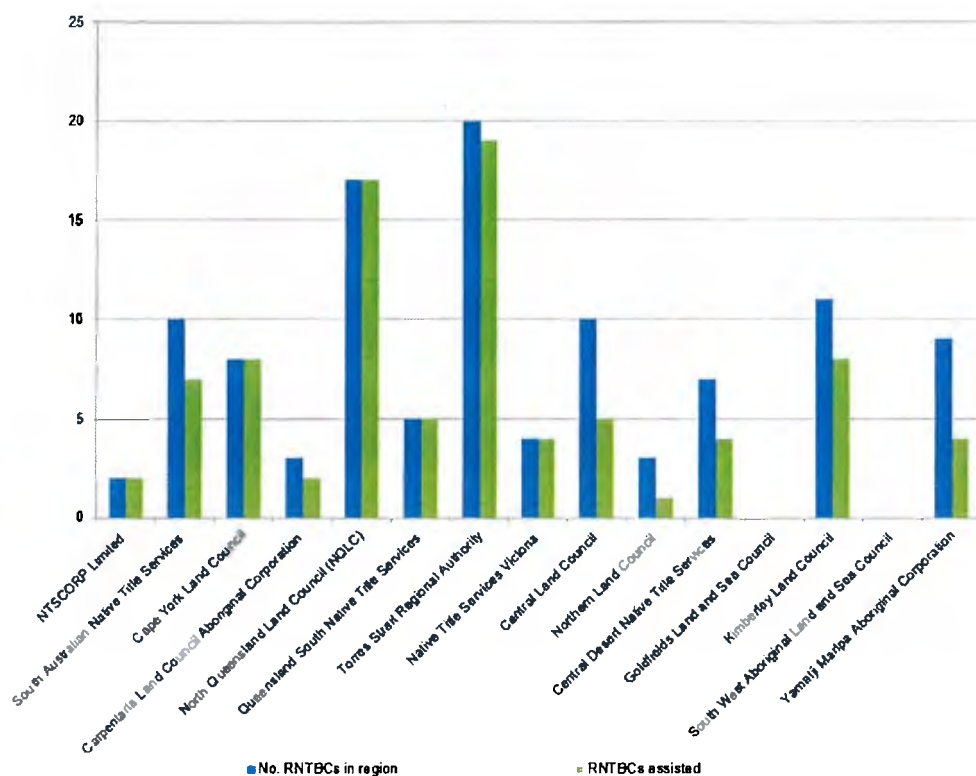
2.3 Support for native title holders

In response to the acute needs and limited resources of most RNTBCs, a range of support mechanisms have begun to emerge. This support is most commonly provided by NTRBs/NTSPs but is also provided by emerging alternatives.

RNTBC assistance by NTRBs/NTSPs

Most NTRBs/NTSPs provide support to at least some of the RNTBCs in their region. Chart 1.2 presents the number of RNTBCs to which each NTRB reports offering assistance. In 2012-13 NTRBs/NTSP reported assisting 86 RNTBCs, an increase from 72 in the previous year. Ongoing growth in the level of this assistance reflects the demands for these services as a consequence of the growing number of RNTBCs and their significant support needs.

Chart 1.2: Number of RNTBCs and number assisted by region, 2012-13



Further evidence on the areas of NTRB/NTSP assistance to RNTBCs is provided in Section B.4.1 of Appendix B.

NTRBs/NTSPs have developed a variety of different models to support RNTBCs based on significant variation in local circumstances. These models can be broadly grouped as:

- **RNTBC support integrated with other activities** – often provided on an ad hoc basis and based on existing relationships, used by NTRBs/NTSP such as the CLC and NLC;
- **RNTBC support unit / support officer** – used by NTSV, CYLC and TSRA;
- **Shared services provided on a fee-for-service basis** – offered by:
 - Desert Support Services (DSS) established by CDNTS;
 - Ngurra Barna established by YMAC; and
 - Kimberley Regional Economic Development Enterprise (KRED) established by the KLC.
- **Regional Default PBC operated by the NTRB/NTSP** – as currently in use by the NLC.

These models are described in more detail in Section B.5 of Appendix B.

The particular arrangements used will be influenced by how developed the RNTBCs are. For example, an RNTBC support unit can be useful for RNTBCs in their infancy as they build basic capabilities around, say, governance and their accounts. A Default PBC can be appropriate where few income-generating opportunities are available. Shared services can be a useful means of efficiently meeting various costs for more established RNTBCs.

NTRBs/NTSPs do not have a specific function related to assisting RNTBCs in the management and enjoyment of native title rights and interests or the implementation of agreements. However, the Act states that they are required to “give priority to the protection of the interests of native titleholders” and to provide “facilitation and assistance” on a range of related topics, requirements widely cited by NTRBs/NTSPs and others as a statutory foundation for their activities in these areas. Indeed, in many respects the ongoing post-determination support provided to RNTBCs is a natural progression from the support these groups have received prior to determination.

The extent and nature of NTRB/NTSP support for RNTBCs is determined by:

- the resources they have available to them and the restrictions associated with their individual PFAs;
- resources available to them through associated non-native title activities or responsibilities; and
- the preferences of native title holders regarding the nature and level of support they require.

Reflecting these factors, the level of NTRB/NTSP support varies significantly between regions. Common areas of support include the administrative assistance, expertise and planning necessary to undertake activities such as:

- future act management, negotiations and agreements;
- management of native title including monitoring and implementation of agreements and work on capacity-building through skills and corporate governance development; and
- using native title by pursuing other income-generating activities in areas such as culture, heritage and land management.

Models of non-NTRB/NTSP support for RNTBCs

While NTRBs/NTSPs are currently the main source of support for RNTBCs in the native title system, there are a number of emerging models that offer alternative support structures.

In particular, the notion of establishing a RNTBC grouping as the basis for shared support is widely noted. A number of emerging examples are:

- Federation of Victoria Traditional Owner Corporations (the Federation) – Victoria;
- Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation (the Sea and Land Council) – Torres Strait; and
- (proposed) Central Services Corporation (CSC) – South West Region of Western Australia.

These models are described in more detail in Section B.6 of Appendix B.

Each model provides support for RNTBCs through shared services, either through ongoing contracts or fees-for-service. As such, the model helps RNTBCs to obtain the benefits of scale and capacity of a large organisation, potentially acting as a fee-for-service hub for users of native title services.

2.4 Role and impact of private agents

Native title holders are not mandated to engage the services of an NTRB/NTSP for native title related work. Rather, if the native title holder or group feels they will be better served by an external service provider they can choose to engage a 'private agent'. Additionally, capacity constraints of NTRBs/NTSPs and matters of conflict of interest sometimes render a NTRB/NTSP unable to provide services and the use of a private agent becomes necessary. As such, a number of private individuals and organisations have developed native title expertise and provide a range of services to native title holders.

Common services provided by private agents include:

- **legal services:** covering a variety of services throughout the native title process including in both native title matters and commercial matters;
- **anthropological services:** primarily required for native title matters, particularly in informing connection reports and the collection and collation of claims evidence; and
- **commercial advice:** supporting RNTBCs, related organisations and other native title corporations to undertake a wide range of activities within commercial services, including basic compliance, funds management, land management and enterprise development.

The nature of these services is described in Section B.7.1 of Appendix B.

In addition to its primary focus on the roles and functions of NTRBs/NTSPs, the Review has also been asked to consider the impact of these private agents.

Despite the recognised need for private agents to be contributing to the native title system, some concerns have been raised regarding the potential negative impacts for native title holders caused by the practices of a small number of private agents.

The Review has been provided with instances where the behaviour of private agents has adversely affected the experiences of native title holders, such as those identified in Box 1. However, there is no comprehensive evidence base in regard to the level of any unscrupulous behaviour by private agents.

Box 1: Submissions on private agent impacts

Submissions provided to the Review, including that of CYLC, Dan O’Gorman QC, NNTC, NQLC, QSNTS, TSRA and YMAC, outlined some of the potential adverse consequences of inappropriate private agent activity. These impacts included:

- lack of transparency for members of native title groups;
- divisions between members of the same native title group;
- delays and complexities in claims processes and agreement making;
- reduction in the funds available for the benefit of the entire native title group;
- challenges for NTRB/NTSP legal representatives seeking instructions from clients; and
- uncertainty for third parties seeking to make agreements with native title holders.

In particular, conflict within the native title system is fuelled by questions over where and to whom native title applies and how it should be managed. Structural features inherent to the native title system also have the potential to foster conflict, such as:

- the legal ambiguity in relation to connection prior to a determination;
- the legal ambiguity relating to group members, particularly prior to determination but sometimes following a determination;
- the legal ambiguity of the presence of a fiduciary duty by the named Applicant in relation to the broader native title group – that is they owe consideration to the interests of the broader group;
- the disjunction between the Western legal framework underpinning native title and traditional practices of native title holders;
- the complexity of the issues facing native title holders and the often limited information they have in areas such as corporate governance, decision-making processes, benefit management, legal matters and commercial issues; and
- conflicting incentives in dispute resolution where breakaway claimants may, in the absence of a determination in their favour, have an interest in prolonging the claims process, in contrast to the interests of the main claimant group and other stakeholders.

These tensions contribute to disputes and other problems often associated with private agents. Where unscrupulous behaviour of a small number of private agents occurs, existing tensions may be further exacerbated, particularly where there are significant opportunities for financial benefit for the private agent associated with lucrative agreements.

These issues are analysed further in Sections B.7.2 and B.7.3 of Appendix B.

3 The native title system in the future

The Review has identified a series of reform options which are intended to support the development of a future native title system in 10 to 20 years, whereby:

- native title holders are well positioned to enjoy their rights;
- NTRBs/NTSPs have a clearly-defined ongoing role and the scope to evolve with different emphases in response to localised needs and circumstances;
- some NTRBs/NTSPs will have a lesser claims focus and a greater focus on supporting native title holders to manage and use their native title, all within a contestable market;
- there is a closer match between RNTBC capacity and their obligations and aspirations;
- there are clear pathways for RNTBCs to work with each other and other organisations (including NTRBs/NTSPs) to achieve these goals;
- it is recognised that while all RNTBCs should be given the opportunity to achieve their aspirations not all will succeed (based on the reality of the opportunities offered by the nature of their own native title or other partnerships);
- private agents provide services to native title holders within a contestable environment which supports transparent and accountable service provision; and
- there is an alignment between native title and broader Indigenous policy directions by the Commonwealth, state and territory governments.

For the native title system to align with these principles, native title holders must have the opportunity to pursue a pathway for the use of their native title which is consistent with regional opportunities and their aspirations. This pathway will vary, in some cases leading to minimal activities beyond a role responding to land access requests and associated future acts. Other native title holders may be able to participate in a wide range of activities related to land management and economic development.

The Review has established that there are constraints on the ability of native title holders to pursue these pathways. This primarily reflects the limited capacity of most RNTBCs, due in large part to the limited resources they have available. Consequently, for native title holders to have a reasonable prospect of enjoying their native title, there must be a realistic prospect that RNTBCs can operate as effective vehicles to pursue the aspirations of native title holders.

The reform options identified by this Review as necessary to achieve these outcomes fall within three broad areas:

- enhancing the functions of RNTBCs;
- the roles and functions of NTRBs/NTSPs; and
- the role of private agents.

The following sections discuss these three reform areas.

4 Towards functional RNTBCs

As reviewed above, a small number of RNTBCs have developed a substantial asset base, typically as a result of significant settlements and agreements, and have used these resources to develop the capacity necessary to undertake a wide range of activities. In contrast, the majority of RNTBCs have extremely limited resources and no capacity to respond to their obligations or pursue pathways for the use of their native title, causing great distress among native title holders.

Due to significant differences in the capacities, aspirations and opportunities of native title groups and their RNTBCs, the outcomes they achieve will always be highly varied. However, a well-functioning native title system should be characterised by circumstances in which all native title groups have the chance to consider how to use their native title, what aspirations they have and what opportunities they want to seek out.

4.1 RNTBC pathways

There were 118 RNTBCs at December 2013, with the prospect of this number growing substantially over the next decade. Many of these RNTBCs will not have access to income-generating activities or the skills base to be able to meet all of the aspirations of their group. Some will fail. The Review found that, at present, most RNTBCs have yet to achieve even the most basic functionality and as a consequence, lack the capacity to pursue any potential viable opportunities.

Below are four examples of the types of RNTBCs that might emerge in a context in which native title holders have the chance to make considered decisions about their future. The examples below are characterised by the types of activities different RNTBCs will pursue based on their different capacities, aspirations and opportunities.

- **Wide range of activities:** the land of some native title groups is associated with significant economic value (particularly land covering resource extraction projects or other development potential). RNTBCs for these native title groups are able to generate significant income through future acts, agreements and associated enterprise development opportunities. These resources provide the basis for developing sufficient capacity independently to undertake the full range of functions identified in Section 2.
- **Land management focused:** RNTBCs with more limited economic development opportunities may still be able to pursue income-generating opportunities through fee-for-service or government-funded work in land or heritage management. Given their procedural rights and connection to land and heritage, native title holders through their RNTBC are ideally placed to undertake this work. To conduct these activities efficiently, RNTBCs may rely on the support of NTRBs/NTSPs, groupings of RNTBCs and other organisations.
- **Cultural management focused:** some native title groups may lack the opportunity for generating income or opt not to pursue available opportunities but may still find value in an RNTBC which is focused on protecting the group's native title interests and cultural connection to land. Such RNTBCs are unlikely to develop significant capacity

and will be reliant on the support of NTRBs/NTSPs, groupings of RNTBCs and other organisations to undertake necessary activities.

- **Minimal activities:** some native title holders may have no need for an active RNTBC and may opt to contract out the compliance activities of their RNTBC on a fee-for-service basis to their NTRB/NTSP or other organisations. In this context the involvement of native title holders with their RNTBC and its functions will be limited, such as certain future act notices and holding occasional general meetings.

Native title holders should have the capacity to consider their options and make informed decisions about their direction, based on their aspirations and opportunities. The Review found that this capacity is often lacking at present. Given the particularly severe implications of limited resources in constraining capacity, options to ease this constraint are considered below.

4.2 RNTBC funding

Limited but well targeted additional funding for RNTBCs would relieve one of the most critical constraints on their capacity and provide the opportunity for native title holders actively to consider the pathways they have available.

At the same time, the Review recognises the tight budgetary conditions that are likely to continue for some years and the limits to re-prioritising existing programs without compromising other policy objectives. The following presents a measured approach for increasing support for RNTBCs to an extent that the Review considered should be feasible through modest re-prioritisation of existing programs.

RNTBCs have two sets of needs which should be supported through increased funding:

- **Establishment funding:** during their establishment and early development, RNTBCs require establishment funding to undertake planning and corporate establishment. This should include consideration of appropriate governance structures and decision-making processes.
 - Such funding could be provided on a temporary basis to empower RNTBCs to proactively to chart a course for their future, rather than remaining reactive and dependent on future acts to generate any further opportunities.
 - While the Review is unable to advise on the specific level of funding required, it considered that funds need to be sufficient to facilitate initiatives that assist RNTBCs to develop a high-level strategy.
 - This may include the identification and preliminary assessment of opportunities for income generation for long-term RNTBC sustainability. Depending on the aspirations of the native title group and the nature of native title holdings, this might explore the potential for ongoing activities related to culture and heritage management, land management, enterprise development or service delivery. However, this funding would not be intended to cover the costs of preparing detailed, project-specific business cases.
 - RNTBCs may also choose to investigate the potential for partnerships which will contribute to the long-term sustainability of their operations. This might include other local or regional Indigenous groups or corporations. For example, partnerships may be particularly effective in instances where a specific native

title holder group is represented by multiple RNTBCs. Furthermore, RNTBCs may choose to approach non-Indigenous stakeholders regarding the potential for an ongoing partnership.

- It is envisaged that the provision of temporary establishment funding would empower RNTBCs to make necessary decisions regarding their future pathway, with reference to the aspirations of native title holders.
- **Basic support funding:** where RNTBCs have insufficient funds to meet their core compliance and governance responsibilities, clear and transparent basic support funding should be available on an ongoing basis.
 - The main activities that this funding would be directed towards include bookkeeping, reporting associated with basic compliance and the facilitation of general meetings as required under the *CATSI Act*. These constitute a base level of activities required to be undertaken by RNTBCs.
 - Depending on a range of factors, necessary funding is likely to vary across RNTBCs, although it is considered that this funding would average less than the funding currently made available by PM&C for some PBCs.
 - To reduce the burden on native title holders and achieve efficiencies, RNTBCs may outsource some of these activities to organisations such as NTRBs/NTSPs, consistent with the 'minimal activities' pathway described in Section 4.1, should the RNTBC choose to do so.

Eligibility for both sets of funding could be dependent upon criteria developed by government. This could include:

- demonstration of basic accountability and governance standards;
- means tests based on the assets and income generated by the RNTBC (and related entities); and
- a requirement that RNTBCs allocate the funding towards prescribed activities, such as planning, community engagement and corporate establishment, rather than hiring staff, purchasing assets or direct payments to members.

These suggested funding provisions deliberately exclude funding for the employment of staff, including a CEO, the rental of offices and the purchase of vehicles. The funding of such activities would need to come from other sources for those RNTBCs with the wherewithal to do so.

While some transitional, capacity-building support may be needed to get RNTBCs to a position where they can make effective use of the temporary funding designed to identify their future paths, it is considered that any ongoing, direct government support should be limited, so as to promote long-term responsibility for future activities, rather than perpetuating dependence.

The aim of the funding would be to provide a basic level of support for all RNTBCs to be given an opportunity to decide on their path forward without risking the entrenchment of costly and administratively cumbersome structures for what could be a large number of RNTBCs.

In determining actual funding levels, allowance could be made for the differences between RNTBCs, with funding levels varied based on factors such as membership size, remoteness

and the size of the area covered. While the needs of native title holders are acute and further delay in providing appropriate resourcing likely to be costly, timing of additional funding could be staggered to lessen the budgetary implications in the early years. These and other administrative details should be considered by government.

It is important to recognise that there should be flexibility with regard to the administration of this funding, given that there are varying capacities and relationships across the native title system.

In addition, the variation in capacity of the RNTBCs raises the issue of where the funding should be directed and who is able to make decisions on how it is spent. There are essentially two options available, namely direct funding of the RNTBCs or funding provided to NTRBs to provide specified services to the RNTBCs. (In those cases where relationships between the RNTBC and the NTRB/NTSP were poor, a further option could be for an independent trustee to be appointed.)

If they are in a position to make appropriate decisions as to how the funding should be applied, the RNTBCs ideally would be given the opportunity to manage of the funds themselves. This is consistent with the responsibilities the RNTBC assumes under the Act where a determination is made, including responsibilities surrounding the use of any financial proceeds from the settlement.

It is recognised, however, that RNTBCs will still be on a steep learning path at this point of their development and there is a possibility that the establishment funding in particular could be poorly used or, as has happened at times in the past with other funding, misappropriated. To minimise these risks, the RNTBC would have to apply for the funding with a clear course for how the money will be used and an acknowledgement that the establishment funding would only be available for a specific, short term period.

At the discretion of the RNTBC, there may be a role for the NTRB/NTSP to assist in the preparation of such applications (as is the case with the current funding for PBCs). The Department of PM&C would then assess the applications based on the evidence of RNTBC capacity. It may agree to the application, agree to the application subject to the funding being directed, possibly temporarily, to the NTRB/NTSP or a nominated trustee for the purposes set out in the application, or reject the application.

This level of flexibility establishes two potential scenarios. In instances where RNTBCs are able to manage the appropriation of their funds, potentially alongside income from alternative sources such as settlements and revenue from other activities, they will have the opportunity to seek support services from their NTRB/NTSP and other private agents. At the other end of the spectrum, an RNTBC that is unable to demonstrate basic accountability will have access to support from their NTRB/NTSP or nominated trustee, which will be responsible for the management of funds for such purposes.

It is also important to allow for movement of an RNTBC along the spectrum, towards greater empowerment and capacity to apply for, receive and appropriate its own funds for purposes that align with the objectives of native title holders and the opportunities available to it. This places a responsibility on the NTRB/NTSP or trustee to try to build the capacity of the RNTBC over time. It may be the case that an NTRB/NTSP manages funds on behalf of the RNTBC on a temporary basis, while this capacity is developed.

Re-prioritisation of native title funding

Within the constraint of the Review's Terms of Reference, which specified that the availability of additional financial resources should not be assumed, the Review judged that the additional funding specified above could be found through a modest re-prioritisation of the existing funds allocated to the native title system.

Having required the establishment of RNTBCs under the Act and placing responsibilities on them, the Australian Government has the primary responsibility for responding to RNTBC needs. As such, the basic support and establishment funding should be provided by the PM&C Native Title Program (as is the current limited RNTBC funding). However, the role of states and territories in imposing responsibilities on RNTBCs and the significance of RNTBCs for certain state and territory policy objectives, suggests they should also contribute to RNTBC resourcing needs.

The following comments are made in relation to options for re-prioritising existing Commonwealth programs within the native title system.

- Given the importance of progressing the remaining claims work in an orderly manner, the Review cautions against reorientating expenditure from the resources required to undertake the significant amount of claims work still outstanding. This could affect all stakeholders who rely on the greater certainty accorded by the clarity that comes with the formal recognition of native title.
 - AIATSIS, in its submission, made a number of other suggestions to free up native title resources, including reducing the requirements of proof of native title under section 223 of the NTA.
- At the same time, any opportunities to improve the deliberations of claims could free up resources. As noted at the outset, the native title system should be viewed in its entirety, recognising how changes in one part can flow throughout the system.
 - Two areas of particular concern are the differential roles played by various state and territory governments and the challenges that in some cases have arisen with private agents.
- If steps could be taken to relieve the pressure on the claims process, some resources could be re-directed from this aspect of the NTRBs/NTSPs funding. However, any such progress is likely to be slow and thus in the first instance, other sources of funds should be explored.
- The current review of the ILC and IBA provides an opportunity to consider some re-orientation of their spending as it considers their effectiveness in relation to "driving Indigenous economic development" (Commonwealth of Australia, 2013). Combined, they have assets of almost \$3 billion and an annual budget of \$326.6 million.
 - The priorities for the ILC in particular have evolved since it was established and a modest shift in those resources towards direct support for native title holders would be consistent with the broad purpose of the ILC.
- Government might also choose to consider how funding could be re-allocated among Indigenous Affairs programs more broadly, given that a well-functioning native title system should contribute towards a range of related policy objectives. For instance, there may be scope to review how the roles and functions of Indigenous Coordination Centres and Regional Operations Centres will interact with NTRBs/NTSPs and RNTBCs going forward.

4.3 Additional RNTBC resourcing

The additional funding suggested above is intended to provide native title holders with the means to meet the minimal compliance obligations of their RNTBC and consider the future use of their native title, acting independently or with external assistance. For those RNTBCs with the opportunities and desire to do more, additional capacities and income sources would also be required.

At the state and territory level, increased focus should be given to ensuring that settlements reached with native title holders are of sufficient value and appropriately structured to support RNTBCs establishment and future operations. There is precedent for this in a number of jurisdictions, notably comprehensive settlements encouraged under the TOS Act in Victoria and those between the Government of Western Australia and native title groups such as the Yawuru, Miriuwung Gajerrong and (that proposed for) the Noongar group. In each of these cases, resources have, or will be, dedicated to activities including corporate establishment, capacity-building and the planning necessary to identify further income-generating and economic development opportunities.

At the Commonwealth level, work could be done with RNTBCs as they seek to pursue opportunities in their region. In its submission to the Review, NTSV notes that funding for RNTBC-led initiatives could be provided through models equivalent to the flexible funding arrangements under section 64(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, the Indigenous Remote Service Delivery Special Account, or by making a time-limited special-purpose appropriation to the Indigenous Land Fund to be administered as a separate program by the ILC.

In addition to government funding, other alternatives for income generation have been suggested. For instance, NTSV suggested the establishment of an independent foundation, funded in partnership with industry. An option of this nature has been elaborated on by June Oscar AO and is presented in Box 2. Further exploration of such suggestions falls outside the Review's Terms of Reference.

Box 2: June Oscar AO, Chair of Bunuba Dawangarri Aboriginal Corporation RNTBC, extract of speech presented to National Native Title Conference, Alice Springs, June 2013

"My view is that waiting for governments to provide an adequate level of funding to PBCs will be like waiting for snow to fall in Fitzroy Crossing.

I therefore propose a partnership model between native title holding corporations, industry and government to establish a national fund which could be called something like a Native Title Corporations Foundation which native title holding groups could draw on to help fund their governance and operational responsibilities in their start up development phase.

The Foundation would be an independent non-government organization and voluntary in terms of participation. Like many emerging Indigenous corporate bodies which deal in the marketplace it should be incorporated as an unlisted public company limited by guarantee. We must start to assert our independence and be self-determining in a real way.

Such a Foundation should have a Board representative of PBCs from around Australia and include independent Directors to provide independent expert advice.

Besides providing financial support to PBCs, the Foundation would arrange for professional firms and individuals to provide commercial, governance, legal and other advice and facilitate strategic support for training, corporate and organizational development and project management with assistance from bodies such as Indigenous Community Volunteers Australia, and Aurora to mention two that come to mind.

Legislative rather than funding support would be required from the Australian Government to establish this Fund. The red tape around registration with the Australian Charities and Not for Profit Commission, or the ACNC, as a charity or public benevolent institution, and then the subsequent endorsement by the Australian Taxation Office for tax exemption and deductible gift recipient status, is complex, confusing, and overly bureaucratic."

Source: Oscar (2013)

5 Implications for NTRBs/NTSPs

The Review expects that NTRBs and NTSPs will continue to play a central role in the native title system in both pre- and post-determination contexts. Indeed, the future efficiency and effectiveness of the native title system will be strengthened to the extent that it makes use of the considerable strengths that NTRBs/NTSPs have developed to date, rather than seeking to re-build these capacities in other institutions.

At the same time, it is important to acknowledge the rights of native title holders and their RNTBCs to choose how their native title is used. As such, it is critical that NTRBs/NTSPs have the flexibility to continue to work closely with, and respond to the needs of RNTBCs in their regions. This section outlines the key implications for the ongoing roles and functions of NTRBs/NTSPs in the native title system.

5.1 Future roles and functions of NTRBs/NTSPs

As described in Section 2, NTRBs and NTSPs are central to the native title system, undertaking a broad range of activities which reflect not only their legislative roles and functions, but also emerging demands from RNTBCs. In undertaking these activities, NTRBs/NTSPs have developed significant strengths, as outlined in Box 3 below.

Box 3: Strengths of NTRBs/NTSPs relevant to RNTBC support

In considering the potential future role of NTRBs/NTSPs, it is useful to do so with reference to their general strengths in various areas. These include:

- **Established relationships** – through the claims process they have developed and (often) maintain good relationships with native title groups and other related group;
- **Scale** – both in terms of physical infrastructure and personnel – that potentially allows for the efficient delivery of services;
- **Expertise** – long periods of operation as organisations supporting native title holders and their local focus has in most cases lead to the accumulation of a significant institutional knowledge;
- **Connectivity** – well positioned to make linkages between symbiotic programs of various levels of government (e.g. native title claims, PBC support, rangers program);
- **Regional focus** – their strong regional focus provides a critical local knowledge base to assess the risks / implications of different activities such as regional land use activities and economic development;
- **Accountability** – are accountable for their actions to government, with the obligation to publicly report on the funds they receive and services they provide. Most NTRBs/NTSPs also have arrangements to promote responsiveness to native title holders through elected boards and other mechanisms; and
- **Ability to evolve** – over the long histories of many of the organisations which now operate as NTRBs/NTSPs most have shown the ability to evolve in response to new developments in the system.

The Review considers that NTRBs/NTSPs will continue to be central to the operation of the native title system. For many NTRBs/NTSPs the significant claims work they have ahead will continue to be their primary focus for the next 5 to 10 years. At the same time, NTRBs/NTSPs will have an increasingly important role in working closely with native title holders to manage their native title and use it to achieve tangible social, cultural and economic outcomes.

Accordingly, the Review found that NTRBs/NTSPs have the core capability to be involved in providing ongoing support to native title holders across a range of areas, including:

- claims resolution;
- negotiation of future acts and other agreements, in both pre- and post-determination contexts;
- management of native title – including legal, governance and mediation services, and overall management where RNTBCs choose to delegate those responsibilities;
- using native title to achieve cultural, social and economic outcomes – including strategic planning, enterprise development, land management, cultural heritage management; and
- local and/or regional co-ordination, perhaps with other RNTBCs or other relevant stakeholders in the community.

Overall, the precise focus of NTRBs/NTSPs will vary across the country as each works with the particular circumstances it faces. Ideally, policy should support this flexibility. For instance, in each case, NTRBs/NTSPs should be encouraged to determine whether they are suited to:

- directly provide a support service to RNTBCs;
- outsource the service to a third party;
- facilitate RNTBC access to a service by providing advice on appropriate sources of assistance; or
- if the support service is not particularly relevant within their region.

Critically, the appropriate response of an NTRB/NTSP will depend upon the nature of its organisation, particularly in terms of whether it has broader roles under other legislation, the nature of its relationships in the region, and the demands of RNTBCs.

The Review anticipates that, combined with the additional RNTBC resourcing described above, the range of activities expected of NTRBs/NTSPs can be primarily conducted with the resources currently available through the native title program, cost-recovery measures and other government program funding and grants. The Review considers that some level of base support for NTRBs/NTSPs as part of their PFAs would be appropriate, to allow them to retain their core capabilities in a post-determination environment.

Models for NTRB/NTSP support for RNTBCs are discussed further in Section 5.3.

5.2 A contestable market for RNTBC support in a post-determination environment

As the need for RNTBC support services in a post-determination environment grows, the Review considers that the provision of support services by NTRBs/NTSPs to RNTBCs should take place within the context of a contestable market, to strengthen the opportunity for autonomy and self-determination among native title holders and their RNTBCs, a central objective of the Act.

Within a contestable market, NTRBs/NTSPs will continue to be able to draw on, and compete with, private agents to provide services to the RNTBCs. The enhanced autonomy of RNTBCs created through the contestable environment means that NTRBs/NTSPs and private agents will ultimately need to learn how to provide services that the RNTBCs believe are relevant and useful.

Additionally, contestability sharpens incentives for providers to remain efficient in providing services to RNTBCs. This is likely to manifest in lower costs, higher quality work or both as providers compete to win contracts from RNTBCs. Secondly, the entry of private agents allows for a more efficient distribution of support services as NTRBs/NTSPs focus specifically on the services and abilities in which they have specialised knowledge and expertise, and thus leave more routine or generic tasks to private agents that can perform them competitively. If NTRBs are competitive in particular tasks, they will thrive, but there is no reason why they should enjoy a monopoly on services to RNTBCs.

Contestability will also fundamentally alter the nature of the relationship and services provided to RNTBCs by NTRBs/NTSPs. Ideally, contestability will result in the professionalization and regularisation of services to RNTBCs, away from informal and ad hoc measures. Thus the relationship between NTRBs/NTSPs and RNTBCs will be brought within the ambit of contract law, providing rights of recourse that draw on the full weight of the civil justice system.

As the MCA notes in its submission:

"Where PBCs have significant potential to generate economic benefits, they should be able to purchase the services from reputable providers in an open market. If NTRBs are competitive, they will be the preferred providers – but it's not appropriate for them to hold a monopoly on services." (MCA Submission to the Review, 2013:4).

This will inevitably lead to a shift in NTRB/NTSP accountability away from the Commonwealth and more directly towards native title holders. The transition process towards a contestable market will require several key changes and careful management to ensure that the strengths of NTRBs/NTSPs are retained.

For example, the reporting and management requirements imposed on NTRBs/NTSPs should be relaxed to permit flexibility in responding to the demands of native title holders. Furthermore, it is likely that amendments to legislation defining the scope of NTRBs/NTSPs would also be required, to include post-determination activity. This activity is best interpreted as an extension of the scope of existing work rather than the creation of wholly new fields of endeavour.

Overall, the Review considers that the combination of existing strengths and provisions for greater flexibility is likely to provide a platform for NTRBs/NTSPs to thrive in a contestable system. NTRBs/NTSPs are well placed to build on their connections to the community and existing RNTBCs flowing from the work associated with native title claims and determinations. These existing skills and relationships suggest that NTRBs/NTSPs will have a significant advantage in a contestable system to provide services that involve community consultation (such as community development and land use planning) or relate to connections to industry (such as agreement compliance).

5.3 Models for NTRB/NTSP support to RNTBCs

Having established that NTRBs/NTSPs are well placed to work closely with native title holders and their RNTBCs, it is important to recognise that this support should be based on models of both:

- in-kind support based on NTRB/NTSP resources; and
- fee-for-service support based on cost-recovery.

In a pre-determination context, in-kind support will necessarily dominate. However, in a post-determination context there must be sufficient scope for increased fee-for-service support as RNTBCs develop their own income sources.

The native title system needs to provide sufficient flexibility for the balance between in-kind support and fee-for-service to emerge as appropriate to local circumstances. As a consequence, the Review does not set out to prescribe what sort of services should be provided by NTRBs/NTSPs under either model but instead offers ideas on areas requiring attention.

In-kind support

In terms of in-kind support, NTRBs/NTSPs should work with native title groups in the pre-determination and early post-determination context to:

- develop native title group capacity through support for skills and governance development; and
- assist with identifying and pursuing income-generating opportunities to be undertaken by RNTBCs and their related entities.

These activities are currently undertaken to varying extents by most NTRBs/NTSPs in the pre- and post-determination context. However, the extent of this support varies significantly among NTRBs/NTSPs and is often minimal. In part this variety reflects differing perspectives on the extent to which these activities fit within the statutory roles and functions of NTRBs/NTSPs and the terms of their PFAs.

The Review understands that, possibly subject to prior agreement, there are no current restrictions, in PFAs or elsewhere, on the ability of NTRBs/NTSPs to use their native title program funding for these purposes. This view is inconsistent with the understanding of a number of NTRBs/NTSPs and other stakeholders to the system. The Government may be able to assist in this regard, through public communication of the range of activities for

which NTRBs/NTSPs are able to use their funding and the expectation that NTRBs/NTSPs provide such services.

To support these activities, NTRBs/NTSPs may be able to gradually re-prioritise their current activities gradually. As claims work declines over time, NTRBs/NTSPs should have increased opportunities to use their resources in support of these objectives.

All NTRBs/NTSPs should also be in a position to provide options for RNTBCs that may choose to use their native title in a minimal way (as described in Section 4.1). Those options may include the RNTBC delegating the ongoing management of the title to the NTRB/NTSP subject to various conditions, the establishment of a regional RNTBC, consistent with the NLC's 'Default PBC' model, or simply being in a position to provide services such as governance and accounting services on a fee-for-service basis as discussed below.

Cost-recovery

NTRBs/NTSPs should increasingly look to support RNTBCs using a cost-recovery model. While it is acknowledged that the scope for such cost-recovery is currently constrained by the limited resources of RNTBCs, the additional RNTBC funding discussed above, combined with growing numbers of settlements, agreements and other sources of income generation, should provide increased scope for this model in the future.

Cost-recovery services could be structured in two ways:

- RNTBCs eligible for direct funding may choose to have an ongoing fee-for-service relationship with NTRBs/NTSPs; or
- RNTBCs may opt to direct part or all of their funding to their local NTRB/NTSP in exchange for ongoing support defined in a service agreement.

In practice the second option is likely to be the more practical and preferred model for many RNTBCs eligible for funding. In this context, the service agreement is likely to take on substantial significance, potentially requiring government to create or guide the design of standardised approaches by NTRBs/NTSPs. However, such agreements should also be flexible enough to encompass significant variety.

For instance, some native title groups may adopt a proactive stance, developing their capacity and seeking out opportunities for income generation with the support of their NTRB/NTSP, consistent with the 'wide range of activities' RNTBC described above. In contrast, others may prefer to contract out responsibility for meeting their regulatory obligations to the NTRB/NTSP and to have only minimal involvement with their RNTBC in the context of some future acts and occasional general meetings, consistent with the 'minimal activities' RNTBC described above. The details of these agreements would be established on a case-by-case basis.

The circumstances outlined for the future operation of the NTRB/NTSP support for RNTBCs is consistent with the emerging models in this space described in Section 2. For instance, service agreements established between NTRBs/NTSPs and RNTBCs could be used to employ RNTBC support officers or further develop support units, such as those currently operated by the CYLC, NTSV and TSRA. Likewise, fee-for-service arrangements are consistent with the nascent capacities being developed by organisations connected with YMAC, CDNTS and the KLC.

Based on the services provided by the emerging examples of NTRB/NTSP support for RNTBCs on a cost-recovery basis – such as DSS, Ngurra Barna and KRED – areas of support based on this model could include undertaking the administrative tasks required for basic compliance, future act management and agreement negotiation. This would include bookkeeping, stakeholder management and logistics for meetings.

That said, it is acknowledged that there are practical issues associated with the use of a pure fee-for-service model in relation to certain activities. In particular, the Review anticipates that there will be an ongoing need for NTRBs/NTSPs to provide legal support services to RNTBCs in this area. As the number of RNTBCs which have progressed to a post-determination environment increases, there will also be growing potential for NTRBs/NTSPs to establish fee-for-service arrangements where they are requested to provide these services.

However, exclusive reliance on the fee-for-service model may not be feasible given that there is often a time lag between the provision of and payment for support services as negotiations take place over extended periods. Where RNTBCs request support from NTRBs/NTSPs to assist with negotiations, the associated upfront costs can be particularly large, and with delayed access to funds from proponents, NTRBs/NTSPs bear the burden of reduced cash flow and uncertainty around income streams.

Recognising the importance of retaining the strong legal expertise of NTRBs/NTSPs in this area, the Review considers that providing a base level of support for these activities as part of their PFAs would be appropriate. This base funding should be sufficient to enable NTRBs/NTSPs to maintain their core capabilities in legal services on an ongoing basis, which would be supplemented by fee-for-service income when available.

It is considered that where NTRBs/NTSPs are involved in the delivery of services in areas related to culture, heritage, land management and other components of economic development, this should continue to be funded through the wide range of options available, including program-specific and grant funding, fee-for-service, cost-recovery and cross-subsidisation from other activities.

Further, drawing on their relationships and experience, NTRBs/NTSPs should continue to support the delivery of services by other organisations. For this to be possible, government must recognise the value of the role played by NTRBs/NTSPs and resource them accordingly on a fee-for-service basis. For instance, this would include ensuring that NTRBs/NTSPs are compensated for using their relationships and communication channels to support service delivery in areas such as health and education. Strong and enduring roles in these areas for the organisations currently operating as NTRBs/NTSPs are likely to be fundamental to effective partnerships between government and Indigenous communities.

5.4 Non-NTRB/NTSP support

In a contestable market, RNTBCs would be free to seek support and develop relationships with organisations other than NTRBs/NTSPs.

For instance, RNTBCs may establish relationships with other RNTBCs to form groupings and mutual support consistent with the nascent examples identified in Section 2. In this

context, RNTBCs may opt to pool their funding allocations and other resources to develop shared services hubs. Such hubs have the potential to offer the benefits of scale and specialisation offered by NTRBs/NTSPs, combined with corporate and governance structures consistent with the priorities of native title holders.

In some contexts, these RNTBC groupings may co-exist with the region's NTRB/NTSP or effectively supplement it. The groupings could also encompass other non-RNTBC native title corporations, such as Traditional Owner Corporate Entities in Victoria, Noongar Regional Corporations in Western Australia and other Aboriginal Corporations which have native title agreements but do not have a determination.

As discussed in Section 5.2, native title holders should also continue to have the opportunity to draw on the services offered on the private market. This may especially be the case where RNTBCs have sizeable additional settlement resources which put them more easily in a position to be in full control of all decisions. Drawing on private agents could be conducted in conjunction with ongoing services relationships with NTRBs/NTSPs and/or RNTBC groupings.

Finally, Commonwealth government agencies still have a major role to play in supporting native title holders in both the overall functionality of the native title system and in supporting native title holders leveraging their rights to engage in broader activities within Indigenous affairs. These agencies can bring a national perspective and experience to the native title system, and work with regional bodies to deliver such benefits to native title holders. Similarly, agencies at the state and territory level also provide valuable support services to native title holders and their RNTBCs.

These services should be delivered in a manner which is complementary to the regional focus and local expertise of NTRBs/NTSPs. It is noted that the current review of the ILC and IBA may provide useful insights on how those organisations might interact with NTRBs/NTSPs, RNTBCs and native title holders.

In some cases, greater co-ordination of the roles and functions of different agencies within broader Indigenous Affairs policy across Australia may be required.

5.5 Rationalisation

In the context of a decrease in claim related work in some regions, and the changing roles of NTRBs/NTSPs more generally, there is a question as to whether rationalisation of the number of NTRBs/NTSPs is appropriate. This question arises in the context of a series of past rationalisations, most recently in 2007. While rationalisations can be understood as an attempt to heighten operational effectiveness and utilise economies of scale, historically, rationalisations have been used as a vehicle for changing the structure of under-performing NTRBs/NTSPs.

For example, QSNTS noted that despite a difficult transition period, the amalgamations that occurred in south Queensland have achieved several of its objectives (QSNTS submission to the Review, 2013). The most noteworthy observations include:

- Consolidation of the corporate and organisational overheads (from three organisations into one) has yielded the desired economies of scale.

- Adopting a central office in Brisbane has permitted a targeted recruitment strategy of lawyers and researchers from a broader labour pool. The critical mass has fostered collegiality, workload responsiveness and succession planning.
- QSNTS is in a position to take a strategic regional approach to the resolution of claims, drawing on knowledge across the area. While claims are all unique – there are many common issues which can and will be resolved more efficiently by relying on acquired corporate knowledge.

Drawing on another example, the experience of YMAC, which is the only NTRB/NTSP to work across two representative areas, suggests that organisational structures can be tailored to accommodate differences across large geographical spaces. This is described in Box 4 below.

Box 4: Yamatji Marlpa Aboriginal Corporation

Yamatji Marlpa Aboriginal Corporation's (YMAC's) jurisdiction covers over one million square kilometres, covering both the Pilbara and Yamatji (covering the Gascoyne area) representative areas. With five offices, YMAC represents 24 distinct Traditional Owner groups.

After some initial difficulties during the transition period, the NTRB has found that covering two regions has been a more positive than hindering experience. There have been no lingering issues as a result of the rationalisation and two regions working closely together provides opportunities for knowledge and culture sharing.

Each representative area holds its own AGM, and directors meet for a combined AGM. This has been found to be a useful approach as there are distinct issues that should be discussed at the local and regional levels.

However, efficiencies gained through such rationalisations must be balanced against the any reduction in the ability of the organisations to represent what can be a diverse set of interests. Consultations indicated that while past rationalisations have ultimately led to an improvement in some regions, the transitional period was painful and associated with high costs. Some of the primary barriers to effective rationalisations include:

- differences in legal frameworks across jurisdictions – while this was the view of the majority of stakeholders, one NTRB/NTSP suggested that working across state boundaries might be viable if the body had separate offices in each jurisdiction (SANTS Submission to the Review, 2013);
- potential loss of strong cultural links in relation to unique regional issues; and
- the potential for insufficient knowledge transfer, resulting in a loss of NTRB/NTSP capability.

Some of these issues are illustrated in Box 5 below, which describes the North Queensland Land Council amalgamation.

Box 5: North Queensland Land Council amalgamation

In 2008 the NQLC representative scope was expanded to include the area belonging to the former Central Queensland Land Council (CQLC). Observations made as to the impact of such a move were:

- The direct financial costs involved in the amalgamation were significant. Additional funding was required to employ specialised staff to manage the transition process; conduct information sessions; pay out staff entitlements; provide new office leases and cover relocation expenses. There were further costs incurred through the recruitment of new staff, as only three of the original 25 CQLC staff were retained.
- The loss of corporate knowledge through the staff turnover was profound and impacted heavily on service delivery in the newly acquired region. Many of the CQLC claims were in a 'chaotic' state when the amalgamation was implemented, resulting in the NQLC having to undertake an immediate initial assessment of each claim, after which many were eventually withdrawn or struck out.
- Service delivery in NQLC's initial representation region was also negatively impacted as a high level of resources were needed to carry the CQLC case load. Additionally, new governance structures needed to be developed to cater for the expanded area.

From NQLC's perspective, *"the expansion of the NQLC's representative area in 2008 created a negative impact on the NQLC's impetus beyond a 12 month transition period...the costs incurred in effecting that amalgamation were significant...to repeat such an exercise in the future would be expensive, counterproductive to efficient claim resolution and unlikely to create a more stable and efficient platform for native title service delivery"* (NQLC Submission to the Review 2013:48).

At present, there are significant differences in the activities of the 15 NTRBs/NTSPs, reflecting their different histories and, especially, differences in the circumstances faced by the native title holders in their region. This suggests that the short-term adjustment costs of rationalisation would not be insignificant. It is considered that the NTRBs/NTSPs are of a broadly appropriate scale to balance scale efficiencies with the potential to form and maintain effective relationships.

Further, as described earlier, there will be benefits associated with the continued provision of regional-based support as the number of RNTBCs increases. The local knowledge base that has developed within NTRBs/NTSPs is particularly valuable in assessing the risks and implications of different activities such as regional land use activities and economic development. For example, the TSRA Submission to the Review argued that:

"RNTBC aspirations in the Torres Strait are specific to the region...To a very large extent, RNTBCs in the region need to work together (including in commercial ventures), to realise those aspirations. This necessitates a representative body which is local to the region, closely controlled and directed by the RNTBCs which it services and which can develop a substantial corporate knowledge specific to the region" (TSRA Submission to the Review, 2013:4).

Accordingly, no cases have been identified where rationalisation of NTRBs/NTSPs would be of clear benefit. It is most likely that future rationalisation would only be needed in the instance that an NTRB/NTSP became dysfunctional.

5.6 Recognition

Recognition status, which is given to NTRBs by the Minister on the basis of certain criteria, is a defining feature of NTRBs and distinguishes them from NTSPs. However, the two types of entities face essentially the same regulatory environments and are empowered to undertake identical roles and functions. This was confirmed during the consultations which found that whether a service provider was recognised or not did not result in material operational differences, including with the service provider's relationship with the Commonwealth.

At the same time, at least some, but not all, NTRBs view that the recognition process provides an imprimatur of legitimacy that can assist in supporting native title holders through the development of stronger relationships with, particularly, traditional owners in their region. The better the relationships, the easier it is for the NTRB to represent the group and help to resolve any disputes that may arise.

In fact, one NTSP noted that while there were essentially no practical implications of being an NTSP, the lack of recognition has at times created a negative perception arising from other services (NTRBs) having recognition status (NTSCORP Submission to the Review, 2013).

The increasing popularity of the NTSP model has emerged recently in response to a number of trends. For instance, NTSPs such as QSNTS and NTSV have emerged to fill the gap in service left by the deregistration of some NTRBs. More recently, a number of NTSPs have been formed by existing native title units breaking away from NTRBs which had broader functions than just native title. The breakaway native title units have then opted not to seek recognition but have incorporated under the Corporations Act and have been funded as NTSPs, as in the case of SANTS, CDNTS and NTSCORP. CLCAC has also not sought re-recognition and operates as an NTSP.

There are a range of historical differences between NTRBs and NTSPs that are not mandated by the Act. This includes differences in their governance arrangements and board structure. NTRBs are more likely to have representative boards comprised of traditional owners and NTSPs more likely to have 'professional' boards. NTRBs and NTSPs also differ in relation to their incorporation process: NTRBs are generally registered as Indigenous corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)* while NTSPs are typically registered under the *Corporations Act 2001 (Corporations Act)* and are limited by guarantee.

While these differences are not a direct function of the recognition provision, they do raise some important considerations in regard to board capacity and the relationship between the NTRB/NTSP and native title holders. There were views in some NTRBs/NTSPs that there was a tension between choosing a Board based on the Board's representativeness of the native title holder group or on the Board's qualifications. Both models present strengths and benefits, with a representative Board often holding more political authority within the community while a skill based Board provides a greater pool of potential personnel and can also benefit from being a step further removed from community politics.

Recognition does bring with it additional administrative burdens on the Department and the Minister (as set out under Part 11 of the Act), over and above the processes required of NTSPs to receive their funding. Accordingly, where an NTRB would choose to continue to seek recognition status, the benefits that it sees in terms of providing legitimacy need to be balanced against the additional administrative costs.

These factors considered, the Review has identified two options for the future of the recognition provision, each of which would require some legislative changes. The first option is to streamline the recognition process so that the additional administrative costs over and above those associated with funding applications are minimised. For example, the recognition process could be carried out as part of, or alongside, funding reviews. Alternatively, if this is not feasible, the recognition provision of the Act could be removed.

6 Implications for private agents

The Review anticipates that as the knowledge base of native title holders and other participants in the system grows with experience, the uncertainties currently surrounding dispute resolution will ease. However, areas of ambiguity, limited information and conflicting incentives will persist and will drive ongoing areas of conflict and dispute. As such, there is a strong rationale for measures to increase transparency and accountability within the native title system. In particular, a number of measures are available to improve the services that native title holders receive from private agents.

These range from modest adjustments to the current system to increase transparency and accountability, through to significant regulation and legislative change. Options available to government are listed below.

Register of native title practitioners

A register could be established which lists native title practitioners and experts, and provide a record of past qualifications, experience and references. The register could be established by an agency of the Australian Government, such as the NNTT. In a manner similar to the Federal Court's current approach to native title mediators, this could operate on a voluntary registration basis, providing greater transparency without any significant cost to participants. A more restrictive approach would be to require all lawyers operating in the space to be registered.

Accreditation of native title practitioners

A stronger form of regulation would be to operate a registration system for which native title practitioners require accreditation. Accreditation could be based on a simple test of competencies or qualifications in areas of law or relevant experience. Again, the registration could be voluntary, providing additional information to the market, or mandatory.

Broader transparency measures

As NTRBs/NTSPs are government funded bodies, their actions are subject to a high degree of monitoring. This is not so for private agents. To increase the transparency of private agent activity, with the objective of increasing the ease with which unethical practices could be identified and enabling native title holders to make informed choices, several suggestions were made as part of submissions to the Review:

- Provide for either ORIC or NTRBs/NTSPs to be able to request the records of organisations in relation to the management of native title benefits, requiring independent audit of benefits, statement of accounts, commencing proceedings in own right and to appoint an administrator (Law Council of Australia submission to the Review, 2013).
- Consider whether a Commonwealth Ombudsman be given authority to investigate allegations of corruption in organisations managing Aboriginal and Torres Strait assets obtained under the Act (Law Council of Australia submission to the Review, 2013).

Clarification of fiduciary duties

Among the submissions made to the Review and during the course of the consultations, broad agreement has been expressed in favour of the view that the named Applicant in a native title claim has a fiduciary obligation to the broader native title group. Notably, detailed submissions on this topic by Dan Gorman QC, QSNTS and the Law Council shared the common belief that “at the very least, there is likely to be a fiduciary duty owed by the applicant to the broader claim group” (Law Council of Australia submission to the Review 2013:24). However, the presence of this fiduciary duty is not clearly established in practice.

As such, there is a level of consensus regarding the need for clarification of the fiduciary responsibilities of the named Applicant and the broader claims group through amendment to the Act. The Review supports this proposal.

Mandatory reporting of fees to government

A record of fees paid to private agents in the native title system could be kept by a government agency such as the NNTT. This could be anonymous except where there is clear public benefit from revealing these fees to an interested party. Reporting could be based on mandatory requirements for RNTBCs and other native title holders to report the fees they pay over a 12 month period where total fees exceed some threshold amount. This is consistent with a number of the suggestions provided in the consultations and submissions, including that provided by Dan O’Gorman QC.

While not enabling comparisons across service fees, due to differences in the quality and nature of services provided, such a system may improve the opportunity for broader native title holders to remain informed of the use of their benefits.

Appeals mechanisms

While measures to improve the accountability and transparency of the system would ideally result in a lower number of incidences in which the benefits of native title holders are compromised by private agent activity – there is a need for some form of appeals mechanism in the event that incidents do occur. The Commonwealth Ombudsman could potentially administer such a process. The Review is of the view, however, that an appeals process would only be utilised in rare circumstances with an agreed framework for the type of appeals that would be considered.

Conclusion

Given that private agent issues predominantly stem from the complexity of the issues being dealt with, the Review favours reforms which would encourage greater accountability and transparency without adding to the complexity of the system. The Review considers that this can be achieved with moderate administrative changes involving the registration of practitioners and experts along with changes to the Act to clarify the fiduciary duties of the applicant.

7 Conclusion

The native title system is a relatively new and complex development in both the law and in Indigenous affairs. While the establishment of this system has been challenging, the system is moving in a positive direction.

While the Act is prescriptive on the requirements that need to be met and fulfilled in the making of claims, the post-determination environment is less clear as to how those whose native title has been determined can move to “enjoy fully” those rights and interests in ways that meet the aspirations and expectations of native title holders. The Act gives only limited consideration to how such property rights and interests can deliver enjoyment to the native title holders post-determination. Providing clarity on whether and how NTRBs/NTSPs can assist in this process has been an important objective of this Review.

The process of capacity-building is central to the enjoyment of native title and relevant to both the pre- and post- determination context. The extent to which different NTRBs/NTSPs focus on this element of their responsibilities varies significantly across regions.

Based on the intentions of the Act, native title holders should have the opportunity to consider their options and make informed decisions about their direction. The Review found that this opportunity is often lacking at present. Without adequately functioning RNTBCs, the native title system will be fragile and the ambitions of stakeholders (including native title holders, governments, industry and the wider community) will be impeded.

Limited but well targeted additional funding for RNTBCs would relieve one of the most critical constraints on their capacity and provide the opportunity for native title holders to actively consider the pathways they have available.

Australian governments have an overarching commitment to close the gap on Indigenous disadvantage. A key focus is education, employment and community safety. Native title is an important instrument available to governments to support these goals. However, if it is an instrument that is not functioning well it has the potential to detract from the achievement of broader policy objectives.

The Review’s findings, as they pertain to the Review’s Terms of Reference, are provided below.

1) *Examine the range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs*

The wide range of functions undertaken by NTRBs/NTSPs span their core functions supporting claims resolution and agreements during the pre-determination phase, as well as responding to a growing demand for work in the post-determination context. Much of the post-determination work of NTRBs/NTSPs is focused on supporting native title holders to exercise their native title rights. This includes facilitating the use of rights to achieve social, cultural and economic benefits through effective agreement making.

Reflecting regional differences, there is significant variability among NTRBs/NTSPs in the extent to which they undertake work related to the pre- or post-determination phases and the types of activities they undertake in these phases. Some NTRBs/NTSPs are heavily focused on pre-determination work and are likely to be so for the next 5-10 years. Others have almost completed their region's claims work and are increasingly focused on post determination activities.

The statutory responsibilities of NTRBs/NTSPs in pre-determination matters are clear. In contrast, the support of NTRBs/NTSPs for native title holders in areas like land management, capacity-building and other issues prevalent in a post-determination context are not clearly addressed in the Act. However, the role of NTRBs/NTSPs in these activities is often linked to claims and agreements processes and can be argued to fall within the current provisions of the Act authorising NTRBs/NTSPs to provide facilitation and assistance to native title interest holders in relation to native title applications, future acts, agreements, rights of access and other matters.

To fund these activities NTRBs/NTSPs draw on diverse funding sources. While funding provided by PM&C through the Program Funding Agreements (PFAs) is focused on pre-determination activities, there are examples where PFAs have been flexibly negotiated to cover support broader activities, such as supporting RNTBCs. To augment these resources, NTRBs/NTSPs also draw on funding through state and Commonwealth government programs (in areas such as land management) and some cost-recovery measures.

The broad interpretation of the NTRBs/NTSPs facilitation and assistance function, combined with the flexibility of the PFA to cover areas of post-determination work, illustrate that distinctions between statutory and non-statutory NTRBs/NTSP functions are not relevant.

2) *Consider whether NTRBs and NTSPs could adopt a broader role in promoting and facilitating sustainable use of benefits flowing from agreements and settlement of claims;*

As part of contestable markets, NTRBs/NTSPs are well placed to provide assistance to RNTBCs in the area of sustainable use of benefits flowing from agreement and settlements. The NTRBs/NTSPs should be encouraged to develop the necessary capabilities – either in-house or facilitating access from other providers – so that they are positioned to offer post-determination services in what should be contestable markets. As the claims work slows over time, government funding requirements will be reduced and fee-for-service activities will grow. It is expected that NTRBs/NTSPs will make the transition to a contestable market for their services.

In this context, RNTBCs will require assistance with the design of governance structures and identifying areas of investment and income generation in the initial planning phase and, possibly, ongoing services relevant to the RNTBC's longer-term activities. NTRBs/NTSPs are well placed to provide assistance to RNTBCs in these areas.

3) Consider whether there is a continuing need for the recognition provisions in Part 11 of the Native Title Act, noting that 6 of the current 15 native title organisations are NTSPs and therefore outside of the recognition scheme;

Recognition status, which is given to NTRBs by the Minister on the basis of certain criteria, is a defining feature of NTRBs and distinguishes them from NTSPs. However, the two types of entities face essentially the same regulatory environments and are empowered to undertake identical roles and functions.

Consultations and submissions indicated that recognition has limited practical implications for the administration and operation of NTRBs relative to NTSPs. However, recognition requires an additional burden of administrative processes for the Department and the Minister (as set out in the Act), over and above the processes required of NTSPs to receive their funding. This administrative burden needs to be weighed up against the view of at least some stakeholders, including native title holders and some NTRBs, that the recognition process provides an imprimatur of legitimacy that can assist in supporting native title holders.

Two options arise. The recognition process could be streamlined so that the additional administrative costs over and above those associated with funding applications are minimised. If this is not feasible, the recognition provision of the Act could be removed. It is expected that both options would require some legislative changes.

4) Examine the scope for rationalisation of the numbers of NTRBs and NTSPs currently operating in the native title system;

Previous rationalisations have been driven primarily by decisions to address underperforming NTRBs/NTSPs. The Review did not identify any case of an NTRB or NTSP that warranted intervention.

Further rationalisation may be associated with increased efficiency over the long-run. However, these benefits must be weighed against the high short-term transaction costs of rationalisation in terms of both expense and services. Moreover, the recent nature of past amalgamations and widely noted cross-jurisdictional boundary issues limit the scope for further rationalisation.

In the absence of ongoing significant performance issues and uncertainties around their likely implications for efficiency and effectiveness of service delivery, the Review finds that NTRB/NTSP rationalisation in the medium-term is unlikely to result in significant benefit.

5) Consider whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to RNTBCs, where appropriate, to attain the capacity to undertake their functions in the best interests of their members and the native title group and in accordance with their legislative and governance requirements (noting that not all RNTBCs require such assistance);

The Review finds that nearly all NTRBs/NTSPs, at least to some extent, are currently providing assistance to RNTBCs. However, there is significant variability in the nature of this support: some NTRBs/NTSPs provide only incidental assistance in areas such as future act management while others have a concerted focus on building the capacity and governance structures of RNTBC and supporting them to pursue activities related to culture, heritage, land management and economic development.

The major constraints on the level of NTRB/NTSP assistance for RNTBCs are:

- the level of resources they have and the restrictions/clarity associated with their individual PFAs. There appears to be sufficient flexibility in how the PFAs can be structured to adjust the nature of assistance from NTRBs/NTSPs over time if desired; and
- the preferences of native title holders regarding the nature and level of support they require.

As such, the Review has not identified a compelling reason in favour of legislative change as the Act provides sufficient authority and scope for NTRBs/NTSPs to deliver support to RNTBCs.

6) Consider the nature of that assistance, canvassing capacity-building, and direct or indirect provision of financial, legal and dispute resolution services;

In the context of a system in which RNTBCs can purchase services for post-determination activities, the evolution of the services provided by NTRBs/NTSPs will reflect the priorities of native title holders. The extent to which these services are necessary in any given context will depend on the localised context.

7) Consider the current nature of services to native title holders and claimants by non-NTRB and NTSP based professionals, and the impact on the native title system of these services;

The availability of services provided by private agents (professionals from fields including the law, anthropology and commercial services) is indispensable to a well-functioning native title system. However, any tensions that arise within groups or between stakeholders can be exacerbated by private agents in situations where a profit-motive occurs, and anecdotal evidence gathered through the Review indicates that such actions can result in significant adverse outcomes for native title holders.

It is anticipated that as the knowledge base of native title holders and other system participants builds through experience, the uncertainties currently surrounding dispute resolution processes will be more easily clarified, leading to a gradual dissipation of such issues. However, the structure of the dispute resolution process will continue to encourage native title holders to engage private agents and this provides an ongoing rationale for increased transparency and accountability within the native title system.

8) Consider whether there should be legislative or regulatory changes to ensure the scope and quality of services to native title holders from non-NTRB and NTSP based professionals are appropriate;

There is a range of options available to contribute to improved services for native title holders from private agents. These range from modest adjustments to the current system to increase transparency and accountability, to significant regulation and legislative change. The Review favours a system which encourages greater accountability and transparency without significant regulatory burden or dramatic change to the system.

Accordingly, the Review suggests that a number of options to enhance transparency and accountability should be considered by government. In the context of legal practitioners, these could include:

- A registered list of native title practitioners
- An accreditation system encouraging native title solicitors to gain specialised accreditation
- Reporting of native title fees to external parties over a minimum threshold amount (for all native title service providers, not exclusive to legal practitioners)
- An introduction of an appeals mechanism for unethical behaviour
- Amend the Act to clarify the fiduciary duty of the applicant

9) Make other incidental recommendations relating to the future role and functions of NTRBs, NTSPs and PBCs to facilitate effective support for native title holders and claimants.

Consideration should be given to better coordination between different parts of government including state governments. While there is cooperation through the COAG Closing the Gap agenda, this does not extend through to the native title system. There are opportunities to improve the functioning of the claims process with better Federal/State policy clarity. Particular issues were raised during the consultation in relation to Western Australia, Queensland and NSW, but it was beyond the scope of this report to investigate further.

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This report also uses data provided from the following sources:

- ORIC
- PM&C's Land Branch - formerly within FaHCSIA

Appendix A: Terms of Reference

Preamble: The Reviewer will undertake a review of the role and statutory functions of NTRBs and NTSPs in the light of the changing environment and make recommendations on whether changes are required to ensure that the scope and quality of services to native title holders and claimants are appropriate. In making the recommendations, the reviewer should not assume the availability of additional financial resources.

In December 2013, the above Terms of Reference was amended with the deletion of 'recommendations' and the substitution with 'options'.

Specifically, the Reviewer will:

- Examine the range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs;
- Consider whether NTRBs and NTSPs could adopt a broader role in promoting and facilitating sustainable use of benefits flowing from agreements and settlement of claims;
- Consider whether there is a continuing need for the recognition provisions in Part 11 of the Native Title Act, noting that 6 of the current 15 native title organisations are NTSPs and therefore outside of the recognition scheme;
- Examine the scope for rationalisation of the numbers of NTRBs and NTSPs currently operating in the native title system;
- Consider whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to RNTBCs, where appropriate, to attain the capacity to undertake their functions in the best interests of their members and the native title group and in accordance with their legislative and governance requirements (noting that not all RNTBCs require such assistance);
- Consider the nature of that assistance, canvassing capacity building, and direct or indirect provision of financial, legal and dispute resolution services;
- Consider the current nature of services to native title holders and claimants by non-NTRB and NTSP based professionals, and the impact on the native title system of these services;
- Consider whether there should be legislative or regulatory changes to ensure the scope and quality of services to native title holders from non-NTRB and NTSP based professionals are appropriate;
- Make other incidental recommendations relating to the future role and functions of NTRBs, NTSPs and RNTBCs to facilitate effective support for native title holders and claimants.

Appendix B: Background on the native title system

This Appendix provides supplementary evidence to support the material presented in Section 2 of the report. This evidence has drawn from the consultation and submission process of the Review.

An outline of the contents of this Appendix is provided in Table B.1 below.

Table B.1: Contents of Appendix B

Sub-section	Components
(1) The Native Title Act and Indigenous Affairs policy	<ul style="list-style-type: none"> History and objectives of the native title system The benefits of native title Policy context Recent reforms
(2) Background on NTRBs/NTSPs	<ul style="list-style-type: none"> Roles and functions of NTRBs/NTSPs Activities of NTRBs/NTSPs NTRB/NTSP resourcing
(3) Background on RNTBCs	<ul style="list-style-type: none"> Roles and functions of RNTBCs RNTBC activities Benefits of RNTBC activities Evidence of constrained RNTBC capacity
(4) Background on support for native title holders	<ul style="list-style-type: none"> NTRB/NTSP support Other support
(5) Current models of NTRB/NTSP assistance for RNTBCs	<ul style="list-style-type: none"> RNTBC support integrated with other activities RNTBC support unit/officer Shared services provided on a fee-for-service basis Regional Default PBC operated by the NTRB/NTSP
(6) Models of RNTBC groupings	<ul style="list-style-type: none"> Federation of Victorian Traditional Owner Corporations Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation Central Services Corporation Other PBC groupings
(7) Background on private agents	<ul style="list-style-type: none"> Areas of private agent assistance to RNTBCs Structural causes of private agent issues Obligations for NTRBs/NTSPs and private agents

B.1 The Native Title Act and Indigenous Affairs policy

B.1.1 History and objectives of the native title system

The *Native Title Act 1993* (the Act) was passed by the Australian Parliament in response to the High Court rejection of *terra nullius* in the landmark Mabo decision in 1992. The Act established:

- a process for the determination of native title claims;
- a legal framework for managing land and water subject to native title;
- a system for the provision of services by NTRBs/NTSPs to support native title holders; and
- the role of Registered Native Title Corporations (RNTBCs) to represent native title holders following the recognition of their native title.

The preamble to the Act sets out the considerations and rationale underpinning native title legislation, thereby setting the tone and overarching objectives of the native title system. Specifically, the preamble asserts that the people of Australia intend:

- to address the consequences of past injustices for securing the adequate advancement and protection of Aboriginal and Torres Strait Islanders; and
- to ensure that Aboriginal and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests and their rich and diverse culture, fully entitle them to aspire.

Further, the preamble states that “it is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests” and that funding should be provided to assist dispossessed Indigenous Australians to access land and also to support bodies to assist the pursuit of claims or compensation.

These statements position the Act as a tool with which to address the past injustice of the dispossession of Aboriginal and Torres Strait Islander people. In doing so, the preamble mandates that the Act cannot rest at the ‘recognition’ of land ownership but must also support native title holders in both accessing and ‘enjoying’ their land. However, the Act does not spell out how it expects native title to be enjoyed after determination and how the system would support this endeavour.

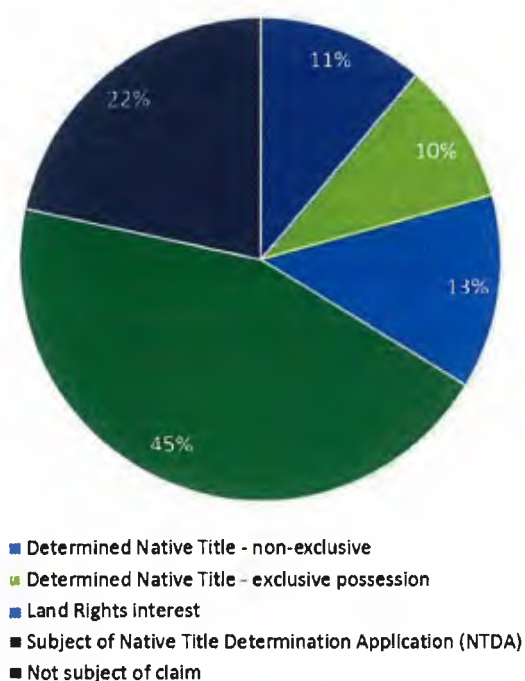
The objectives outlined in the Act provide critical context for considering the operation of the native title system as well as specific roles and functions of NTRBs/NTSPs. Indeed, the focus on allowing for the enjoyment of native title rights highlights the importance of establishing a system in which native title holders receive the support necessary for this enjoyment to be properly realised.

B.1.2 The benefits of native title

Recognition of their native title has important symbolic and cultural meaning for many native title holders. Significantly, native title, managed effectively, can be a source of tangible social and economic benefits and empowerment among Indigenous Australians.

The significant portion of the Australian land mass covered by native title is indicative of the potential scale of the benefits of native title. As shown in Chart 1.3, native title has been determined to exist over 21% of the land area of Australia and a further 45% of land area is currently the subject of a native title determination application. This represents a considerable and growing asset.

Chart 1.3: Australian Land Area Status at 30 June 2013



Source: Land Branch (2013)

The economic potential of this land has been widely noted. For instance, as part of the agreement establishing the Closing the Gap framework and signed by all Australian governments, it is noted that “access to land and native title assets, rights and interests can be leveraged to secure real and practical benefits for Indigenous people” (COAG Standing Council on Federal Financial Relations, 2012). Likewise, it is suggested in the Australian Government’s 2011-18 Indigenous Economic Development Strategy (IEDS) that “Indigenous enterprises are in a unique position to capitalise on business opportunities arising from native title settlements and... payments under native title agreements” (Australian Government, 2011:52).

More recently, the economic potential of native title has been noted by Warren Mundine, Chair of the Government’s Indigenous Advisory Council:

“There is also a great opportunity for Indigenous people to participate in the real economy through their land and Native Title rights and the funds built up through royalties or compensation for loss of land. These assets can and should be used to generate commercial and economic development for Indigenous people through a real economy, real jobs and real for-profit businesses owned and operated by Indigenous people.” (Mundine, 2014)

As many native title claims have only recently been resolved and major blockages persist in the system, these benefits are largely yet to be realised. However, there is a range of anecdotal evidence which illustrates the potential benefits of native title. In particular, a number of native title groups have achieved settlements and agreements which have provided significant financial resources that have been directed to range of community and economic development objectives.

For example, the Western Australian State Government has established agreements with a number of native title groups, including the Yawuru Native Title Holders Aboriginal Corporation RNTBC (Yawuru) and the Miriuwung Gajerrong people, agreements worth \$196 million and \$57 million in land and financial assets respectively. These resources have been used to develop the institutions, governance and community engagement strategies and planning necessary to underpin the cultural, social and economic development activities being undertaken by native title holders in these regions. This includes land development projects, social housing initiatives and a range of enterprise development with positive implications for employment outcomes.

On a smaller scale, a number of Victorian native title groups have also achieved significant agreements, most recently through the Traditional Owner Settlement (TOS) Act 2010. For instance, the Dja Dja Wurrung Corporation reached a settlement worth \$9.65m with Victorian Government in March 2013 through the TOS Act. The agreement included an investment to provide an annual income to the Dja Dja Wurrung Corporation and seed capital for economic development (Victorian Government, 2013).

More broadly, there are a range of observed benefits associated with the Indigenous participation in land based activities that is made possible by native title. For instance, there is a growing body of evidence that natural resource management programs on traditional lands does not only improve environmental outcomes, but also generates cultural, social, health and economic benefits (Urbis Pty Ltd, 2012; AIATSIS, 2011; Berry et al, 2010; Hunt, 2010; Hunt, Altman & May, 2009).

Native title flows from the recognition of a basic legal right, and as such, is not designed as an instrument of government social policy. However, given the observed benefits of native title, it is apparent that a well-functioning native title system has the potential to create an Indigenous controlled asset base and the opportunity for Indigenous Australians to engage in a range of income generating activities. These opportunities may lead to progress in the socio-economic status of Indigenous Australians, including towards targets in education, health and employment objectives to which all Australian governments have committed as part of the Closing the Gap agenda (COAG Standing Council on Federal Financial Relations, 2012).

B.1.3 Policy context

Though power and authority is fragmented across the native title system, the central administration role is undertaken by the Australian Government. This includes roles

undertaken by the Attorney General's Department (AGD) and Prime Minister and Cabinet (PM&C), with the native title program administered by the latter.¹⁰

A number of government entities also have a role in the native title system explicitly identified in the Act. Notably, these include the Federal Court of Australia, and the National Native Title Tribunal (NNTT).

In addition, there are a number of government agencies with an increasingly significant role in the native title system, primarily in relation to RNTBCs and their various support needs. These organisations include the Office of the Registrar of Indigenous Corporations (ORIC), the Indigenous Land Corporation (ILC), Indigenous Business Australia (IBA) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

The policies and activities of state and territory governments also have a significant impact on the native title system. Policies and legislation at a state and territory level have particularly significant implications for the roles and functions of NTRBs/NTSPs. This includes the impact of Land Rights legislation in NSW and the Northern Territory, South Australia, the *Traditional Owner Settlement Act 2010* (TOS Act) in Victoria and the role of heritage legislation in most states and territories.

B.1.4 Recent reforms

There have been several reviews and reforms related to the Act since its commencement in 1994. A number of these are particularly pertinent to this Review, including:

- Reforms to strengthen the role of NTRBs/NTSPs in 1998, including establishing mandatory functions for NTRBs/NTSPs and imposing nationally applicable standards of performance and accountability.
- A 2006 review of the structures and processes of the 42 RNTBCs then in existence, which led to changes including the provision of some basic support funding for RNTBCs in need of resources provided by the Australian Government through FaHCSIA's Native Title Program.
- Amendments to the Act in 2007 providing time limited recognition for NTRBs and clarifying that NTSPs have the same powers and functions as NTRBs.
- A 2008 review of NTRB/NTSP funding, which identified significant resourcing constraints and resulted in the allocation of an additional \$45.8 million over four years to improve the capacity of NTRBs in the 2009-10 budget.
- Amendments to the Act in 2009 to remove the requirement that the Federal Court automatically refer native title claims to the NNTT for mediation and instead allow the Federal Court to determine whether it, the NNTT, or another individual or body should mediate a claim.
- Amendments to the PBC Regulations in 2011 to allow for cost recovery from future act proponents by RNTBCs and to make the RNTBC governance regime more flexible.
- Amendments to the Act in 2012 which made institutional reforms to the Federal Court and NNTT and built on the 2009 amendments.

¹⁰ The native title program was formerly administered by Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

The previous Government announced reforms in areas including the tax treatment of native title benefits, the management of trusts and other matters. Of particular pertinence, the previous Government:

- passed amendments to clarify that native title benefits are not subject to income tax (including capital gains tax) in order to provide certainty and clarity to Indigenous communities when they are negotiating native title agreements;
- established a national regulatory framework for the not-for-profit sector designed to facilitate transparent and accountable management of native title benefits held by not-for-profit organisations; and
- established a working group to examine options for native title and traditional owner groups to strengthen governance and promote sustainability of land-related payments and other benefits, to facilitate greater social, cultural and economic development and wealth creation for current and future generations. The findings of this working group and the previous Government's response can be found on the Australian Treasury's publications webpage¹¹.

¹¹ The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group's report is available at <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title>

The previous Government's response is available at <http://www.treasury.gov.au/Policy-Topics/Taxation/Native-Title-Working-Group/Government-Response>

B.2 Background on NTRBs/NTSPs

This sub-section provides additional material on the current roles and activities of NTRBs/NTSPs, to support Section 0 of the main report.

B.2.1 Roles and functions of NTRBs/NTSPs

There are currently 15 NTRBs/NTSPs in the native title system. Their jurisdictions are mapped in Figure B.1 on the following page.

NTRBs are recognised by the Minister under provisions in Part 11 of the Act to perform the mandatory roles and functions set out in Section 203B of the Act and outlined in Box B1 below.

Box B1: Roles and functions of NTRBs and NTSPs

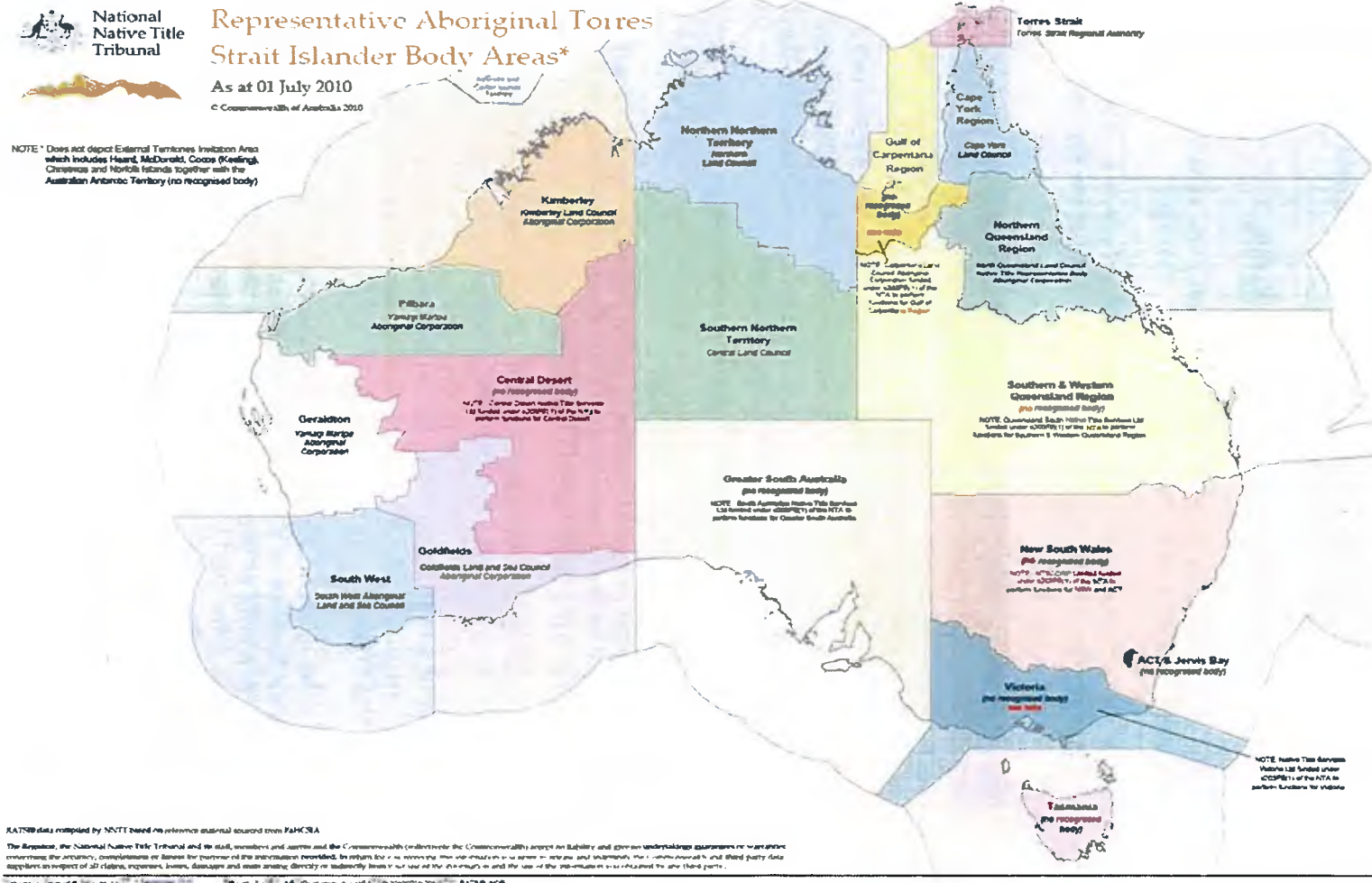
- **Facilitation and assistance** – assistance to native title interest holders in relation to native title applications, future acts, agreements, rights of access and other matters
- **Certification** – of applications for native title determinations and of the registrations of ILUAs
- **Dispute resolution** – to promote agreement and mediate disputes between native title groups
- **Notification** – to ensure that people with a possible native title interest are informed of other claims and of future acts and the time limits for responding
- **Agreement making** – to be a party to ILUAs or other agreements
- **Internal review** – to have and promote a process by which native title claimants can seek a review of decisions and actions of the NTRB
- **Other functions conferred by the Act or by any other law** – these are largely concerned with cooperation between NTRBs, consulting with Indigenous communities, and providing education to Indigenous communities on native title matters

Each NTRB can be formally recognised by the Minister for a period of one to six years and can be re-recognised once its initial recognition period has expired. Time limits on the recognition period were introduced by amendments to the Act in 2007, along with other amendments simplifying the criteria for recognition and de-recognition. The legislation was in part a response to the difficulties in withdrawing recognition of, and replacing, poorly performing NTRBs.

Section 203FE of the Act also allows the Australian Government to fund a person or body to perform the functions of a NTRB without the recognition in Part 11 of the Act. This allows for NTSPs to provide services identified in section 203B of the Act in regions where NTRBs do not operate. The 2007 amendments clarified that the NTSPs have the same powers and functions as NTRBs.

In addition to the roles and functions specified in the Act, NTRBs/NTSPs are also bound by their Program Funding Agreements (PFAs). The PFA stipulate that NTRBs/NTSPs can use their funding at any time to perform their statutory functions in relation to PBCs or provide

Figure B.1: Coverage of NTRBs/NTSPs



Source: National Native Title Tribunal (2010)

'in kind' general support and assistance for PBCs. They also stipulate that funds may be used for the establishment, incorporation and registration of PBCs (up to the PBC's first annual general meeting), and, with PM&C's prior written approval, for PBCs' day-to-day operating costs, such as employing staff, renting premises, purchasing infrastructure, paying for utilities, and complying with legislation other than the Act or PBC Regulations.

In discussion with PM&C, it was noted that the PFA could be altered for each representative body to allow for specific additional functions. However, this did not appear to be an option that was universally well known or utilised by NTRBs/NTSPs.

Historically NTRB/NTSP the roles and functions of NTRBs/NTSPs have focused on supporting native title holders achieve recognition of their native title, managing future acts and making agreements regarding the use of their land and water. However, in response to changing circumstances, many NTRBs/NTSPs are increasingly pursuing activities in broader range of contexts.

The roles and functions undertaken by NTRBs/NTSPs are also influenced by their responsiveness in a range of areas which are not clearly defined or prohibited by the Act. This reflects the historical community basis of many NTRBs/NTSPs and the evolving needs of their constituents. Some detail on the histories of NTRBs/NTSPs is provided in Box B2 below.

Box B2: NTRB and NTSP histories

The roles and functions of NTRBs/NTSPs are shaped by a range of different experiences during their separate histories. A number of entities now operating as NTRBs/NTSPs were established prior to the Act and the emergence of the native title system. This includes the various Land Councils established across the country prior to the Act during the previous three decades (including the Northern, Central, Kimberley, Carpentaria and Cape York Land Councils). These organisations emerged out of a variety of circumstances in order to pursue the land right interests and broader concerns aspirations of Traditional Owners. For instance, CYLC was established by the region's Traditional Owners, with Cape York Elders providing their own pension money to support its financing.

The longevity of these organisations has contributed to the development of significant institutional capacity in a range of functions and secured a status as the preeminent bodies representing the interests of Indigenous people in their regions on a range of topics.

In contrast to the long history of many of the Land Councils, a number of NTSPs have emerged recently in response to a number of trends. For instance, NTSPs such as NTSV and QSNTS were established in 2003 and 2005 respectively to fill the gap in service left by the deregistration of some previous NTRBs. More recently, a number of NTSPs have been formed as native title units have broken from NTRBs which had broader functions than just native title. The breakaway native title units have then opted not to seek recognition but have incorporated under the Corporations Act and have been funded as NTSPs, as in the case of SANTS, CDNTS and NTSCORP. As such, although these entities have only recently been established in their current form, many have a significant past history in other forms.

B.2.2 Activities of NTRBs/NTSPs

NTRBs/NTSPs undertake a range of activities, with the mix of activities for an individual NTRB/NTSP varying according to the extent to which claims work has been resolved in the

region, state and territory laws and policy contexts, the history of the organisation and other local circumstances.

For simplicity, the activities of NTRBs/NTSPs can be categorised as follows:

- claims resolution;
- future acts and agreement making;
- managing native title;
- supporting the use of native title to achieve cultural, social and economic outcomes; and
- other activities related to their broader regional functions unrelated to native title.

The first four classes of NTRB/NTSP activities are commonly grouped in terms of the 'pre' and 'post' determination stages – i.e. before or after the legal determination of a group's native title by the Federal Court of Australia. Pre-determination activities are necessarily centred on the claims process to achieve a successful determination. In contrast, the post-determination phase is focused on native title management following a successful determination.

Both stages entail work supporting native title holders with the management of future acts and agreements as they arise. Likewise, both stages can include work which supports the use of native title to achieve community benefits but this work is typically of considerably more significance in a post-determination context. Though there is overlap between the types of activities undertaken 'pre' and 'post' determination, these categories provide a useful shorthand.

Reflecting the initial necessary focus on achieving recognition of native title, the main arena of NTRBs/NTSPs activity over the past 20 years has been pre-determination work. However, with the growing number of successful determinations, nearly all NTRBs/NTSPs are increasingly providing the broader services relevant to a post-determination context.

Interspersed with the support in these areas, NTRBs/NTSPs are playing an increasingly significant role working with RNTBCs, supporting capacity building and other assistance. Specific examples of NTRB/NTSP assistance to RNTBCs are discussed further in Section B.4.

Claims resolution

NTRBs/NTSPs have largely focused their services on supporting native title holders to achieve recognition of their native title through the claims process. This work is central to enabling native title to be appropriately recognised and allow the native title system to function effectively.

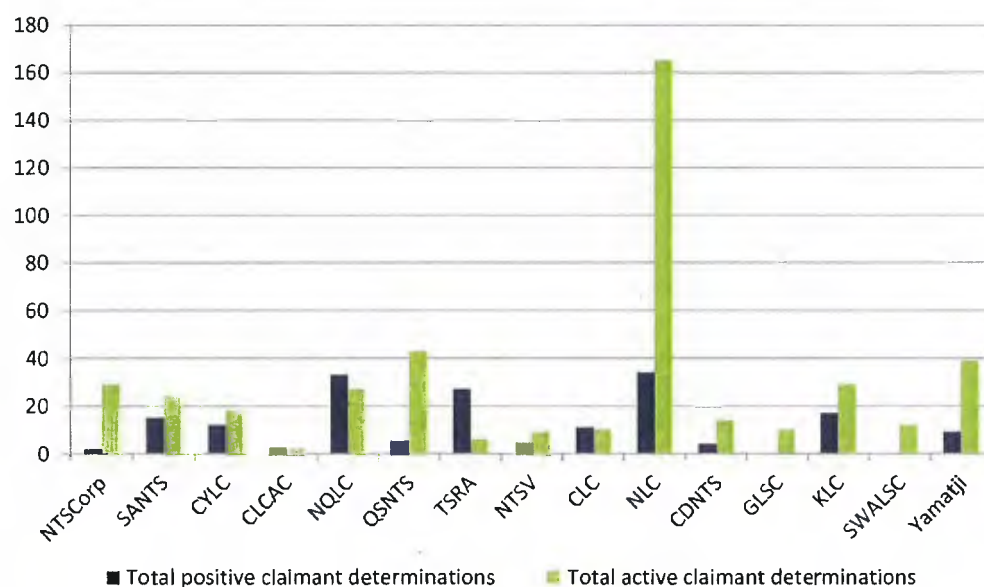
Claims work typically requires research on the group's connection to the land and the development of an associated connection report. If the claim is contested, the NTRB/NTSP is required to provide legal representation to the native title holders throughout the litigation process. These processes require a range of legal and anthropological expertise.

NTRBs/NTSPs also play an active role in mediating and resolving the disputes which emerge in the claims process. Such mediations can also involve assistance from the NNTT and may be necessary in the case of intra-group disputes (such as disputes over membership) or

inter-group disputes (such as overlapping claims). The claims process and associated dispute resolution requires NTBRs/NTSPs to develop deep corporate knowledge of the native title groups within their regions.

As at June 2013, there were 436 active claimant applications for a determination of native title in the system. In addition, NTBRs/NTSPs estimate that there are likely to be 177 more claims yet to be lodged as at 2013, down from an estimate of 265 in the previous year.¹² As reflected in Chart B.1, the distribution of this outstanding claims work is clustered in certain regions and has a significant impact on the types of activities undertaken by the NTBRs/NTSPs of these regions. Furthermore, this suggests that there is a substantial pipeline of future native title claims to work through.

Chart B.1: Total positive claimant determinations and active determinations at June 2013



Source: Land Branch (2013)

In the Torres Strait Islands and a few other regions, there are either no or few outstanding claims. In the regions of other NTBRs/NTSPs, like CLCAC, KLC, NTSV and SANTS, although there remains an ongoing need for claims work, many claims have been resolved and attention has shifted to post-determination issues. In contrast, a significant number of regions are in the midst of a large amount of claims work that may continue for eight or more years and will require an ongoing focus as well as a response to post-determination issues. Regions with most of their claims work outstanding include those of GLSC, NQLC, QSNTS and NTSCORP. There are also a particularly large number of active claimant determinations in the NLC region.

Differing rates of claims resolution reflect a variety of factors such as the nature of connection evidence and the policy context at the state and territory level (including legislation and government approach to the prosecution of claims).

¹² *Native Title System 2012-12, Key data on Native Title Representative Bodies activity and Native Title System Outcomes*

In addition to supporting native title holders initiate claims, NTRBs/NTSPs also have a role responding to non-claimant applications. These applications are made by parties who do not claim to have native title but are asking the Federal Court to make a determination that native title does not exist or seeking to do things in an area and wants 'clearance' in relation to native title (including as part of a future act application). For these claims to be opposed, native title holders must provide evidence of connection. NTRBs/NTSPs are required to assist with these responses, a significant obligation given that in the absence of an appropriate response to these cases, there is a danger that the Court will make an unopposed finding that native title does not exist. As at 30 June 2013, there were 14 such non-claimant applications, nine of which were in NSW (Land Branch, 2013).

A further area of potential work is the responsibility to support compensation claims. Although only one such claim has so far been resolved, this could represent a significant area of responsibilities aligned with the traditional role of NTRBs/NTSP providing legal and anthropological services to native title holders. NTRBs/NTSPs that have recently lodged compensation claims include CDNTS on behalf of the Gibson Desert compensation claim group.

An emerging trend that has potential to represent a significant area of new work for NTRBs in the future is requests from native title holders for assistance with compensation claims to the Federal Court for the loss or impairment of native title. There are numerous examples of acts on Cape York that may be compensable, such as acts that may be performed invalidly in the past by State and local governments and the use of NTA s24JAA to create interests in land. CYLC anticipates requests for assistance with compensation claims in the foreseeable future. To date, native title claims have been given a higher priority by CYLC than compensation claims. However, reconsideration of priorities is likely after compensation claims being progressed in other States provide some guidance, particularly in relation to the calculation of the quantum of compensation for loss or diminishment of native title.

A number of the NTRBs/NTSPs expressed the view that they would struggle to find the capacity to meet demands for compensation claims under the NTA until current and future native title claims are substantially resolved. For example, according to CYLC's submission to the Review, around 92% of the organisation's financial resources are directed towards claims activities.

Also, the approach adopted by state governments, including with respect to supporting evidence around connection and the requirements that need to be met for native title holders to be granted a consent determination, has an important bearing on the NTRBs/NTSPs ability efficiently work through the claims processes. For instance, a number of the NTRBs/NTSPs in Queensland expressed concern during the consultations that the Queensland Government had hardened its approach to what needs to be achieved before receiving a consent determination. The ILC stated in consultation that the "best determinations are underpinned through good state legislation and willingness on the part of States/Territories to achieve settlements".

The importance of the State or Territory's position on native title was also emphasised by AIATSIS:

“State and Territory government political and financial support for native title holders is essential to the sustainability of state/territory government agreements post determination. State government agencies are key land managers and also provide services and infrastructure on determined native title lands and can help or hinder the successful implementation of agreements.” (AIATSIS submission to the Review, 2013:41)

Future acts and agreement making

Management and responses to future acts and the making of agreements is central to ensuring that native title provides for the protection of the native title group’s interests and creates the opportunity for necessary compensation. Such agreements can form the basis for significant economic development opportunities.

Support for native title holders in responding to and negotiating future acts and agreements both prior to and following determination of native title rights represents a sizeable area of demand for the services of NTRBs/NTSPs. To undertake this work some NTRBs/NTSPs have designated future act staff, sometimes sponsored by state governments such as in Western Australia, while others integrate this work with claims activities.

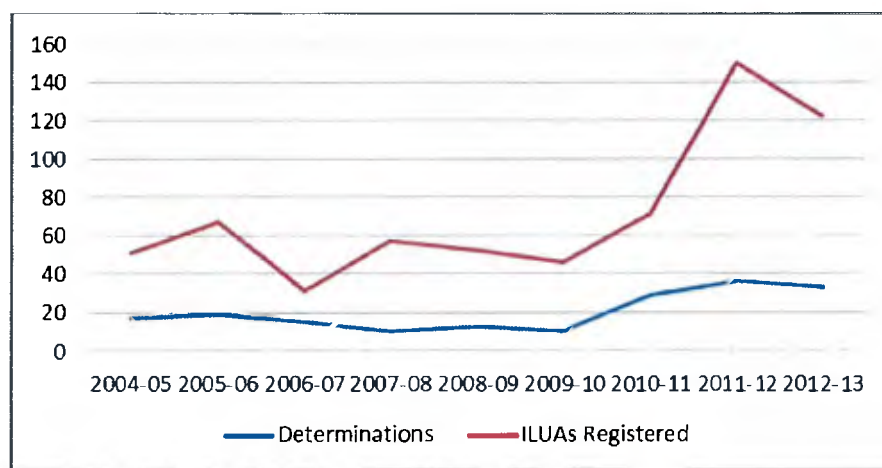
Support for these agreements is a core part of NTRB/NTSP activity identified in the Act. In a pre-determination context, agreements sometimes support the claims process as they may be necessary to facilitate a consent-determination. The role of NTRBs/NTSPs with this work in a post-determination context is less clear. While NTRBs/NTSPs must be notified by a RNTBC that it intends to establish an agreement, this requirement does not extend to a requirement for substantial consultation and engagement.

In either context, NTRBs/NTSPs have a statutory role in the certification of Indigenous Land Use Agreements (ILUAs). These are voluntary agreements between parties about the use and management of an area of land or waters where native title exists or might exist. For such certifications to be made, the region’s NTRB/NTSP must be satisfied that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the area covered by the ILUA have been identified and that these people have authorised the making of the agreement. This can represent a significant work-load for NTRBs/NTSPs when the native title holders are numerous and widely spread.

The upward trend in NTRB/NTSP future acts work is reflected in a range of evidence. For instance, NTRBs/NTSPs reported assisting 76% of native title claimants with future acts along with their claims, a figure up from 49% and 59% in 2010-11 and 2011-12 respectively.¹³ The trend in most States is consistent with the national trend, with the exception of NSW. In SA and QLD, while the trend is in the same direction, the percentage of claims assisted for future act purposes is relatively low at around the 50% mark.

There has also been a marked increase in the number of ILUAs, as illustrated in Chart B.2, an indication of NTRB/NTSP work in this area.

¹³ Native Title Representative Bodies and Native Title System Activity and Outputs Report

Chart B.2: Key outputs of native title system

Source: Land Branch (2013)

Over 2012-13, there were almost 10,000 notifications of proposed future acts and agreements received by NTRBs/NTSPs. Over half of these notifications were issued in Queensland, over a third in Western Australia and the remainder distributed in the other states and territories. The distribution of these activities is shown in Table B.2.

Over the same period, 1,230 agreements were reached with over a third of agreements being reached by YMAC. It is important to note that these figures mask a significant amount of variation in the types of agreements being reached by the different NTRBs/NTSPs. This is particularly acute in the case of ILUAs, which are significantly more complex than other forms of agreements. For example, QSNTS was involved in the registration of 34 of 76 ILUAs in 2012-13 across the country but only reached a total of 54 agreements over the period. On the other hand, GLSC reached 375 agreements, none of which were ILUAs. As such, the raw number of agreements for a period is only an imperfect indicator of the level of activity.

Table B.2: Total Future Act Notifications and Agreements 2012-13

NTRB Region	Total ILUA and Future Act Notifications	Total Agreements for period
NTSCORP	520	0
SANTS	168	49
CYLC	395	10
CLCAC	70	9
NQLC	2713	45
QSNTS	1856	54
TSRA	85	9
NTSV	283	26
CLC	90	15

NTRB Region	Total ILUA and Future Act Notifications	Total Agreements for period
NLC	116	19
CDNTS	439	69
GLSC	1232	375
KLC	316	27
SWALSC	62	35
Yamatji	966	488
Total	9311	1230

Source: Land Branch (2013)

Managing native title

Once native title has been determined, NTRBs/NTSPs are increasingly adopting a role supporting native title holders to manage it effectively. This work is largely focused on supporting RNTBCs to meet their regulatory obligations, and to undertake future act management, agreement making and agreement implementation. The extent of this work varies significantly among NTRBs/NTSPs.

Supporting the use of native title

NTRBs/NTSPs are also increasingly undertaking activities designed to support the use of native title to achieve social, cultural and economic outcomes. This work centres on the role of NTRBs/NTSPs in delivering programs in culture, heritage and land management, as well as support for strategic planning and supporting the development of enterprises. NTRB/NTSP activities in these areas are typically not funded by the native title program, instead largely met through other government programs or grant funding, cost recovery activities, cross-subsidisation with other activities or through funding associated with other statutory functions. As explored below, the extent of this work varies significantly between NTRBs/NTSPs.

Culture and heritage management

Although this function is not specified directly in the Act, the recognition of cultural heritage on traditional lands as part of the claims resolution process and future act negotiations has necessitated the development of capabilities within NTRBs/NTSPs which are also applicable to broader culture and heritage protection matters.

Accordingly, a number of NTRBs/NTSPs assist Indigenous communities within their jurisdictions to protect and maintain their culture and heritage. For instance, in their submissions to the Review, CLCAC, CYLC, NTSCORP and YMAC reported that they deal with cultural heritage matters as part of their involvement in the negotiation and implementation of native title, future act, Indigenous land use and other agreements between native title groups and third parties. Some of the assistance provided includes provision of technical advice, provision or assistance with heritage surveys and assistance with consultations. Examples of a number of the culture and heritage protection activities undertaken by NTRBs/NTSPs are outlined in Box B3 below.

Box B3: Examples of NTRB/NTSP culture and heritage activities

- YMAC has established a Biodiversity and Culture Unit to provide opportunities for the Indigenous community to “actively engage” in cultural heritage protection, and land management more generally. One of the programs undertaken by the Unit has focused on recording the traditional ecological knowledge of the Kuruma and Marthudunera people. YMAC supported the successful application of the Wajarri Yamatji people to have the Weld Range included on the National Heritage List (YMAC submission to the Review, 2013).
- SANTS is involved in the facilitation of cultural heritage projects to assist RNTBCs to access and look after sites, record and share knowledge. The main types of assistance provided include planning, resource allocation, financial management, logistical support, equipment support and report writing (SANTS submission to the Review, 2013).
- CYLC also plays a role in responding to the development of the Cape York Natural Heritage Trust and the review of Queensland’s Indigenous heritage legislation (CYLC submission to the Review, 2013).

Land management

As with culture and heritage protection, although land and sea management is not clearly identified as part of their roles and functions under the Act, nearly all NTRBs/NTSPs have developed programs in this area. This reflects the centrality of these activities for the enjoyment of native title and the role they play underpinning much of the work NTRBs/NTSPs do in supporting RNTBCs.

The information provided in the NTRB/NTSP submissions to the Review and their annual reports shows that the share of resources allocated to land management initiatives is significant and growing. For instance, CLCAC currently allocates more resources to its Land and Sea Management unit than to its native title operations. Indeed, 59% of its income is from non-native title grants targeted at Land and Sea Management initiatives, which aim to protect and manage natural resources in the southern area of the Gulf of Carpentaria (CLCAC submission to the Review, 2013:24).

In addition to the preservation of valuable natural resources, an important objective of these activities is to provide sustainable, long-term employment and economic development opportunities for native title holders. CLCAC has indicated that it considers RNTBCs as the ultimate provider of these land management services, once they have developed their capabilities, sentiments shared by a number of other NTRBs/NTSPs in their submissions to the Review. CLCAC also plays an important co-ordination role as part of these projects, as the land management issues often span multiple determination areas, necessitating involvement from a number of native title groups.

CDNTS also co-ordinates land management activities with traditional owner groups in WA. This work is conducted by the CDNTS Land and Community Unit which is involved in land management advocacy, planning and co-ordination, as part of its support role for RNTBCs in the Central Desert region. Two of the main services provided to RNTBCs in this area are assistance with country mapping and joint management and governance. This work accounts for 30% of CDNTS’ annual operations budget, financed by a range of non-native title funds drawn from both mainstream and Indigenous program grants and fee for service contracts.

Some other land management activities undertaken by NTRBs/NTSPs are described in Box B4 below.

Box B4: Examples of NTRB/NTSP land management activities

- Some of the current land management activities being undertaken by YMAC include facilitation of Indigenous Protected Area consultations with the Nyangumarta people; recording of ecological knowledge with the Kurama and Marthudunera people; and management of the Kalbarri National Park with the Nanda people (YMAC submission to the Review, 2013).
- The KLC has worked with the Karajarri Traditional Lands Association on a Yiriman land management project around the Gourdon Bay and Port Smith areas (Weir, 2013).

Economic development activities

The work of NTRBs/NTSPs in claims, future act management and negotiations, culture, heritage and land management can all contribute towards economic development among native title holders. Indeed, used effectively, native title provides an important foundation for economic development among native title holders. In response to this opportunity, NTRBs/NTSPs are increasingly developing capacities designed to support native title holders leverage this asset for the economic development of their communities. Indeed, socio-economic development for native title holders and Indigenous people in general was a front of mind issue for most NTRBs/NTSPs during the consultations.

In many cases, the economic development activities of NTRBs/NTSPs overlap with cultural heritage and land management objectives. For instance, in its submission to the Review, CLCAC described its role in developing, implementing and maintaining the Ranger Working on Country and Wild River Ranger Programs which provides employment for 16 Indigenous people (2013). Some additional examples of these activities are outlined in Box B5 below. A number of NTRBs/NTSPs have described strong aspirations to continue and further develop these opportunities, with the goal of improving outcomes for local Indigenous communities often central to their objectives as Indigenous organisations.

Box B5: Examples of NTRB/NTSP economic development activities

- The CLCAC commissioned an economic profile assessment for the region. In accordance with the recommendations of that assessment, it is currently pursuing programs in relation to carbon farming, business proposals and a Destination Product Development Plan to improve the attractiveness of the region to tourists (CLCAC submission to the Review, 2013).
- CYLC is able to leverage external partnerships to assist with economic development objectives. For example, through the Cape York Welfare Reform agenda and the Cape York Regional Organisations partnership, the CYLC is also involved in driving policy reform and assisting with policy implementation to increase home ownership, reduce welfare dependence, and establish opportunities for greater economic participation and improved quality of life for Indigenous people. It has further aspirations to increase its involvement in further economic development and home ownership initiatives on Aboriginal land, but is currently restricted by having its resources stretched across a large and diverse range of activities (CYLC submission to the Review, 2013).

Other activities related to their broader functions

In addition to work towards the recognition of native title and that which is directly related to the enjoyment of native title, many NTRBs/NTSP undertake a broader range of activities. For example, the NLC, CLC and TSRA are all statutory bodies with a range of roles and functions additional to those identified in the Act. In the case of the NLC and CLC, these roles and functions relate to the administration of the Aboriginal Land Rights (NT) Act 1976 (see Box B6 below) which creates a range of responsibilities including the distribution of benefits to Traditional Owners from the Aboriginal Benefit Account (ABA). Likewise, the TSRA has responsibility of formulating programs for Torres Strait Islanders and monitoring the programs' effectiveness, as prescribed by the Aboriginal and Torres Strait Islander Act 2005 (ATSI Act).

In TSRA's submission to the Review, they noted a selection of activities which their Native Title Office is currently responsible for to illustrate the diversity of their operations (2013:14). Activities outside native title work included:

- playing a major role advising and assisting RNTBCs on matters relating to the roll-out of the National Partnership Agreement on Remote Indigenous Housing, including social housing lease transactions and social housing ILUAs;
- individual project ILUAs to which RNTBCs are parties for a wide range of government infrastructure (i.e. IBIS stores, Telstra telecommunication facilities, Ergon Energy and AQIS facilities);
- cultural heritage compliance processes;
- development of a strategy on ways to leverage social and economic outcomes from native title; and
- advising on the substantial implications to RNTBCs of new laws for dealing with 'so-called Katter leases'.

Box B6: Aboriginal Land Rights (NT) Act 1976 (ALRA)

The ALR Act establishes a legislative base for the recognition of Aboriginal Land Rights in the Northern Territory, conferring rights and benefits to Aboriginal people. Land successfully claimed under the ALRA 1976 is granted as under inalienable freehold title. As such, it cannot be bought, acquired or mortgaged but is instead communal title that is formally vested in Aboriginal Land Trusts comprised of Aboriginal people who hold the title for the benefit of all the traditional landowners. The Land Trusts can only deal with the land on the instructions of the Aboriginal Land Councils established under ALRA.

In other cases, NTRBs/NTSPs pursue a broader range of roles and functions due to the presence of a range of community needs to which they are or may be well placed to respond. For a number of NTRBs/NTSPs these roles extend to an active stance in the advocacy and representation for all Indigenous Australians in their region on a wide range of issues. The extent to which NTRBs/NTSPs partake in these non-native title activities reflect their different histories and current circumstances.

For example, NTRBs/NTSPs with particularly long histories of operation, such as the KLC, NLC and CLC, have been able to develop relatively sophisticated institutional capacities and status in their regions which aids their ability to work in a range of fields.

NTRBs/NTSPs activities in these areas also reflect the extent to there are other significant Indigenous organisations in their region which are active in the role of supporting Indigenous land management, economic development, service delivery and political representation. Indeed, it was commented during the consultations and in a number of submissions that the decline of significant Indigenous institutions, such as ATSIC and CDEP, has contributed to increased demands on the NTRBs/NTSPs.

For example, in regions in which there are fewer Indigenous organisations active in the role of supporting Indigenous land management, economic development, service delivery and representation, demands on NTRBs/NTSPs in these areas are more substantial. For instance, the CDNTS operates the Western Desert region of WA where there are few other Indigenous organisations and where service delivery institutions are relatively weak. As a consequence, the CDNTS faces demands to assist with service delivery by supporting community engagement and works with the community to undertake a range of land management functions.

In contrast, the NTSCORP is one of a number of organisations that can fill these functions across NSW. Indeed, NTSCORP emerged relatively recently from its parent organisation, the NSW Aboriginal Land Council (NSWALC) which has a far longer history and broader mandate in working with the Aboriginal community in areas of economic development and advocacy. While there is an MOU between NTSCORP and NSWALC, there does appear to be a need to further clarify the roles of the two and how they may better work together for what are often overlapping Aboriginal communities.

All NTRBs/NTSPs also mentioned their work in contributing to policy development. For example, CYLC noted that it provides regular input to policy reform and development processes, such as proposed amendments to Queensland and Commonwealth legislation, necessary for the protection of native title and enabling economic development opportunities.

B.2.3 NTRB/NTSP resourcing

The native title program funds NTRBs/NTSPs under its Program 7.3 Native Title and Land Rights. Funding allocations are determined on the basis of a broad assessment of the level of native title activity in an NTRB's region, in conjunction with an assessment of submitted draft Operational Plans and historical costs. Each NTRB/NTSP is funded on the basis terms and conditions described through their respective PFAs.

In addition to this native title funding, NTRBs/NTSPs typically generate income from a range of other sources. This includes:

- Income earned in the course of their native title activities. This includes cost recovery from future act proponents relating to the cost of engaging in the negotiation and agreement making process, such as where a mining company or developer contributes to the cost of meetings (through paying for venue, travel or staff time) to assist with claim group meetings as well as fee for service work in areas such culture, heritage and land management.
- Funding from government to undertake other activities, such as the operation of ranger programs and other land management programs funded by the Department of Environment's Caring for Our Country program.

- Funding for other statutory functions. For example, the CLC and NLC are funded to undertake their statutory functions under the ALRA.

This diversity of funding sources reflects the wide range of activities undertaken by NTRBs/NTSPs, some of which fall outside of the PFA and are funded other than through the native title program. However, NTRBs/NTSPs report challenges both in relation to their overall level of funding and the flexibility with which they are able to deploy these resources. These challenges are reported across all areas of NTRB/NTSP activity identified above. Concerns regarding NTRB/NTSP resourcing are shared widely among stakeholders with an interest in a well-functioning native title system, including most state and territory governments, corporations, industry peak bodies, such as the Minerals Council of Australia, and recent research.¹⁴

The Review was not undertaken to provide a forensic analysis of NTRB/NTSP funding or resource needs and therefore cannot provide a definitive statement on the adequacy of NTRB/NTSP resourcing. However, the extent of reports on resource constraints by a wide range of stakeholders is informative.

Likewise, the Review notes that the 2008 *Review of Funding of the Native Title System* (Funding Review) conducted by the Government's Native Title Coordination Committee found that the NTRBs/NTSPs were not sufficiently to undertake their statutory functions identified in the Act. The Funding Review recognised that the inability of NTRBs/NTSPs to operate effectively contributes to delays in resolving native title determinations and the quality of outcomes for native title parties, including in relation to future acts. In recognition of these constraints, an additional \$45.8 million funding was provided for NTRBs/NTSPs over four years in the 2009-10 budget.

The current Review did not identify any evidence that the factors resource pressures identified in the Funding Review have eased. Rather, with growing demands on NTRBs/NTSPs to assist in the management and use of native title as well as high levels of ongoing claims work, these pressures are likely to become more intense over the next few years. These pressures are discussed below.

Claims work

The ability of NTRBs/NTSPs to progress claims reflects a wide range of factors, including the resources they have available to provide the necessary support. As most NTRBs/NTSPs have more claimants than they are able to progress at one time they must make decisions about which claims to progress first, contributing to delays for some. The demand on the resources of NTRBs/NTSPs is contributed to by a number of factors identified here.

For instance, the recent decision of the Federal Court to compress time frames for the resolution of claims is contributing to increased pressure on NTRBs/NTSPs, requiring them to have the available evidence to respond to native title claims in a shorter time frame. In consultations with the Federal Court, the pressures its actions are creating were acknowledged but argued to be reasonable given the positive outcomes associated with quicker claims resolution.

¹⁴Strelein and Regan (forthcoming)

In a number of jurisdictions, NTRBs/NTSPs are being forced by the state to litigate a large number of claims, slowing down the resolution of claims and placing pressure on NTRB/NTSP resources. This is widely reported to be a particularly salient issue in Western Australia. These issues are captured in comments made by a number of NTRBs and NTSPs presented in Box B7.

Box B7: Comments by NTRBs and NTSPs on resourcing pressures on claims work

"...an unprecedented level of litigated matters due partly to the current policies of the West Australian State Government and partly to the pressure being placed on both native title claimants and respondent parties by the Federal Court to resolve native title determination applications. The move of claim mediation from the National Native Title Tribunal to the Federal Court has also contributed to the increase of litigated outcomes. Points of law or fact which remain outstanding in otherwise negotiated determinations are increasingly being scheduled for trial in short time frames in order that the particular question be resolved and, subject to any appeals, the application proceed to determination quickly. These actions are out of Central Desert's control and given FaHCSIA's funding limitations, this litigious environment could see native title groups not being able to secure their legitimate rights through lack of adequate funding." (CDNTS submission to the Review, 2013:6)

"In late 2011, the WA State Government changed its approach to the assessment of connection reports and is reserving its right to withhold its position during mediation for consent determinations in Federal Court. Unless the State changes its policy there is a likelihood that the Federal Court will continue to list matters for hearing, placing a significant strain on native title claimants and exceeding YMAC's financial and human resources." (YMAC submission to the Review, 2013:5)

"Because existing funding must be divided between competing statutory functions CYLC experiences difficulty in meeting all of its statutory obligations. In Queensland, native title claim work was for many years progressed on the basis of priorities agreed between the State, the relevant NTRB and the National Native Title Tribunal. More recently, the Federal Court has required substantive progress to be demonstrated for all native title claims within each NTRB region. This has resulted in some claims having to be withdrawn from the Federal Court. It is likely that those areas will be the subject of fresh claims in the future. The consequence of this is that other statutory functions such as dispute resolution and agreement-making functions are generally constrained by the level of funding available after prioritising native title claim work." (CYLC submission to the Review, 2013:6)

Accordingly, while the rate of claims progressing is dependent on many variables, it is apparent that the quality and quantity of claims work being progressed by NTRBs/NTSPs is constrained by the limited resources which they have to respond to a range of imminent and complex issues. Consequently, further limiting NTRB/NTSP resourcing or requiring a broader range of functions without additional funding would likely come at the expense of slower claims resolution.

Future acts and agreements

The costs associated with developing future acts and agreements can be supported by funding from the native title program but is supposed to be covered largely through cost recovery measures at the expense of the proponent based on the 'user pays principle'. However, while NTRBs/NTSPs can sometimes negotiate full cost recovery from proponents, the consultations indicated that, currently, this is often not the case. Indeed, such cost recovery is normally contingent on high financial value of future acts, as is commonly available in relation to resource projects for example, but are not available to most native title holders.

For example, CDNTS notes that:

"While negotiations with government and mining companies are resource intensive, both from a financial and human resource perspective, this aspect of the future act regime is often subsidized by industry who understand both the limitations of NTRBs/NTSPs resources, and the benefit of ensuring that native title parties are the recipients of all necessary advice in order that they are able to make informed decisions. It is Central Desert's aim to ensure that all future acts undertaken are with the free, informed and prior consent of native title parties."

The real issue for NTRBs/NTSPs is when things go wrong. Some mining companies are simply recalcitrant and have no intention of doing a fair deal or obtaining the free, prior and informed consent of a native title party; others are facing strict timelines and resort to the arbitration processes under the NTA to obtain their tenure without finalizing an agreement with the native title party." (CDNTS submission to the Review, 2013:8)

Due to the amount of future act activity they generate, a number of state governments provide some financial support for future act negotiations. For instance, to support quicker resolution of native title processes during the mining boom and a number of specific resource development projects, the WA government funded NTRBs including the KLC and YMAC to retain lawyers focused on relevant future act work. However, these practices are not widespread and are sometimes insufficient.

For instance, the Northern Territory does not fund any future act legal work for native title organisations. Likewise, according to YMAC's submission, the WA government withdrew its funding to cover the cost of future act activity in mid-2010 meaning YMAC has been required to cover the cost of two dedicated future act officers through native title funding and income from other sources.

In the absence of ongoing dedicated funding, few NTRBs/NTSPs have developed the capacity to respond to the significant demands in this space. For instance, in consultations it was noted by KLC lawyers that they were being asked by native title holders for advice on future acts with potentially significant commercial implications. While the KLC lawyers sought to provide assistance, this was not recognised as part of their role and they noted concern that the matters related to topics outside of their expertise, meaning the quality of the advice could be in question.

Managing and using native title

The PFAs established between each NTRB/NTSP and the native title program set out the types of activities which can be conducted with the native title funding provided under these agreements. While NTRBs/NTSPs can identify areas of activity designed to support the enjoyment of native title (such as cultural heritage work, land management and economic development) as a priority in their PFAs and seek funding accordingly, this is not straightforward. Rather, it is widely reported by NTRBs/NTSPs that native title funding is closely focused on the claims process, with little consideration of how to support the enjoyment of native title once recognised.

For example, CDNTS notes that despite the significant demand for a range of services relevant to post-determination activity:

“FaHCSIA’s native title funding model focuses on securing native title. It only considers the post determination world in an ad hoc manner with a very limited PBC support consideration and apart from some access to contested litigation funding, no strategy for compensation and other statutory considerations that may arise.” (CDNTS submission to the Review, 2013:6)

Likewise, in the NQLC submission, they note that:

“Suffice to say, that our activities are strictly subject to funding conditions contained in the Terms and Conditions Native Title Agreement – Annexure A attached to our Program Funding Agreement, particularly Section 5 concerning Management of Funding, Section 6 concerning Budget and Operational Plan and Section 7 pertaining to Variations. These sections strictly control the type of activities that can be undertaken by the NQLC in an approved Operational Plan and as it requires FaHCSIA’s approval, it is difficult to imagine FaHCSIA providing funding to the NQLC to perform anything other than our functions under the Act or those activities related to our functions.” (NQLC submission to the Review, 2013:12)

In the absence of being able to draw on native title funding to support the enjoyment of their title by native title holders, nearly all NTRBs/NTSPs have sought to augment their capacity to act in these areas by drawing on a more diversified range of income sources, primarily government grants. For example, CLCAC derives a significant portion of its income from grants targeted at Land and Sea Management initiatives while CDNTS pursues land management through its not-for-profit subsidiary Desert Support Services.

For example, the CDNTS notes:

“Staff time that is dedicated to facilitating development of and managing these projects is significant. A major issue with the rapid growth of projects in the post determination environment is that the funding for salaries to facilitate these projects is pieced together through small percentages of successful project applications and the funding for these projects is generally year to year, from diverse sources and is time restricted. In addition and as a result of this project vs program based funding approach, very little funding is available for employment of project officers, field staff or facilitators.

A major area of need for Central Desert is core funding in this area to maintain appropriate staffing levels to cope with a huge increase in demand for post determination project management and implementation services. This is significant in terms of enabling native title holders to develop economic activities on their lands thereby reducing welfare dependency.” (CDNTS submission to the Review, 2013:7)

NTRBs/NTSPs also widely reported difficulty responding to the demands on their resources associated with their contribution to the policy development process. For instance, the CYLC noted that it is frequently required to participate in policy processes because the outcomes of these processes often have significant implications for the rights and interests

of traditional owners. As CYLC is not funded to undertake these activities, in doing so it must divert resources away from other activities.

These resourcing issues have a range of implications for the capacities and activities of NTRBs/NTSPs. The limited resources available for these activities also limit the abilities of NTRBs/NTSPs to develop the expertise required to plan and undertake these activities over the long-term. Commonly identified areas of need in order to support the enjoyment of native title holders include areas of commercial expertise in relation to law, business planning, feasibility assessment and implementation.

Of particular relevance to the Review, these constraints also limit the ability of NTRBs/NTSPs to respond to the growing needs of RNTBCs, identified in the following two sections.

B.3 Background on RNTBCs

This sub-section provides additional material on the current roles and activities of RNTBCs, to support Section 2.2 of the main report.

B.3.1 Roles and functions of RNTBCs

The roles and functions of RNTBCs, as dictated by the Act and the Regulations are listed in Box B8 below.

Box B8: Roles and functions of PBCs and RNTBCs

- Managing the native title holders' native title rights and interests.
- Receiving future act notices, and advising native title holders about such notices.
- Consulting with the native title holders about native title decisions.
- Exercising procedural rights afforded to native title holders including commenting on, objecting to and negotiating about proposed future acts.
- Preparing submissions to the NNTT or other arbitral bodies about right to negotiate matters.
- Negotiating, implementing and monitoring native title agreements.
- Considering compensation matters and bringing native title compensation applications in the Federal Court.
- Bringing revised or further native title determination application cases in the Federal Court.
- Holding money (including payments received as compensation or otherwise relating to the native title rights and interests) in trust.
- Investing or otherwise applying money held in trust as directed by the native title holders.
- Preparing and maintaining documentation as evidence of consultation and consent.
- Consulting and considering the views of the relevant native title representative body (NTRB) or native title service provider (NTSP) for an area about proposed native title decisions.
- Performing any other function relating to the native title rights and interests as directed by the native title holders.

Source: Indigenous Programs Branch (2011)

B.3.2 Activities of RNTBCs

In response to their roles and functions, RNTBCs are required to undertake a set of 'core' activities which can be grouped as:

- basic compliance activities;
- future act management, negotiations and agreements;
- monitoring and implementation of agreements; and
- management and distribution of benefits to their members.

Further, in response to the aspirations of their members, RNTBCs and their associated entities (such as separately established enterprise arms) often undertake or seek to undertake a broader range of activities which offer income and employment generating opportunities, including:

- culture and heritage management;
- land management activities;
- enterprise development;
- service delivery; and
- advocacy on behalf of their native title holders.

RNTBC involvement in these activities reflects a range of influences. For instance, in most jurisdictions, RNTBCs have a role responding to legislation covering culture, heritage and land management issues.

RNTBC activities are also driven by the aspirations of native title holders to pursue activities which support their enjoyment of their native title. There is a significant body of evidence illustrating the significant aspirations of native title holders to leverage their native title to undertake activities encompassing all those identified here. For instance, a recent survey of RNTBCs by AIATSIS found that when asked what they wanted to do in the future, RNTBCs identified activities such as tourism, business development or financial investment and agriculture, aquaculture or commercial fishing (AIATSIS submission to the Review, 2013:20).

RNTBCs undertaking activities are supported by procedural rights of native title holders pertaining to their country. This includes the right of native title holders to negotiate about some proposed developments on their land and the opportunities created by financial benefits associated with agreements.

Finally, it should be noted that, while many of these activities are not defined in statute, they are consistent with the requirement for RNTBCs to:

- manage the native title holders' native title rights and interests; and
- perform any other function relating to the native title rights and interests as directed by the native title holders.

Basic compliance activities

In order to remain compliant with various regulatory responsibilities, RNTBCs must undertake a range of basic compliance activities. These include the responsibility to:

- establish a corporation;

- hold annual general meeting and directors meetings;
- maintain accounts and information management; and
- comply with other elements of their individualised rule book.

The imposition of the compliance requirements on native title holders as a consequence of the recognition of their native title was widely reported in the consultations and submissions as a significant burden. Moreover, these corporate structures are often commented on by native title holders as foreign frameworks, inconsistent with the cultural practices and decision making processes they were required to demonstrate as the basis for their determination.

These difficulties are compounded by the reality that undertaking even these basic compliance activities often exceeds the capacity of RNTBCs, as illustrated by the experience of SANTS quoted below.

"For most of the PBCs in South Australia, the focus is on simply keeping a PBC operational and fulfilling compliance and other legislative obligations. This is not a reflection of the knowledge and skills of Directors and members of PBCs, but a lack of resources and focus on building the institutional and administrative capacity of their corporations...Unfortunately, a focus on these compliance activities also does not allow much time, if any, to seek out the broader aspirations of the native title holders...this is particularly frustrating for Directors and members of PBCs as they see few outcomes and progress from native title" (SANTS submission to the Review, 2013:11).

Future Act management, negotiations and agreements

Under the Act, RNTBCs are entitled to receive notifications from authorities when permits, licenses or other certifications which may have an impact on native title rights (i.e. future acts) are proposed. Depending on the interests being applied for, native title holders have various rights to notification, comment, consultation and negotiation in relation to the granting of such permits.

Where future acts may have an impact on the native title group's land or water, it may be necessary to undertake negotiations targeted at minimising these impacts and/or the provision of compensation for the native title group. These rights provide for the protection of the native title group's interests and the opportunity for compensation arrangements to be agreed upon. Successfully undertaking these negotiations are the primary mechanism through which native title can deliver sustainable benefits for native title holders. For native title holders to achieve such benefits they must be able to undertake effective future act management and negotiations.

Effective future act management requires the ability to sort through and respond to the future act notices issued to the RNTBC. For this purpose, RNTBCs must be able to ascertain the likely implications of the future act for their land and waters and the commercial elements of the proposal to determine whether to undertake negotiations with the proponent.

Where negotiations are necessary, RNTBCs require a wide range of commercial, legal and anthropological expertise. Further, the RNTBC requires the capacity to engage with the

native title holder group to ensure that any agreement established accurately reflects the interests of affected native title holders. These capacities go directly to whether the native title holders are in a position to enjoy their rights and to whether they have the practical ability to make decisions about the use of their land and water. In addition to the principles outlined in the Act, the Australian Government has acknowledged the importance of ensuring native holders have these opportunities by announcing its support for the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration provides for the right of Indigenous peoples to determine their own priorities for the development or use of their lands as well as the right to free, prior and informed consent for any project affecting their lands or territories, as summarised in Box B9 below.

Box B9: United Nations Declaration on the Rights of Indigenous Peoples

In 2009, the Australian Government announced its support for the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). Of pertinence to the native title system, Article 10 of the Declaration states:

"Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." (United Nations, 2008).

In his 2011 Native Title Report, Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, identified the Declaration as a mechanism through which to guide the development of healthier relationships between Indigenous people and government, industry and the wider Australian community (Australian Human Rights Commission, 2011). He stated that "the native title system is currently supported by an unequal power dynamic that promotes the external decision making process of governments and breaks down internal decision-making and conflict management processes of Aboriginal and Torres Strait Islander peoples" (2011:129). In acknowledging the complexities of Indigenous societies that are not accommodated in the current native title system and the need for a culturally appropriate decision making framework, the Commissioner noted that "the consequences of decisions often ripple across the community and beyond, along extensive Indigenous social and cultural networks" (2011:129).

The Commissioner states that 'free, prior and informed consent' means, among a range of things:

- no force, bullying or time pressure;
- given all available information and being informed when information changes, 'if our people do not understand this information then we have not been informed';
- during negotiation, all parties are equal, group decision-making processes are allowed to operate and the right of Indigenous people to choose how to live is respected; and
- it is the duty of the organisation that is seeking consent to ensure that the decision that is made is free and informed (2011).

As reiterated in consultations with NTRBs/NTSPs and RNTBCs, the notion of 'free, prior and informed consent' in this context is central to the recognition of native title and negotiations of related future acts and agreements. This creates a necessity for effective mechanisms which support the capacity of native title holders in these areas.

In some instances, the capacity of RNTBCs to undertake future act management and negotiations will be supported by the proponent (e.g. fees charged to hold meetings). However, the extent of this support is highly variable and the 'proponent pays' model has been criticised by some parties as propagating adverse incentives. For instance, the

Chamber of Minerals & Energy (CME) WA submitted to the Review that “proponents being required to directly fund native title parties distorts the negotiation process” (2013:14).

Specifically, the difficulties were cited as being:

- a perception negotiations are not as ‘arm’s length’;
- delays and inefficiencies because one party is not responsible for its own costs; and
- some proponents are unable to provide such funding in addition to paying benefits under the agreements negotiated, including for economic reasons or due to compliance with national and international anti-corruption legislation” (CME submission to the Review, 2013:14)

However, where appropriate support is not provided, the ability of RNTBCs to negotiate will depend on their own capacity or support from their NTRB/NTSP which can be limited. Indeed, the consultations and submissions have established that RNTBCs face significant difficulties undertaking effective future act management and negotiations. Even well-resourced RNTBCs have reported that future acts represent a significant drain on their limited resources.

For example, the Yawuru submission notes that:

“The Yawuru PBC meets monthly and every second meeting focuses solely on future act and land development proposals. Whilst the user pays principle applies to the assessment of land use and development applications, Yawuru must spend a considerable portion of our own resources to develop and maintain capacity to make decisions that reflect the rights and aspirations of Yawuru native title holders within tight legal timeframes.” (Yawuru submission to the Review, 2013:2)

Due to these difficulties, it was noted in the consultations that the obligations of RNTBCs in relation to future acts was a source of significant anxiety among their boards and members. Such anxiety was based on awareness that mishandling of future act negotiations could cause native title holders to miss opportunities to protect their native title and/or to achieve appropriate compensation. Failure in this regard could cripple the RNTBCs long-term viability as a vehicle to support the aspirations of native title holders in a range of areas, including economic development.

The experiences of native title holders under the future act regime are affected by the significant differences in future act activity between different regions. Past future act activity has been particularly lucrative where native title covers land of significant economic value, such as mineral deposits, ports, townships or agricultural land.

In contrast, other native title holders are unlikely to have the opportunity to derive significant benefits from future act activity because their native title holding does not cover economically valuable assets or the native title rights exist in a diminished form. This is particularly the case for a large portion of the native title holdings in the Northern Territory that co-exist with land covered by pastoral leases, consequently offering only limited economic opportunities for native title holders.

Monitoring and implementation of the agreements

Once established, agreements require ongoing resourcing to facilitate the implementation and monitoring of each one. RNTBCs play a crucial role in this, as mandated in the terms of some agreements, ensuring that agreements are properly enforced.

Monitoring and implementation can require significant resources as evidenced below.

“In circumstances where agreements are in fact reached, substantial resources need to be allocated to the continuing implementation and monitoring of compliance with such agreements, and, the larger the future act agreement, generally the more onerous the implementation and compliance obligations are.” (CDNTS submission to the Review, 2013:9)

The absence of implementation and monitoring by RNTBCs can negatively impact native title holders if this hinders the ability to collect benefits that should rightfully be accrued. AIATSIS have noted that there are many examples of groups being unable to secure benefits under an agreement due to a lack of capacity to monitor implementation, invoice for amounts due or to capitalise on economic opportunities (AIATSIS submission to the Review, 2013). Effective monitoring and implementation can be associated with activities such as land management and enterprise development discussed below.

Management and distribution of benefits to their members

A central role of RNTBCs is to manage and distribute benefits that arise from agreements and other sources on the instructions of the native title holder group. These obligations emerge from the requirement for RNTBCs to:

- hold money (including payments received as compensation or otherwise relating to the native title rights and interests) in trust; and to
- invest, or otherwise apply, money held in trust as directed by the native title holders.

For these purposes, native title holders are required to establish trusts from which monies are distributed or invested. For native title groups with large compensation, establishing and operating this is a significant area of activity. However, RNTBCs with more limited resources face significant difficulties in this area. This difficulty is attested to in the submission of CDNTS, which notes that most native title groups in their region “do not have the resources to establish and operate their own trustee companies (as many groups in the Pilbara have done), or pay the sorts of professional fee structures charged by the big trustee companies” (CDNTS submission to the Review, 2013:3).

Culture and heritage management

The links between Indigenous identity, culture and land contributes to a natural role for RNTBCs in undertaking culture and heritage management activities as part of their statutory responsibility to manage native title rights and interests. Indeed, there is evidence that RNTBCs view their ability to undertake these types of activities as central to their role as representatives of native title holders. For instance, the AIATSIS Survey found that cultural programs and heritage management were two of the three main areas of activity reported by RNTBCs (AIATSIS submission to the Review, 2013).

The transfer of cultural knowledge to younger generations is also recognised as a priority for the majority of RNTBCs (AIATSIS submission to the Review, 2013:8). These activities align with the right of Indigenous people to maintain and protect their cultural heritage on, and traditional knowledge about, their lands, territories and resources, as acknowledged in Article 31(1) of the Declaration of Rights of Indigenous Peoples.

Roles for RNTBC cultural heritage management activities have emerged in the context of culture and heritage planning processes of most states and territories. For instance, in Victoria, Barengi Gadjin Land Council Aboriginal Corporation, Gunaikurnai Land and Waters Aboriginal Corporation and Gunditj Mirring Traditional Owners Aboriginal Corporation have been appointed as Registered Aboriginal Parties (RAPs) for specific geographic areas under the *Aboriginal Heritage Act 2006 (Vic)*. As RAPs, these corporations are responsible for the management of Aboriginal cultural heritage within their jurisdiction, and are involved in the assessment of Cultural Heritage Management Plans for developments. A number of RNTBCs are involved in similar arrangements in other states and territories, such as Queensland.

RNTBCs may also make agreements for land use or exploration in the resources industry as outlined in the Act, which often include provisions for culture and heritage management. These may involve surveys of proposed development areas, the establishment of exclusion areas, opportunities for Aboriginal heritage rangers and the provision of cultural awareness training to staff and contractors of the prospective developer (O'Faircheallaigh, 2013). Likewise, some RNTBCs, such as the Karajarri Traditional Lands Association (Aboriginal Corporation) are involved in provision of heritage clearances as part of community development planning (Weir, 2013).

A number of RNTBCs are also involved in the provision of cultural programs or heritage management, separate to the development process. This includes mapping of cultural heritage sites within their native title holdings, and participation in projects targeted at the management and protection of specific sites due to their significant cultural value. For instance:

- In 2010 Mungarlu Ngurrarankatja Rirraunkaja Aboriginal Corporation RNTBC (MNR) participated in the Australian Research Council's Canning Stock Route Rock Art and Tjukurrpa Project, alongside Australian National University (ANU), government departments and a number of other organisations (CDNTS, 2011:6).
- The Yawuru Native Title Holders Aboriginal Corporation RNTBC was involved in the preparation of a cultural heritage management plan, which has won multiple state and national landscape awards (UDLA, 2011; Nyamba Buru Yawuru, 2013b).

In some instances these activities are undertaken in collaboration with other agencies, such as the Wet Tropics Management Authority, as described in Box B10 below.

Box B10: Wet Tropics Management Authority (WTMA) case study

The WTMA is a statutory organisation which manages the Wet Tropics World Heritage Area under the World Heritage convention. One of the WTMA's core strategies is to support Rainforest Aboriginal people in expressing their knowledge, culture and management practices on country, through developing and maintaining strong relationships with Rainforest Aboriginal people and their organisations.

In the WTMA's submission they stated:

"The Authority's focus is on effective management of the World Heritage Area and believes Rainforest Aboriginal people to be integral to the success of this management. We currently collaborate with and assist several PBCs in addressing issues related to working in the World Heritage Area. Our collaboration assists in achieving outcomes which not only contribute to World Heritage management, but also assist PBCs in building capacity to manage country in culturally appropriate ways." (2013:2)

In supporting this claim, the WTMA last year was able to grant money to five PBCs to undertake work within the World Heritage Area. Specifically, this work included:

- weed removal and management at Wongalaing Beach;
- cultural heritage mapping on the Atherton tablelands;
- development of a country based management plan; and
- propagation of the Black Palm seed for revegetation projects.

Source: WTMA submission to the Review (2013)

Despite the success of many RNTBCs in pursuing culture and heritage management, these activities are beset by a range of challenges. Foremost among these is the limited capacity of NTRBs/NTSPs to respond to these issues. In its submission, the Federation of Victorian Traditional Owner Corporations (the Federation) notes that limited resources currently hamper the cultural heritage activities of the RNTBCs which comprise its membership. These issues were also highlighted in the Victorian Government's *Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*.

In addition to capacity issues, some RNTBCs have noted the challenges of protecting cultural heritage associated with insufficient engagement and co-operation with government bodies. For instance, the submission made by Yawuru expressed aspirations for stronger co-operation with local businesses, government bodies and service providers to ensure the protection of cultural heritage.

Land management activities

A significant number of RNTBCs undertake, or aspire to undertake, a wide range of land and sea management activities. Though these activities are not a statutory function of RNTBCs, they are a key interest of native title holders and have clear relevance to RNTBC statutory function of "managing the native title holders' native title rights and interests". Indeed, it is the demonstration of a continuing association with land and sea by the native title holder group which underpins the establishment of the RNTBC, creating a clear link between native title recognition and involvement in land management activities for the native title group.

Illustrative of this significance, the AIATSIS Survey found that land and sea management was the second most commonly cited response to the question of what activities PBCs would like to do (but are currently unable to do) in the future (AIATSIS submission to the Review, 2013). These aspirations reflect the fact that an active role in land management is seen as an important end in itself as well as providing the opportunity for a range of other benefits.

The aspirations of native title holders in relation to land management are supported by procedural rights of native title holders pertaining to land. Further, with the recognition of native title over significant amounts of Crown Land, there are now widespread expectations among governments for native title holders to play an active role in this space. A recent AIATSIS report on the co-management of land by native title holders and government (Bauman, Haynes & Lauder, 2013), found that Indigenous land management has increased significantly over recent years due to a number of factors including:

- Indigenous people demanding greater access to and decision making power over their traditional lands.
- The Commonwealth Government objective to increase the size of the Australian National Reserve System (NRS), through initiatives such as the Indigenous Protected Area (IPA) program which supports traditional owners of lands or seas to voluntarily dedicate their lands as protected areas.
- Commonwealth investment in programs aimed to increase Indigenous employment in line with a recognised link between Indigenous activities on country and reducing Indigenous disadvantage, such as Working on Country which currently employs more than 680 Indigenous rangers across Australia and is expected to continue to expand.

Some specific examples of land management activities being undertaken by RNTBCs are summarised in Box B11 below.

Box B11: Land management activities undertaken by RNTBCs

- The Gulf Regional Aboriginal Corporation RNTBC reported that facilitation of the Working on Country and Indigenous Protected Area Ranger Programs is a task they are expected to undertake in their region (GRAC submission to the Review, 2013)
- The Mungarlu Ngurruankatja Rirraunkatja RNTBC (MNR) has successfully attracted government funding for land management, through the IPA program. The funding associated with the program is employed according to MNR's own priorities for country and it was submitted that this increased independence has emboldened the way MNR makes decisions, with the RNTBC currently looking to leverage their land management into country-focused income streams such as tourism opportunities and permit systems. Such projects would "integrate native title holders' view on country – and how it should be cared for – with the right to control and regulate access" (CDNTS submission to the Review, 2013:18).

As with other areas of activity, the effectiveness of RNTBCs in pursuing land management activities is constrained by their limited capacity. As noted above, the limited capacity of RNTBCs is often already stretched beyond its limits in order to undertake the basic compliance, future act and agreement activities, leaving little room for proactive pursuit of land management activities.

Other constraints include the inconsistency with which governments have engaged native title holders and their RNTBCs on these matters. For instance, PBCs in the Kimberley region stated in consultations that the State government did not engage well with them, ignoring PBCs until an interaction was forced. The native title holders felt the government did not invest in PBC capacity because it was too busy litigating against the PBC to prevent it from achieving native title.

Enterprise development

RNTBC activities in culture, heritage and land management are often conducted on a fee-for-service basis, providing opportunities for commercial development. These and other areas of enterprise provide an opportunity to leverage the financial and procedural benefits associated with native title to generate sustainable income for the RNTBCs and broader benefits for the native title group, particularly employment.

Notably, the AIATSIS Survey found that when asked what activities RNTBCs would like to do in the future (but were currently unable to), the leading response was establishment of commercial enterprises, in areas such as tourism, business development, financial investment, agriculture, aquaculture or commercial fishing as top priorities.

In order to facilitate these activities, many RNTBCs have developed enterprise arms. For example, the Yawuru Native Title Holders Aboriginal Corporation RNTBC has established an operational arm Nyamba Buru Yawuru (NBY) (NBY, 2013a). This was administered as part of the RNTBC's 2010 settlement agreement, with the objective that NBY could act as a vehicle for pursuing the obligations and opportunities emerging from the agreement. To this end, NBY manages Yawuru's commercial assets, employs staff, facilitates land development and undertakes enterprise activity. As such, NBY is tasked with undertaking activities designed to support the sustainable development for Yawuru people and ensure the availability of income necessary for current programs and for future generations.

Again, opportunities for enterprise development are constrained by the lack of capacity in areas outlined in later in this Appendix.

The submission by Kellehers Australia highlights the problems faced by Indigenous entrepreneurs that are fundamental to the structure of the RNTBCs:

"In findings that apply to all entrepreneurial opportunity, ie unrelated to any unique feature of indigenous entrepreneurship, the Study data reinforces concern in the context literature as to the impediment of bureaucracy to entrepreneurial opportunity, a finding common to the broad literature concerning Indigenous entrepreneurship. It confirms the absence of attention across the data sets as to how a mandatory public-private alliance, concerned with management of native title land, that is structured by regulatory mandate shapes its design and property arranges its ongoing management, review and future strategy to optimise short and long term outcomes for all alliance partners. The Study data reveals that problems already exist in areas of alliance governance, complexity and the influence of powerful partners and there are strong indications that these are likely to increase." (Kellehers Australia submission to the review, 2013:5)

A further challenge in these areas is the unequal distribution of opportunities among different RNTBCs. RNTBCs with significant agreements are often well placed to develop enterprises as a consequence of financial resources these agreements create and the elements of the agreement which support these businesses.

For example, the Yawoorroong Miriuwung Gajerrong Yirrgb Noong Dawang Aboriginal Corporation (MG Corporation) is the “umbrella corporation” for the Miriuwung and Gajerrong #1 Aboriginal Corporation RNTBC and the Miriuwung and Gajerrong #4 Aboriginal Corporation RNTBC (Sullivan & Hughes, 2013:208). MG Corporation was established in 2006 as part of the Ord Final Agreement (OFA) with the WA Government, which also included a compensation package worth \$57 million. MG Corporation has used that financial capacity to establish several businesses including the MG Civil Contracting business (established as a joint venture between MG Development Trust and Charles Hull Contracting) which has secured over \$2 million worth of contracts in relation to the Ord Irrigation Expansion Project (Yawoorroong Miriuwung Gajerrong Yirrgb Noong Dawang Aboriginal Corporation, 2012).

In contrast, RNTBCs with limited economic opportunities are less likely to develop businesses. This compounds the inter-regional disparities which also emerge through the future act regime.

Service delivery

A number of RNTBCs have also developed a role in the delivery of services to their community or broader society. This includes the culture, heritage and land management services (described above) and extends to a broader range of services aligned with the interests of the native title group. For instance, NBY plays an active role in supporting the delivery of public housing to its members. In consultation for the Review, RNTBCs who were not currently engaging in such activities often expressed a desire to do so while AIATSIS has identified service provision as among key areas of RNTBC aspirations (AIATSIS submission to the Review, 2013:26).

Advocacy

Many RNTBCs seek to engage with the government on behalf of their native title group, playing a lobbying or advocacy role. This aspiration reflects the status of the RNTBC as the representative of native title holders following the recognition of native title rights. However, it was noted in consultation that a lack of recognition of this relationship contributes to widespread frustration among RNTBCs.

The AIATSIS submission to the Review highlighted this issue:

“State government legislative regimes and ways of doing business on country have also been slow to change to recognise and accommodate native title and the role of RNTBCs within the decision-making frameworks, for example in land use planning. While NTRBs/NTSPs and the NNTC currently provide a voice in these debates, particularly in relation to the recognition and protection of native title, the perspective of RNTBCs across the growing breadth of activities and challenges have prompted calls for direct input and a more audible national voice.” (AIATSIS submission to the Review, 2013:25)

B.3.3 Benefits of RNTBC activities

Successfully combining culturally legitimate institutions and decision making processes has played an important role as the basis for economic development and community empowerment. However, successfully developing the appropriate representative structures has been perennial challenge in the recent history of Indigenous affairs. Consequently, it is significant that there are signs that RNTBCs are emerging offer potential in this area.

Indeed, a number of RNTBCs have developed sophisticated governance structures designed to facilitate community decision making in a culturally legitimate manner. These processes emerge primarily from the need to identify and engage the appropriate individuals in claims, future act and agreement making activity. Further, in some instances these processes are being extended to decision making and community engagement on a wider range of topics.

The potential value of clearly defined groups and related institutions, recognised by their communities and government as the representative of a native title holder group, is explored in a recent speech by Warren Mundine outlined in Box B12. While the Review is not a position to endorse all the proposals outlined by Mundine, it notes the parallels with his suggestions and the emerging role being played by a number of RNTBCs.

Box B12: Future role of RNTBCs

The challenges of Indigenous governance and the potential value of clearly defined governance structures based on Indigenous nations, linked to native title groups, was explored by Warren Mundine in a recent speech:

"The existence of multiple systems of Indigenous land recognition and compensation funds at different levels of government and multiple governance bodies leads to confusion as to who represents a group. ...the risk is that discussions on commercial development become unproductive with no clarity as to who speaks for the nation and who speaks for other interests. This impedes economic development."

In response to these challenges Mundine outlines an approach through which native title groups are recognised by the government and empowered to undertake a range of responsibilities on behalf of their communities.

"What I am proposing is that we acknowledge Indigenous nations as formally recognised and established groups with the ability to govern matters concerning their traditional lands, assets, culture, language and heritage. And there should be one governing entity established to represent that nation with clear criteria for membership based around descent..."

Most importantly, the governing entity representing each Indigenous nation will be the one that companies who want to invest in an area can deal with on development and use of traditional lands and the protection of culture and heritage in the process. The recognition of nationhood will provide a framework to build an economic future for Indigenous people."

Source: Mundine (2014)

B.3.4 Evidence of constrained RNTBC capacity

The Review has established that in the complex and demanding environment in which they operate, most native title holders are unable to effectively meet their obligations or leverage their native title to pursue outcomes aligned with their aspirations. As such, most native title holders are limited in their opportunity to benefit from their native title, contrary to the objectives of the Act. This challenge was apparent during the consultation processes and in the submissions to this Review, and is attested to by a body of past research as outlined in Box B13 below.

Box B13: RNTBC capacity

The difficulties faced by RNTBCs have often been identified. For instance, a 2006 review found that very few RNTBCs were operating effectively in fulfilling their core responsibilities (Australian Government, 2006). The review established that these difficulties were caused by a range of capacity constraints, factors which were again identified in national meetings of RNTBCs in 2007 and 2009.

An AIATSIS report has noted that “the risk that RNTBCs will be locked in an ‘incapacity spiral’ is high” as “they cannot build capacity through programs because funding partners are adverse to investing in organisations that lack capacity” (Bauman, Strelein & Weir 2013:18). This is evidenced by “numerous cases of missed opportunities where basic administrative capacity would have made a difference” (2013:18). Citing the Wik PBC as an example, AIATSIS noted that while revenue streams were available to the PBC, particularly under Queensland’s mandated exploration payments, there was no capacity to issue an invoice.

Areas of RNTBC capacity

Specifically, areas of necessary capacity for RNTBCs relate to:

- administration;
- engagement with their members;
- planning; and
- accessing expertise.

Capacity in one or a number of these areas is required to undertake each of the activities identified in above. For instance, for effective future act management and negotiations the RNTBC must have the:

- administrative capacity to receive and respond to the notification;
- capacity to effectively consult with affected native title holders to make a decision to authorise any proposed agreement; and the
- capacity to access the necessary legal and commercial expertise to understand inform the decision making and negotiation process.

Likewise, to undertake land management activities, the RNTBCs must have:

- capacity to engage with their members to identify priorities and aspirations in relation to land management;
- capacity to plan for these activities, including identifying relevant government departments, funding opportunities and regional partners;
- administrative capacity to prepare grant applications; and

- access to the expertise necessary to undertake land management activities successfully.

The need for capacity across these areas is recognised in the 2012 *Native Title Report* of the Social Justice Commission and several of the submission made to this Review. These areas of capacity are summarised in Table B.3 and discussed below.

Table B.3: Areas of RNTBC capacity needs

Capacity	Description
Administration	<ul style="list-style-type: none"> • Corporate establishment • Holding directors meetings and AGMs • Membership lists • Corporate management (tax, insurance, budgeting, payroll) • Trusts management (professional trustees, trust accounting) • Information management (including transfer of research information) • Grant application
Engaging members	<ul style="list-style-type: none"> • Communication, consultation and decision making (e.g. for decision on group direction, future acts, agreements etc.) • AGMs • Conflict management • Accommodation support
Planning	<ul style="list-style-type: none"> • Developing a shared vision • Corporate design and governance (including succession planning for boards) • Participatory planning / identifying opportunities (e.g. land management and enterprise development) • Establishing partnerships and regional coordination
Expertise	<ul style="list-style-type: none"> • Legal expertise <ul style="list-style-type: none"> • agreement implementation, compliance and reporting • future act/land use activity • referral for legal advice • Governance expertise <ul style="list-style-type: none"> • Corporate design • Conflict management • Natural resource management <ul style="list-style-type: none"> • country planning • management • Economic development <ul style="list-style-type: none"> • enterprise development • business planning • investment

Administration

RNTBCs require the administrative capacity to undertake the activities identified above. For instance, such administrative capacity is necessary to undertake the basic compliance activities identified above, such as corporate establishment and holding directors meetings. Moreover, it is a necessary capacity for elements of benefit management (such as establishing a professional trust) or seeking grants to undertake activities in culture, heritage or land management.

The administrative capacity of most RNTBCs is severely limited, with the majority of RNTBCs lacking the necessary basic equipment, staff and skills. For instance, many RNTBCs are unable to afford basic infrastructure, such as office space, office equipment or even reliable email addresses, which would form the foundation of basic administrative capacities. The AIATSIS Survey found that 67% of RNTBC groups who participated either did not have an office or did not have an office that suited their needs. Likewise, in the absence of staff employed to undertake administration, these tasks often fall to the RNTBCs board members who are required to act in a voluntary capacity.

There are a number of examples which are illustrative of this capacity constraint. For instance, during the consultations a number of RNTBC board members reported undertaking their RNTBC administration during work hours and using the office equipment of their workplace.

In addition, AIATSIS research has found that not having an office excludes RNTBCs from a range of substantial benefits, curtailing the ability RNTBCs to provide continuity and access to corporate information, providing an access point for third parties and, importantly a point of contact for native title holders and the local community to remain informed and involved (AIATSIS submission to the Review, 2013).

Such arrangements severely threaten the viability of RNTBCs, with many expressing concern in consultation that the willingness of members to provide ongoing volunteer work could not be sustained over the long term. It was stated in consultation with Victorian RNTBCs that while the current RNTBC members are committed, due to their heavy investment in the struggle for determination, this may be less true of future generations.

Engaging members and dispute resolution

The ability of RNTBCs to make decisions that are recognised among the native title group as legitimate depends critically on the capacity of RNTBCs to engage with their members appropriately. The needs for engagement vary among RNTBCs, reflecting the requirements in their circumstances and individual rulebooks. Examples of necessary engagement include the need to consult with native title holders on future act, agreements and decisions regarding investment of benefits, establishment of related corporate entities and broader group direction.

To undertake this engagement, Yawuru's NBY engages with the native title holders through community forums, local indigenous radio, community consultation, newsletters, social events and use of cultural advisors and monitors. Decisions about the group's future direction, such as establishing an operational arm or pursuing certain enterprise activities are likely to require the capacity to undertake engagement with the native title group's

members. However, most RNTBCs have limited capacity in this regard. This limited capacity means that, though this consultative process is a core requirement of ensuring that the RNTBC is undertaking activities consistent with the aspirations of native title holders, many RNTBCs are unable to comprehensively undertake these responsibilities.

RNTBCs also require the ability resolve disputes which may emerge within the RNTBC group.

Planning

RNTBCs require the capacity for planning at a number of levels. Most fundamentally, native title groups require the ability to identify a realistic shared vision for their group developed through a planning process. Following this, native title groups require the capacity to plan for how these objectives will be met, requiring planning on issues such as:

- developing appropriate governance frameworks and institutions;
- corporate considering areas of strengths to build on and weaknesses to address;
- identifying income generating opportunities; and
- establishing partnerships and regional coordination.

Further, RNTBCs require the ability to plan for each aspect of their activities in areas such as capacity building, land management and enterprise development.

RNTBC capacity to undertake planning in each of these areas is critical to ensure that they are able to respond to available opportunities and pursue a pathway which is consistent with the aspirations of native title holders. However, most RNTBCs currently lack this capacity.

For instance, the Australian Human Rights Commission identifies this activity as one that enables effective governance of the corporation currently lacking among RNTBCs (AHRC, 2012). The IBA has also identified the challenges faced by RNTBCs with planning and responded by providing assistance in this area through its recently established Traditional Owner and Native Title Unit.

Accessing expertise

Significant expertise is necessary to facilitate the activities undertaken by RNTBCs in a range of areas. This range of expertise is as varied as are the options for RNTBC activity.

For instance, legal expertise is a core need of RNTBCs to assist with future act management and negotiation. In the absence of such capacity, RNTBCs may be unable to reach agreements that safeguard the rights or maximise the benefits of native title holders. Further, external legal advice can be necessary to develop appropriate governance arrangements and resolve disputes as they emerge.

RNTBCs also require expertise in governance. This encompasses development and application of the provisions of the corporations rule book, and the capabilities for RNTBC directors to fulfil their responsibilities. Challenges commonly faced by RNTBCs in relation to governance are described later in this Appendix.

RNTBCs also require access to commercial expertise in order to maximise the benefits derived from agreements and explore other opportunities for income generation. For instance, Chief Justice Keane noted at the 2011 Native Title Conference that it is essential for RNTBCs to have access to commercial skills in order to make decisions in relation to the use of their land and the conditions of this use (NNTT, 2011). This includes skills in areas such as business development, finance and venture capital.

At present, most RNTBCs face tight constraints in relation to all these examples of expertise. As established by the AIATSIS survey, RNTBCs rely heavily on external advisors for specific expertise, with the most common forms of independent advice being in the areas of legal advice and governance, followed by financial, strategic planning and business development. (AIATSIS submission to the Review, 2013) RNTBCs would also like to receive advice on corporate and information management, community development, strategic planning, environmental planning and management, and research engagement. (AIATSIS submission to the Review, 2013)

In recognition of the importance of access to this expertise and the limited capacity of RNTBCs in this regard at present, a number of organisations have tried to fill this gap, including NTRBs/NTSPs, IBA and others.

RNTBC capacity challenges

In a post-determination context, the realisation of the anticipated benefits for native title holders depends in large measure on the ability of the RNTBCs to operate as an effective vehicle to comply with their obligations, reach agreements regarding the use of their land and undertake activities including land management and economic development. As such, a native title system that encourages RNTBC functionality is central to achieving the benefits for native title holders envisaged under the Act and by successive governments. Accordingly, understanding the circumstances and challenges faced by native title holders and their RNTBCs has been central to the Review's conduct.

The Review has established that most native title holders face extreme difficulty leveraging native title to pursue outcomes aligned with their aspirations. This difficulty largely reflects the limited capacity of most RNTBCs to perform their extensive statutory functions and support steps towards achieving the high and varied aspirations of native title holders.

These circumstances are resulting in lost opportunities for native title holders to proactively pursue opportunities associated with their native title in areas such as land management and economic development. The current mismatch between RNTBC obligations and capacity also creates significant pressures on NTRBs/NTSPs – pressures which, in the absence of reform, will continue to grow as more RNTBCs are established.

“There are significant gaps between the expectations that native title groups have for cultural, social, economic and community outcomes when a native title determination is achieved, and the reality for most RNTBCs who struggle to achieve more than their core native title functions without secure income streams. This has led to RNTBC directors lamenting that ‘we spend all our time doing other people’s business’. This perception highlights the institutional, cultural and political tensions that RNTBCs face in realising benefits from their traditional lands and waters.” (AIATSIS submission to the Review, 2013:18)

The limited capacity among many RNTBCs described above reflects several key constraints which the Review has found to be widespread. Of most significance, the limited resources available to most RNTBCs severely hampers their ability to develop necessary capacities in areas such as administration, engaging with their members, planning and accessing expertise.

In addition to the limited resources, the capacity of RNTBCs is constrained by the finite skills and experience of their boards and membership. Likewise, RNTBC functionality is also dependent on robust governance measures, which are currently often lacking. Shortfalls in these areas limit the ability of RNTBCs to act as an effective tool for achieving native title holder aspirations, as explored below.

Resources

Sources of RNTBC resources are discussed in Section 2.2.

Basic RNTBC functions such as facilitating directors' meetings and annual general meetings can entail significant costs. For instance, the administration cost of holding annual general meetings in remote areas can cost more than \$50,000 per meeting, primarily driven by the travel cost of group members. Financial resources are also required to undertake core RNTBC functions relevant to the decision making process, such as community consultation and communication as mandated by the Act and Regulations.

Further, the ability to draw on the necessary support and expertise to support a range of RNTBC functions is again contingent on resource levels. This support may be provided either through employing permanent staff or through a contestable market. This support includes basic functions related to administrative requirements and funding applications, through to the expertise necessary for agreement and future act negotiations, developing appropriate governance arrangements and strategic and business planning. In the absence of this support, RNTBCs are wholly reliant on the expertise and time of their own board and membership or through other voluntary support, primarily their NTRB/NTSP. As identified in section 4, this support can be highly variable and is problematic where the relationships between RNTBCs and their NTRB are weak or antagonistic.

Concern regarding the limited resources available to RNTBCs is shared widely by stakeholders and viewed by many as the most pressing problem in the native title system. For instance, the Minerals Council of Australia notes that it "has for a long time been concerned that PBCs have not been funded adequately to undertake their statutory and practical responsibilities" (MCA submission to the Review, 2013:7). Likewise, based on their research, AIATSIS contends that inadequate funding is the primary barrier to developing capacity among RNTBCs. These concerns are also widely shared among NTRBs/NTSPs, with all submissions from NTRBs/NTSPs and the NNTC noting the significant negative implications for native title holders associated with the limited resources available to RNTBCs.

It is contended by many that additional funding for RNTBCs would significantly increase capacity and result in numerous other positive benefits. For instance, the WTMA submission notes:

"... all too often new Aboriginal organisations including PBCs, are under-subsidised and need assistance in areas such as administration, governance, grant writing and management. They often rely on organisation such as the Authority, or individuals, to

provide advice or auspice funding for them. New PBCs with few resources and low capacity, but high motivation, are also vulnerable to exploitation...Providing financial support to PBCs for on ground activities, helps to build the capacity of their members, improves the confidence of the PBCs to achieve outcomes and helps them to build important positive working relations with both government and non-government organisations.” (WTMA submission to the Review, 2013:3)

The Gulf Regional Aboriginal Corporation RNTBC supports this assertion, stating that they would “be greatly assisted if the funding body would provide additional funding so that we may secure a small office, a vehicle and an administrative assistant. We find that a great deal of our current funding is taken up responding to future act notices and meeting regularly as a board of directors” (GRAC submission to the Review, 2013:4).

The Federation notes that “as a matter of principle, governments should not create organisations through statute (whether they are PBCs, TOGEs or RAPs) without adequately funding their operation. To do so is to set our organisations and our people up to fail” (FTVOC submission to the Review, 2013:5).

The MCA notes that it “has for a long time been concerned that PBCs have not been funded adequately to undertake their statutory and practical responsibilities” (MCA submission to the Review, 2013:7).

Skills and experience

The capacity of most RNTBCs to undertake their functions is constrained by the finite human capacity of their leadership, board and broader group. Important dimensions of this capacity are the skills and experience relevant to the running of a corporate entity, meeting administrative requirements, engaging with external stakeholders and undertaking activities in areas such as land management and enterprise development. The leadership capacity required to make group decisions and develop a shared vision for the native title group’s future is also an important element of the capacity required among RNTBCs. While some RNTBCs have boards that have significant capacity in these areas, most face severe constraints.

The limits on this group capacity reflect a number of factors. One major challenge is the complexity and significance of the issues which board members and native title groups are expected to make decisions about. For instance, future act agreements require decisions as to whether to accept the terms of offers from proponents. These decisions may be binding on the native title group into the future, meaning poorly informed decisions may adversely impact the benefits the group is able to derive going forward. These problems are compounded by the inability of RNTBCs to access expertise, either from in-house staff or external sources, as described above.

Further, most native title groups rely on the leadership of a small number of people, often elders. Even where these individuals have significant relevant experience and leadership skills their time is inevitably limited, often split between a range of leadership roles, family responsibilities and employment. This problem can be further compounded by the proliferation of entities associated with RNTBCs, such as business enterprises and trusts. The reliance on a small number of volunteer leaders is not sustainable.

Governance and disputes

The effectiveness of RNTBCs is constrained by a range of problems related to governance, group structure, decision-making and dispute resolution. The consultations and submissions revealed that a range of factors contributed to challenges in these areas, including:

- The inconsistencies between traditional decision making processes and the requirements placed on RNTBCs, where such inconsistencies can create a source of governance tension and dispute issues and undermine the effectiveness of group decision making processes.
- Problems with the nature and composition of the RNTBCs membership. It was commonly noted in the consultations that during the claims process the composition of claim groups are influenced by considerations of how to create a group which minimise conflicting claims in order to achieve a successful determination. In this context, little if any thought is given to how the composition of the claim group will affect the operation of the RNTBC into the future, creating structural issues which fuel disputes and complicate decisions.
- Poorly designed RNTBC governance structures. For example, RNTBC noted that on the establishment of the RNTBC, it was decided to have a large number of board members – mainly comprised of Elders living in remote areas. As a result, it was incredibly difficult to encourage a minimum number of board members to attend meetings and it became almost impossible for the decision-making process to occur in a manner considered legitimate by the broader native title holding group.
- Monopolisation of the decision processes of RNTBCs by small sub groups, often to the effect that benefits are distributed narrowly among certain families and 'big men'.

Examples of the types of problems and disputes which have emerged as results of these issues are identified in Box B14 below.

Box B14: Examples of disputes

- For instance, a submission by a RNTBC (confidential) expressed that “a number of issues were decided by the RNTBC without consultation with the community” and that “despite the Elders wishes, the RNTBC has pursued commercial opportunities within the community”.
- Members of one RNTBC group stated that they felt forced to compromise their claim in order to gain a consent determination. “Where anthropological evidence diverged from our knowledge of boundaries or blood lines, we were persuaded to alter our claim to align with the evidence – hoping to speed up the process”. Such a compromise was stated to have significantly hindered the group’s ability to work together.

These problems have created heightened awareness of the need to support improved governance and dispute resolutions mechanisms for RNTBCs.

B.4 Background on support for native title holders

This sub-section provides additional material on the current roles and activities of RNTBCs, to support Section 2.3 of the main report.

B.4.1 NTRB/NTSP support for native title holders

Areas of NTRB/NTSP support

NTRB/NTSP assistance to RNTBCs enables them to undertake their role of managing native title in a manner consistent with the aspirations of native title holders. As such, NTRB/NTSP may relate to the full range of RNTBC activities identified in Section B.3.2.

NTRBs/NTSPs do not have a specific function related to assisting RNTBCs in the management and enjoyment of native title rights and interests or the implementation of agreements. However, they are required to “give priority to the protection of the interests of native titleholders” and to provide “facilitation and assistance” on a range of related topics, requirements widely cited by NTRBs/NTSPs and others as a statutory foundation for their activities in these areas.

In many respects the ongoing ‘post-determination’ support provided to RNTBCs is a natural progression from the support these groups have received prior to determination. In its submission, the NNTC notes that throughout the pre-determination process, NTRBs/NTSPs can become involved in a broad range of activities on behalf of native title groups to support intergenerational, cultural, social and economic benefits. In addition to agreement making, such support may relate to land management or development of other enterprises.

Such support is viewed as an integral part of the NTRBs/NTSPs support for the claims and agreement making process and provides a foundation for an ongoing role of NTRBs/NTSPs to support land management and other economic development activities following a determination. Indeed, much of broader native title work conducted by native title holders relates to the implementation of agreements which they have had a significant role establishing, providing a further natural avenue for ongoing support for the RNTBCs.

For example, nearly all NTRBs/NTSPs provide some assistance to help native title holders to establish RNTBCs and to remain compliant with their CATSI Act obligations. Likewise, it is common place for NTRBs/NTSPs to provide ongoing assistance to RNTBCs with responding to future acts and making agreements.

Sometimes this support is administered through a formal arrangement, for instance, SANTS is currently funded through their PFA to support six of the PBCs in South Australia. It was submitted that this “involves quite intense work in managing their Director’s meetings and general meetings, general compliance matters and providing support to develop policies and processes for Governance, Financial Management, Planning, and other activities as they arise” (SANTS submission to the Review, 2013:5). Despite the acknowledgement that these PBCs do not yet have the capacity to run their own administration so rely heavily on SANTS to maintain their operations; it was also asserted that such activities require

specified funding. It was stated that as “SANTS operates on a very tight budget, and any unplanned activity (such as unfunded requests to assist in ILUA negotiations and claim settlement) takes resources away from priority matters” (2013:5).

Other areas of NTRB/NTSP assistance grow out of their broader activities in culture and heritage, land management and economic development work described in Section B.2.2. Indeed, most NTRBs/NTSPs describe their activities in these areas as focused on developing RNTBCs to undertake these activities on their own in the future. Some examples of NTRB/NTSP assistance in these areas are provided in Box B15 below.

Box B15: Examples of NTRB/NTSP support for RNTBC activities

Culture and heritage

Where state level heritage legislation applies, as noted in section 3.2, NTRBs/NTSPs generally aim to help RNTBCs to comply with those additional responsibilities. For example, CYLC supports RNTBCs where they have become registered cultural heritage bodies for their determination areas (CYLC submission to the Review, 2013). Similarly, the TSRA undertakes cultural heritage compliance processes for registered native title claimants and RNTBCs, given their responsibilities under the Aboriginal Cultural Heritage Act 2003 (Qld) (ACH Act) and Torres Strait Islander Cultural Heritage Act 2003 (Qld) (TSRA submission to the Review, 2013). NTSV also assists traditional owner groups in the application process to become Registered Aboriginal Parties under the Aboriginal Heritage Act 2006 (Vic). This includes the provision of advice to prepare and manage applications (NTSV submission to the Review, 2013).

Land management

A number of NTRBs/NTSPs are involved in land management projects with RNTBCs. For instance, CDNTS provides land management services to RNTBCs as part of its community development operations, particularly in relation to country planning, joint management and governance. In addition, SANTS and YMAC indicated in their submissions that they have provided RNTBCs with assistance with land management projects within resourcing constraints. Another NTRB/NTSP involved in this area is CLCAC, which has carried out land and sea management activities in the determination area of the Gangalidda & Garawa Peoples, such as the investigation of Indigenous Protected Area projects. However, the extent to which the Gangalidda & Garawa Native Title Aboriginal Corporation is involved in these activities in an institutional sense is unclear from CLCAC's submission.

Economic development

Some NTRBs/NTSPs also assist RNTBCs to achieve their aspirations for economic development. Specifically, this support was identified as a current activity in submissions from CDNTS, NQLC, NTSV and TSRA. Some of the main services currently provided include advice on enterprise development, business planning, investment facilitation and the development of capacity-building workshops. Many NTRBs/NTSPs have indicated their willingness to expand the provision of services in this area, citing resource constraints as a key barrier to greater assistance.

The ways in which NTRBs/NTSPs assist RNTBCs to undertake these types of activities can be linked to the four main RNTBC capacity needs identified in 0: administration, engaging members, planning and expertise. The contributions made by NTRBs/NTSPs in developing RNTBC capacity in these areas are summarised in turn below.

The extent to which, and the way in which NTRBs/NTSPs might provide these types of assistance varies significantly. This variety is driven by factors such as their level of

resourcing, the circumstances of RNTBCs in their jurisdiction and the specific opportunities in the region.

It must be noted that a RNTBC will not universally receive support from an NTRB/NTSP. Many factors may limit this support, such as NTRB/NTSP capacity and priorities, RNTBC capacity and the relationship between the RNTBC and the NTRB/NTSP. For instance, “the WA Government’s experience is that many RTNBCs have not maintained a relationship with the NTRB/NTSP after a native title determination. In one recent instance (September 2013) the RNTBC released a public statement which denied access to the determination area by all staff, officials and Board members of the NTSP because the NTSP was deemed not to have acted in the best interests of the native title holders” (WA DPC submission to the Review, 2013:1).

Administration

The consultations and submissions to the Review have indicated that, at the most basic level, administrative capacity is critical for the day-to-day operations of any RNTBC, to enable them to undertake all types of activities, from statutory compliance to broader initiatives which seek to fulfil the aspirations of the native title holders they represent.

The main services that NTRBs/NTSPs provide to RNTBCs which address this need include:

- corporate entity establishment to implement native title agreements;
- general office administration support, including provision of precedents;
- assistance with compliance with CATSI Act and other statutory obligations, such as reporting requirements;
- corporate financial services including tax, insurance, budgeting, resource allocation and payroll advice, (either direct or brokered);
- holding money in trust;
- access to alternative independent trustee companies;
- information management in relation to future acts, native title holders and traditional owners, including record keeping of anthropological research and legal documents, and transfer of research information;
- provision of office space;
- setting up office space and facilities;
- assistance with holding director’s meetings and annual general meetings;
- management of future act notifications;
- responding to non-claimant applications;
- development of processes for agreement implementation;
- assistance with securing funding grants; and
- assistance with applications to take on broader responsibilities under state/territory legislation.

Engaging members

Given their responsibility to manage the native title rights and interests of native title groups, the ability of RNTBCs to engage with their members is of utmost importance.

Although the requirements for consultation with their constituents differs between corporations based on the provisions in their rule books, regulations require RNTBCs to undertake consultations and obtain consent from members of the native title group in certain circumstances.

Of particular importance are the dispute resolution services provided by NTRBs/NTSPs. In their submissions to the Review, a number of NTRBs/NTSPs indicated that beyond conflicts in the pre-determination phase, RNTBCs also lack capacity to manage disputes that arise post-determination. These can relate to disagreements within their existing membership, or with applicants wishing to be acknowledged as members of the native title group (CLCAC, SANTS, TSRA and YMAC submissions to the Review, 2013). Given their in-depth knowledge of RNTBCs and the nature of localised disputes, many NTRBs/NTSPs provide support for culturally appropriate mediation, which takes into account relevant traditional laws and customs of the native title group. This support is provided alongside dispute resolution services provided by other agencies. For example, NTSCORP and SANTS noted the increasing involvement of the Federal Court in the resolution of conflicts faced by RNTBCs (NTSCORP and SANTS submissions to the Review, 2013).

NTRBs/NTSPs may also be involved in the process of engaging members by:

- identifying traditional owners;
- ensuring appropriate members of the community are consulted where necessary;
- travel and accommodation logistics support for meetings;
- organising, notifying and convening meetings;
- providing advice on the conduct of meetings;
- undertaking community visits;
- preparing and distributing membership newsletters and other forms of communication, or supporting the ability of the RNTBC to do so;
- facilitating programs which generate employment opportunities for RNTBC members;
- providing accommodation support; and
- providing information to RNTBC members or those seeking to become members upon request.

Planning

Furthermore, RNTBCs require planning capacity for a range of purposes, from developing a shared vision for the native title group, to setting out how their objectives will be met and how specific activities will be undertaken.

In their submissions to the Review, most NTRBs/NTSPs provided examples of planning services they provide to RNTBCs, such as:

- assistance with the development of strategic visions;
- corporate planning;
- community planning;
- strategic country planning;
- business planning;
- succession planning for boards;

- joint management planning;
- delivery of planning workshops; and
- policy co-ordination.

Expertise

RNTBCs also require access to expertise in order to undertake their activities. Access to accurate technical advice is necessary to empower RNTBCs to produce successful outcomes for native title holders.

NTRBs/NTSPs are often key providers of expertise across a range of fields, in the following ways:

- legal advice and representation in matters relating to native title, future acts, ILUAs, compensation, other settlement or agreements, statutory and regulatory rights and obligations;
- corporate governance advice and services, including guidance with the development of rulebook provisions and delivery of governance training;
- agreement implementation and compliance services;
- research support for membership applications and production of family genealogies on request;
- providing access to economic advice;
- report writing;
- assistance with land management and/or cultural heritage protection and management matters, including heritage surveys, monitoring and clearances and facilitation of projects;
- direct or brokered advice on corporation development, business development and investment facilitation; and
- advice and assistance with broader economic development projects.

Level of NTRB/NTSP support for RNTBCs

The level and nature of the demand for RNTBC support from NTRBs/NTSPs is influenced by a number of factors. These include:

- the number of RNTBCs in the region;
- the nature of the opportunities being pursued by RNTBCs; and
- the level of RNTBC capacity.

First, the number of number of RNTBCs in each region varies significantly. The larger number of PBCs in regions covered by the NTRBs such as the TSRA, NQLC and KLC, create higher demands for support in these areas. In contrast, regions such as the South West and Goldfields have no PBCs to support.

Demands on NTRB/NTSP support services are also shaped by the extent to which they operate in areas which provide opportunities for RNTBCs to pursue relevant activities. For example, activities relating to agreement implementation issues, land management and enterprise development all relate to the availability of relevant opportunities. As such

NTRBs/NTSPs operating in areas with significant future act and agreement activity face greater demands for assistance for agreement implementation and monitoring.

The level of capacity among RNTBCs will also have significant implications for demands on NTRBs/NTSPs. For instance, RNTBCs with sufficient capacity to undertake a range of activities may require only limited assistance. In contrast, RNTBCs with very little capacity often remain heavily dependent on their NTRB/NTSP for assistance to undertake core activities such as basic compliance, engagement with membership and future acts management. However, even RNTBCs with substantial capacity are likely to need assistance with planning and access to relevant expertise in complicated areas such as future acts and enterprise development for example. As such, although RNTBC capacity does affect the type of support they require, it should not be assumed that there is a steady inverse relationship between these variables.

Constraints on NTRB/NTSP assistance

The level of assistance provided by NTRBs/NTSPs to RNTBCs is constrained by current resource levels and funding arrangements as well as the preferences of some RNTBCs.

Funding arrangements

In addition to tight resources constraints, some NTRBs/NTSPs reported that their ability to respond to the needs of RNTBCs is curtailed by the nature of their individual PFAs. An example of this was provided in the NQLC submission to the Review and is provided in Box B16 below.

Box B16: NQLC comments on the PFA

"Many of the requests that the NQLC receives for assistance from Native Title claimant groups, as well as PBCs, relate to matters that are prohibited under 5.5 (g) which states:

You agree not to use Funds for any of the following purposes: ...(g) to cover the costs of economic development, property operating expenses, land management activities, or heritage protection activities associated with Native Title agreements, unless the costs relate to performing the functions of a Representative Body under the Act;

Most of our traditional groupings wish to engage in economic development activities on lands subject to Native Title as well as play a leading role in the management of their traditional lands including protected areas. Part of land management activities wishing to be undertaken by traditional owners is the identification and protection of significant cultural sites on country. Undertaking a more central role in these types of activities is a natural progression for groups when they achieve a favourable determination of Native Title. Not being able to assist our PBCs in this space in the post determination environment creates a dysfunction between the assistance provided by the NQLC to obtain the recognition of Native Title and the assistance we can provide for traditional owners conducting activities on country, effectively exercising their Native Title rights. The NQLC strongly recommends that this restrictive condition be removed from our Program Funding Agreement.

Many traditional owner groups have other companies associated with their PBCs. A significant percentage of PBCs in our region have established other companies to conduct business or land management activities on determined land and have close corporate relationships with the PBC. Section 5.5 (h) restricts the NQLC from assisting these associated entities in the management of any activities they undertake and particularly associated matters relating to their holding Native Title. Specifically, the clause states:

...(h) [NQLC is forbidden to] support Native Title claimant group structures (such as reference/working/steering groups) in relation to an area of land and waters where Native Title has been determined to exist, or [to] support another person or body corporate to enable them to perform the functions of a Representative Body under the Act.

Source: NQLC submission to the Review (2013)

CYLC echoed this sentiment in their submission to the Review, stating that their obligation or desire to, perform a wide range of additional functions which were not explicitly a statutory obligation. Such functions included support for RNTBCs in the following activities:

- cultural heritage mapping and management;
- supporting land use planning and management;
- providing a centralised, secure repository for anthropological research and important documents for RNTBCs;
- resolving land administration and land tenure issues on Aboriginal land; and
- facilitating economic development and home ownership on Aboriginal land.

CYLC noted that "despite these activities often having a close link to the recognition or exercise of native title rights and interests, CYLC does not receive core funding to provide these services and only becomes involved if resources are available and received from another source" (CYLC submission to the Review, 2013:6).

In consultation, it was noted by PM&C that the PFA could be altered for each NTRB to allow for specific additional functions. With a suitable case being made, individual PFAs could be

re-crafted to address many of the issues outlined in the comments from NQLC and CYLC above. Indeed, just how flexible individual PFAs could be was a matter discussed during the consultations and the process of conducting the Review may assist in clarifying matters going forward.

RNTBC preferences

In addition, some native title groups may have a strong aversion to working with their NTRB/NTSP. Indeed, during the course of the consultations and submissions process, a number of RNTBCs indicated a strong preference for operating independently of their NTRB/NTSP in many or all respects. This was the case even among some poorly resourced RNTBCs, who opted to use their limited settlement funds to retain the support of private agents, particularly lawyers, for tasks which could have been provided for free by NTRBs/NTSPs.

These preferences may reflect a range of issues. For instance, AIATSIS notes in its submission that "in some cases personal or political differences between native title holders and their regional NTRBs/NTSPs exist; in others, RNTBCs simply desire to be self-sufficient and operate independently. As a result, some RNTBCs prefer not to have an ongoing relationship with their NTRB/NTSP post-determination" (AIATSIS submission to the Review, 2013:13).

The submission of the WA Government also illustrates this point. It notes that many RNTBCs have not maintained a relationship with the NTRB/NTSP post-determination and identifies a recent example where a RNTBC denied access to their land by all staff, officials and board members of the NTSP due to the belief the NTSP had not acted in the best interests of the native title holders.

B.4.2 Other support for RNTBCs

RNTBCs can also obtain assistance from government agencies that sit outside the native title framework, but within the Indigenous Affairs portfolio, and also from state/territory governments. In general, however, support available through these sources has been relatively small and limited in its application.

This section summarises the current support provided by:

- Indigenous Business Australia (IBA);
- Indigenous Land Corporation (ILC);
- Office of the Registrar of Indigenous Corporations (ORIC); and
- State and territory governments.

Indigenous Business Australia

As submitted to the Review, the ultimate objective of the IBA is to increase the independence and importance of Indigenous people within the Australian economy. To achieve this, it delivers services through its Business Development and Assistance, Equity and Investments and Home Ownership Programs.

In early 2013, IBA established a Traditional Owner and Native Title Unit (TONTU), which provides support to RNTBCs as well as other traditional owner groups and native title claimants. TONTU was founded in response to the findings of an IBA-commissioned research project – that Indigenous organisations commonly identified weaknesses in their commercial capabilities, particularly with respect to governance, management, strategy and finance, including investment decision making, execution and performance management.

Funded by IBA's retained earnings and resourced with two full time staff, TONTU currently has capacity to provide advice and support to between three to five established native title or traditional owner groups per annum, which are equipped with an asset base and have demonstrated aspirations for undertaking commercial activities.

Specifically, TONTU is able to undertake commercial capability health checks, assist with best practice procurement and provide tailored advice, tools, training and implementation support to help drive self-sufficiency. IBA is also involved in the facilitation of peer-to-peer learning on economic development experiences among native title holders. This assistance is particularly relevant to enhancing RNTBC capacity in relation to planning and access to expertise.

The IBA is also interested in building a quorum of emerging leaders, potentially establishing an Indigenous Institute of Directors and engaging members and beneficiaries as part of strategic planning.

The agency aims to develop long term joint ventures partnerships with RNTBCs, to help build their wealth and capability. Some examples of these types of relationships are provided in Box B17 below.

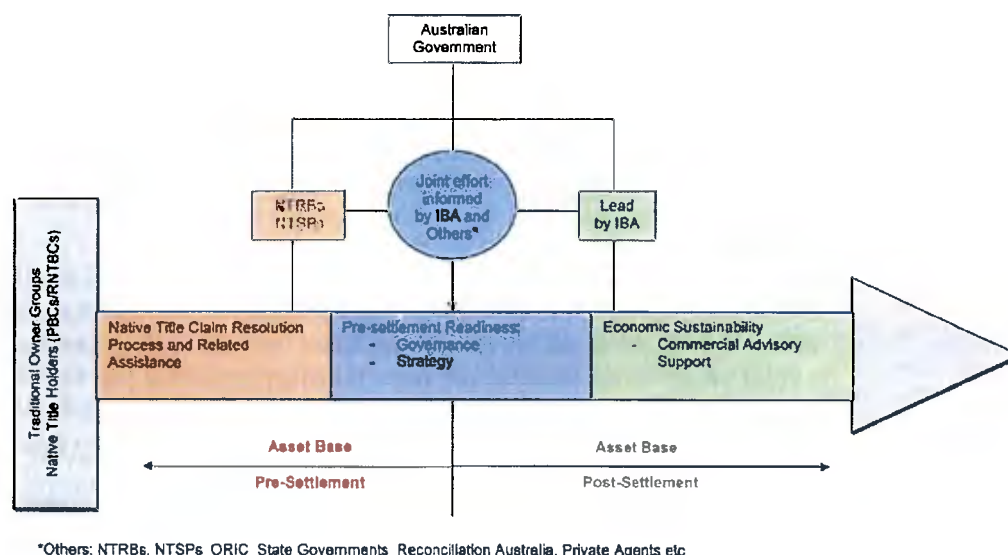
Box B17: Examples of IBA interactions with traditional owner groups

- IBA and the Adnyamathanha Traditional Lands Association (Aboriginal Corporation) RNTBC (ATLA) have formed a joint venture to purchase the Wilpena Pound Resort in the Flinders Ranges National Park. As ATLA develops its capacity to independently manage the investment, IBA plans to gradually sell its share in the Resort to the RNTBC.
- IBA provided support for a business consultant to help the Palyku, Kariyarra and Ngarla Aboriginal Corporations negotiate commercial relationships with a number of mining companies in the Pilbara. Prior to this, the three traditional owner groups had established mining and land use agreements with the companies but were yet to take advantage of further business opportunities. The assistance provided by the consultant lead to \$251 million worth of contracts and joint ventures over five years for the corporations, with opportunities for additional Indigenous employment in the future. IBA provided further financial assistance to one Indigenous entrepreneur, by way of a loan to enable delivery on a contract.

In these ways, IBA considers that it can play a central role in supporting RNTBCs with aspirations for post determination commercial activities, as part of a comprehensive approach involving other government bodies and Indigenous stakeholders, particularly NTRBs and NTSPs. The support structure envisioned by the agency is illustrated in Figure B.2 below. Through this process of collaboration, IBA expects that an increasing number of RNTBCs will become self-sufficient, with the ability to independently exercise sustainable

commercial options which meet the objectives of the native title holder group and/or partner with IBA in further initiatives.

Figure B.2: IBA's proposed support network for native title holders



Source: IBA submission to the Review (2013:19)

Indigenous Land Corporation

The ILC is an independent statutory authority enabled by the Aboriginal and Torres Strait Islander Act (2005). Their primary role is to assist Indigenous people to acquire and manage land to achieve economic, environmental, social and cultural benefits. Given the explicit links between native title recognition and land management, the ILC is well positioned to play a supporting role for native title holders in the accessing and utilising land.

Office of the Registrar of Indigenous Corporations

ORIC is an independent statutory office holder that administers CATSI Act, responsible for the support and regulation of all corporations incorporated under the Act.

It was suggested in numerous submissions, and in consultation, that ORIC could potentially play a larger role in supporting the development of governance structures within PBCs, rather than playing a largely regulatory based role. For instance, in their submission to the Review, the Federation noted that while the services provided by ORIC (as well as the IBA and ILC) were acknowledged, they were not well tailored to the needs of Aboriginal Corporations, and as such, the capacity building services provided by such organisations should be reviewed (FTVOC submission to the Review, 2013).

Numerous RNTBCs noted that ORIC largely maintains an 'enforcement' approach to their corporations. In contrast to helping to build the capacity of RNTBCs, holding a regulatory focused approach causes anxiety amongst RNTBC members in regards to operating in a

compliant manner. RNTBCs, in consultation, noted that this restricted the ability of their organisation to grow.

For example, one RNTBC noted in consultation that ORIC was unresponsive for requests for guidance in changing governance structures, limiting their ability to restructure inefficient elements of the organisation. However, ORIC still required the RNTBC to meet their statutory obligations, which was difficult given the inefficient governance mechanisms the RNTBC was trying to change.

State and territory governments

The states and territories can also offer support for PBCs through other measures. For instance, the Victorian Government, through recognition of the role of Aboriginal people as the guardians and keepers of Aboriginal cultural heritage, established an avenue for the management of cultural heritage by native title holders through Registered Aboriginal Parties (RAPs).

There are currently nine Victorian RAPs, who are determined by the Victorian Aboriginal Heritage Council, have responsibilities under the Victorian Aboriginal Heritage Act 2006 to evaluate cultural Heritage Management Plans, provide advice on applications for Cultural Heritage Permits, make decisions about Cultural Heritage Agreements and provide advice on ongoing Protection Declarations. These services are provided on a fee for service basis.

B.5 Current models of NTRB/NTSP assistance for RNTBCs

Owing to their unique circumstances, there are almost as many models of RNTBC support as there are NTRBs/NTSPs. However, from this range it is possible to identify four broad models of current NTRB/NTSP assistance to RNTBCs:

- RNTBC support integrated with other activities;
- RNTBC support unit / support officer;
- Shared services provided on a fee-for-service basis; and
- Regional Default PBC operated by the NTRB/NTSP.

These are described in turn below.

B.5.1 RNTBC support integrated with other activities

The most common means of assistance for RNTBCs by NTRBs/NTSPs is through support integrated with their various other activities. As a consequence, much of this support is in-kind, growing out of the relationships which have developed between NTRBs/NTSPs and native title holder groups during the claims process, as well as involvement with other activities of NTRBs/NTSPs in areas such as culture, heritage, land management and economic development. The level and extent of this support varies between NTRBs/NTSPs, ranging from basic support with compliance and future acts, through to expansive assistance in land management, enterprise development and advocacy.

At a basic level, many NTRB/NTSP lawyers are responsible for assisting with the resolution of claims, establishing agreements and often also provide ongoing support to native title holders post-determination or settlement. For example, RNTBC assistance provided by the CLC is primarily conducted by one lawyer who ensures that RNTBCs remain compliant, that necessary future acts are responded to and that agreements are made. As this work is not covered in the CLC's PFA, these activities are described as occurring in the 'spare time' of relevant staff and effectively being funded through cross-subsidisation with other native title work and other activities in response to the ALR Act 1976.

Other NTRBs/NTSPs provide more expansive support from a wider range of program activities. Those NTRBs/NTSPs which operate significant land management programs or cultural maintenance projects can support RNTBC activities through these programs.

For example, KLC reported supporting RNTBCs to undertake land management programs through its operation of a Caring for Country ranger program. The AIATSIS submission to the Review also notes that KLC:

- provides governance support and logistical support for annual general meetings and directors meetings;
- offers legal support for future acts in relation to exploration, tourism and government activity; and
- undertakes governance projects for both determined and soon to be determined groups ... looking at decision making and structural models as well as the integration of

traditional decision making models into the corporate governance requirements of the CATSI Act (2013:30).

This wide range of support integrated with the other operations of NTRBs/NTSPs is the primary means through which most NTRBs/NTSPs assist RNTBCs. Indeed, the models described below typically operate in conjunction with the types of support provided here.

B.5.2 RNTBC support unit / support officer

An increasingly common response by NTRBs/NTSPs is to establish a dedicated unit or officer with responsibility for assisting RNTBCs in certain areas. The RNTBC unit or officer will typically be focused on ensuring RNTBCs are able to meet their basic compliance requirements and are able to effectively consider future act activities. RNTBC units and officers are also likely to give some attention to RNTBC capacity building, through activities such as director training and workshops.

Rather than operating in isolation from the rest of the NTRB's/NTSP's operations, this model typically combines the support provided by the RNTBC unit or officer with the broader capacities of the NTRB's/NTSP's other activities. For instance, the RNTBC support unit may draw on the support of the NTRB's/NTSP's legal team for future acts or working with its land management division to provide assistance for RNTBCs in these areas. As such, rather than replacing the support provided under the integrated RNTBC model, PBC units or officers normally compliment these activities.

The dedicated support associated with this model is particularly common in regions where there remains only a small amount of outstanding claims. Several examples consistent with this model, as identified in the consultations and submissions, are outlined below.

NTSV - Policy Development Unit

NTSV have established a policy unit which support RNTBCs across their full range of activities, such as basic compliance, future acts and agreements, implementation and monitoring, cultural heritage, land management, enterprise development, service delivery and advocacy. The support work carried out by NTSV also includes providing secretariat support to the newly established Federation of Victorian Traditional Owner Corporations (described further in Section B.6.1).

Support provided by the unit includes capacity building with RNTBCs, administrative support, assistance with engaging membership and other stakeholder communications, planning activities and expertise in relation to areas of law, land and commercial development. Much of this support is provided in pre and post determination phase.

TSRA – PBC Support Officer

The TSRA has a dedicated PBC Support Officer located with the Governance and Leadership arm of TSRA who provides comprehensive capacity building support for RNTBCs to coordinate training, assist with ORIC compliance and help in the delivery of other TSRA programs such as land management, economic development and health.

CYCLC - PBC Support Unit

In 2009-10, FaHCSIA established a trial PBC Support Unit in the Cape York Land Council to test the viability of providing a central support resource to service the needs of PBCs in the region. The PBC Support Unit provided in-kind assistance to PBCs with the aim of increasing PBC's capacity to:

- comply with their own governing documents, relevant laws and requirements of regulatory bodies; and
- govern their own affairs through an effective board that ensures delivery of its objects and sets strategic direction and policy.

Comments on this model made in CYLC's submission are provided in Box B18 below.

In 2011, FaHCSIA engaged PricewaterhouseCoopers to undertake an evaluation of the performance of the CYLC PBC Support Unit. The evaluation concluded that the unit was a cost effective model, worthy of being rolled out to assist PBCs in other regions, although some enhancements were recommended.

Box B18: CYLC Comments on PBC support unit

The CYLC has established a PBC Support Unit that provides assistance to Cape York RNTBCs so that the determination of native title is more certain to provide economic benefit and social development opportunities for native title holders.

It is generally accepted that Cape York RNTBCs look to CYLC to provide administrative, financial and legal assistance for RNTBC operations. At present CYLC's PBC Support Unit provides regulatory (eg ORIC compliance) and economic development assistance to RNTBCs, and is working on the establishment of a training unit to train directors on their fiduciary duties with respect to the management of their respective RNTBC. Informal assistance is also provided from time to time in relation to the implementation of ILUAs. However, CYLC does not have a definite statutory responsibility to provide these types of support.

The CYLC PBC Support Unit is also involved in RNTBC capacity building through the delivery of initiatives such as strategic planning, business planning, and corporate governance training workshops. On the ground, the CYLC PBC Support Unit supports traditional owners and their requests for support for economic development, employment and training, traditional knowledge transfer, and other projects. To provide these types of support CYLC draws on in-house expertise, plus from an extensive pool of expertise available through partnerships with organisations such as Jawun.

There are clear advantages for the CYLC PBC Support Unit model to deliver these types of support services over other service provider models (such as a centralised Canberra based service provider model) including:

- shorter travelling distances, regional knowledge, and capacity to respond quickly to take advantage of good weather, people's availability, etc - a national or statewide body could not have the logistical and spatial advantages that CYLC possesses;
- positive long term relationships formed with RNTBCs built on mutual respect and good will that have grown out of CYLC's support for the determination of native title and establishment of the RNTBC – no other organisation could acquire such invaluable relationship capital simply because it could not have the history of association that CYLC does; and
- understanding of each RNTBC as a unique entity and knowing RNTBC Board members as individuals to tailor make training sessions that suit the requirements of the RNTBC and individuals.

Despite the proactive PBC Support Unit model that CYLC has implemented the support provided is still not sufficient to fully meet the needs of RNTBCs. Additional resources are required by the PBC Support Unit to provide sufficient levels of support, including legal advice, enforcing agreements, maintaining genealogies, responding to future act notifications (such as for mining, roads and government infrastructure) the provision of services in this area, citing resource constraints as a key barrier to greater assistance.

Source: CYLC submission to the Review (2013)

B.5.3 Shared services provided on a fee-for-service basis

To augment the services which NTRBs/NTSPs are able to provide native title holders, a number of NTRBs/NTSPs have developed separate corporate entities which operate on a fee-for-services basis. These entities have so far provided services in aspects of RNTBC administration, support for commercial development and wealth management. Nascent examples of these entities associated with the CDNTS, YMAC and KLC are described below, drawing from the Review's consultations and submissions.

In addition to the models currently operating, a number of NTRBs/NTSPs, including the NQLC, QSNTS and NTSV, indicated interest in exploring the role of fee-for-service shared services in their region. However, a number of NTRBs/NTSPs, including NTSCORP and CDNTS, noted that the applicability of this model to their region is constrained by the limited resources of RNTBCs in their region.

Desert Support Services (DSS) is a wholly owned subsidiary of CDNTS which offers administrative, financial, labour hire, training, heritage surveys and land management services. CDNTS has also established Rockhole Funds Management which can act as a trustee for trusts that receive, hold or manage benefits (including cash or non-cash benefits) that relate to native title or traditional Indigenous rights of ownership, occupation, use or enjoyment of land.

Likewise, YMAC has established Ngurra Barna which provides assistance in aspects of administration, such as corporate establishment, convening meetings, book keeping and grant writing, and broader support relevant to pursuing land management or enterprise development, such as business planning and support for commercial joint ventures.

The Kimberley Regional Economic Development Enterprises (KRED) was established by the KLC and is owned by the Ambooriny Burru Charitable Foundation which has eight native title holder groups as members (Mayala, Bardi Jawi, Karajarri, Ngurrara, Nyikina Mangala, Tjurabalan, Mawadjala Gadjidgar and Jaru native title groups).

KRED works with native title holders and their RNTBCs to negotiate future acts and agreements, which is its primary source of income. KRED also supports native title holders to undertake heritage work on a fee for services basis and provides some assistance in capacity building and corporate governance development.

KRED operates independently from the KLC, a necessary requirement primarily due to the fact that the KLC's mandate as a NTRB/NTSP and representative board structure mean that it is poorly placed to manage the distribution of revenue from agreements among the different groups. However, the KLC is able to nominate a board member and has a service agreement with KRED to support its activities.

DSS, Rockhole, Ngurra Barna and KRED operate as not-for-profits which provide their services at cost to RNTBCs and other Indigenous people and organisations, inside and outside their NTRB/NTSP regions. As such, these entities operate in contestable markets. By drawing on the institutional capacity and established relationships of their associated NTRBs/NTSPs, these entities are designed to provide services tailored to the circumstances of their clients at a cost lower than available on the private market.

However, these entities do face challenges. For instance, there are difficulties in meeting the requirement to be self-sustaining based on their cost recovery model. This challenge is significant as it highlights the difficulty of operating commercially viable fee-for-services for native title holders given the limited resources these groups often have. It is particularly notable that this challenge is experienced by Ngurra Barna even though it focuses on a region, the Pilbara, in which native title groups have significantly more resources than is commonly the case.

Further, these entities have had to establish a level of independence from their respective NTRBs/NTSPs, in order to avoid perceived or actual conflicts of interests. In the case of Ngurra Barna, its board comprises some members of YMAC's staff and directors but has established protocols to distinguish the activities of these groups.

CDNTS describes this situation as:

"... because of its role as a native title service provider with very particular functions under the NTA, Central Desert was of the view that it should not provide these services directly to groups. It is more appropriate to establish separate corporate entities to offer these services. These entities can draw on Central Desert and its staff to leverage its corporate knowledge and experience. It also removes any perception of conflict in the community

In essence, Central Desert sees itself as something of a 'backbone' organization with the experience and skills to facilitate the effective functioning of Aboriginal Corporations and PBCs in the Central Desert region. Central Desert has the ability to coordinate, source and provide the sorts of advice and services that Aboriginal Corporations require. This centralised approach is designed to lead to outcomes that are sustainable, effective and culturally appropriate and that empower groups to use their traditional lands to achieve their social, cultural and economic aspirations about Central Desert handling monies.

The incorporation of both DSS and Rockhole Funds Management P/L allows Central Desert to focus on performing its statutory functions and assisting groups with their land management aspirations, while providing a greater complement of services to its constituents" (CDNTS submission to the Review, 2013:4).

KRED is has perhaps operated the largest organisation of the shared services identified here. However, it too reported financial difficulty as the mining boom and associated future act activity in the region has waned.

B.5.4 Regional Default PBC operated by the NTRB/NTSP

The NLC has developed a model whereby each native title group in their region is given the opportunity to opt into the one RNTBC, the 'Top End Default PBC', which would act as the agent for the group's native title. The Default PBC model has been designed by the NLC as an option for native title holders to reduce the regulatory burden they face in complying with the requirements imposed on RNTBCs. This model means that the administrative needs of all native title groups can be met through the operation of a single RNTBC, with one board, one annual general meeting and one set of reporting requirements, creating considerable efficiencies.

It is noted by the NLC that this option may be preferred by native title holders in their region as a consequence of the reality that they will likely have few opportunities to leverage their native title for any ongoing benefits. This is largely a consequence of the limited economic opportunities available to most native title holder groups, the limited capacity of these groups and the fact the most determinations in the NLC region coexist with pastoral leases or land covered by the ALR Act 1976 which limit opportunities for native title holders to utilise their land. Given these circumstances, it is argued by the NLC

that if each native title group was required to establish a RNTBC, the most likely consequence would be high rates of non-compliance and dysfunction, creating distress among native title holders and a significant cost for the NLC which would be expected to provide support and ultimately a burden on the government.

In this context, it is important to note that there 165 active claimant applications in the NLC region, approximately one third of the system total and the most of any region. If a new RNTBC were established for each of these determinations, this would more than double the total number of current RNTBCs.

The Default PBC is comprised of the members of the NLC Executive Council. The Executive Council is a committee of the NLC Full Council and comprises the NLC Chair, Deputy-Chair, and seven Full Council members, all of whom are Indigenous. This is consistent with PBC Regulations amended in 2011 so that a PBC may include people who are not native title holders, on the proviso that the native title holders agree and that 51% of a corporation's members are Indigenous, as required under the CATSI Act. The Default PBC would hold native title assets in trust.

NLC staff would assist the Default PBC to undertake its activities consistent with requirements on PBCs. This effectively removes the compliance burden on native title holders (and reduces cost to government).

Native title holders are expected to be able to decide on matters of importance to them by stipulating the type of issues on which they must be consulted. For example, in the instance of a future act which could have a significant impact on their land or generate significant benefits (e.g. a resource extraction project), it is expected that native title holders will require consultations. The rules for the consultation process are outlined in the Default PBC rule book. Accountability in this model is also supported by the NLC's representative board structure and government oversight.

Financial benefits emerging from agreements would flow through the NLC and would be distributed to the royalty corporations set up under the relevant agreements. This is analogous with the process currently operated under the ALRA. There are corporations currently in existence which receive benefits under the ALRA which could be used for this purposes in relation to native title. There is sufficient overlap between native title groups and existing corporations to make this approach viable – where such a corporation does not exist it will be established.

The Default PBC would operate on an opt-in basis. Native holders that receive benefits or have income to manage their own affairs may establish a separate PBC. Native holders will be able to opt out of the Default PBC as desired at any point in time.

B.6 Models of RNTBC groupings

The notion of establishing a RNTBC grouping as the basis for shared support is a widely touted prospect, of which there exist a number of nascent examples. These are the:

- Federation of Victorian Traditional Owner Corporations (the Federation) – Victoria;
- Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation (the Sea and Land Council) – Torres Strait; and
- (proposed) Central Services Corporation (CSC) – South West Region.

Each model provides support for RNTBCs through shared services, either through ongoing contracts or fees-for-service. As such, the model helps RNTBCs to obtain the benefits of scale and capacity of a large organisation, potentially acting as a fee-for-service hub for users of native title services.

Like the model of NTRB/NTSP support for RNTBCs, these groupings have been driven primarily in response to the needs of RNTBCs discussed throughout this paper. Where they differ from the NTRB/NTSP support model is that they provide greater control for the RNTBCs and their native title holders. This is in line with the preferences among native title holders in many regions to develop greater autonomy and develop an effective platform for direct interface with government.

Each of these groupings have been developed with the support of the region's NTRB/NTSP and, as described below, are designed to ultimately replace or supplant the NTRB/NTSP at some point in the future (with the exception of KRED).

The groupings are described in this section.

B.6.1 Federation of Victorian Traditional Owner Corporations (Victoria)

The Federation of Victorian Traditional Owner Corporations (the Federation) was formally registered as a public company, limited by guarantee under the *Corporations Act 2001* (Cth) in August 2013. The Federation was established to drive collective action among traditional owner corporations in Victoria after a series of discussions facilitated by NTSV (which now provides secretariat, policy and planning support to the Federation).

The Federation is governed by a Board of Directors, which comprises of two representatives appointed by each member organisation. Each year, the Board of Directors elects the Chairperson. Through this structure, the Federation aims to "support and strengthen the resources and capacity of member organisations", particularly within the following three areas:

- advocacy on policy issues relevant to Traditional Owners;
- commercial and economic development opportunities; and
- natural resource management and cultural heritage protection (The Federation submission to the Review, 2013:3).

In addition to RNTBCs prescribed by the Act, this grouping is inclusive of Traditional Owner Group Entities (TOGEs) and Registered Aboriginal Parties (RAPs) as established by the *Traditional Owner Settlement Act 2010 (Vic)* (TOS Act) and the *Aboriginal Heritage Act 2006 (Vic)* respectively. This illustrates the importance of developing models for Indigenous representation within a broader policy context. Further details on the Traditional Owner Settlement Act are provided in Box B19 below.

Box B19: The Traditional Owner Settlement Act 2010 (Vic) (TOS Act)

The TOS Act established an alternative framework for negotiation of out-of-court settlement of native title in Victoria, removing the requirement for native title holders to go through the lengthy, and often costly, processes that are required under the Native Title Act. Under the TOS Act, Traditional Owner groups applying for a native title settlement are required to lodge a Threshold Statement, which once evaluated and accepted by the State Government, allows for the negotiation of a settlement package. As part of this process, successful Traditional Owner groups are required to establish Traditional Owner Group Entities (TOGEs).

As established in consultation, a key interest of the Victorian Government is having activities related to the TOS Act recognised as a legitimate part of their duties under the NTA and funded as such. It was submitted in consultation that the TOS Act provides for economically viable TOGEs, as evidenced by the relatively high capacity of Victorian PBCs, through:

- compensation payments partially funded by the state government;
- alignment of fee-for-service and other roles relating to heritage and Registered Aboriginal Parties (RAP) with TOCs; and
- focus on capacity building and development of scale to pursue economic development opportunities.

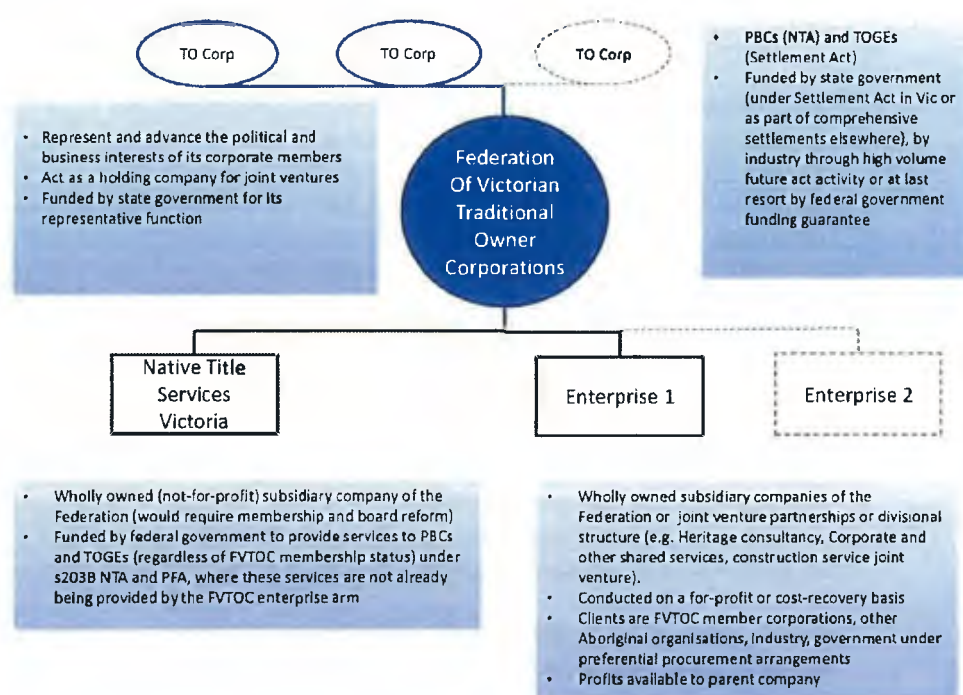
The Federation currently has six member organisations: three RNTBCs (two of which are also RAPs), a TOGE, a RAP and NTSV. It is anticipated that the number of members will grow over time, particularly as the number of TOGEs increases.

As the internal capacity of each member grows over time, it is envisaged that the Federation will play a more central role in the representation and supply of services to RNTBCs and other traditional owner corporations. In their submissions to the Review, the Federation and NTSV put forward consistent views on a potential model which would allow corporations to have greater control and ownership of their NTSP. As illustrated in Figure B.3, this could involve:

- member corporations consisting of RNTBCs and TOGEs, funded by settlements with the state government, future act activity, or a federal government guarantee as a last resort;
- a central role for the Federation as the representative of its corporate members, funded by the state government for this purpose, and acting as a holding company for joint ventures;
- a number of wholly owned subsidiary companies of the Federation or other joint venture partnerships, which deliver services to member corporations, other Aboriginal corporations, industry and government as required, either as not-for-profits or through a cost-recovery basis; and
- NTSV as a wholly owned, not-for-profit subsidiary of the Federation, funded by the federal government to provide support services to RNTBCs and TOGEs, where these

services are not provided by the Federation's enterprise arm (The Federation and NTSV submissions to the Review, 2013).

Figure B.3: Federation model diagram



Source: The Federation submission to the Review (2013:8)

B.6.2 Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation

There is also a strong interest in providing RNTBCs in the Torres Strait with greater control over their NTRB, through the Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation (the Sea and Land Council). As outlined in its submission to this Review, the Torres Strait Regional Authority (TSRA) established the Council and would support its recognition as the NTRB for the region, instead of the Authority.

The first objective of the Sea and Land Council is "to empower the native title holders and Native Title Bodies (RNTBCs) of the Torres Strait to fulfil their responsibilities to hold and manage their sea and lands in accordance with traditional law and custom" (TSRA submission to the Review, 2013:2).

The rules of the Sea and Land Council provide for membership of any Torres Strait Islander RNTBC registered under the CATSI Act, and governance by a Board of Directors comprising of one representative from each member RNTBC. As such, it is envisaged that the recognition of the Council as the NTRB for the region will enable:

- RNTBCs to make decisions regarding NTRB resource allocations between a range of RNTBC priorities;

- RNTBCs to have more direct involvement in NTRB services, including assistance with applications for further land and water title grants under Queensland legislation;
- greater skills transfer between the NTRB and RNTBCs, to build RNTBC capacity;
- greater independence and autonomy for RNTBCs; and
- an exclusive focus on serving the needs of RNTBCs, relative to the broader focus of the TSRA.

The TSRA strongly advocates for the appointment of the Sea and Land Council as the NTRB for the Torres Strait and has indicated its willingness to work with the government and RNTBCs through the transfer process. The Authority proposes that the Council play a broad native title role in the region to assist RNTBCs to achieve their social and economic objectives. This includes the possibility of also taking on TSRA's cultural heritage function, given the statutory linkages between native title and cultural heritage established by Queensland legislation.

B.6.3 Central Services Corporation (WA)

Under the proposed settlement of the South West (Noongar) claim, the Noongar people would surrender their native title over the South West in consideration for a range of benefits from the Western Australian Government, including a significant financial benefit. As well as negotiating this settlement, the region's NTRB, SWALSC, is currently designing structures for a future operating model to hold, manage and utilise settlement funds.

In this model, there would be six Noongar Regional Corporations (NRCs), which are based on sub groups within the Noongar nation and are similar to RNTBCs but would not hold native title given the nature of the agreement with the State. The NRCs would incorporate under the CATSI Act and would have responsibility for pursuing activities in land, culture and community services. These activities could also include responding to community aspirations in relation to areas like anti-poverty programs and establishing enterprise development entities. Funds for the NRCs would be provided by a Trustee Company established to hold the settlement funds.

To provide services to the NRCs, SWALSC infrastructure would be converted into a provider of shared services, renamed the Central Services Corporation (CSC). Building on existing infrastructure will allow the Noongar people to retain the necessary experience, knowledge, scale and capacity developed by the CSC to date. Funding for ongoing operation of SWALSC settlement is expected to be negotiated as part of the settlement, after which point it is envisaged that the CSC will be largely self-funding through its arrangements with NRCs.

B.6.4 Other PBC groupings

Beyond these current PBC groupings, a number of native title holder groups have identified the aspiration of developing structures in which a formal grouping of PBCs would be formed and control a shared services support arm.

For instance, in its submission to the Review, Mandingalbay Yidinji Aboriginal Corporation RNTBC (MYAC) advanced a model of RNTBC support based on regional resource hub operated by regional groupings of RNTBCs. This hub would belong to, and be operated for,

the benefit of RNTBC members, and enable them to achieve economies of scale by working collaboratively.

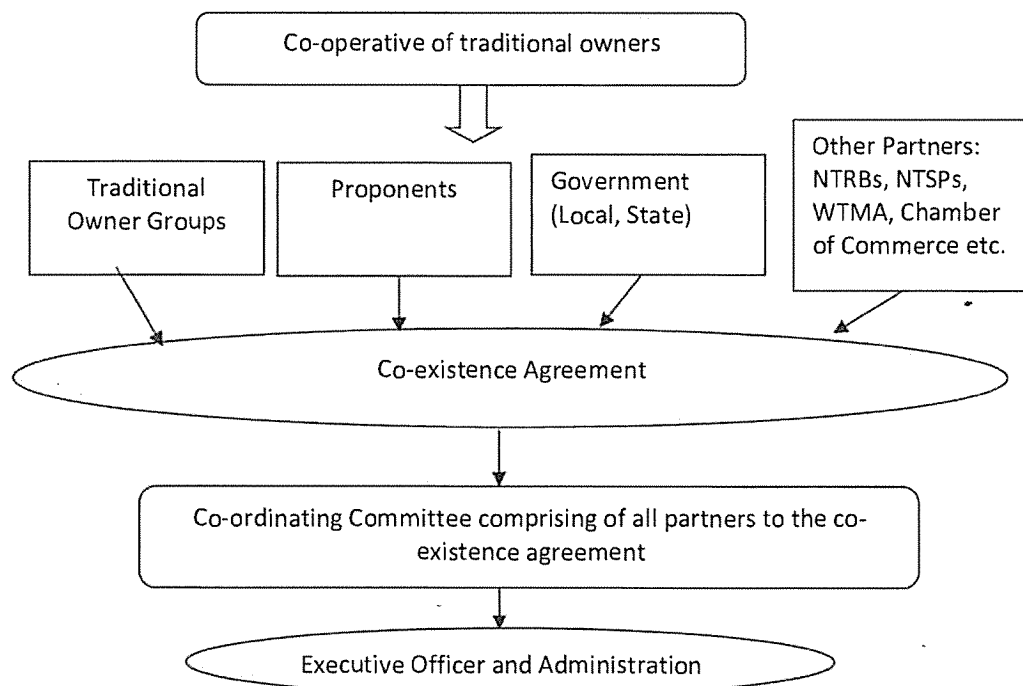
As illustrated in Figure B.4, MYAC envisages that a co-operative of traditional owners would work to negotiate partnerships with service providers and other stakeholders. These partnerships would be formally recognised as part of a co-existence agreement, with flow on roles for a co-ordination committee of stakeholder representatives, an executive officer and administration staff.

The hub would provide RNTBCs with a single point of contact for post-determination support and professional services that they could utilise when required, spanning many of the services currently provided by NTRBs and NTSPs, including legal advice, organisational development, financial services and community development. In addition, the hub could provide assistance to local governments and proponents in their dealings with traditional owners.

MYAC proposed that the resource hub could be funded through existing RNTBC funds, if those corporations elected to do so, third party service providers, philanthropic organisations and government programs. Indeed, one of the proposed benefits of the hub is that it would make it easier for RNTBCs to make joint funding applications to relevant programs, with a consequent reduction in administration costs.

MYAC noted that the Queensland Government is in the process of assessing the feasibility of a 'Queensland Aboriginal and Torres Strait Island Land Tenure, Land Use Planning Hub' (MYAC submission to the Review, 2013).

Figure B.4: Indicative model of resource hub proposed by MYAC



Source: MYAC submission to the Review (2013:15)

B.7 Background on private agents

This sub-section provides additional material on the current roles and activities of RNTBCs, to support Section 2.4 of the main report.

B.7.1 Areas of private agent assistance to RNTBCs

Within the native title system, common services provided by private agents to RNTBCs include:

- legal services;
- anthropological services; and
- commercial advice.

These are discussed in turn in below.

Native title legal services

Legal officers offer a variety of services throughout the native title process, including in both native title matters (claims applications and future act negotiations and agreements) and commercial matters (providing legal advice to RNTBCs on issues such as contracts, employment and taxation, particularly for post-determination activities such as enterprise development) (LCA submission to the Review, 2013).

It is more common for native title holders to seek private representation in future act matters than in claims progression. However, in both components of native title legal assistance, the number of claimant groups engaging in NTRB/NTSP representation has increased over the last year (Land Branch, 2012).

- In 2011-12, approximately 60% of claimant groups were being represented by NTRBs/NTSPs in future act negotiations (up from 49% in 2010-11). This indicates that 40% of claimant groups did not require assistance, were receiving assistance from private agents in future act negotiations or were not participating in such negotiations. Claimant groups could also be receiving assistance from both an NTRB/NTSP and a private agent.
- 92% of claimant groups received assistance from NTRBs/NTSPs in 2011-12, up from 85% in 2010-11. More detail on the extent of private representation in legal matters, and how this differs by region, is presented in Table B.4 below.

The consultations and submissions to the Review indicated that private agents are particularly likely to be utilised for native title related work in situations where the NTRB/NTSP declines or is unable to assist native title holders due to a variety of reasons, including:

- resourcing constraints;
- conflict of interest issues;
- a belief that a claim does not have sufficient evidence to receive a determination; or
- a need for complex or unique skills not currently available within NTRB/NTSP resources.

Such services are also important where native title holders are discontent with the services provided by the NTRB/NTSP in their region. Indeed, with only one NTRB/NTSP funded to provide services in each area, the absence of alternative free support services for native title holders is an area of controversy. Private agents play some role in responding to this demand but generally on a fee-for-service basis.

A number of NTRBs/NTSPs, in the context of constrained resources, have made the strategic business decision to outsource various elements of their service provision. For instance, for a period QSNTS decided to focus on claims processing and declined to engage in any future act activity, outsourcing much of the future act activity to private agents. Similarly, CLCAC outsources all its anthropology and legal work, retaining no 'in-house' employees in these fields (CLCAC submission to the Review, 2013:39). As such, private agents are vital contributors to the functioning of the native title system in these circumstances.

Anthropological services

Consultant anthropologists offer services primarily in native title matters, particularly in informing connection reports and the collection and collation of claims evidence. A connection report is evidentiary material provided by native title applicants to support their native title claim. While a connection report is not mandated by the Act, it has become standard practice to seek expert advice (from an anthropologist, historian or linguist) to ensure an application satisfies the conditions of the Act. As such, the services of anthropologists are critical in the pre-determination phase.

The Centre for Native Title Anthropology (CNTA) states that there are currently 74 anthropologists employed by NTRBs/NTSPs (up from 45 in 2004), and approximately 40 anthropologists currently acting as private native title consultants (CNTA submission to Review, 2013). The number of private consultants in this field has remained relatively stable over the past decade.

Consulting services

Discussions in the consultations and evidence from the submissions indicates that RNTBCs are also increasingly drawing on the services of private consultants to support their ability to undertake various commercial activities, including basic compliance, funds management, land management and enterprise development. These services include governance advice, capacity building, investment analysis, strategic and business planning and identification of economic development opportunities. Given the growing number of RNTBCs, some of which have access to considerable resources, the Review anticipates that demand for these services will increase strongly in coming years.

Private agents are an important part of a contestable market for a wide range of native title services. As such, they are often in direct competition with NTRBs/NTSPs. However, private agents also provide an important resource to NTRBs/NTSPs as an avenue for outsourcing when NTRBs/NTSPs require additional resources, niche skills or cannot provide services due to conflict of interest. For instance, approximately 5% of NTRB/NTSP assistance with claimant applications was briefed out to private agents in the financial year of 2011-2012. Likewise, a number of NTRBs/NTSPs indicated that they are involved in brokering services

to support native title holders in a wide range of post-determination activities, such as strategic planning and land management.

Table B.4: Legal representation of native title matters (2011-12)

NTRB/NTSP	Claimant applications			Claimant groups represented in Future Acts		
	<i>NTRB/NTSP assisted</i>	<i>Non NTRB/NTSP assisted</i>	<i>% Non NTRB/NTSP assisted</i>	<i>NTRB/NTSP assisted</i>	<i>Non NTRB/NTSP assisted</i>	<i>% Non NTRB/NTSP assisted</i>
NTSCORP	12	15	56%	6	21	78%
SANTS	19	1	5%	9	11	55%
CYLC	18	2	10%	16	4	20%
CLCAC	2	0	0%	2	0	0%
NQLC	30	3	9%	28	5	15%
QSNTS	33	8	20%	2	39	95%
TSRA	6	0	0%	0	6	100%
NTSV	8	1	13%	7	2	22%
CLC	17	0	11%	NA		0%
NLC	159	0	0%	103	56	35%
CDNTS	13	1	7%	13	1	7%
GLSC	7	5	42%	7	5	42%
KLC	28	0	0%	28	0	0%
SWALSC	12	0	0%	12	0	0%
Yamatji	39	1	3%	39	1	3%

Source: Land Branch (2012)

'NTRB/NTSP assisted' includes assistance that was briefed out to private agents for capacity of conflict reasons which was 5% of total work.

'% Non NTRB/NTSP assisted' is the number of claimant groups that were not assisted by an NTRB/NTSP and may therefore be assumed to be privately represented. However, this may be over-representing the number of privately assisted groups as groups may not have any form of representation. Similarly, it may be under-representing the number of privately assisted groups as some groups may have been represented by both NTRP/NTSPs and private agents.

B.7.2 Structural causes of private agent issues

As noted in Section 2.4, the Review has been notified of examples where the behaviour of a small number of private agents has adversely affected the experiences of native title holders. Although there is no comprehensive evidence base in regard to the level of unscrupulous behaviour by private agents, it is recognised that structural features inherent to the native title system have the potential to foster conflict.

It was suggested in consultation that the fundamental structural variation between government funded NTRBs/NTSPs and private agents provides an opportunity for the financial exploitation of native title holders by private agents. While the potential to charge

exorbitant fees or profit unfairly through the provision of over-charged services is not unique to native title issues, there are several underpinning factors which render native title holders particularly vulnerable to exploitation in this manner:

- Native title exists within an immensely complex legal framework which is still evolving, making it difficult for native title holders to assign true value to private agent services.
- The benefits associated with future acts can be very high, particularly in negotiations relating to mining resources. As such, the incentive for exploitative behaviour (by both individual native title holders and private agents) is high.
 - Pre-determination, some of these issues emerge due to the fact that the ultimate holders of the native title rights and interests have not yet been determined. The group progressing the claim may, or may not, represent the final native title holders. While recent case law indicates the claimant has a duty to the native title holders, this obligation is not reflected expressly in the Act.
 - Post-determination, similar issues arise because there are currently no parameters regarding the management and use of native title benefits. While there is a requirement to gain consent from native title holders in relation to certain native title decisions, there is no express requirement to consider the interests of the broader native title group in managing and using native title benefits.
- Stemming from a history of disadvantage and often low levels of education (SCRGSP, 2011), native title holders often lack the skills necessary to establish reasonable and just financial agreements. In some instances this may allow private agents to charge exorbitant fees or provide low quality work.

A culmination of the above factors, which illustrate the vulnerability of native title holders in relation to fair representation in some native title matters, and the systematic issues discussed earlier such as asymmetric incentives and the inherent uncertainty in proving connection, has resulted in a situation in which there are cases of private agents being used, sometimes self-motivated or sometimes directed by select members of a claim group, to erode the benefits of the wider native title group.

One of the key reasons cited in submissions and consultation for differences in the outcomes of services provided by private agents and NTRBs/NTSPs is the relationship between the legal officer and the Applicant. This issue is outlined in Box B20 below.

Box 20: The relationship between the legal officer and the Applicant

A PBC should ideally have as members, all the people relevantly connected to the native title claims it makes. However, there is a potential difference between the group of people who should be members of a PBC and the group of people who actually are members of a PBC. This arises naturally as individuals join together to form PBCs prior to undertaking comprehensive anthropological studies about a particular native title claim.

A consequence of this difference is that individuals (or groups of individuals) will often have an incentive to control or manipulate the membership of a PBC. This usually takes the form of encouraging or resisting the admission or removal of certain members from a PBC. The rewards associated with such manipulation can be quite large, and can include 'sitting fees' paid to members of a PBC for attending meetings with mining companies, as well as control over the PBC, its funds and corresponding native title rights.

NTRBs/NTSPs have a statutory responsibility to the body of people who hold or may hold native title over particular land and waters. This would be the 'registered native title claimant' for future acts of the 'applicant' for s61 native title determinations. However, at an organisational level, the NTRB/NTSP holds an obligation to any people who may hold native title, a concept which is broader than the Applicant or the native title claim group at any one point in time.

This distinction holds implications for the obligations held by NTRB/NTSP lawyers as opposed to private agents. For instance, if research indicates that a body of people who are not currently part of the Claimant group may hold native title, the NTRB/NTSP is bound to represent the new group of potential native title holders regardless of the original Claimant group initiating the process. In this circumstance, a private agent who is not bound by such statutory functions, may retain that their client is the original group (i.e the 'registered native title claimant' or the 'applicant').

The profit motive underpinning the actions of some private agents, as distinct from government funded NTRBs/NTSPs, was frequently cited by stakeholders as a factor that encouraged unscrupulous behaviour by private agents. The observation that private agents are more likely to offer services in resource rich regions where agreements may yield significant financial settlements has been advanced to illustrate the focus of private agents on activities which offer the prospect of significant financial return (NNTC submission to the Review, 2013). The MCA found that in 2011-12, the amount of native title monies provided by the mining industry was around \$3 billion, a figure which illustrates the scale of resources which some private agents may seek to exploit (Australian Government – the Treasury, 2013:13). One NTRB/NTSP stated in consultation that "the level of private agent activity fluctuates with the price of gold".

It was submitted that the incentives associated with such funding differences also resulted in a narrower breadth of service delivery from private agents, with NTRBs/NTSPs working to a broader and more sustainable set of objectives. For example, CYLC submitted that "private agents have no incentive to proactively improve the capacity and performance of RNTBCs. In fact, a chronic need for support from RNTBCs is in the best interests of private agents" (2013:28). Accordingly, in contrast to the approach taken by NTRBs/NTSPs to encourage RNTBC autonomy, private agents may have an incentive to encourage ongoing dependence of RNTBCs on their services. However, several submissions to the Review argued the inverse of this.

In particular, it was argued that the differences in the profit structures of private agents resulted in higher quality service delivery to native title holders. It was suggested that the

monopoly style position held by NTRBs/NTSPs in the native title services sphere, and the guaranteed revenue stream provided by government funding, resulted in limited incentives for NTRBs/NTSPs to effectively and efficiently progress claims. For instance, one RNTBC submitted that “we have found that the vast majority of services provided by professionals outside of the NTRB/NTSP framework to be of a high standard. It is our view that individuals in the private market are more susceptible to loss of business if they do not perform at a high level and therefore go above and beyond to produce good work” (GRAC submission to the Review, 2013:8).

To counter this imbalance, it was suggested in Just Us Lawyers submission to the Review (2013) that funding be made available to native title claimants rather than directly to the NTRB/NTSP. Their submission suggests a system similar to that of the Higher Education Contribution Scheme (HECS) in which funds (with reasonable limits) could be made available for a Native Title Determination Application and repaid from future compensation payments (i.e. future acts). Under the proposed system, claimants would be free to choose their own lawyer (NTRB/NTSP based or private), creating an even playing field and resulting in increasing competition levels and thereby efficiency. It was suggested that such a scheme would hold the added benefit of increased ownership over the claim process by native title claimants.

B.7.3 Obligations for NTRBs/NTSPs and private agents

NTRBs/NTSPs and private agents operate under different sets of obligations. In addition to the professional obligations on some NTRB/NTSP staff, NTRBs/NTSPs have ongoing statutory, corporate and other responsibilities to native title holders in their region, as well as to regulatory bodies. These obligations impact the way in which NTRBs/NTSPs provide services. In particular, they are designed to ensure NTRBs/NTSPs operate as inclusively and transparently as possible. Private agents do not have these broader obligations to the native title group, or to as many regulatory agencies.

NTRB/NTSP statutory obligations include the following requirements:

- provide services in a timely manner (s203BA(1)) and in a manner that promotes the satisfactory and fair representation by the NTRB of native title holders and persons who may hold native title in its region (s203(2));
- to assist both native title holders and persons who may hold native title in relation to native title matters (s203BB(1));
- to consult with affected native title holders and persons who may hold native title regarding its actions, and ensure the same group understands and consents to general courses of action taken by the NTRB/NTSP on their behalf (203BC(1));
- to act in a way that promotes an orderly, efficient and cost effective process for making applications (s203BC(3)(a));
- to make all reasonable efforts to minimise the number of applications covering the same land (s203BC(3)(b)); and
- to promote agreement between native title holders and persons who may hold native title regarding native title matters (s203BF)).

NTRB/NTSP corporate structures vary but many have representative boards, and/or constitutions that require assistance to native title holders and persons who may hold

native title in their region. NTRBs/NTSPs also have clear contractual and statutory accountability to PM&C. These include reporting and review obligations.

Private agents do not have these obligations. In fact, the Act gives authority to instruct on native title matters to a limited number of people – ‘the applicant’. The applicant, once chosen by the group, has authority to instruct in relation to claims and future act negotiation matters, without further reference to the group.

Appendix C: Reference Group

The reference group includes representatives from the following organisations:

- Attorney-General's Department
- Australian Institute of Aboriginal and Torres Strait Islander Studies
- Central Desert Native Title Services
- Central Land Council
- Department of Families, Housing, Community Services and Indigenous Affairs
- Eastern Maar Aboriginal Corporation
- Law Council of Australia
- Minerals Council of Australia
- National Native Title Council
- North Queensland Land Council
- NTSCORP Ltd
- Queensland Government
- Torres Strait Regional Authority
- University of Melbourne
- Victorian Government
- Yamatji Marlpa Aboriginal Corporation

Appendix D: Consultation schedule

Table D.1: Consultation schedule summary

Date	Organisation	Representatives of organisation
19 March	National Native Title Council (NNTC)	Brian Wyatt, Kevin Smith CEO QSNTS, Matthew Storey CEO NTSV
19 March	Indigenous Land Corporation (ILC)	Paul Hayes, Joanne Elliot, Jacob Habner
20 March	Law Council of Australia	Jason Behrendt, Chalk & Fitzgerald Tony McAvoy, Fredrick Jordan Chambers Murray Hawkins, Law Council Valarie Permural, Law Council Nick Parmeter (apology)
21 March	Office of the Registrar of Indigenous Corporations (ORIC)	Anthony Beven, Registrar
22 March	Minerals Council of Australia (MCA)	Melanie Stutsel
11 April	National Native Title Council (NNTC)	Brian Wyatt, Kevin Smith CEO QSNTS, Matthew Storey CEO NTSV, Nolan Hunter, CEO KLC, Dan O’Gorman, Ian Kutch CEO NQLC
24 April	Indigenous Business Australia (IBA)	Tom Jenkins, Ken Markwell
7 May	Native Title Consultative Committee	Sean Sexton-Moss, Matthew Little, Kerrie Finlayson (AGD), Lee Emerson, Yvonne Fetherston, John Eldridge, Elizabeth McDermott (FaHCSIA), Ian Irving (Federal Court), Treasury (apology) and Department of Finance (apology)
19 June	Aboriginal and Torres Strait Islander Social Justice Commissioner	Mick Gooda
2 July	South Australia Native Title Services (SANTS)	Keith Thomas (CEO), Tom Jenkin, Andrew Beckworth and Osker Linde
3 July	De Rose Hill and Yankuntjatjara PBCs	Karina Lester (Director of both PBCs)
3 July	Arabana PBC	Aaron Stuart (Chairperson) and board members

Date	Organisation	Representatives of organisation
4 July	Government of South Australia (including representatives from Department of Premier and Cabinet; Attorney Generals Department; Department for Manufacturing, Innovation, Trade, Resources and Energy; Department of Environment, Water and Natural Resources)	Virginia Leek, Jenny Hart, Georgina Reid, Katherine Betschart, Eliza Northrop
8 July	<ul style="list-style-type: none"> • North Queensland Land Council • Representatives of the following North Queensland PBCs: <ul style="list-style-type: none"> ▪ Kyburra Munda Yalga Aboriginal Corporation RNTBC ▪ Gugu Badhun Aboriginal Corporation RNTBC ▪ Combined Dulabed Malanbarra & Yidinji Aboriginal Corporation RNTBC ▪ Wabubadda Aboriginal Corporation RNTBC ▪ Nguddaboolgan Native Title Aboriginal Corporation RNTBC 	<p>NQLC staff representatives: Ian Kutch, Brad Foster, David Saylor; NQLC board representatives: Kaylene Malthouse, Phil Rist Errol Neal, Patricia Dallachy PBC representatives: Angie Akee, Dale Gertz, Allison Halliday, Marita Budden, Colin Wason</p>

Review of the Roles and Functions of Native Title Organisations

Date	Organisation	Representatives of organisation
9-11 July	<p>Torres Strait Regional Authority (TSRA)</p> <p>Representatives of the following Torres Strait PBCs:</p> <ul style="list-style-type: none"> • Erubam Le Traditional Land and Sea Owners (TSI) Corporation RNTBC • Mer Gedkem Le (TSI) Corporation RNTBC • Garboi (TSI) Corporation RNTBC • Porumalgai (TSI) Corporation RNTBC • Warraberalgal (TSI) Corporation RNTBC • Mura Badulgal (TSI) Corporation RNTBC • Badu ar Mua Migi Lagal (TSI) Corporation RNTBC • Mualgal (TSI) Corporation RNTBC • Geberalgai (TSI) Corporation RNTBC • Magani Lagaugal (TSI) Corporation RNTBC • Goemulgaw (TSI) Corporation RNTBC • Maluilgal (TSI) Corporation RNTBC • Malu Ki'ai (TSI) Corporation RNTBC • Saibai Mura Buway (TSI) Corporation RNTBC • Ugar Ged Kem Le Zeuber Er Kep (TSI) Corporation RNTBC • Kaurareg Native Title Aboriginal Corporation RNTBC 	<p>TSRA representatives: Joseph Elu, Murawap Nona, Wayne See Kee, John Ramsey and Peter Krebs</p> <p>Jimmy Gela, Doug Passi, Kevin Ghee, Aven Noah, Nazareth Faud, Francis Pearson, Sam Tamu, Willie Lui, Peo Ahmat, Maluwap Nona, Saila Savage, Cyril Manas, Kiwat Lui, Richard Newie, Terrance Whap, Simeon Baluz, Albert Baluz, Gamai Auda, Stanley Marama, Eric Peter, Herbert Warusam, Markie Kabai, Chelsea Aniba, Jeffrey Gaidan, Tenny Elisala, Noel Baker, Jerry Stephen, Yen Loban, Sam Maka, Kinda Mosby, Milton Savage, Ruemi Barrack, Solomon Luta, Isaac Makaku, Ruth Namai, Mellissa Anderson, Jeffry Bosun, Gerald Bowie, Fred Gela, Dirk Laifoo, Napav Stephen, Gabriel Bani, Toni Baw, Sereako Stephen, Dimple Bani, Jack Bani, Abigail Harry, Isaiah Paico, Nazareth Adidi, Dama Ahwang, Robert Sagigi, Ned David, Maryann Muri, Garagu Kawai, Fred Savage, John Whop, Solanima Mareko, Kellie Thmpson, Lavenia Ahmat and Clifford Wasiu.</p>
18 July	Native Title Services Corporation (NTSCORP) – Executive Staff	Natalie Rotumah (CEO), Mischka Holt (PLO) Keong Soon (CFO), Hema Hariharan (Strategic Development Manager)
19 July	NTSCORP – Board Members	Michael Bell – Chairperson, Norm Newlin – Member Director
22 July	BHP	Bardy McFarlane, Carl Binning
22 July	Government of Western Australia – Department of Premier and Cabinet	John Catlin, Sara Burke, Stephen W Robson

Review of the Roles and Functions of Native Title Organisations

Date	Organisation	Representatives of organisation
22 July	Government of Western Australia – Department of Mines and Petroleum, Department of Aboriginal Affairs, Department of State Development, Department of Lands and the Association of Mining & Exploration Companies	Tony Bullen (DMP), Graham Short (AMEC) Aaron Rayner (DAA), Gary Simmons (DSD), Declan Morgan(Lands),
23 July	Nyamba Buru Yawuru Ltd	Howard Pederson, Brendan Renkin
23 July	Kimberley Regional Economic Development Enterprises (KRED)	Wayne Bergmann, Anthony Watson
24-25 July	Kimberley Land Council (KLC)	First meeting: Frank Davey, Nolan Hunter, Erika Blades, Jackie Cole, Tiffany LaBuc-Garstonne, Ari Gorrington, Irene Davey, Merle Carter Second meeting: Ari Gorrington, Cissy Gore-Birch Gault, Joanne Howard, Daniel Oades, Gabriella Raetz, Bill Arthur, Simon Blackshield, Rob Houston Third meeting: Frank Davey, Erika Blades, Jackie Cole, Tiffany LaBuc-Garstonne, Ari Gorrington, Irene Davey, Merle Carter, Cissy Gore-Birch Gault, Rob Houston, Sandy Chalmers
25 July	Representatives of the following Kimberley PBCs: <ul style="list-style-type: none"> • Bardi/Jawi • MG Corp • Balanggarra • Gooniyandi • Yununijarra • Karajarri • Williggin • Tjurabalan 	Frank Davey, Irene Davey, Merle Carter, Cissy Gore-Birch Gault, Lynette Shaw, Marmingee Hawd, Peter Murray, Lenny Hopiga, Gordon Marshall, Shirley Spratt, Valarie Wiggan, Jean O'Reeri, Joe Edgar, David Banjo, Gary Boxer, Peter Murray
5 August	National Native Title Tribunal	Raelene Webb, Stephanie Fryer-Smith, June Eaton
5-6 August	Yamatji Marlpa Aboriginal Corporation	Simon Hawkins, Michael Meagan, Olivia Norris, Nicholas Kimber, Christina Colegate, Amy Cargill, Nyaparu Rose, Donny Wilson
6 August	Rio Tinto	Robyn Sermon and Kate Crompton

Review of the Roles and Functions of Native Title Organisations

Date	Organisation	Representatives of organisation
7 August	South West Aboriginal Land and Sea council	Glen Kelly, Malcolm Firth, Wayne Nannup, Maryse Aranda, Sarah Bell, Stuart Bradfield
8 August	Native Title Holder	Darren Farmer
8 August	Central Desert Native Title Services Board	Fred Chaney, Terry Grose
9 August	Central Desert Native Title Services Staff	Ian Rawlings MLA, Colm O'Dell, Ric West, Lindsay Langford, Jo Lanagan and Christina Araujo
9 August	Githabul PBC	Queenie Speeding, Lena Logan and Dianne Torrens
19-20 August	Central Land Council Staff	David Ross, Pat D'Arango, Sue Polden, Jayne Weepers
21-22 August	Northern Land Council Staff	Ron Levy (Principal Legal Officer), Alexandra Gibson
22 August	National Native Title Tribunal	Dr Valerie Coombs
22 August	Queensland State Government	Judith Jensen, Andrew Luttrell, Yoland Pacheco (DNRM) & Kathy Seaton (DATSIMA)
22-23 August	Queensland South Native Title Services	Kevin Smith, Paul Davies, Colleen Ma'Run Wall, Bernie Yates, James William, Tim Wishart and Arabella Douglas.
23 August	Representatives of the following PBCs from the QSNTS area: <ul style="list-style-type: none"> • Quandamooka • Kalkadoon • Gunggari 	PBC representatives from each claimant group.
23 August	Northern Territory Government	John Coleman (CEO), Leah Croke, Simon Flavel, Elizabeth Jacob (Department of Lands, Planning and the Environment); Anita Kneebone and Jennifer Lawrence (NT Solicitor's Office)
26-27 August	Carpentaria Land Council	Tommy Wilson (Chair), Murrando Yanner, Rachel Amini-Yanner, Terrence Taylor, Helen Tait, Charles Hammond, Marnie Parkinson, Delma Loogatha, Lawrence Burke, Leah Brown
28 August	Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (QLD Government)	Deidre Findlay, Bruce Lawson, Buzz Symonds, Lisa Castanelli and Maria Grimaldi
28-29 August	Cape York Land Council	Peter Callaghan (CEO), Kirsty Broderick (Deputy CEO), Jim Davis (Head of PBC Unit) and other staff Richie Ah Mat, Dion Creek and other board members

Review of the Roles and Functions of Native Title Organisations

Date	Organisation	Representatives of organisation
29 August	Representatives of the following Victorian PBCs <ul style="list-style-type: none"> • Eastern Maar Aboriginal Corporation • Barengi Gadjin Land Council • Gunaikurnai Land and Waters Aboriginal Corporation • Dja Dja Warrung Clans Aboriginal Corporation • Gunditj Mirring Traditional Owner Aboriginal Corporation 	Barry Kenny, Lloyd Hood, Robert Critch, Damein Bell, Graham Atkinson, Aunty Fay Carter, Janine Coombs, Jeremy Clark, Thomas Clarke, Steve Fiyalko, Ron Jones, Perry Wandin, Bobby Mullins, Mick Harding. Representatives from NTSV – Matthew Storey, Austin Sweeney, Christy Hawker, Drew Berick, Kim Robinson and Jess Orr
30 August	North Queensland Land Council Representatives of the following PBCs <ul style="list-style-type: none"> • Jangga Aboriginal Corporation • Nguddaboolgan Native Title Aboriginal Corporation • Western Yalanji Aboriginal Corporation • Djabugay Aboriginal Corporation • Wadjanbarra Tableland Yidinji Aboriginal Corporation • Croorechillum (Ngadjon Jii PBC) Aboriginal Corporation • Wanyurr Majay Aboriginal Corporation • Girrimay Aboriginal Corporation • Ewamian Aboriginal Corporation • Djiru Aboriginal Corporation • Gunggandji Aboriginal Corporation (Yarrabah) 	NQLC staff representatives: Ian Kuch, Martin Dore, Margaret Saunders, NQLC board representatives: Terry O'Shane PBC representatives: Colin McLennan; Percy Neal, Alwyn Lyall, Chris Richardson, Deputy Chair, Ron Turpin Joelene Gertz, Merv Ahkee, Abe Muriata, Kenny Georgetown, Sharon prior, Dawn Hart, Rona Hart Ailsa Lively
5 September	Victorian Government – Department of Justice	Dean Cowie, Anoushka Lenffer
5 September	NTSV – Board	Graham Atkinson, Mick Harding, Ken Stewart and Eileen Alberts
5 September	NTSV – Staff	Matt Storey, Austin Sweeney, Kim Robinson, Christy Hawker, Drew Berick, Tony Kelly
10 September	Goldfields Land and Sea Council	Dianne Logan, Ricky Dimer, Ivan Forrest, Cyril Barnes, Trevor Brownley, Danny Graham, John Graham, Janice Tamwoy, Vanessa Thomas, Ian Tucker, Sharon Tucker, Karyn Vincent, Veronica Williams-Bennell, Hans Bokelund, Trevor Donaldson, Peter Voros, Mark Rumler, Maurene Williams
24 September	NSW Government, Native Title Legal Branch, NSW Trade and Investment	Vanessa Field and Duncan Stewart

Review of the Roles and Functions of Native Title Organisations

Date		Organisation	Representatives of organisation
2 October		Federal Court	Ian Irving
3 October		ACT Government	Brian Wilson

Appendix E: Submissions

Deloitte Access Economics' Review of Native Title Organisations received a total of 58 submissions. The list of authors who contributed is provided below, noting that some authors submitted multiple submissions. Any submissions that are not marked confidential (*) are provided on the Review website.

Submissions were received from:

- Alexandra Rose
- Anonymous*
- ANU Student (anonymous)
- Australian Institute of Aboriginal and Torres Strait Islander Studies*
- Barada Barna People*
- Bejam Kunmunara Jalo Noonuccal Kabool
- Bulganunna Aboriginal Corporation*
- Cape York Land Council
- Central Desert Native Title Services
- Central Land Council Aboriginal Corporation*
- Centre for Native Title Anthropology
- Chamber of Minerals and Energy (WA)
- Cody Stephens
- D & G Lawyers*
- Debbie Muday
- Department of Justice (Vic)
- Department of Premier and Cabinet (WA)
- Dillon Lawyers*
- Ellen Mundy
- Gloria Williams
- Gordon Soon
- Gulf Region Aboriginal Corporation RNTBC
- Harry Boyd
- Hugo Willesmlth
- IndiEnergy
- Indigenous Business Australia
- Judy Zhu
- Just Us Lawyers
- Kaurareg Native Title Aboriginal Corporation
- Kellehers Australia

- Law Council of Australia
- Mandingalbay Yidinji Aboriginal Corporation RNTBC
- Marbuck Guawamau
- McKenzie's Mountain
- Meriam Elders*
- Minerals Council of Australia
- National Native Title Council
- Native Title Services Victoria
- North Queensland Land Council
- NTSCORP
- Queensland South Native Title Services
- Rachel (ANU student)
- Robert Williams
- Roma Mitchell Chambers
- Samuel Guthrie
- South Australia Native Title Services
- Terriel-Powell Associates
- The Federation
- Torres Strait Regional Authority
- Wet Tropics Management Authority
- Yamatji Marlpa Aboriginal Corporation
- Yawuru
- Yirendali People – Ngawun Mbara People*

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