Review of the Roles and Functions of Native Title Organisations

Discussion Paper

June 2013
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## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>DETERMINATION</td>
<td>A decision by the Federal Court of Australia (FCA) that native title does or does not exist in a particular area of land or waters.</td>
</tr>
<tr>
<td>FUTURE ACT</td>
<td>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.</td>
</tr>
<tr>
<td>FUTURE ACT AGREEMENT</td>
<td>Future act agreement generally refers to an agreement made under the right to negotiate provisions of the Native Title Act 1993, but may also refer to an Indigenous Land Use Agreement that consents to a future act.</td>
</tr>
<tr>
<td>INDIGENOUS LAND USE AGREEMENT (ILUA)</td>
<td>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.</td>
</tr>
<tr>
<td>NATIVE TITLE CLAIMANT</td>
<td>The group of people who are identified on the claim application as claiming native title through the FCA process under the Act.</td>
</tr>
<tr>
<td>NATIVE TITLE GROUP</td>
<td>Either a native title claimant or a native title holder.</td>
</tr>
<tr>
<td>NATIVE TITLE HOLDER</td>
<td>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.</td>
</tr>
<tr>
<td>NATIVE TITLE REPRESENTATIVE BODY (NTRB)</td>
<td>NTRBs are organisations recognised and funded by the Australian Government to perform a wide variety of functions to assist native title groups in a specific region under the Native Title Act 1993.</td>
</tr>
<tr>
<td>NATIVE TITLE SERVICE PROVIDER (NTSP)</td>
<td>NTSPs are funded by FaHCSIA to do the same work as NTRBs in areas where NTRBs have not been recognised.</td>
</tr>
<tr>
<td><strong>PRESCRIBED BODIES CORPORATE (PBC)</strong></td>
<td>A corporation established under the <em>Corporations (Aboriginal and Torres Strait Islander) Act 2006</em>, 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.</td>
</tr>
<tr>
<td><strong>PROGRAM FUNDING AGREEMENT (PFA)</strong></td>
<td>NTRBs/NTSPs (other than the Torres Strait Regional Authority) are funded by the Department of Families, Housing, Community Services and Indigenous Affairs 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.</td>
</tr>
<tr>
<td><strong>REGISTERED NATIVE TITLE BODIES CORPORATE (RNTBC)</strong></td>
<td>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 <em>Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations)</em>.</td>
</tr>
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## Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ATSI Act</td>
<td>Aboriginal and Torres Strait Islander Act 2005 (Cth)</td>
</tr>
<tr>
<td>ALR Act</td>
<td>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</td>
</tr>
<tr>
<td>CATSI Act</td>
<td>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</td>
</tr>
<tr>
<td>CDNTS</td>
<td>Central Desert Native Title Services</td>
</tr>
<tr>
<td>CLC</td>
<td>Central Land Council</td>
</tr>
<tr>
<td>CLCAC</td>
<td>Carpentaria Land Council Aboriginal Corporation</td>
</tr>
<tr>
<td>CYLC</td>
<td>Cape York Land Council</td>
</tr>
<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
</tr>
<tr>
<td>FaHCSIA</td>
<td>Department of Families, Housing, Community Services and Indigenous Affairs</td>
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<tr>
<td>FCA</td>
<td>Federal Court of Australia</td>
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<tr>
<td>GLSC</td>
<td>Goldfields Land and Sea Council</td>
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<tr>
<td>IBA</td>
<td>Indigenous Business Australia</td>
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<tr>
<td>ILC</td>
<td>Indigenous Land Corporation</td>
</tr>
<tr>
<td>ILUA</td>
<td>Indigenous Land Use Agreement</td>
</tr>
<tr>
<td>KLC</td>
<td>Kimberley Land Council</td>
</tr>
<tr>
<td>NLC</td>
<td>Northern Land Council</td>
</tr>
<tr>
<td>NNTC</td>
<td>National Native Title Council</td>
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<tr>
<td>NNTT</td>
<td>National Native Title Tribunal</td>
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<tr>
<td>NQLC</td>
<td>North Queensland Land Council</td>
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<tr>
<td>NTRB</td>
<td>Native Title Representative Body</td>
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<tr>
<td>NTSCORP</td>
<td>NTSCORP Limited</td>
</tr>
<tr>
<td>NTSP</td>
<td>Native Title Service Provider</td>
</tr>
<tr>
<td>NTSV</td>
<td>Native Title Services Victoria</td>
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<tr>
<td>ORIC</td>
<td>Office of the Registrar of Indigenous Corporations</td>
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<tr>
<td>PBC</td>
<td>Prescribed Body Corporate</td>
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<tr>
<td>PBC Regulations</td>
<td>The Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</td>
</tr>
<tr>
<td>PFA</td>
<td>Program Funding Agreement</td>
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<tr>
<td>QSNTS</td>
<td>Queensland South Native Title Services</td>
</tr>
<tr>
<td>RNTBC</td>
<td>Registered Native Title Body Corporate</td>
</tr>
<tr>
<td>SANTS</td>
<td>South Australian Native Title Services</td>
</tr>
<tr>
<td>SWALSC</td>
<td>South West Aboriginal Land and Sea Council</td>
</tr>
<tr>
<td>TSRA</td>
<td>Torres Strait Regional Authority</td>
</tr>
<tr>
<td>YMAC</td>
<td>Yamatji Marlpa Aboriginal Corporation</td>
</tr>
</tbody>
</table>
1 Introduction

It is now over 20 years since the *Native Title Act 1993* (the Act) was introduced and established the regulatory and legal framework for the operation of native title organisations across Australia. In recognition of changes in the native title system, the Australian Government has determined that it is timely to assess the roles and functions of native title organisations – being native title representative bodies (NTRBs) and native title services providers (NTSPs).

The Review will examine whether the statutory roles and 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. The Review’s terms of reference were established by the Minister for Families, Community Services and Indigenous Affairs and are provided in Appendix A. Given the nature of the terms of reference, the Review should be understood 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.

Deloitte Access Economics has been contracted to undertake the Review by the Minister’s Department, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). The Review is being conducted over the calendar year of 2013, with the final report to be completed by the year’s end.

To inform the Review, Deloitte Access Economics is requesting submissions from interested parties and conducting targeted consultations commencing with the release of this discussion paper. Complementing this process of public engagement, the Review is also receiving comment and strategic direction from a reference group, the membership of which is listed in Appendix B.

This discussion paper has been prepared to support public engagement with the Review’s submission and consultation process. In particular, it provides information useful for understanding the context of the Review and identifies a series of ‘Discussion Points’ designed to focus submissions on pertinent issues.

1.1 Context of the review

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. It establishes a process for the determination of native title claims and a legal framework for managing land and water subject to native title. It also establishes a system for the provision of services by NTRBs/NTSPs to assist Indigenous people in relation to their native title.

Reflecting the focus of their original mandate, NTRBs/NTSPs have traditionally focused on assisting native title holders to achieve recognition of their native title through the claims process. However, the last few years has seen an increasing focus by a number of NTRBs/NTSPs on assisting native title holders with the challenges of a post-determination context.
The increased focus on post-determination activities is largely driven by the growing demand from native title holders for support following successful determinations. This trend reflects the rapid increase in the number of determinations in recent years, presented in Chart 1.1 below, and the capacity issues faced by prescribed bodies corporate (PBCs) and registered native title bodies corporate (RNTBCs) detailed in Section 3.

**Chart 1.1 Total number of determinations, 1992-2012**

![Chart 1.1 Total number of determinations, 1992-2012](image)


There has also been dramatic growth in the number of registered ILUAs and future act agreements. There are now over 760 ILUAs registered, up from less than 300 at the beginning of 2008.1 The planning, implementation and management activities required to realise the opportunities which flow from these ILUAs and future act agreements all contribute to the future workload faced by NTRBs/NTSPs.

At the same time, though a small number of NTRBs/NTSPs are facing a decline in claims work, many others will continue to face a large volume of claims and agreement making work for some years. As reflected in Chart 1.2, there were approximately 460 remaining claims in 2010-11. In addition, a further 76 new claims were lodged in 2011-12, while NTRBs/NTSPs estimate that there are a further 265 applications yet to be lodged. Moreover, non-claimant applications (claims made by a party interested in establishing that native title does not exist in a certain area) also create a significant amount of ongoing work for a small number of NTRBs/NTSPs.

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In addition, NTRBs/NTSPs are also likely to face future demands for assistance with compensation claims. Compensation applications can be made to the FCA for the loss or impairment of their native title. To date, only a small number of such claims have been made. Clear judicial precedents for dealing with compensation applications have yet to be established. However, these claims are likely to significantly increase in number. Accordingly, these applications could represent a significant area of new claims work for NTRBs/NTSPs.

In summary, while the situation varies considerably across the NTRBs/NTSPs, many are facing a changing balance in the type of work they undertake, with an increasing focus on post-determination support. The Review focuses on how NTRBs/NTSPs can be best positioned to support native title holders in this changing context.

1.2 Policy context

In understanding the roles and functions of NTRBs/NTSPs it is useful to provide some basic context of the policy environment in which these organisations operate.

All Australian governments have an overarching commitment to close the gap on Indigenous disadvantage. As part of this agenda, the Council of Australian Governments (COAG) has set six targets in the Closing the Gap framework with the aim to close the gap between Indigenous and non-Indigenous people in life expectancy, child mortality, education and employment.

In the native title field, the Australian Government supports timely resolution of claims, high quality agreement-making and sustainable outcomes for current and future generations from native title benefits. Improved economic and social outcomes from native title agreements have the potential to make an important contribution to Closing the Gap.
The policy context is also shaped by the range of policy and legislative differences between jurisdictions which affect NTRBs/NTSPs. In particular, most states and territories have some form of legislation which allows for the recognition of Indigenous land rights outside of the native title process. For instance, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides scope for the recognition of land rights and for the operation of statutory authorities to support this process. Likewise, the *Traditional Owner Settlement Act 2010* (Victoria) allows for land settlements held by traditional owner group entities.

Other relevant policy issues include the impact of heritage legislation on the native title system. Most Australian jurisdictions have their own heritage legislation. This legislation can create demands on NTRBs/NTSPs.

In 2009, the Australian Government also announced its support for the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration has articles relating to both land and self-determination.

### 1.2.1 Recent reforms

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

- 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 PBCs/RNTBCs then in existence, which led to changes including the provision of some basic support funding for PBCs/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 FCA automatically refer native title claims to the NNTT for mediation and instead allow the FCA to determine whether it, the NNTT, or another individual or body should mediate a claim.
- Amendments to the PBC Regulations in 2011 including to allow for cost recovery from future act proponents by PBCs/RNTBCs and to make the PBC/RNTBC governance regime more flexible.
- Amendments to the Act in 2012 which made institutional reforms to the FCA and NNTT and built on the 2009 amendments.
More recently, the Government has announced reforms in areas including the tax treatment of native title benefits, the management of trusts and other matters. For instance, the Government has:

- introduced 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;
- introduced targeted amendments to improve agreement making, encourage flexibility in claim resolution and promote sustainable native title outcomes;
- established a national regulatory framework for the not-for-profit sector which will also 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 present Review aims to build on these efforts and provide recommendations to ensure that the native title system assists native title holders to benefit from the emerging opportunities associated with their native title rights.

The rest of this paper is structured as follows:

- **Section 2** presents a summary of native title organisations and identifies several issues to be considered in the Review pertaining exclusively to these organisations
- **Section 3** identifies the role of PBCs and RNTBCs, their relationship with NTRBs/NTSPs and the scope for optimising this relationship
- **Section 4** explores the role of private agents in the native title system and identifies some areas of concern in relation to this role
- **Section 5** outlines the next steps to be undertaken as part of the Review.
2 Native title representative bodies and native title service providers

The Act establishes a system for the provision of services to native title holders by NTRBs and NTSPs. This section provides background information to the Review’s examination of the roles and functions of these bodies, along with identification of a few issues for particular focus.

2.1 Roles and functions of native title representative bodies and native title service providers

Each NTRB/NTSP is funded by FaHCSIA to deliver native title services to a specific region. 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 1 below. Each NTRB can be recognised for a period of one to six years and can be re-recognised once its initial recognition period has expired.

Time limited recognition was 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.

In addition to the roles and functions specified in the Act, NTRBs/NTSPs are also bound by their PFAs. The PFA stipulate that NTRBs/NTSPs can use their funding at any time to perform their statutory functions in relation to RNTBCs or provide ‘in kind’ general support and assistance for PBCs. They also stipulate that funds may be used for establishment, incorporation and registration of PBCs (up to the PBC’s first annual general meeting), and, with FaHCSIA’s prior written approval, for PBCs/RNTBCs 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.
Box 1: 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

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. Following the 2007 amendments which clarified that the NTSPs have the same powers and functions as NTRBs, these two types of native title organisations are almost identical. Some minor differences, which are largely historical, are explored in Section 2.3 below. Given the similarity between these organisations, they are referred to collectively throughout this paper as ‘NTRBs/NTSPs’ unless identified separately.

There are nine NTRBs and six NTSPs, the details of which are summarised in Table 2.1 below and the map in Appendix C.
Table 2.1: NTRBs and NTSPs

<table>
<thead>
<tr>
<th>NTRBs/NTSPs</th>
<th>State / Territory</th>
<th>Status</th>
<th>Incorporation Act</th>
<th>Date of founding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carpentaria Land Council Aboriginal Corporation (CLCAC)</td>
<td>Qld</td>
<td>NTSP</td>
<td>CATSI Act 2006</td>
<td>1984</td>
</tr>
<tr>
<td>Torres Strait Regional Authority (TSRA)</td>
<td>Qld</td>
<td>NTRB</td>
<td>ATSI Act 2005</td>
<td>1994</td>
</tr>
<tr>
<td>Cape York Land Council (CYLC)</td>
<td>Qld</td>
<td>NTRB</td>
<td>CATSI Act 2006</td>
<td>1990</td>
</tr>
<tr>
<td>North Queensland Land Council (NQLC)</td>
<td>Qld</td>
<td>NTRB</td>
<td>CATSI Act 2006</td>
<td>1994</td>
</tr>
<tr>
<td>Queensland South Native Title Services (QSNTS)</td>
<td>Qld</td>
<td>NTSP</td>
<td>Corporations Act 2001</td>
<td>2005</td>
</tr>
<tr>
<td>NTSCORP Limited (NTSCORP)</td>
<td>NSW</td>
<td>NTSP</td>
<td>Corporations Act 2001</td>
<td>2001</td>
</tr>
<tr>
<td>Native Title Services Victoria (NTSV)</td>
<td>Vic</td>
<td>NTSP</td>
<td>Corporations Act 2001</td>
<td>2003</td>
</tr>
<tr>
<td>South Australian Native Title Services (SANTS)</td>
<td>SA</td>
<td>NTSP</td>
<td>Corporations Act 2001</td>
<td>2008</td>
</tr>
<tr>
<td>South West Aboriginal Land and Sea Council (SWALSC)</td>
<td>WA</td>
<td>NTRB</td>
<td>CATSI Act 2006</td>
<td>2001</td>
</tr>
<tr>
<td>Goldfields Land and Sea Council (GLSC)</td>
<td>WA</td>
<td>NTRB</td>
<td>CATSI Act 2006</td>
<td>1985</td>
</tr>
<tr>
<td>Central Desert Native Title Services (CDNTS)</td>
<td>WA</td>
<td>NTSP</td>
<td>Corporations Act 2001</td>
<td>2007</td>
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<td>Yamatji Marlapa Aboriginal Corporation</td>
<td>WA</td>
<td>NTRB</td>
<td>CATSI Act 2006</td>
<td>1994</td>
</tr>
<tr>
<td>Kimberley Land Council (KLC)</td>
<td>WA</td>
<td>NTRB</td>
<td>CATSI Act 2006</td>
<td>1979</td>
</tr>
<tr>
<td>Northern Land Council (NLC)</td>
<td>NT</td>
<td>NTRB</td>
<td>ALR Act 1976</td>
<td>1973</td>
</tr>
<tr>
<td>Central Land Council (CLC)</td>
<td>NT</td>
<td>NTRB</td>
<td>ALR Act 1976</td>
<td>1974</td>
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</tbody>
</table>

There is significant diversity among NTRBs/NTSPs in the:

- size of the region and population which they represent;
- variety and size of funding sources which they draw on;
- extent to which native title has been extinguished in their region;
- number of determinations achieved in their region;
- number of outstanding claims in their region;
- level of ILUA and future act activity in their region; and
- responsibilities they have as a result of different state and territory legislation (especially for the statutory authorities – the CLC, NLC and TSRA -, where native title is often a relatively small element of their workload).

Each of these factors has implications for the actual roles and functions undertaken by various NTRBs/NTSPs.
Accordingly, it is important that future policy development be based on a comprehensive understanding of the diversity of circumstances faced by NTRBs/NTSPs. In this regard, perhaps of most relevance for the present Review is the balance between pre- and post-determination work and the implications of this for NTRBs/NTSPs. This is explored further in Section 3.

Given the diversity among NTRBs/NTSPs it is useful to consider the roles and functions they undertake. To this end, the Review is seeking answers to the questions below.

### Discussion Points 1

- What current activities of each NTRBs/NTSPs respond to statutory obligations under the Act or regulations and what non-statutory work is undertaken?
- What factors impact on the focus of NTRB/NTSP activity? (e.g. state and Commonwealth Government policies and native title holder needs).
- What is the relative importance of these activities, and the relative scale of the resources deployed to undertake these activities?
- Have these activities been subject to any trends or recent changes?
- What are the main areas where the NTRBs/NTSPs are unable to meet current demands for their services? Why?
- What is the potential growth/decline in demand for services in the short to medium term?
- How much of NTRB/NTSP resources are taken up by their claims activities versus post-determination activities?
2.2 Agreements

This section briefly considers the role of NTRBs/NTSPs and the scope of their work in relation to ILUAs and future act agreements, particularly after a determination has been made. The section also reviews the potential for NTRBs/NTSPs to support the achievement of sustainable benefits from these agreements for native title holders.

2.2.1 Agreements

The Act provides that NTRBs/NTSPs can assist RNTBCs, native title holders and persons who may hold native title with consultations, mediations, negotiations and proceedings relating to native title agreements (s203BB(1)(b)). Section 203BH of the Act creates scope for a NTRB/NTSP to be party to an ILUA.

In law and in practice NTRBs/NTSPs have a greater role in relation to agreements made ahead of a native title determination than after a determination has been made. Prior to a determination, the Act gives NTRBs/NTSPs a discretionary function in certifying that all persons who hold or may hold native title have been identified and authorised the making of the agreement. Following determination, NTRBs/NTSPs do not have this role. Rather, responsibility for meeting consultation and consent requirements set out in the PBC Regulations falls on the RNTBC (which must also inform the relevant NTRB/NTSP of its intention to enter the ILUA). The RNTBC may also seek advice on matters relevant to the agreement from the NTRB/NTSP.

A number of NTRBs/NTSPs also play a role in the implementation of various agreements post-determination but this function is not expressly conferred by the Act. The extent to which this role is undertaken in practice varies.

Native title holders may be vulnerable in the negotiation and implementation of agreements because of lack of expertise and the complicated nature of the arrangements. This can be compounded when there is inadequate information about the agreement or how it will be managed and implemented. Further, the inability to obtain information after the arrangements are entered into may also be of concern.

Given the increasing numbers of agreements being made, with many more to come, it is important that native title groups are well supported in making these agreements.

2.2.2 Benefits

For some native title groups agreements are leading to significant income streams and/or a growing asset-base. The Government has for some time been concerned to ensure that native title benefits are used sustainably, that is, that they are directed wherever possible to the broad benefit of current and future generations of the native title group.

The achievement of sustainable benefits may be at risk from a number of areas. For instance, in some circumstances there may be no mechanisms to support agreement implementation. This is of particular concern where these agreements are complicated and the native title holders lack relevant expertise. Accordingly, it is timely to consider whether
NTRBs/NTSPS should have a recognised role in relation to facilitating the sustainable use of benefits flowing from agreements and settlements.

The Australian Government has established the Working Group on Native Title and Traditional Owner Benefits to consider issues surrounding the governance and tax treatment of native title and other land related benefits. That work is not the focus of the Review. Rather, the Review notes that currently there is no statutory function for NTRBs/NTSPs that clearly relate to assistance in relation to benefit management in the Act. Notwithstanding this, it is the practice of some NTRB/NTSPs to act as trustees for benefits held by native title groups, particularly where the sums are small and do not warrant the establishment of separate entities.

With reference to the issues identified here, the Review will consider the extent to which NTRBs/NTSPs support for agreement making and the sustainable use of benefits is currently optimal or needs to be strengthened or broadened. In considering these issues, the Review recognises the importance of protecting the property rights of native title groups and their right to determine how any benefits should be secured or spent.

Discussion Points 2

- What are the current challenges to supporting native title holders in relation to agreements post-determination?
- What are the practical differences between certified and non-certified ILUAs and what are the implications of these differences?
- Should NTRBs/NTSPs have a stronger or broader role in agreement making post-determination?
- Should NTRBs/NTSPs have a stronger or broader role facilitating, or assisting in managing, sustainable use of benefits flowing from agreements and settlement of claims?
- If so, how could this stronger or broader role be achieved? Should it be subject to any limitations?
2.3 Recognition of NTRBs

NTRBs and NTSPs face almost identical regulatory environments and are empowered to undertake identical roles and functions. However, they do exhibit some minor differences. For instance, NTSPs are not recognised by the Minister and their funding period is not determined by the recognition process.

Further, there are a range of historical differences between NTSPs and NTRBs. 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. However, these differences are not mandated by the Act.

Several NTSPs such as QSNTS and NTSV have emerged to fill the gap in service left by 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.

Given the practical similarities between these organisations and that six of the current 15 native title organisations are NTSPs, the question arises as to whether there is any benefit in continuing the recognition provisions for NTRBs under Part 11 of the Act. In coming to a view on this issue, the Review seeks advice on the questions identified below.

**Discussion Points 3**

- What are the current implications, both positive and negative, of having to seek recognition and being covered by the recognition provisions?
- Are governance and funding arrangements affected by the recognition provisions?
- What impact does the possibility of de-recognition have on the operation of NTRBs?
2.4 Rationalisation of NTRBs/NTSPs

The Review will consider whether there is any scope for the rationalisation of the number of NTRBs/NTSPs currently operating in the native title system. This question arises in the context of past rationalisations, most recently in 2007, and reflects the understanding that the relative size of NTRBs/NTSPs can affect their operational effectiveness and that larger bodies may benefit from economies of scale. These potential benefits need to be assessed against any reduction in the ability of the organisations to represent what can be a diverse set of interests.

Recent trends make rationalisation particularly relevant:

- Though there remains a significant amount of outstanding claims work, some regions are nearing the completion of this work and others will enter this phase over the next 10 years. This trend represents a decline in the claims focus of some NTRBs/NTSPs with an expected corresponding decline in funding for this work.
- The services some NTRBs/NTSPs provide in post-determination may be significantly more effective when provided by an organisation with greater scale.

These trends indicate that in some instances native title holders may be better served by a smaller number of NTRBs/NTSPs. However, such rationalisations may confront political, historical, operational, cultural and institutional barriers. Additionally, given that some areas were rationalised in 2007, there appears to be limited scope for further amalgamations.

Accordingly, the Review will determine if the number of NTRBs/NTSPs is consistent with the efficient delivery of services and the effectiveness of representation. The Review will explore this issue with reference to the impact of the most recent rationalisation and by seeking answers to the questions outlined below.

Discussion Points 4

- What anticipated financial and non-financial costs and benefits would be associated with rationalisation?
- Could an NTRB/NTSP operate effectively in more than one state or territory?
- How would barriers associated with political, historical, operational, cultural and institutional factors be overcome to achieve any rationalisation?
- In what circumstances is a rationalisation of NTRBs/NTSPs likely to enhance the effectiveness and efficiency of service delivery to native title holders and claimants?
- What measures might enhance the ability of NTRBs/NTSPs to collaborate on facilitation and assistance for traditional owner groups, for example, across jurisdictions?

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2Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Report on the operation of Native Title Representative Bodies, Parliamentary Paper no. 56, 2006.
Prescribed bodies corporate and registered native title bodies corporate

The Act provides for incorporated entities known as PBCs and RNTBCs to create an institutional framework for the interaction of native title holders with the native title system. The Act requires the creation of PBCs prior to, or as soon as practicable after, a determination to represent the interests of native title claimants and manage their native title rights and interests. Once the corporation is approved by the FCA, it is entered onto the National Native Title Register as the registered native title body corporate (RNTBC) for the determination. This process is illustrated in Figure 3.1 below.

As of May 2013, there were over 105 RNTBCs, up from 68 in September 2010. This rapid rise reflects the increasing number of determinations detailed in the introduction. Based on the number of claims yet to be resolved, this number is predicted to grow strongly over the next several years, particularly in the Northern Territory.

Once established as an RNTBC, these organisations have specific functions outlined in the Act and relevant regulations. The core functions of RNTBCs are to:

- protect and manage determined native title in accordance with the wishes of the broader native title holding group; and
- ensure 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.

A more comprehensive list of the roles and functions of RNTBCs based on the Act, as well as other legislation and regulation, is presented in Box 2 below.

In practice, PBCs/RNTBCs roles and functions are also affected by the legislation of different jurisdictions, the expectations of their communities and the group’s capacity. Consequently, the activities of PBCs/RNTBCs range from a limited focus on fulfilling their basic statutory responsibilities, through to expansive roles exercising native title rights for the economic and social benefit of the group by pursuing business development and other opportunities. In some instances, this includes the need to operate in complex commercial environments, requiring specialist knowledge on topics such as corporate tax and administration.
Box 2: Roles and functions of 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 FCA
- Bringing revised or further native title determination application cases in the FCA
- 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) Guidelines for Basic Support Funding for Prescribed Bodies Corporate (PBCs), FaHCSIA, Australian Government.

PBCs/RNTBCs have historically faced tight financial constraints. Since 2007 some funding has been made available through NTRBs/NTSPs. These funds have been sourced from Native Title Program resources otherwise available for NTRB operations.

As at February 2013, of the almost 100 PBCs/RNTBCs identified, 39 were funded by the Native Title Program. At that time annual funding per PBC/RNTBC provided with basic support funding averaged approximately $50,000 and totalled a little under $2 million for 2012-13. While small, this figure represents significant growth since the funding was introduced in 2007-08 and then totalled less than $400,000. Note that these arrangements do not include funding for PBCs/RNTBCs in the Torres Strait, who are funded by the Torres Strait Regional Authority.

Other revenue may be available to PBCs/RNTBCs through other government programs, benefits packages associated with settlement of claims, ILUAs, future act agreements and related commercial activity. The extent to which PBCs/RNTBCs have been able to generate revenue from these avenues varies greatly. Illustrative of this diversity, recent research has found that while a small number of PBCs/RNTBCs had annual income of over $1 million, of the PBCs/RNTBCs identified, 64% and 67% reported no income and no assets respectively.
As reflected in Chart 3.1, the research also found that of the PBCs/RNTBCs identified, 75% were classified as ‘small’ based on the Office of the Registrar of Indigenous Corporations’ 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
- Less than five employees.

Given the limited resources and scale of most PBCs/RNTBCs, it is unsurprising that PBCs/RNTBCs face capacity constraints.

**Chart 3.1: Selected characteristics of current PBCs/RNTBCs**

(Percentage, number of PBCs/RNTBCs)

- **Location**: QLD [49%, 46] WA [26%, 24] \(\rightarrow\) NSW [2]
- **Size**: Small [80%, 73] Medium [18%, 16] \(\rightarrow\) Large [2%, 2]
- **Income**: Nil income [64%, 48] Low income – under $1 million [27%, 20] \(\rightarrow\) High income – over $1 million [9%, 7]
- **Net assets**: Nil net assets [67%, 50] Low net assets – under $1 million [20%, 15] \(\rightarrow\) High net assets – over $1 million [13%, 10]

Note: The statistics used in this figure include only PBCs for which sufficient information was available. Information was available in relation to 98 PBCs, but in relation to size - only 91 PBCs, income - only 75 PBCs, 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.

### 3.1 PBC/RNTBC capacity

Capacity constraints faced by PBCs/RNTBCs have been widely recognised and limit their ability to undertake the responsibilities they face post-determination, such as those identified in Box 2 above. The capacities of PBCs/RNTBCs are shaped by factors including the availability of qualified staff, the skills and experiences of staff, the effectiveness of governance arrangements and the organisation’s scale and resourcing levels relative to their responsibilities. While appropriate resourcing is not sufficient to ensure strong capacity among PBCs/RNTBCs, it is nevertheless important.

While a small number of PBCs/RNTBCs have significant resources, most have no income or assets. Moreover, many PBCs/RNTBCs are never likely to generate significant income streams. This reflects the fact that the financial prospects of PBCs/RNTBCs are largely dependent on the extent to which their native title covers land or water which offers economic opportunities, such as infrastructure development or mining.
The difficulties faced by PBCs/RNTBCs have often been identified. For instance, a 2006 review found that very few PBCs/RNTBCs were operating effectively in fulfilling their core responsibilities. The review established that these difficulties were caused by a range of capacity constraints, factors which were again identified in national meetings of PBCs/RNTBCs in 2007 and 2009.

The implications of these constraints are significant, affecting native title holders and other stakeholders, particularly in a post-determination setting. Of most pressing concern, the lack of capacity among PBCs/RNTBCs can impinge on the ability of native title holders to successfully access the opportunities which may flow from their native title rights. For instance, in areas where native title covers (or may cover) land and/or water with significant development potential, without appropriate future act agreements native title holders may miss opportunities to protect their native title and facilitate other sustainable social and economic development.

At a more basic level, imposing significant regulatory responsibility on native title holders without cultivating commensurate capacity could lead to their failure.

The lack of capacity among PBCs/RNTBCs also has implications for governments and other stakeholders with an interest in developing agreements over land or water covered by native title. In the absence of sufficient capacity among the native title holder group, these organisations may be required to invest significant time and resources in developing the group’s capacity to a point at which they are able to enter into agreements.

Given this setting, there is a clear need to ensure that PBCs/RNTBCs are appropriately supported to undertake their designated roles. One option to address this issue is to enact legislative change to expand the roles and functions of NTRBs/NTSPs to ensure appropriate assistance to PBCs/RNTBCs.

### Discussion Points 5

Recognition of the diversity among PBCs/RNTBCs is important to the Review’s context. Differences among PBCs/RNTBCs in terms of their size, ability to generate income and their stage in the native title process are particularly significant. Accordingly, considering how your answers to the questions below would vary based on these differences is important.

- In what areas do PBCs/RNTBCs need the most support?
- What legislative and administrative changes, if any, might improve the capacity of PBCs/RNTBCs to fulfil their functions and responsibilities?
- Should incorporation (i.e. creation of an RNTBC) be required for all native title holders?

### 3.2 NTRB/NTSP support for PBCs/RNTBCs

The relationship between NTRBs/NTSPs and PBCs/RNTBCs is defined in a broad sense by the Act, creating some ambiguity in the nature of this relationship. With the growing

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numbers of determinations and needs for PBC/RNTBC support, there may be a need for further details regarding the operation of these relationships.

Important to understanding the relationship between NTRBs/NTSPs and PBCs/RNTBCs is appreciation of the changes which occur following a determination of native title. Prior to determination, NTRBs/NTSPs act as the representatives of native title groups. However, following formal recognition of native title rights the representative role transfers from the NTRB/NTSP to the newly established RNTBC. This change has significant implications for the relationship between NTRBs/NTSPs and PBCs/RNTBCs.

Reflecting their mandate to help achieve recognition of native title rights, NTRBs/NTSPs typically play a significant role supporting PBCs in a pre-determination setting. However, following determination, some of the NTRB’s/NTSP’s legislative functions in relation to the native title group cease (i.e. certification of ILUAs).

Despite this change, the limited capacity of many RNTBCs means some NTRBs/NTSPs often end up providing significant post-determination support for these organisations. Examples of some of these activities are summarised below in Table 3.1 and include both statutory functions and non-statutory work.

<table>
<thead>
<tr>
<th>Services</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal advice</td>
<td>• Agreement implementation, compliance and reporting</td>
</tr>
<tr>
<td></td>
<td>• Future act/land use activity</td>
</tr>
<tr>
<td></td>
<td>• Referral for legal advice.</td>
</tr>
<tr>
<td>Organisational</td>
<td>• Governance (including succession planning for boards)</td>
</tr>
<tr>
<td>development</td>
<td>• Corporate planning</td>
</tr>
<tr>
<td></td>
<td>• Communications and community engagement</td>
</tr>
<tr>
<td></td>
<td>• Sourcing funds (grant writing)</td>
</tr>
<tr>
<td></td>
<td>• Accommodation support</td>
</tr>
<tr>
<td></td>
<td>• Conflict management</td>
</tr>
<tr>
<td></td>
<td>• Information management (including transfer of research information)</td>
</tr>
<tr>
<td>Financial services</td>
<td>• Corporate (tax, insurance, budgeting, payroll)</td>
</tr>
<tr>
<td></td>
<td>• Trusts (professional trustees, trust accounting)</td>
</tr>
<tr>
<td>Community development</td>
<td>• Natural resource management (country planning, joint management and governance)</td>
</tr>
<tr>
<td></td>
<td>• Economic development (enterprise development, business planning and investment facilitation)</td>
</tr>
<tr>
<td></td>
<td>• Participatory planning (strategic country planning, monitoring and evaluation)</td>
</tr>
</tbody>
</table>

Source: Adapted from information provided by NNTC
Given the experience of NTRBs/NTSPs and their relationships with native title holders, there may be benefits for native title holders from a formalised ongoing support role for NTRBs/NTSPs. This could entail creating greater scope for NTRBs/NTSPs to undertake post-determination support such as that outlined above. This may entail providing ongoing support to PBCs/RNTBCs in areas which can be delivered more efficiently by NTRBs/NTSPs given their greater scale. Specifically, this may include specialist corporate advice and administrative assistance, as well as broader capacity building activities. However, in considering the appropriateness of this option, it is necessary to consider a number of factors. These are discussed below.

3.2.2 NTRB/NTSP capacity constraints

Apart from basic support funding, NTRBs/NTSPs are generally not explicitly funded to deliver services for RNTBCs. This means that any support they do provide must be either cost-neutral to the NTRB/NTSP (e.g. fee based services), subsidised through other general revenues, or involve reprioritising allocations from pre-determination activities.

It should be noted that NTRBs/NTSPs have adopted a general regime of cost recovery from future act proponents relating to the cost of engaging in the negotiation and agreement making process. The key rationale for this relates to the resourcing constraints faced by NTRBs/NTSPs and the fact that it is the proponent who initiates the process for their own benefit and thereby necessitates the incurring of costs by the native title parties. There is currently no explicit authorisation for cost recovery practices by NTRBs/NTSPs in the Act. By contrast, amendments to the PBC Regulations in December 2011 allowed for cost recovery by PBCs.

A related issue is that many NTRBs/NTSPs lack the skill sets relevant to assisting native title holders in a post-determination context. For instance, few NTRBs/NTSPs have the expertise required to advise native title holders on the details relevant to understanding and pursuing business development and other economic development activities.

3.2.3 NTRB/NTSP relationships with RNTBCs

It is not clear that all RNTBCs require and/or want additional support from NTRBs/NTSPs. Indeed, a number of RNTBCs are of sufficient scale and capacity so that they are able to effectively pursue the interest of their members. Alternatively, some native title holders may prefer not to undertake the development activities which require significant capacity and organisational support.

Further, some RNTBCs with limited capacity may have a history of poor relationship or no relationship with an NTRB/NTSP, and do not view NTRBs/NTSPs as the most appropriate source of support. In part, this may reflect concerns among RNTBCs regarding the limited capacity of NTRBs/NTSPs and concerns regarding the ongoing dependence of RNTBCs on NTRBs/NTSPs.

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4 Toni Bauman and Tran Tran 2007, First National Prescribed Bodies Corporate Meeting: Issues and Outcomes, Canberra 11-13 April 2007, Native Title Research Report No. 3, Australian Institute of Aboriginal and Torres Strait Islander Studies.
3.2.4 Other sources of support

RNTBCs are already able to draw on a wide range of services offered by organisations other than NTRBs/NTSPs. For instance, Indigenous Business Australia (IBA) offers a range of programs which can assist RNTBCs to develop commercial enterprises. Likewise, the Indigenous Land Corporation (ILC) works with Indigenous Australians to help manage their land, creating scope for ongoing relationships between the ILC and RNTBCs. Further, the Office of the Registrar of Indigenous Corporations (ORIC) offers legal assistance to corporations covered by the CATSI Act, including all RNTBCs. State governments also provide some assistance to PBCs. In general, however, support available through these sources has been relatively small and limited in its application.

The Review will consider whether there should be any legislative changes to NTRBs/NTSPs existing powers and functions to expressly expand assistance to RNTBCs. In addressing this question, the Review will consider the questions outlined below.

### Discussion Points 6

Again, given the diversity among PBCs/RNTBCs, in terms of their size, ability to generate income and their stage in the native title process, considering how your answers to the questions below would vary based on these differences is important.

- How do NTRBs/NTSPs currently support pre-determination activities by PBCs in areas such as agreement making and capacity development? Does this support lead to capacity building post-determinations?
- To what extent do NTRBs/NTSPs currently support RNTBCs post-determination and what models does this support follow?
- Why do NTRBs/NTSPs provide post-determination support even after an RNTBC exists and has assumed representative responsibilities for native title holders? Is this support sufficient?
- Are there non-financial constraints to the support that NTRBs/NTSPs can give to RNTBCs post-determination?
- What costs would be imposed on NTRBs/NTSPs as a result of increased support for RNTBCs?
- What other support and relationships do PBCs/RNTBCs draw on and do these represent a viable substitute to NTRBs/NTSPs for some of the services PBCs/RNTBCs may need?
- Where do bodies established as part of an alternative settlement, or to facilitate the business of a claim group pre-determination, fit in the picture in terms of support?
- What are the advantages and disadvantages associated with cost recovery by NTRBs/NTSPs?
4 Private agents

While NTRBs/NTSPs are the main providers of services to native title holders, they operate in a contested market in which native title holders are also able to purchase services from non-NTRB/NTSP based professionals. Non-NTRB/NTSP based professionals may be hired to provide a range services covering activities across the native title process.

These services are provided by professionals from disciplines including anthropology, law and commercial development (referred to in this paper collectively as ‘private agents’). Private agents discussed in this section refer specifically to parties acting without any involvement from NTRBs/NTSPs (i.e. the discussion does not include any analysis of private agents contracted by NTRBs/NTSPs).

4.1 Services provided

Private agents play a significant role working with native title holders in the context of the claims process and agreement making, while also providing a range of services utilised by native title holders subsequent to the resolution of these issues. For the purposes of this discussion, it is useful to distinguish between these different types of services.

4.1.1 Claims process and agreement making

Native title holders may require legal advice from private lawyers in a range of circumstances relevant to the claims process and agreement making. For instance, overlapping land claims may prevent the relevant NTRB/NTSP from representing one or either claimant, creating a need for independent legal advice. In other circumstances, some clients who would otherwise be able to draw on the services provided by NTRBs/NTSPs may choose to use private lawyers. For instance, native title groups can be assisted by their NTRB/NTSP in progressing their claim while also being represented by private lawyers for future act matters. This occurs predominantly in regions with a lot of development and exploration activity where the group has the potential to reap significant income from future act agreements.

There are some differences in the legal requirements faced by private legal practitioners compared with those faced by NTRBs/NTSPs. In particular, NTRBs/NTSPs must meet a range of ongoing statutory, corporate and other responsibilities mandated under the Act which are not explicitly faced by private agents. These include the need to consult persons who may hold native title regarding certain matters and to act in a way that promotes an orderly, efficient and cost effective process for making applications. The full range of these differing obligations is elaborated in Appendix D.

Anthropologists also play an important role in the claims process. Most importantly, anthropologists provide expert evidence for native title cases in the form of reports and testimony to the court for both applicant and respondent parties.5

4.1.2 Post-determination and post agreement finalisation

Following the settlement of claims and the finalisation of agreements, native title holders may opt to draw on a range of further services provided by various private agents. These services may cover many of the topics identified in Table 3.1 and include other issues such as governance support, executive assistance and organisational management. Given that large numbers of native title claims and agreements have been finalised only recently, the range and scope of these services and their potential use is only beginning to emerge.

4.2 Issues related to private agents in the native title system

The role of private agents, in providing choice for native title holders and alternatives where NTRBs/NTSPs face capacity issues or conflicts of interest, is widely appreciated. Private agents can offer solutions which, without their involvement, would not have been possible.

However, some concerns have been raised regarding the potential negative impacts for native title holders caused by the practices of some private agents.

Of most pressing concern is the impact of private agents, primarily lawyers and anthropologists, in the legal process concerning claims and agreements. For instance, the National Native Title Council (NNTC) alleges that some native title groups have been poorly served by independent lawyers and anthropologists resulting in negative outcomes for the native title groups. This includes activities which:

- contribute to the creation of new disputes and friction within native title groups, which:
  - lead to further complexities and delays on significant decisions, slowing down the claim resolution process; and
  - jeopardise the group’s capacity to leverage their rights and interests for economic development.
- undermine efforts to strengthen governance and build leadership within native title groups
- erode the benefits to native title holders associated with their claim because of unreasonably high fees for service.

In the case of independent lawyers, some of these issues emerge where claims, which have been determined by the NTRB/NTSP to have little prospects of success, or are otherwise contrary to the NTRB/NTSP statutory obligations (see Appendix D), have been progressed by independent lawyers regardless. Anthropologists can also contribute to these issues, through for instance, providing unsubstantiated reports or testimony.

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.

It must be noted that the issues discussed above also often occur in the absence of private agents. For instance, conflict between or within native title groups may reflect long standing differences or be driven as a response to the requirements of the native title system.

Finally, the role of private agents providing services following the native title claims process and agreement also creates scope for adverse consequences for native title holders. For instance, given the complexity in some of these matters, issues of fairness, competitiveness and value for money may arise in the context of consultants providing services in areas such as management and business planning.

In light of these issues, the Review will consider the current scope and nature of the services being supplied by private agents and the impact of those services on the native title system. The Review will also consider the possibility of reforms in this area to optimise the scope and quality of services to native title holders. The Review will consider these issues in relation to the discussion points identified below.

**Discussion Points 7**

- Are there significant differences in the types of native title services provided by private agents compared to NTRBs/NTSPs?
- In recent times, are there differences in cost and outcomes of cases and agreements managed without the involvement of NRTBs/NTSPs?
- Should there be more explicit accountability for the claimant group or its representatives in the Act?
- Would there be value in greater regulation of private agents, e.g. a registration system, constraints on private agents undertaking particular activity? Should private agents assisting Indigenous parties be made subject to some of the same standards and obligations as set down for NTRBs/NTSPs under the Act?
- What costs and benefits would be associated with implementing any legislative or regulatory changes?
- Why do some claim groups choose to pay private lawyers for services they could receive for free from an NTRB/NTSP?

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5 Next steps

The Review is seeking submissions in response to the issues identified in this paper, with particular reference to the discussion points identified throughout. The submission process will be open from 3 June until 30 September 2013.

Submissions will provide an important source of information as the Review considers these issues and prepares recommendations to be included in our final report to the Minister this December.

Submissions can be made through any of the following channels:

1) **Website:** Submissions can be uploaded at:

2) **Email:** Submissions can be emailed to:
   native.title@deloitte.com.au

3) **Mail:** Submissions can be mailed to:
   Attention: Native Title Review Team
   PO Box N250 Grosvenor Place
   Sydney NSW 1220 Australia

All enquiries about the Review and Submission process should be sent by email to native.title@deloitte.com.au.
Appendix A: Terms of Reference

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.

Specifically, the Reviewer will:

1. Examine the range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs;
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;
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;
4. Examine the scope for rationalisation of the numbers of NTRBs and NTSPs currently operating in the native title system;
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);
6. Consider the nature of that assistance, canvassing capacity building, and direct or indirect provision of financial, legal and dispute resolution services;
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;
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;
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.
Appendix B: 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 C: Coverage of NTRBs/NTSPs

Representative Aboriginal/Torres Strait Islander Body Areas*

As at 01 July 2010

*Source: National Native Title Tribunal 2010

Deloitte Access Economics
Appendix D: Statutory context of NTRBs/NTSPs and private agents

NTRB/NTSPs and private agents operate under different sets of obligations. In addition to the professional obligations on some NTRB/NTSP staff, NTRB/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 NTRB/NTSPs provide services. In particular, they are designed to ensure NTRB/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))
- 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 FaHCSIA. 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.