

Factual submission provided jointly by: Department of the Prime Minister & Cabinet Attorney-General's Department

Joint Standing Committee on Northern Australia

Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

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List of acronyms

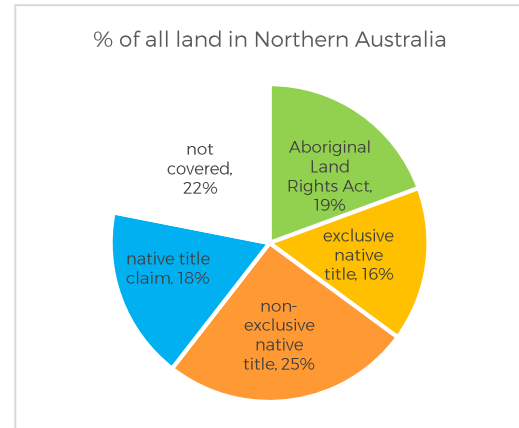
ABA	Aboriginal Benefit Account
AGD	Attorney-General's Department
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 1996</i>
CDP	Community Development Program
EDTL	Executive Director of Township Leasing
FPIC	Free, prior and informed consent
IAS	Indigenous Advancement Strategy
IBA	Indigenous Business Australia
IBD	Indigenous Businesses Database
IEF	Indigenous Entrepreneur's Fund
ILSC	Indigenous Land and Sea Corporation
ILUA	Indigenous Land Use Agreement
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i>

TOR 1: The current engagement, structure and funding of representative bodies, including land councils and native title bodies such as prescribed bodies corporate

1.1 Overview of Indigenous land

There are two systems under which Aboriginal and Torres Strait Islanders hold Indigenous land rights in Australia, native title and statutory land rights. 78% of land in Northern Australia is claimed or recognised under these two systems as at 2 December 2018 – see map at [Attachment A](#).¹

Native title is a set of communally held rights and interests relating to land held, grounded in traditional law and custom and recognised in Australian law.² For example, a group may have a native title right to hunt and camp on the land. For 35% of native title land nationally (as at 2 December 2018) this includes a right to exclude others and is referred to as “exclusive” native title. Under the *Native Title Act 1993* (NTA), following a determination of native title, native title holders are required to form a Prescribed Body Corporate (PBC)³ to manage their native title.



The Australian Government invests approximately \$110 million per annum to support the native title system. Through the Indigenous Advancement Strategy (IAS), administered by the Department of the Prime Minister and Cabinet (PM&C), funding is provided to Native Title Representative Bodies and Service Providers (NTRB/SPs)⁴ and Prescribed Bodies Corporate. The Attorney-General's Department (AGD) provides funding for the Federal Court, including the National Native Title Tribunal (NNTT), for native title respondents and to support the professional development of native title anthropologists.

Various **statutory land rights** regimes allow governments to provide a grant of title to land to traditional owner groups. In 1976, the Commonwealth passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) which established a statutory land rights scheme in the Northern Territory for Indigenous people to claim land based on traditional ownership. Around 50% of the Northern Territory is inalienable Aboriginal freehold land granted under the Act. The four Northern Territory Land Councils are established under the ALRA to represent the interests of traditional owners and communities on Aboriginal Land.

¹ Data provided by the NNTT. 10% of land in Northern Australia is covered by non-ALRA statutory land rights regimes, however this largely overlaps with native title.

² For native title to be recognised under the NTA, claimants must demonstrate a connection to land and waters in accordance with traditional laws and customs. Native title may be validly extinguished by past activities over land and waters, in which case the NTA provides an entitlement to compensation in certain circumstances.

³ The term “Registered Native Title Body Corporate” or RNTBC applies once the PBC is determined by the Federal Court and registered by the NNTT. It is used interchangeably with Prescribed Body Corporate (PBC)

⁴ The distinction between NTRBs and NTSPs is technical – they perform identical functions but NTRBs are subject to a process of formal ‘recognition’ under the NTA. Of 15 NTRBs/SP nationally, there 6 NTRBs and 9 NTSPs.

There are a range of other statutory Indigenous land rights schemes across Australia. This includes the Wreck Bay community, and the various state and territory schemes. A detailed overview of these schemes is at [Attachment B](#).

1.2 Regional Bodies

Native Title Representative Bodies and Service Providers (NTRB/SPs)

NTRB/SPs are funded by the government through the IAS to provide native title services at a regional level to PBCs and native title claimants. There are 15 NTRB/SPs across the country and 10 of these operate wholly or partially within Northern Australia (see [Attachment C](#)).

Key functions include:

- Supporting native title claims
- Assisting traditional owners with agreement making
- Certifying applications and agreements
- Assisting with disputes
- Notifying traditional owners of potential impacts on their native title.

IAS funding for NTRB/SPs is detailed at [Attachment D](#).

Northern Territory Land Councils

The ALRA establishes four Land Councils in the Northern Territory to assist traditional owners to acquire and manage land. The Land Councils are representative bodies of elected Aboriginal people. The Northern Land Council and the Central Land Council perform dual functions as both NTRBs and Land Councils under the ALRA.

Section 23 of the ALRA sets out the functions and responsibilities of the Land Councils which include:

- Representing the views and interests of traditional owners and their communities
- Protecting the interests of traditional owners and other Aboriginals interested in Aboriginal land, including the protection sacred sites on their land
- Assisting traditional owners and other Aboriginals interested in Aboriginal land to manage and develop land in the Northern Territory
- Assisting traditional owners to negotiate with people wishing to obtain an estate or interest in land owned by land trusts
- Assisting Aboriginal people to claim land.

ALRA land is vested in land trusts, which act on the directions of the relevant Land Council.

Aboriginals Benefit Account

Statutory royalty equivalents for mining activity on Aboriginal land in the Northern Territory are paid to the Aboriginals Benefit Account (ABA) which is established by the ALRA. The Aboriginals Benefit Account provides funding for a number of purposes outlined in the ALRA, including funding for a biannual grants round for proposals that benefit Aboriginal people in the Northern Territory. The Aboriginals Benefit Account also provides funds for the administration of the four Land Councils and funds for the benefit of traditional Aboriginal owners directly affected by mining on their land (see [Attachment D](#) for more detail, including funding provided to the Land Councils and other ALRA entities through the ABA).

Executive Director of Township Leasing

The position of Executive Director Township Leasing (EDTL) is an independent statutory office holder established under the ALRA. The primary role of the EDTL is to hold long term leases over Aboriginal townships in the Northern Territory for the Australian Government and the respective Aboriginal Land Council and Land Trust under section 19A of the ALRA. The Office of Township Leasing assists the Executive Director in this role.

Narrariyal Aboriginal Corporation

Narrariyal Aboriginal Corporation (NAC) was established by the Gumatj clan to hold and administer the Ganyagala township lease. Narrariyal’s directors are senior Gumatj traditional owners, as well as two independent directors. Its broader membership is comprised of members of the Gumatj clan. Narrariyal Aboriginal Corporation (NAC) is an approved Commonwealth entity under section 3AAA of the ALRA.

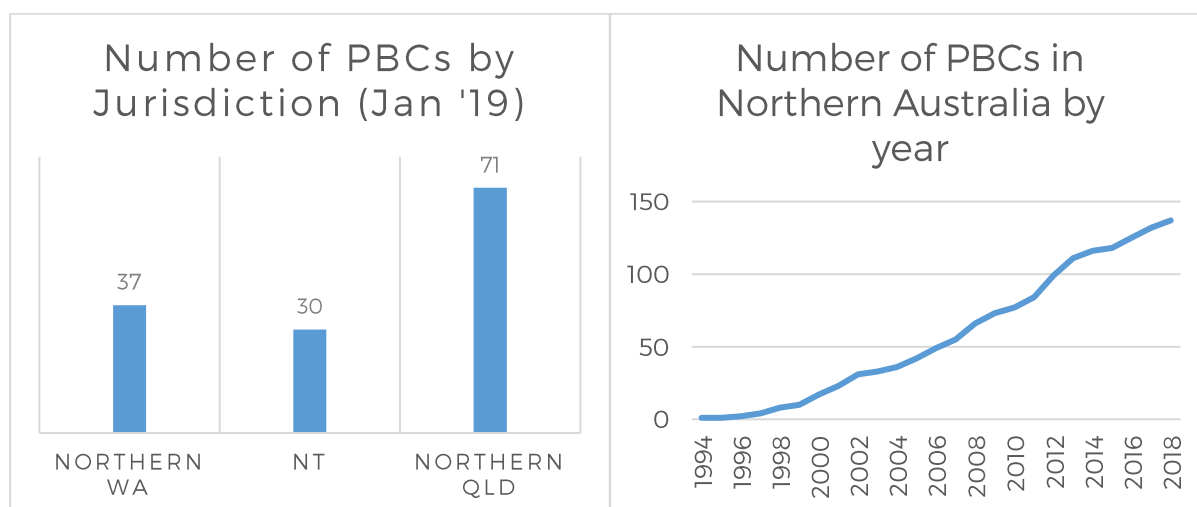
1.3 Prescribed Bodies Corporate (PBCs)

PBCs are the corporate entity which represents an individual traditional owner group. The NTA requires a PBC to be formed after a successful determination of native title to hold native title for the benefit of the native title holding group. PBCs are required to be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and have a range of statutory functions directed at:

- Protecting, managing and holding native title in accordance with the instructions and consent of the broader native title holding group.
- 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 these functions, PBCs also have the potential to act as vehicles for the broader aspirations of native title holders. PBCs often seek to undertake activities relating to cultural heritage, advocacy, land management, enterprise and service delivery.

The number of PBCs is growing as more native title claims are resolved. As at 22 January 2019 there are 195 Australia wide. 139 (71%) are located in Northern Australia.⁵



⁵ Data provided by ORIC

The number of PBCs will continue to increase as more native title determinations are resolved. There are now more determinations of native title (450) than current claims (273)⁶. Approximately 100 new PBCs nationwide are projected over the next decade⁷. The Northern Australia White Paper (2015) noted the Commonwealth Government aspires to have all current native title claims resolved within a decade (page 22).

PBC Membership

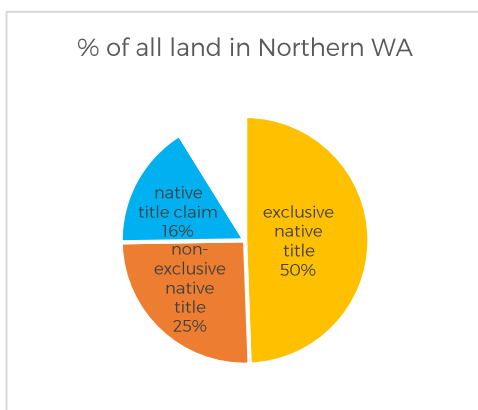
PBCs have obligations to all common law native title holders, not all of whom will necessarily be members of the PBC. A PBC’s membership may provide a rough indication for the size of the group that the PBC represents.

The median PBC has 116 members. 25% of PBCs have fewer than 40 members, and 25% have more than 248.⁸ The Far West Coast Aboriginal Corporation RNTBC has 1808 members, the most of any PBC.

PBCs collectively (nationwide) have 39,000 members.⁹

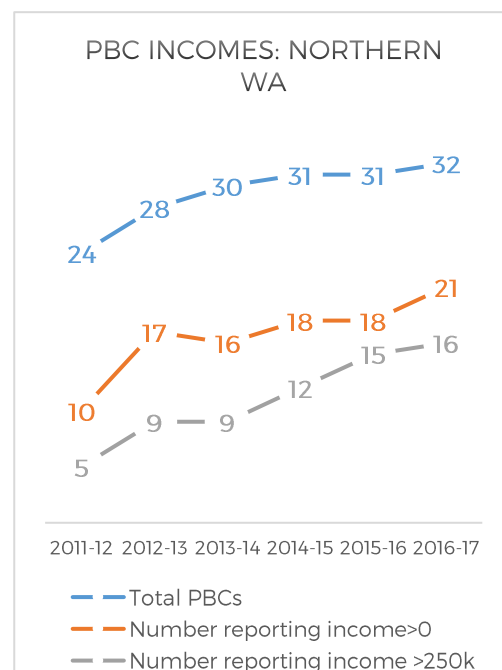
1.4 Native title in Northern WA

There are three NTRB/SPs operating in Northern WA: Kimberley Land Council, Yamatji Marlpa Aboriginal Corporation, and Central Desert Native Title Services.



The bulk of exclusive native title in Australia is in Western Australia, including Northern Western Australia. This region includes the wealthiest PBCs in Australia as well as many with no income or assets.

50% of PBCs in the region reported incomes of over \$250,000 to ORIC in 2016-17, whilst 34% reported an income of \$0. In 2011-12, only 21% of PBCs reported incomes above \$250,000, whilst 58% reported incomes of \$0.



13% of land in Northern WA is covered under state statutory land rights legislation, the *Aboriginal Affairs Planning Authority Act (WA)*. This land largely overlaps with native title.

⁶ As at 31 January 2019. Sourced from NNTT register of native title claims. These figures include non-claimant applications.

⁷ Projections done by the NNTT

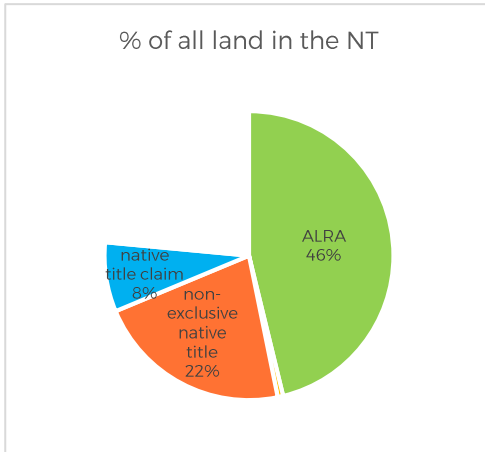
⁸ All data provided by ORIC in February 2019

⁹ Some individuals may be members of more than 1 PBC, so the number of individuals that are members of a PBC may be lower than this figure.

1.5 Native title in the Northern Territory

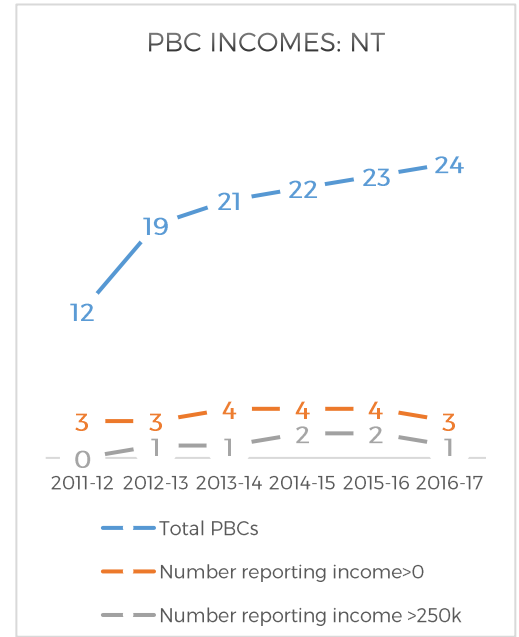
The NTRB/SPs in the NT are the Central Land Council and Northern Land Council.

Almost all native title in the Northern Land Council region is held by the Top End Default PBC, an entity run by the Northern Land Council. This body is responsible for 58% of all native title land in the NT and 70 separate determinations. Many future determinations are likely to be included in the Top



End Default PBC, so few new PBCs are expected.

The other PBCs in the NT have very low capacity compared to other parts of the country. 88% of NT PBCs reported \$0 in income to ORIC in 2016-17. In 2011-12, 75% of PBCs reported an income of \$0. The absolute number of PBCs reporting nonzero income remained roughly constant over the period.



1.6 Native title in Northern QLD

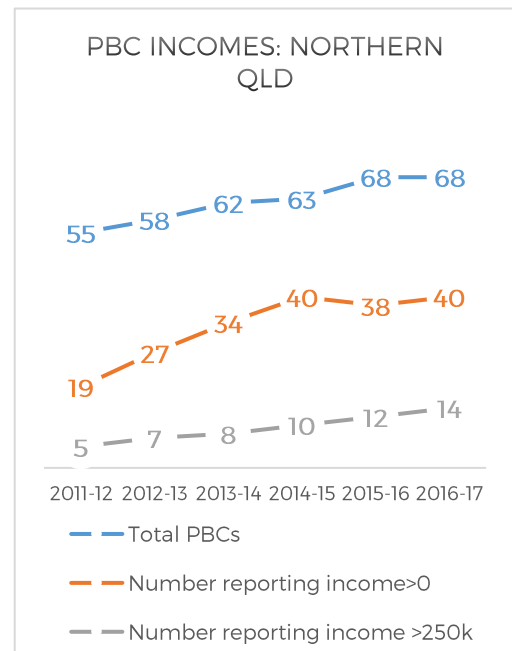
There are five NTRB/SPs operating in Northern QLD: the Torres Strait Regional Authority, Cape York Land Council, Carpentaria Land Council, North Queensland Land Council and Queensland South Native Title Services. There are 71 PBCs in this region, which is over a third of all PBCs.

7% of land in Northern Queensland is covered by one of several state-based statutory land rights regimes. This land largely overlaps with native title.

Whilst many PBCS in Northern QLD continue to have



low incomes, there has been consistent growth on financial indicators across the region. In 2016-17, 21% of PBCs in the region reported more than \$250,000 in income to ORIC, up from 9% in 2011-12. In the same year, 41% reported incomes of \$0, down from 65% in 2011-12



1.7 Pama Futures Agenda in Cape York

Over the past two years, leaders from across Cape York have developed a new approach to work in partnership with government, Pama Futures. This builds on the Empowered Communities initiative already being established in Cape York and focuses on three areas of reform:

- *Land Rights* reform to strengthen decision making by grassroots land owners, as more land in the region is settled under native title and lands rights processes;
- *Empowerment* of Indigenous families and individuals in Cape York sub-regions, including involvement in robust local decision making processes for services and programs in these areas; and
- *Economic development* on Indigenous land supported through investment ready tenure, industry and enterprise opportunities, employment and retaining funding in Cape York with appropriate investment to build the human capital required for success.

The Commonwealth government has supported an extensive 18 month consultation process, led by Cape York Partnership, including three Cape York wide summits, co-design labs, sub-regional facilitators and community engagement activities. PBCs have been actively involved in this process. These engagements aim to ensure Cape York people can all have input, and the sub-regional governance structures developed respect the rights and responsibilities of traditional owners and the leadership of local Aboriginal Councils and their Mayors.

The decision to commit to Pama Futures is one for the people of Cape York. The Pama Futures model proposes a system where each of the 12 sub-regions can progress their own plans and agendas at their own pace, with the regional governance framework still under active development. In the proposed Pama Futures model local community leaders, including local Mayors, will hold lead roles both at the sub-region and regional level.

Pama Futures does not propose to seek control of all funding decisions on behalf of Cape York traditional owners. Instead the model proposes a governance model to enable communities (sub-regions) to have an interface with the three levels of Government about the decisions that affect them, including decisions about land and opportunities for economic development. Where it is advantageous and common interests exists, the Pama Futures model will provide a mechanism for the people of Cape York to come together and speak with one voice. There will also be work with those groups who are seeking more information. In particular, Pama Futures leaders are continuing to engage the local Mayors and traditional owners on the revised governance model.

1.8 Sea country

As at 3 February 2019, 83,643 sq km of native title has been determined over the sea. The High Court has held that native title rights over the sea are non-exclusive in nature (*Commonwealth v Yarmirr* (2001) 208 CLR 1). Non-exclusive rights that may be claimed generally include the right to fish, hunt and gather resources for personal, domestic and communal uses.

Non-exclusive native title rights over the sea can also extend to the right to take and use the resources of the claimed area for any purpose, including commercial purposes, where it is in accordance with traditional law and custom. The High Court found in *Akiba v Commonwealth*

(2013) 250 CLR 209 that members of the Torres Strait Regional Seas Claim Group held a right to access and take resources for any purpose, including commercial purposes. The Torres Strait Regional Authority and the Protected Zone Joint Authority now support the aspiration of Torres Strait communities to own 100% of commercial fisheries in the Australian area of the Torres Strait Protected Zone.

84% of the coastline of the Northern Territory is held by Aboriginal people under the ALRA. The High Court found in the Blue Mud Bay case (*Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24) that this included exclusive ownership of the intertidal zone. The Northern Territory Government is working with Land Councils and traditional owners to establish agreements that will benefit everyone - Indigenous Territorians, recreational and commercial fishers and other water users.

TOR 2: The role, structure, performance and resourcing of Government entities (such as Supply Nation and Indigenous Business Australia)

2.1 Indigenous Business Australia

The committee is referred to the submission provided by Indigenous Business Australia.

2.2 Supply Nation

Role and structure

Supply Nation supports implementation of the Australian Government's successful Indigenous Procurement Policy by registering businesses that meet the definition of an Indigenous business on the Indigenous Businesses Database (IBD). Supply Nation is a not-for-profit public company and is not a government entity.

Supply Nation is Australia's leading supplier diversity organisation with over 1,600 Indigenous Businesses listed on the IBD. There are more than 380 corporate, government and not-for-profit members who support Indigenous procurement within their organisations. The IBD has expanded beyond Commonwealth procurement and is used nationally by the private and public sector to support Indigenous procurement.

Supply Nation also facilitates trade shows across the country for Indigenous businesses. The first series of Indigenous Business Trade Fairs was run in 2017-2018 and consisted of five events held around the country. The series was very successful with high engagement from the 263 Indigenous businesses that exhibited and over 1,100 buyers who attended.

Resourcing

Supply Nation receives \$1.35 million in Commonwealth funding each year through the IAS to undertake verification and monitoring services and maintain the IBD. Additional funding of \$300,000 was provided in 2018-19 for staff and IT upgrades to undertake registration of Incorporated Indigenous-owned joint ventures. The government has provided a further \$260,000 for Supply Nation to conduct a second National Indigenous Business Tradeshow Series in 2018-19. Supply Nation also generates revenue from corporate membership fees and events. There is no fee for Indigenous-owned businesses to be registered in the IBD.

2.3 Indigenous Land and Sea Corporation

The Indigenous Land and Sea Corporation (ILSC) is a Commonwealth corporate entity established under the *Aboriginal and Torres Strait Islander Act 2005* and subject to the *Public Governance, Performance and Administration Act 2013*.

The ILSC assists Aboriginal and Torres Strait Islander Australians to realise economic, social, cultural and environmental benefits from the ownership and management of land. From 1 February 2019, it will also have the ability to acquire and manage fresh and salt water country.

The ILSC Group also manages three subsidiaries:

- Voyages Indigenous Tourism Australia Pty Ltd: Owns and manages Ayers Rock Resort (NT), Home Valley Station (WA) and Mossman Gorge Centre (Qld).

- National Centre of Indigenous Excellence: Operates a facility built by the ILSC on the site of the former Redfern Public School to enable young Indigenous people from across Australia to participate in life changing programs.
- Australian Indigenous Agribusiness Company PTY Ltd: Manages employment on the 14 ILSC Group-operated agribusinesses, mainly in the northern Australian beef industry.

The ILSC Board is the primary decision-making body for the corporation which oversees governance, considers land and water acquisition, management proposals and monitors performance.

Performance

The ILSC annual performance statement is available online:

<https://www.ilc.gov.au/Home/About/Publications/Latest-Annual-Report>

Resourcing

The ILSC currently receives annual payments from the Aboriginal and Torres Strait Islander Land Account. From 1 February, the assets of the Land Account will be transferred to the Aboriginal and Torres Strait Islander Land and Sea Future Fund and managed by an experienced manager of public funds. Annual payments will continue to be made. In addition, discretionary payments may be determined, limited to once per financial year, authorised by the Finance Minister and the Minister for Indigenous Affairs.

2.4 Office of the Registrar of Indigenous Corporations

Role and structure

The Registrar of Aboriginal and Torres Strait Islander Corporations (known as the Registrar of Indigenous Corporations) is an independent statutory office holder appointed by the Minister for Indigenous Affairs. In performing his functions and exercising his powers, the Registrar must have the following aims:

- to facilitate and improve the effectiveness, efficiency, sustainability and accountability of Aboriginal and Torres Strait Islander corporations
- to provide certainty:
 - for the members, officers and employees of an Aboriginal and Torres Strait Islander corporation in their dealings with the corporation and with each other;
 - for persons outside Aboriginal and Torres Strait Islander corporations in their dealings with those corporations
- to have regard to Aboriginal and Torres Strait Islander tradition and circumstances
- to administer the laws of the Commonwealth that confer functions and powers on the Registrar effectively and with a minimum of procedural requirements
- to ensure that information is available as soon as practicable for access by the public.

The Registrar has the following functions:

- to administer the CATSI Act
- to maintain such registers as he thinks appropriate
- to make available to the public information about the registration of Aboriginal and Torres Strait Islander corporations and the administration of the CATSI Act
- to provide advice about:
 - the registration of a particular Aboriginal and Torres Strait Islander corporation; and
 - the rules governing the internal management of the corporation; and
 - the operation of the corporation
- to conduct public education programmes on the operation of the Act and on the governance of Aboriginal and Torres Strait Islander corporations
- to assist with the resolution of disputes:
 - internal to the operation of an Aboriginal and Torres Strait Islander corporation; or
 - between an Aboriginal and Torres Strait Islander corporation and others
- to assist with complaints under the Act:
 - about the internal operation of an Aboriginal and Torres Strait Islander corporation; or
 - involving Aboriginal and Torres Strait Islander corporations
- to conduct research in relation to matters affecting Aboriginal and Torres Strait Islander corporations:
 - to develop policy proposals about Aboriginal and Torres Strait Islander corporations;
- such other functions as are conferred on the Registrar under another law of the Commonwealth
- such other prescribed functions.

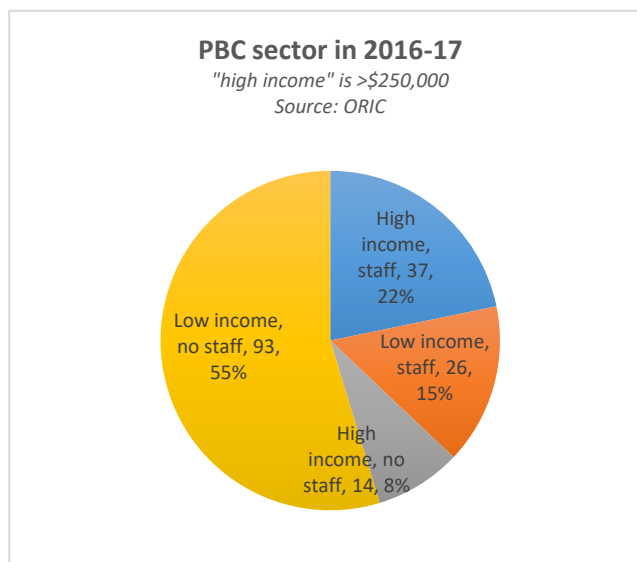
ORIC had 44.9 full-time equivalent staff at 30 June 2018 and a budget for 2017-18 of \$8.508 million, making the Registrar, by comparison, a relatively small Australian Government regulator.

TOR 3: Legislative, administrative and funding constraints, and capacity for improving economic development engagement

3.1 PBC Capacity

In discharging their statutory obligations and acting as vehicles for the aspirations of the native title holding group, PBCs can have large demands placed on them. Many of these demands are driven by state government development priorities.

PBC capacity is difficult to assess. That said corporate data reported by PBCs to the Registrar of Indigenous Corporations provides evidence of the operating environment for PBCs. Many PBCs have limited resources: nationally 40% of PBCs have no income and 63% have no employees.¹⁰



A significant challenge for many PBCs is the requirement to consult with and represent the all members of the native title holding group in making decisions. Not all native title holders will necessarily be members of the PBC and PBCs are unique in being accountable to this broader group outside their membership.

PBCs with low capacity generally depend on their NTRB/SP for support. NTRB/SPs are provided with funding for this purpose (see [Attachment D](#)).

Ensuring PBCs have sufficient capacity is essential to ensure that communal decision making processes work effectively, and that traditional owners are empowered to engage with economic opportunities.

3.2 Government funding

The Commonwealth provides support to PBCs. This support includes direct funding and support provided via NTRB/SPs. Further detail in section 4.3 and [Attachment D](#).

A large number of PBCs are likely to continue to require government support into the future, particularly as approximately 100 new PBCs are formed over the next decade. Due to the large number of PBCs which already require support, funding must be prioritised to areas of highest need. Low capacity PBCs struggle to access other sources of funding due lack of access to skilled staff.

The Commonwealth is not aware of systems of operational support for PBCs in State governments other than where the PBC is part of a broader land settlement.

¹⁰ Data is for 2016-17, provided by the Office of the Registrar of Indigenous Corporations (ORIC)

3.3 Nature of native title rights

As outlined above, the NTA establishes statutory processes through which native title rights to land and waters can be recognised. Native title arises as a result of the recognition, under Australian common law, of pre-existing Indigenous rights and interests according to traditional laws and customs. Native title rights extend to matters such as the right to live and camp in an area, conduct ceremonies, collect food, and to visit places of cultural significance.

The recognition of native title in accordance with the NTA can give rise to a range of economic opportunities and procedural rights, including the right to enter into beneficial agreements – such as Indigenous Land Use Agreements (ILUAs) – with proponents of development.

However, while native title gives rise to economic opportunities, it is not necessarily sufficient, in and of itself, to enable traditional owners to capitalise on them. There may be tenure or other rights required to undertake a commercial enterprise or venture, such as a tourism license, and there are some limits on what native title can be used for.

Examples of these limits include:

- Due to the communal and inalienable nature of native title rights, native title rights and interests cannot be used as security for loans or for other forms of investment. That said, land where native title exists may be leased, see section 3.4 below.
- 65%¹¹ of native title is held over tenure where only limited, non-exclusive native title rights can be recognised. As non-exclusive rights are subject to the rights of third party interest holders, such as pastoralists, the opportunity for traditional owners to use the land for economic purposes may be more restricted than on tenure where exclusive native title rights have been determined to exist.
- While native title rights can extend to using or taking natural resources for commercial purposes, this is only in limited circumstances where it is established according to the traditional law and customs of the native title group (for example, where there is evidence of a history of undertaking trade practices relating to fish or other agriculture resources according to traditional law and custom – this is the principle established by the High Court in *Akiba v Commonwealth* (2013) 250 CLR 209).
- Like other tenure, native title rights to minerals, gas or petroleum are not recognised under Australian law. Generally speaking, these assets are vested in the Crown.

3.4 Leasing on native title land

Whilst native title cannot be bought and sold, leasehold provides a mechanism for the creation of fungible tenure without loss of native title. This can be done with the agreement of the native title holders and the land holder (eg the state in relation to crown land), for example documented in an ILUA. This gives native title holders options regarding the use of native title land.

Leases on native title land entail the suppression of inconsistent native title rights for the duration of the lease, after which native title rights are restored in full. Leases can include terms which protect the exercise of native title rights. It is important to note that any leasing (whether of ordinary freehold or Aboriginal freehold) involves some diminution of the land owner's rights of access and use to make way for the lease.

Further, it is open to holders of exclusive native title to seek a head lease from the state, for example, in the name of their PBC. The PBC would then control all land use – including

¹¹ As at 2 December 2018, source: NNTT

further leasing and the income that leasing might generate. This has not been explored widely in practice to date.

In some instances, native title agreements may entail the surrender of native title as was the case in the Noongar Settlement. This is a decision for the parties in individual cases.

3.5 Native title monies

Native title has led to significant growth in the Indigenous asset base (see also section 6.1 below). Under the NTA, native title groups have procedural rights when development that affects their interests is being considered. In some instances this has led to significant financial and other benefits to native title groups.

Native title monies may be held by PBCs, or outside PBCs in professional or local trusts or other corporate entities. Irrespective of how native title monies are held, the regulatory environment may involve Commonwealth and/or state legislation, and principles from the common law and equity. This new and unique legal and operating environment is challenging for professionals and indeed for non-professionals. Best practice is still emerging in some sectors.

There have been examples of 'loss' of native title monies to the native title beneficiaries. Cases include:

- Inappropriate disbursement by trustees – for example inappropriately high consultant fees.
- Lack of transparency by trustees to native title beneficiaries – for example inappropriate loans to related parties.
- Poor trust design and/or trust management leading to difficulty accessing funds by native title beneficiaries.

In December 2018, the Hon John Quigley MLA, Attorney-General of Western Australia, released a report into the Njamal People's Trust. The report explored some of the above issues as they applied to this case.

Counter measures have also been taken. For example, individual cases have been investigated and prosecuted by relevant State and Commonwealth entities. Moreover, in 2015, the Financial Services Council released a Cultural Capability in Native Title Services Standard which aims to build strong partnerships between trustees and Indigenous communities founded on equality, mutual respect, and recognition of the knowledge and skills gaps on both sides.

3.6 Nature of ALRA Land

The ALRA provides a legislative framework for claims to, and the grant and management of, inalienable Aboriginal freehold land – the strongest form of traditional land title in Australia. The ALRA gives traditional owners in the NT control over what happens on their land and the right to consent to development and lands use proposals from government and investors.

The ALRA sets down detailed procedures for:

- the negotiation of mining agreements on Aboriginal land and the application of laws for mining on Aboriginal land;
- funding of Land Councils through the Aboriginal Benefits Account;
- a number of minor but important provisions, such as roads and entry onto Aboriginal land, a protection of sacred sites and protection of traditional rights over land;
- land use agreements on Aboriginal land; and
- dealing with income from land use agreements.

The Commonwealth engages regularly with NT Land Councils and NT Government on a range of ALRA-related matters to ensure traditional owners can harness the economic opportunities that exist on their land, including: operational improvements to the ALRA; improving the efficiency of core business processes; updating exploration and mining provisions of the ALRA; community entity township leasing to support economic development and localised decision making; finalising land claims and improving the distribution of royalties.

This work is undertaken through frequent collaboration and consultation, including through the Northern Territory Biannual Strategic Forum and associated Working Groups on ALRA-related issues.

3.7 Leasing on ALRA Land

ALRA land is inalienable freehold title that cannot be bought and sold. Similar to native title land, some consider this, coupled with perceived complex processes, delays and high costs associated with development on Aboriginal land, a constraint on economic development.

However, leasing provided for under the ALRA has now become commonplace, allowing traditional owners and third party investors to engage in economic activity on Aboriginal land, providing certainty for all land users in the NT.

Under section 19 of the ALRA traditional owners can grant a right or interest in land to private businesses, Governments, community members and other land users. The NT Land Councils carry out consultations and negotiations on behalf of traditional owners with parties interested in carrying out activities on Aboriginal land.

Using this process, traditional owners are given the opportunity to make an informed land use decision in accordance with their traditional decision making processes. Affected Aboriginal people and communities are also given an opportunity to express their views in relation to land or water use proposals. Where informed consent is given, the Land Councils can direct the appropriate Land Trust to enter into a section 19 Land Use Agreement with the proponent. Section 19 leases include terms that specify the length of the lease and any rent payable to traditional owners.

Township leasing is also available to traditional owners under the ALRA and is explored in greater detail below at TORs 4 and 6.

TOR 4: Strategies for the enhancement of economic development opportunities and capacity building for Traditional Owners of land and sea owner entities

4.1 Indigenous Advancement Strategy

The Indigenous Advancement Strategy (IAS) provides funding for Indigenous Australians through five flexible, broad programs including the Jobs, Land and Economy program. The IAS improves the way that the Government does business with Aboriginal and Torres Strait Islander people to ensure funding actually achieves outcomes. In the 2018-19 Budget, the Australian Government allocated \$5.1 billion to the IAS, over four years to 2021-22.

4.2 Indigenous Reference Group (IRG)

The Ministerial Forum on Northern Development was formed in 2017 and brings Australian Government Ministers, and Ministers from the Western Australian, Northern Territory and Queensland governments together to provide oversight and direction on the development of the north.

Since inception, the forum has sought to ensure the northern development agenda is inclusive of Indigenous interests and provides tangible benefits for Indigenous land owners, workers and businesses. The Minister for Indigenous Affairs participates in the Ministerial Forum.

The Indigenous Reference Group (IRG) to the Ministerial Forum on Northern Development was established to provide advice on developing the Indigenous business sector, growing the capability of Indigenous land owners to engage in development and supporting Indigenous innovation in Northern Australia.

Members of the Indigenous Reference group were nominated by forum member governments for their high-level of expertise and experience across a range of industries, sectors and regions. Members do not represent specific organisations or communities.

Eight business leaders make up the IRG: Mr Peter Yu (WA), Mr Lawford Benning (WA), Mr Joe Morrison (NT), Dr Donna Odegaard AM (NT), Mr Nigel Browne (NT), Adjunct Professor Colin Saltmere (QLD), Ms Vonda Malone (QLD), and Ms Fiona Jose (QLD).

Members of the IRG have attended each of the three meetings of the Ministerial Forum (1 September 2017, 18 April 2018 and 8 November 2018). The IRG is supported by the Department of the Prime Minister and Cabinet in partnership with the Office of Northern Australia (ONA), with financial support from the Commonwealth through PM&C and the Western Australian, Northern Territory and Queensland Governments. PM&C facilitates the engagement of the IRG with other Commonwealth agencies and entities to support the IRG's policy deliberations.

The IRG made recommendations to the April 2018 Ministerial Forum across six thematic areas identified by the IRG as important for helping people get into jobs and providing the right support for entrepreneurs, including helping traditional owners realise the economic potential of their land, sea and cultural assets. These are:

- Creating jobs, fostering labour participation, entrepreneurship and business acumen
- Knowledge management systems and research and development to support Indigenous commercial end-users
- Infrastructure investment to support Indigenous economic development

- Access to capital and domestic and international markets
- Activating the economic value of land, water, sea and cultural resource rights
- Institutional arrangements that work to activate, accelerate and optimise Indigenous economic development across northern Australia.

Forum Ministers acknowledged the extensive body of work undertaken by the IRG to explore opportunities to unlock and maximise the economic potential of northern Australia for Indigenous businesses, individuals and communities. Ministers agreed in principle to the 16 recommendations put forward to the Forum by the IRG.

At the November 2018 Ministerial Forum, Ministers considered implementation planning for the IRG's recommendations and agreed to progress key actions including:

- expanding fee-for-service opportunities for ranger groups;
- scoping a Northern Australian Indigenous commercial research plan that will look at knowledge priorities of Indigenous commercial decision-makers, including traditional owners, and identify gaps in the existing knowledge base; and
- scoping a Northern Australia Indigenous Enterprise and Employment Hub System to provide advice and support on economic development, including to traditional owners.

The Ministerial Forum also agreed in November 2018 to develop a Northern Australia Indigenous Development Accord for consideration by the Northern Australia Strategic Partnership. This intergovernmental agreement will be a mechanism for states, territories and the Commonwealth to work together to progress economic development and capture the work of the IRG.

The Ministerial Forum also made commitments relating to maximising the Commonwealth's defence investment and capability development in Northern Australia. We note that this commitment has considerable potential to enhance Indigenous economic engagement in northern development.

Similarly, the Forum's prioritisation of the development of new tourism products and destinations is another area of focus that has the potential to better leverage the value of the land, water and cultural assets of the Indigenous population of Northern Australia.

The IRG is continuing to develop further recommendations for future consideration by the Ministerial Forum, including the establishment of a Northern Australia Indigenous economic development body, which would seek to improve engagement on economic development, provide business and policy advocacy, facilitating connection to domestic and international markets and Indigenous perspectives to the economic research agenda. Governments have supported initial scoping of the proposal recognising it may be valuable in advancing the Indigenous economic development agenda.

We are aware that there is also interest by the IRG in examining reservation of funding under the Northern Australia Infrastructure Facility (NAIF) for Indigenous projects. One of the constraints affecting economic engagement of traditional owners is the availability of capital funding and funding for feasibility studies. In particular, feasibility funding for infrastructure projects are often identified as barriers to development. At present, many infrastructure projects do not progress beyond the planning stage because of a lack of funding to conduct feasibility studies. The NAIF Expert Review Report noted "It is apparent that one of the biggest problems for NAIF is finding proponents with a bankable feasibility study (BFS). There would appear to be a need for some form of government support to assist proponents to get to the BFS stage. This may be in the form of a grant."

The Commonwealth is also progressing actions that are relevant to addressing the IRG's thematic areas, including those that will support economic development opportunities for traditional owners. The Data Integration Partnership for Australia has funded the Indigenous Extension to the Integrated Analysis for Sustainable Regional Development: Northern Australia project. The project is seeking to explore how government data can be used to create advice and data products that can be used by Indigenous organisations to negotiate for better economic outcomes from public and private investment in Northern Australia. The current pilot seeks to provide information on sustainable natural resource development and workforce requirements in the Darwin-Daly-Wagait region. The focus of the research team's efforts will be to see if and how existing government data can support land and water management and workforce planning decisions that can deliver better economic outcomes for Indigenous organisations and enterprises in the Darwin region. The project will engage in a co-design process with Indigenous organisations to answer a range of questions relating to data gaps, accessibility, use and the integration of Indigenous perspectives in investment decisions.

4.3 Commonwealth support to PBCs

The Commonwealth's objective is to support PBCs to become self-sufficient managers of land. Historically, support for PBCs has primarily been provided through NTRB/SPs. In 2015, in recognition of the increasing number of PBCs the Commonwealth established the new capacity building funding stream to provide funding direct to PBCs to take advantage of opportunities to use their native title rights and interests to pursue economic development.

The government has developed a support framework for services to PBCs, including basic support funding provided via NTRB/SPs, and targeted funding for PBCs who have access to specific opportunities.¹² Funding detail is at [Attachment D](#). This ensures that support can be provided both for PBCs that lack the capacity to apply for funding independently, and for PBCs with specific economic opportunities.

PBCs have diverse needs. [Attachment E](#) outlines the four stage PBC development path from incubation (with the support of an NTRB/SP) to entrepreneurship. Most PBCs are in the early stages of this path. PM&C provides services at all stages of PBC development.

As part of the support framework, the government funds a number of programs that provide strategic support to the PBC sector as a whole. These include:

Accredited PBC training course	The National Native Title Council (NNTC) (in partnership with RMIT, University of Melbourne and AIATSIS) is funded to develop a PBC curriculum and deliver pilot training. The first training block was delivered in Melbourne and Perth at the end of 2018.
PBC regional forums	The Australian Government in conjunction with the NNTC, is facilitating twelve regional forums to engage directly with and provide additional support to PBCs. Seven forums have been held to date.
Native title holder training	NNTC is funded to produce education material to native title holders and PBCs on their native title determination and what it means on the ground with workshops to be held with native title holders.
Native title website	AIATSIS is funded to host a PBC website which serves as a central resource bank - a 'one-stop shop' - for PBCs and stakeholders wishing to engage with PBCs. It offers a wide range of resources on a variety of topics providing useful, practicable and easily accessible information to PBCs, their directors and native title holders.

¹² The White Paper on Developing Northern Australia provided \$20.4 million over four years (ongoing) to support capacity building for PBCs.

PBCs are also supported Office of the Registrar of Indigenous Corporations (ORIC). See further section 4.6 below.

4.4 Economic Development Support

Native title holders engage in a wide range of enterprise including in pastoralism, mining and tourism. For many traditional owners, cultural enterprises are a way of achieving economic development in a manner consistent with community values and the exercise of native title rights.

The government provides a range of services to support Indigenous enterprise. These services are not specific to land-related ventures, but traditional owners have the opportunity to benefit from them.

<p>Indigenous Entrepreneurs Fund (IEF)</p>	<p>The IEF provides Indigenous businesses in regional and remote Australia with access to capital for plant and equipment. The IEF is not specific to Northern Australia. The objective is to support Indigenous businesses (with a focus on remote and regional Australia) through <i>grants for plant and equipment</i>—to provide one-off grants, where finance is not available or additional support is required to attract finance. This can include grants for lease or purchase of items required to start or grow a business.</p>
<p>Community Development Program (CDP) Business Incubator Pilots</p>	<p>The Community Development Program is the remote employment service that supports participants to build skills, address barriers and contribute to their communities through a range of flexible activities.</p> <p>The CDP Business Incubators is a pilot model which will be delivered to support development of Indigenous-led start-ups in CDP regions.</p>
<p>Micro Enterprise Development support</p>	<p>Many Rivers Microfinance Limited is engaged by the Commonwealth to support microenterprise development and community economic development in partnership with Aboriginal and Torres Strait Islander entrepreneurs and organisations in regional and remote Australia. Many Rivers is contracted to support individuals and organisations in the 13 Northern Australian locations. Approximately one third of the services delivered by Many Rivers are in the North.</p> <p>To strengthen local communities' roles in how CDP is delivered, and to support reforms announced by the Minister for Indigenous Affairs as part of the 2018-19 Budget, the Government is:</p> <ul style="list-style-type: none"> • ensuring CDP is delivered by Indigenous organisations • establishing a \$2 million Capital Investment Fund • establishing community advisory boards or other local engagement mechanisms to provide advice on local service delivery • continuing to drive community engagement in design and delivery of activities through our performance framework for providers.

4.5 Reforms to the native title system

On 21 February 2019, the Native Title Legislation Amendment Bill 2019 was introduced into the Australian Parliament.

The Bill was developed through two stages of public consultation. Following consultation on an options paper for native title reform from November 2017 to February 2018, the government released an exposure draft of the Native Title Legislation Amendment Bill 2019 (the Bill) from October to December 2018 for public comment. 89 submissions were received in response to both these processes (52 on the options paper, 37 on the exposure draft), and over 40 consultation meetings held with key stakeholders across the country – including native title representative bodies and native title corporations. An Expert Technical Advisory Group – comprised of representatives from the NNTC, industry and Commonwealth, state and territory government – was also convened to provide technical advice on the development of the Bill. The Bill will support economic and investment opportunities for traditional owners by giving native title holders greater flexibility around their internal decision-making processes, making improvements to the processes relating to native title claims resolution and agreement-making, and better supporting the sustainable management of native title post-determination.

Supporting native title holders through greater flexibility around decision-making

The Bill will implement a number of recommendations made by the Australian Law Reform Commission's 'Connection to Country: Review of the Native Title Act' (2015) to give native title claimants greater flexibility around setting their internal decision-making processes prior to a determination of native title.

These include allowing the native title claim group to place conditions on the authority of its nominated representatives in a claim (i.e. the applicant), allowing the applicant to act by majority as the default position (although the claim group will still be required to use traditional-decision making processes, if these exist), and allowing the claim group to put in place pre-agreed succession-planning arrangements for replacing members of the applicant.

These changes are intended to support claim groups to establish more effective governance arrangements prior to a determination of native title, with a view to assisting the transition to corporate structure (through PBCs) as required following a determination.

Improving native title claims resolution and agreement-making

The Bill contains a number of technical amendments to improve native title claims resolution and agreement-making processes under the NTA. These amendments implement a number of recommendations made by the Council of the Australian Government's Investigation into Land Administration and Use (2015), including to expand the circumstances where prescribed body corporates can enter into ILUAs and make compensation applications.

The Bill also includes an amendment to allow historical extinguishment to be disregarded over areas of national, state and territory parks where the parties agree, potentially leading to new economic development opportunities for traditional owners (including, for example, through co-management arrangements around park area).

Increasing the transparency and accountability of prescribed bodies corporate to native title holders

A key focus of the Bill is on supporting the sustainable management of native title following a determination, to ensure that traditional owners are able to capitalise on the opportunities arising from the recognition of their native title.

Following a determination of native title, the NTA requires a prescribed body corporate (or registered native title body corporate) to be established by native title holders to manage native title rights on behalf of the native title holders. This role is an important one for the community and for land management generally. Unlike other corporations, prescribed body corporates have obligation to common law holders, who may or may not be members of the corporation.

The Bill includes a number of amendments to the CATSI Act as recommended by ORIC's Technical Review of the CATSI Act (2017), to improve the transparency, accountability and governance of prescribed bodies corporate to the common law/native title holder. These include:

- requiring PBCs to certify PBC decisions on native title and making the certificate which contains information about the nature of the decision and decision-making process available to native title holders, and
- removing the currently existing discretion of PBC directors to refuse membership where a person applying to become a member of the PBC meets the membership criteria.

Improving pathways for dispute resolution following determination of native title

The Bill also includes a number of measures intended to support the resolution of disputes that can arise around how prescribed bodies corporate are managing native title. Such disputes can impact on the ability of traditional owners and native title holders from exercising these rights. These measures include:

- A new requirement for prescribed bodies corporate to include a process in their rule books for resolving disputes with native title holders. This would ensure corporations have procedures to address disputes with native title holders, and aims to resolve disputes early and internally before the corporation needs to obtain costly legal advice or the disputes escalates.
- Creating a new ground for the appointment of a special administrator by the Registrar of Indigenous Corporations for PBCs where there has been a serious or repeated failure by a PBC to perform its native title legislation obligation
- Conferring a new function on the NNTT to allow it to provide assistance to prescribed bodies corporate and native title holders to promote agreement about native title-related issues. Access to the NNTT's native title expertise may assist native title holders and bodies corporate to prevent or resolve disputes at an earlier stage, and to establish governance structures that will better equip them to manage their native title rights.

Confirming the validity of mining and exploration-related native title agreements

Finally, the Bill will confirm the validity of agreements made under Part 2, Division 3, Subdivision P of the NTA (section 31 agreements) following the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (*McGlade*).

While the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* confirmed the validity of area ILUAs affected by McGlade, there is a significant risk that section 31 agreements not signed by all members of the applicant (or registered native title claimant) may be similarly affected.

Confirming the validity of these agreements will provide certainty to traditional owners around benefits they have negotiated and agreed with other parties under section 31 agreements (and which can, for example, include compensation in return for the grant of mining or exploration tenements over native title land).

4.6 Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)

The CATSI Act is a tailored statute that includes special forms of regulatory assistance to support contemporary standards of good corporate governance. It combines the key facilities of a modern corporate statute and the unique cultural circumstances, and special social and economic needs, of Aboriginal and Torres Strait Islander people. PBCs are required to incorporate under the CATSI Act.

Governance training

The Registrar offers a pathway of corporate governance courses to diploma level to directors and members of Aboriginal and Torres Strait Islander corporations. The principal training objectives are to:

- improve the skills of potential and existing directors through their individual accreditation against key competencies
- improve governance and management within developing sectors (relevantly, PBCs)
- facilitate the delivery of corporate governance training by mainstream training providers, with ORIC providing limited, highly targeted and tailored special training in conjunction with other related initiatives.

In 2017/18, ORIC delivered corporate governance training to 1,083 participants from 260 corporations. There were 64 workshops in total (one diploma; one Certificate IV; six Introduction to Corporate Governance workshops; seven two-day Governance workshops; two Building Strong Stores workshops; and 72 corporation-specific workshops). Ninety-seven per cent of participants reported they increased their understanding of corporate governance.

Examinations

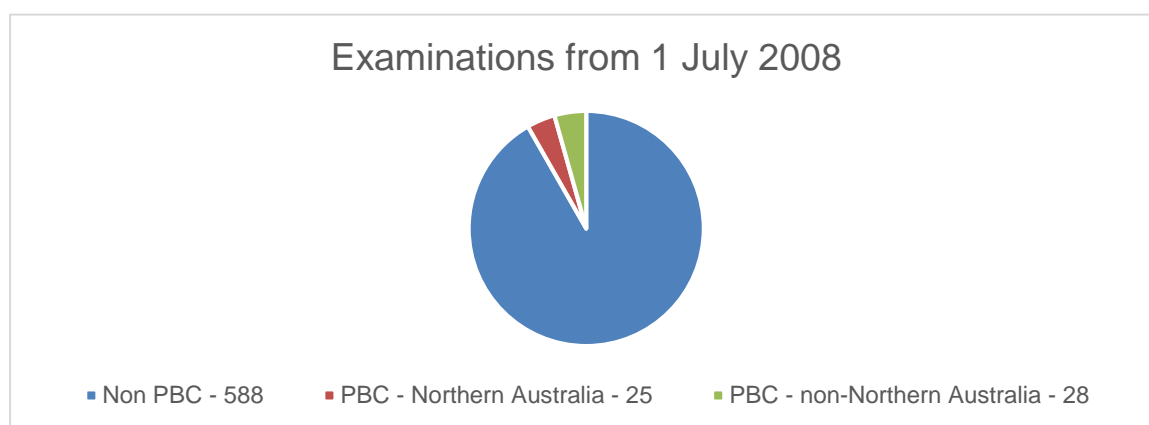
The Registrar may cause examiners to examine the books of an Aboriginal and Torres Strait Islander corporation or a related body corporate, and to report to the Registrar on the results of the examination. Examinations may identify when corporations are running well, but if a corporation is shown to be experiencing financial or governance difficulties, the Registrar may use an examination as a basis to identify and provide assistance or to exercise regulatory powers.

The Registrar conducts an annual rolling programme of examinations. The programme examines large, essential or publicly funded corporations. The Registrar also conducts examinations when matters come to his attention and he is satisfied that an examination of the books of the corporation should be undertaken. Matters may come to the Registrar's attention by way of information, complaints or allegations about a corporation. The Registrar also conducts a risk assessment of corporate reporting of Aboriginal and Torres Strait Islander

corporations. The outcome of an assessment may satisfy the Registrar that an examination of the books of a corporation should be undertaken.

Responses the Registrar may make to an examination report include:

- issuing a management letter to the corporation if its standard of corporate governance and financial management is considered good
- issuing a compliance notice to the corporation requiring the corporation to take action to ensure it is complying with the CATSI Act or its rule book, or to remedy irregularities in the affairs of the corporation
- issuing a show cause notice to the corporation asking it to explain why it should not be placed under special administration
- arranging governance and other training for the corporation and its directors
- arranging the facilitation of mediation or dispute resolution
- undertaking further inquiries.



ORIC started the 2017/18 financial year with 19 examinations in progress and has started a further 69. As at 30 June, 53 examinations had been finalised. Of these, 25 corporations were operating well and were issued a management letter; 23 were required to improve standards outlined in a compliance notice; and five had serious issues and were asked to show cause why a special administrator should not be appointed.

Special administrations

The CATSI Act allows the Registrar to place an Aboriginal and Torres Strait Islander corporation under special administration. Special administration is a form of external administration unique to the CATSI Act. It is a special measure that addresses the unique roles and circumstances of Aboriginal and Torres Strait Islander corporations. It contributes towards the CATSI Act as a special measure to advance and protect Aboriginal and Torres Strait Islander people and their respective cultures. Special administration enables the Registrar to provide early proactive regulatory assistance when a corporation experiences financial or governance difficulties. It is quite different to a receivership or voluntary administration under the *Corporations Act 2001*, which are usually driven by the interests of creditors.

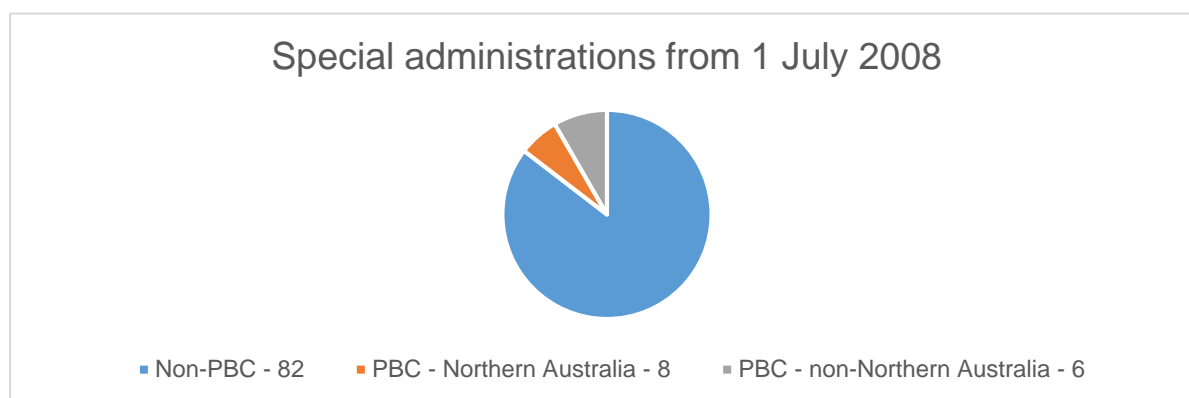
The grounds for placing a corporation under special administration are broad. They are not restricted to insolvency or the inability to pay a debt. They allow early intervention once certain risk factors are present and may help avoid later corporate collapse. For example, a common risk factor is a dispute between members and the board that has escalated to the point of

interfering with the operations of the corporation. This would be one reason for placing a corporation under special administration and is an important special measure. However, placing a corporation under special administration more frequently arises after an examination of the corporation's books.

The aim of the Registrar in placing a corporation under special administration is usually to achieve one or more of the following outcomes:

- To restore good operational order to the corporation – usually when the corporation is not complying with the provision of the CATSI Act or its rule book, is experiencing financial difficulties or a dispute within the corporation.
- To restructure the corporation – for example, where the directors or members ask the Registrar to intervene to review the governance structures of the corporation or to restructure its business.

Once the outcomes of the special administration have been achieved, control of the corporation is returned to its members.



Six special administrations were in progress at the outset of the 2017/18 financial year and six were started during that year. Eight were completed. All eight were hand back to members' control—one of these by order of the Court. The average duration of special administrations was 5.8 months.

Amendments to the CATSI Act

Modern corporations make use of a variety of business structures, including subsidiaries, to manage economic opportunity and risk. Presently, registering an Aboriginal and Torres Strait Islander corporation as a subsidiary is difficult because of the statutory requirement that the majority of the directors of the corporation must be members of the corporation. This requirement prevents wholly corporate memberships. Consequently, it is complex for an Aboriginal and Torres Strait Islander corporation to be a wholly-owned subsidiary of another Aboriginal and Torres Strait Islander corporation. Therefore, many Aboriginal and Torres Strait Islander corporations register companies under the *Corporations Act 2001* to create corporate groups, and in so doing, become subject to two separate corporate regulatory frameworks.

The Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018, introduced into the Senate on 5 December 2018, proposes amendments to the CATSI Act allowing for wholly corporate membership by relaxing the requirement for directors to be members of Aboriginal and Torres Strait Islander corporations that are subsidiaries of other Aboriginal and Torres Strait Islander corporations.

The proposed amendments will enable Aboriginal and Torres Strait Islander subsidiary corporations to access the special supports provided to corporations registered under the CATSI Act and will also enable the corporations within the group to be subject to the one regulatory scheme.

4.7 Finalising land claims under the ALRA

There have been 249 traditional Aboriginal land claims submitted since the ALRA came into operation and no new land claims have been lodged since 1997, when a related 'sunset' provision in the Act came into effect. There are 41 land claims remaining to be finalised. 22 of these land claims are limited to intertidal zones and/or the beds and banks of rivers, all in the NLC region.

Resolving land claims under the ALRA provides certainty to Aboriginal land owners and other sectors that use land and sea. The Commonwealth has committed to resolving outstanding land claims in the NT as soon as possible and, for the first time, has provided funding to a range of impacted stakeholders to make this happen.

The Government has provided \$7.5 million to the Northern Land Council (NLC) and an additional \$1 million to the Aboriginal Land Commissioner to help resolve outstanding land claims. Further, the NLC receives approximately \$900,000 annually through the Land Council budgets process under the ALRA for resourcing to manage land claims.

The Government continues to ensure land is scheduled under the ALRA to enable more grants of Aboriginal land, including legislative amendments passed on 19 February 2019 for the scheduling of half of Kakadu National Park. This is a significant milestone for traditional owners involved in four long-running land claims.

When relevant parties are ready (the Commonwealth, NT Government, NLC and traditional owners), the Minister can recommend to the Governor-General that the land be granted. This would result in the Governor-General signing a deed of grant, and a land handover ceremony occurring on country.

ALRA Land Claims Detriment Review

At the request of the Minister for Indigenous Affairs, the Commissioner has completed a review of detriment issues in respect of 16 land claims that have been previously reported on and recommended for grant, but not yet finalised under the ALRA. These land claims were the subject of land claim inquiries and reports at various times between 1981 and 2004.

The aim of the Commissioner's review was to provide current advice on relevant detriment issues to assist the Minister in deciding whether to proceed with the recommended grants. All land claim reports provided by a Commissioner are required to include comments on potential detriment to other parties if a related grant of Aboriginal land is made. The Commissioner's review report was provided to the Minister on 24 December 2018 and has been tabled in Parliament and can be viewed on the Department's website at <https://www.pmc.gov.au/resource-centre/indigenous-affairs/report-review-detriment-aboriginal-land-claims-recommended-grant-not-yet-finalised>.

The Minister has invited comment on the report from all stakeholders that provided submissions and gave evidence during the review process.

4.8 Economic Development through township leasing on ALRA Land

Under the Northern Australia White Paper, the Government provided \$17 million over three years to 2017-18 to support improved land administration and township leasing in the NT.

A township lease is a lease on Aboriginal freehold land in the NT under section 19A of the ALRA. Township leases provide security of tenure for private sector investment and create land administration arrangements which give confidence to businesses and financial institutions while maintaining traditional ownership of the land.

A township lease covers the entire township area, including all the buildings and houses as well as areas for future development and may include other township infrastructure. The Government is working with traditional owners to develop leasing arrangements that work for them.

There are five township leases over eight communities in the NT held by the EDTL: Wurrumiyanga, Milikapiti and Wurankuwu and Pirlangimpi in Tiwi; Angurugu, Umbakumba and Milyakburra on Groote; and a township sublease over Mutitjulu. The Executive Director manages land on behalf of the traditional owners by issuing subleases over individual Lots in the Township and by collecting rent. The Executive Director makes decisions about land use with traditional owners through a Consultative Forum.

Community entity township leasing

In 2015 the Government agreed to requests from local traditional owners of the Gunyangara community, the Gumatj people, to negotiate a township lease that gave traditional owners a greater say in the management of their land.

The community entity model of township leasing enables an approved entity in the form of a local Aboriginal corporation to hold and administer a township lease, and provides another option for traditional owners to leverage their land assets for economic and community benefit. Community entity township leasing has been developed at the request of traditional owners to improve localised decision making over their lands. Under a community entity township lease, traditional owners and community members are responsible for all land based decision making on their traditional lands.

The Gunyangara community entity township lease commenced on 1 December 2017 and is the first township lease to be held by a community entity from the outset. The lease is held by the Ngarrariyal Aboriginal Corporation (NAC) and the EDTL has no obligations under the lease.

Gunyangara traditional owners have already seen the benefits brought about by township leasing. This includes formalising subleasing arrangements with all land users, a nearly threefold increase in rental revenue, and the development of elder housing and a youth centre supported by Narrariyal's township lease advance payment of rent (see Gunyangara case study in section 6.3 below).

TOR 5: The principle of free, prior and informed consent

Land rights regimes provide procedural rights to traditional owners when there are potential impacts on their rights from acts by government.

5.1 Procedural rights under the NTA

The NTA contains a number of procedural safeguards and rights to ensure native title claimants and holders are notified, consulted, and, in some circumstances, have the opportunity to negotiate or enter into agreements with project proponents, before any activities (including any public works or development) occur over native title land.

The primary source of these processes is the ‘future acts’ regime under Part 2, Division 3 of the NTA, which sets out requirements which must be met before development and other activities on native title land can be validly done. Depending on the kind of activity being proposed, this can include a requirement to notify, consult or negotiate with native title claimants and holders. In most instances, the activities will trigger notification rights, but more substantive procedural rights are available in some cases such as mining and exploration, tenure upgrades and compulsory acquisition.

In the case of mining and exploration, the relevant native title holders or claimants have the right to negotiate with the proponent, including negotiating for compensation for the impairment of their native title rights. Agreements concluded in this way are referred to as section 31 agreements.

Alternatively, the NTA allows traditional owners to enter into an ILUA. ILUAs are flexible agreements which can provide native title groups with a range of economic, social and cultural benefits, including direct financial contributions, employment and training opportunities; and can apply to areas where native title has, or has not yet been determined. For ILUAs to be legally binding, they must be registered on the Register of Indigenous Land Use Agreements by the Native Title Registrar. ILUAs are required for most tenure upgrades that impair or extinguish native title rights (see also section 6.1 below).

NTRB/SPs and PBCs are required to act on the consent of the native title holding group when making decisions relating to native title.

5.2 Consent provisions under ALRA

Traditional owners of land granted under the ALRA hold decision-making powers over access to and use of that land. For an activity to go ahead, the relevant land council must be satisfied that the traditional owners of an area of land understand the nature and purpose of a proposed action and, as a group, consent to it. A land council must also be satisfied that any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view. This includes resource exploration and extraction activities where traditional owners have a right of veto.

TOR 6: Opportunities that are being accessed and that can be derived from native title and statutory titles such as the Aboriginal Land Rights (Northern Territory) Act

Generating wealth through unlocking the commercial value of land provides a critical pathway for Indigenous people to address disadvantage.

6.1 Opportunities derived from native title

Positive trends in PBC incomes indicate that progress is being made in the ability of traditional owners to take advantage of economic opportunities.¹³

PBCs are able to leverage native title to access economic opportunities for traditional owners in a range of ways:

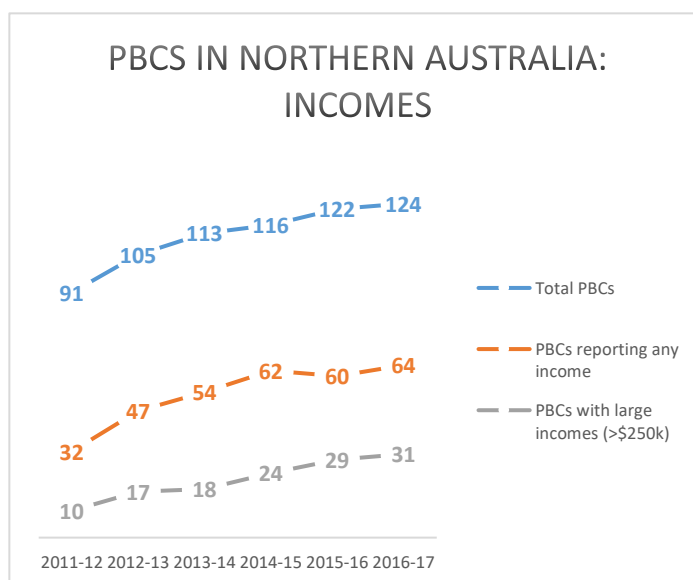
Native title agreement making

The NTA contains well established mechanisms for agreement making with respect to economic development proposals. Traditional owners can receive benefits from ILUAs and section 31 Agreements as compensation for development activity on their land. Native title agreements can also provide Indigenous communities with a range of economic, social and cultural benefits, including direct financial contributions, employment and training opportunities, and support for heritage protection and management.

As of 25 January 2019, there were 1274 ILUAs registered on the Register of Indigenous Land Use Agreements.¹⁴ There are also several thousand section 31 Agreements nationwide. Accessing the detail of the terms of these agreements is difficult as in many instances they are commercial in confidence. It is also important to note that ILUAs are for a variety of purposes, and accordingly not all will have a commercial value. That said, in October 2015, in a KPMG authored report titled 'Valuing the native title market' for the Financial Services Council, it is estimated that the value of all ILUAs will grow from \$350 million in 2014 to \$520 million by 2020.

Entrepreneurship

Native title holders can engage in ventures on native title land. Due to the use of the beneficial provisions of the NTA, there are many instances where native title holders also own mainstream tenure. This includes businesses such as horticulture. Where mainstream tenure is not available, exclusive native title holders also control access to the land, and have used this right to leverage benefits for their communities. This approach has been used in northern Western Australia communities to ensure tourism operators pay a fee for access.



¹³Data provided by ORIC

¹⁴ Source: NNTT

There is also an opportunity to leverage native title to participate in projects such as heritage and land management. Some economic opportunities for native title holders arise from refraining from activity, or changing the timing or nature of traditional activities – for example, the emerging carbon economy can enable native title holders to generate tradeable carbon credits, and biodiversity credits may also be available under other programs.

The government, through PM&C, has provided funding for the CSIRO, working in partnership with the NNTC and local groups, to conduct case studies on investment opportunities on Indigenous land. The goal is to learn more about building Indigenous capabilities to attract investment to emerging on-country.

6.2 Opportunities under the ALRA

Agreement-making

In addition to monies provided through the Aboriginal Benefit Account (see Attachment D), the ALRA also provides for mining-related payments privately negotiated between mining companies, traditional owners and the relevant Land Council. Some traditional Aboriginal owners have leveraged their land interests under the ALRA to undertake exploration and mining on their traditional estates.

Land access and use agreements under ALRA include provisions for the payment of rent or licence fees at market value, to be paid for the benefit of the relevant traditional Aboriginal owner group(s). These agreements commonly include provisions designed to promote local Indigenous training, employment and enterprise opportunities, and for the protection of sacred sites. As with mining and exploration, traditional Aboriginal owners enjoy the right to refuse consent to any development proposal relating to land held under the ALRA. Many groups have chosen to use income received under such agreements to finance initiatives designed to promote community wellbeing and support service delivery to the broader affected community.

Bankable interests in land

As outlined above, leasing of Aboriginal land is provided for under ALRA and is now commonplace, providing certainty for traditional owners and land users. PM&C maintains a role in negotiating township leases. Township leases can support bankable interests in land and positive economic development outcomes by providing long-term tradeable tenure. Township leases are either held for the Commonwealth by the EDTL, or by a 'community entity' which is an Aboriginal corporation established by traditional owners (see Gunyangara case study in section 6.3 below).

In relation to township leases held by the EDTL, there have been 529 commercial subleases in Groote Eylandt, Tiwi Islands and Mutijulu. The majority of the commercial subleases are held by the Northern Territory Government and Regional Council. A breakdown of these leases is at Attachment F.

The Committee may wish to consult with the Northern Land Council, the Central Land Council, Tiwi Land Council and Anindilyakwa Land Council for information on ALRA 'Section 19' leases in their regions.

Land Councils have reported an increase in the number of enterprise, Government and community activities on Aboriginal land by agreement under the ALRA in recent years. Agreements allow for a wide range of Aboriginal land access and use arrangements including third party tourism, pastoralism and fisheries operations. There are current

examples of Aboriginal corporations and / or joint ventures entering into such land use proposals, creating potential for direct economic benefits from related business activities.

There are significant prospects for further economic opportunities in the NLC region in relation to the operation of commercial fisheries in tidal waters overlying Aboriginal land. To date traditional owners (through the NLC) have waived the requirement for section 19 agreements and access permits to undertake commercial fishing activities in tidal Aboriginal waters, however the NLC has more recently signalled a change to this approach.

Challenges associated with the time and cost of consulting with traditional owners and negotiating section 19 agreements may be considered in light of the strong entitlements of traditional owners under the ALRA and the remote context of those consultations, among other factors.

Delegation of Land Council functions

Under the ALRA, a land council may delegate to an Aboriginal and Torres Strait Islander corporation certain functions or powers including leasing and mining negotiations and agreements. The application is made to the land council and decided by the land council. There are requirements that the corporation be representative of the traditional owners or community in the area and to meet other governance and capacity requirements.

The traditional Aboriginal owners of Banyala wish to seek a delegation to manage their land directly, to enable localised decision-making, more efficient land management and encourage home ownership and economic development on their lands.

The traditional owners and community members of Banyala as well as the nearby communities have come together to establish the Banyala Nimbarrki Land Authority (BNLA) and develop the required governance structures for the corporation to comply with the ALRA. The project managers and traditional owners are working in partnership with the NLC on the proposal. Parties have agreed for a decision on the delegation application to be extended to 28 June 2019.

The Australian Government has provided \$1,075,000 to 2018-19 Banyala traditional owners to support their delegation project.

6.3 Case Studies

Jabalbina Yalanji Aboriginal Corporation RNTBC

In 2007, the Federal Court determined native title over approximately 144,000 hectares of Eastern Kuku Yalanji land in Far North Queensland. The Jabalbina Yalanji Aboriginal Corporation was registered as the PBC for the area in that same year and now holds and manages the native title on behalf of the native title holders, the Eastern Kuku Yalanji people.

The Commonwealth is investing at the grassroots assisting PBCs to realise their cultural, economic and social aspirations. In 2017-18, Jabalbina received \$258,938 in PBC Capacity Building funding under the White Paper on Developing Northern Australia to pursue economic and employment opportunities for Eastern Kuku Yalanji people on their native title land. This funding has supported the organisation in establishing camp grounds and cultural trails, tours and other tourism ventures. In carrying out these projects, Jabalbina has engaged with key stakeholders including native title holders, neighbouring PBCs, Indigenous businesses, local councils and state government. Tourism and business contracts have

created new economic opportunities in the region which have generated almost 100 per cent Indigenous employment.

Gunyangara township lease

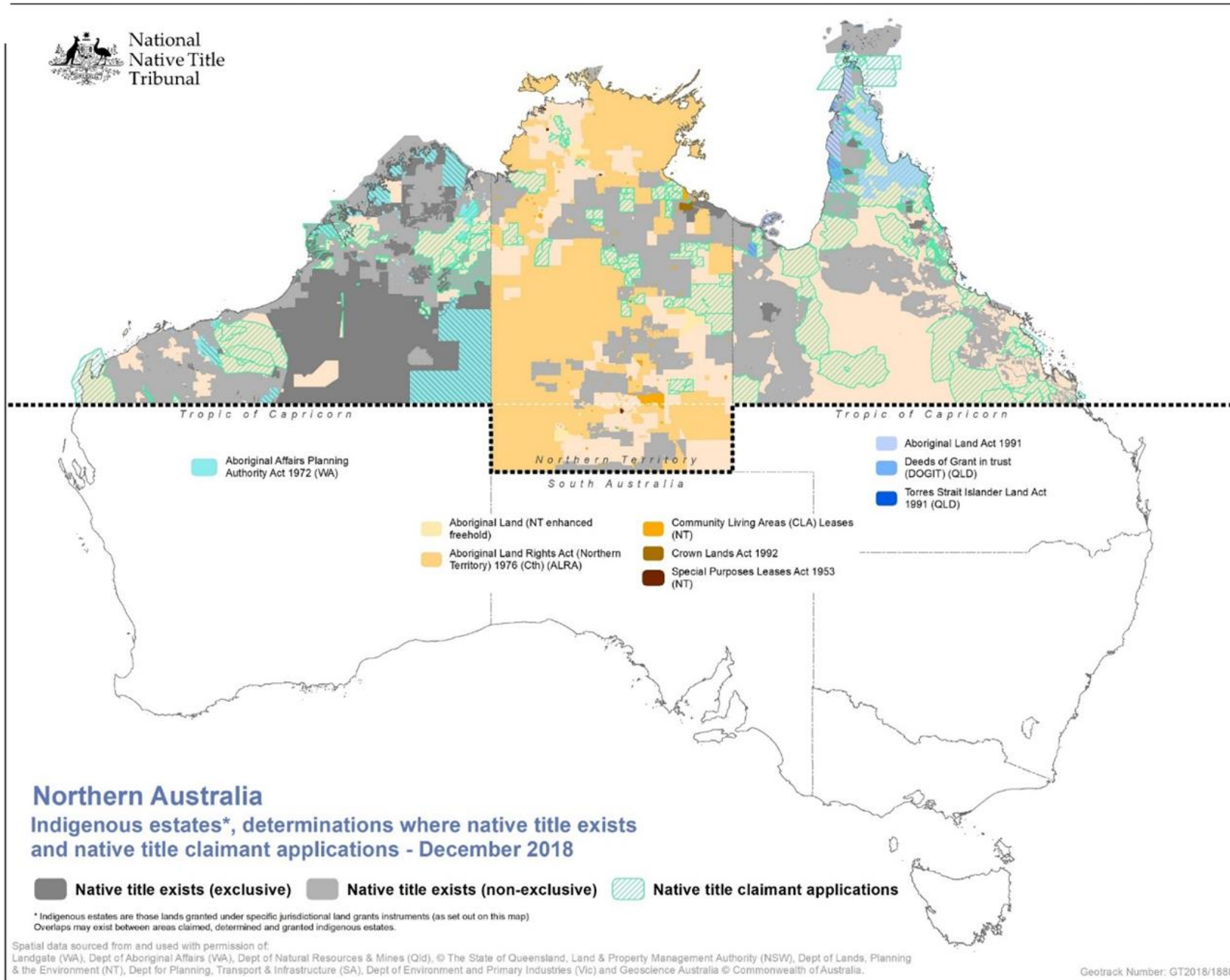
The Gunyangara township lease, executed in 2017, is the first township lease to be held by a local Aboriginal corporation from the outset. Driven by the community, the 99 year lease provides control over leasing and land use decisions to the Narrariyal Aboriginal Corporation, whose board of directors is comprised of Gumatj traditional owners of Gunyangara. In the first 12 months of operation, the traditional owners are already seeing the benefits of being able to negotiate directly with people wishing to use their land, and move forward with projects and developments in their own timeframes and on their own terms.

The township lease provides long-term, tradeable tenure to support the ongoing development of existing businesses run by the Gumatj clan through its business arm, Gumatj Corporation Limited, as well as the creation of new business and rental returns which will be reinvested in the community. There are 13 subleases under the head lease.

The lease supported Commonwealth investment in housing, with \$5.3 million provided to build employee houses in Gunyangara. This will provide Gumatj Corporation with private housing to reward long-term employees. The housing will be built by Gumatj Corporation, using materials from their saw mill and concrete batching plant.

Gumatj Corporation runs a range of businesses in Gunyangara and the Gove Peninsula area to support local employment, including a saw mill and timber works, concrete batching plant, construction joint venture, a cattle farm and butcher, shop, café and nursery and the first Indigenous-owned and operated bauxite mine in the Northern Territory.

Attachment A



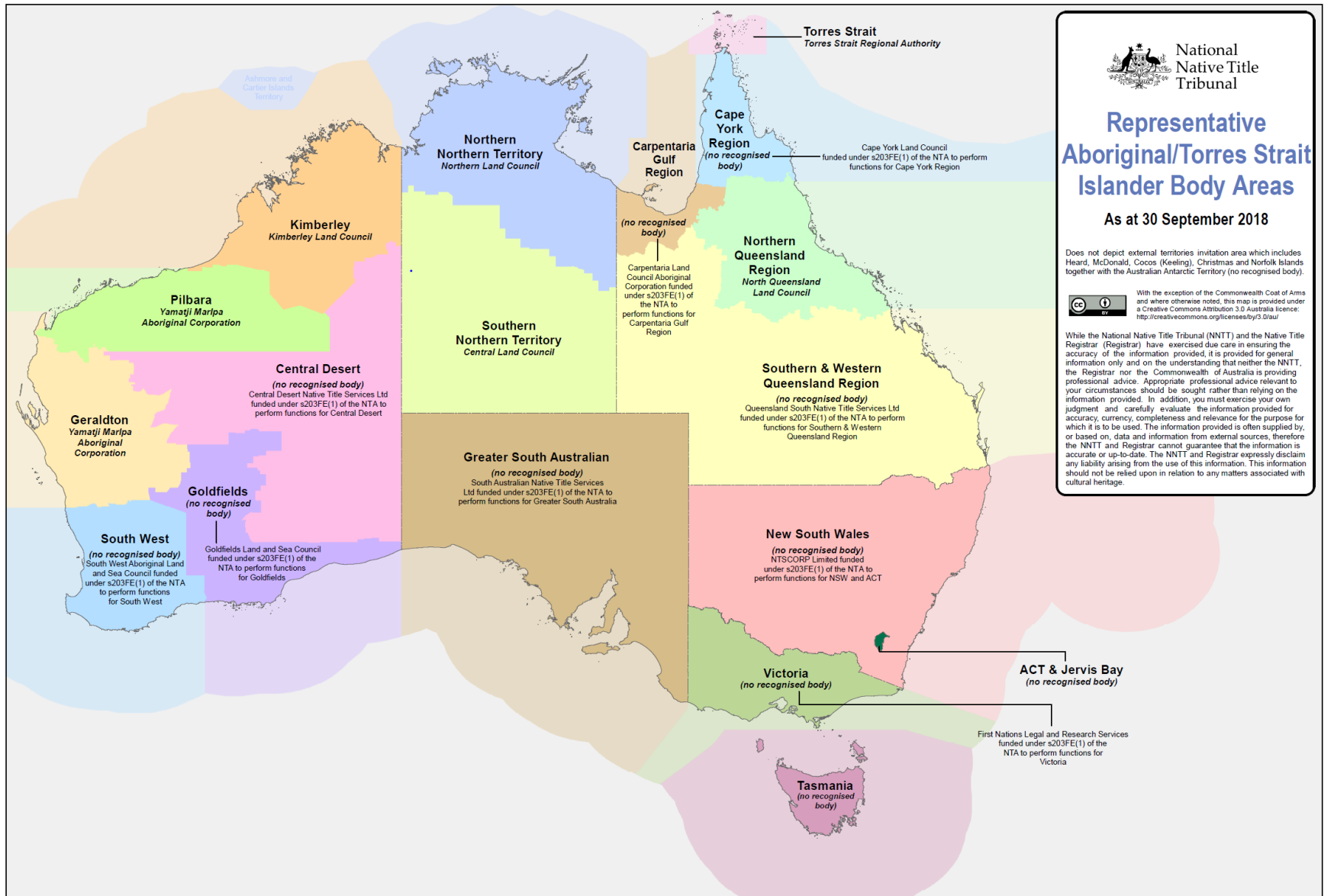
Attachment B

Principal statutory Indigenous land rights schemes and native title legislation in Australia

Statute	Aim	Landowner	Form of title	Private sale	Leasing or subleasing
National					
<i>Native Title Act 1993 (Cth)</i>	Provides for the recognition & protection of native title, and establishes a process for undertaking future activity impacting native title.	Common law holders as determined by the Federal Court of Australia and held by a registered native title body corporate.	Recognition of the communal, group / individual rights & interests.	No.	Yes.
Northern Territory					
<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>	Provides for the grant of land to aboriginal land trusts in the Northern Territory.	Aboriginal land trusts - consisting of Aboriginal people resident in the land council region.	Inalienable freehold title.	No.	Yes of leasehold interest.
<i>Pastoral Land Act 1992</i>	Provides for the grant of land to Aboriginal communities (living area) on pastoral lease.	Aboriginal association.	Restricted freehold.	No.	Yes, with restrictions.
Queensland					
<i>Land Act 1994</i>	Provides for freehold to be provided on trust to Indigenous communities (deed of grant in trust)	Trustees	Inalienable freehold	No but see below.	Yes
<i>Aboriginal and Torres Strait Islander Land (Providing Freehold) Amendment Act 2014</i>	This Act amended the ALA and TSILA to provide the option of converting town areas of Aboriginal and Torres Strait Islander communities to ordinary freehold land.	Specified Aboriginal or Torres Strait Islander people.	Freehold.	Yes, subject to conditions.	Yes.
<i>Aboriginal Land Act 1991 (ALA)</i> <i>Torres Strait Islander Act 1991 (TSILA)</i>	Provides for the grant of land on mainland Queensland and the Torres Strait for the benefit of a broader Indigenous group.	ALA – Trustees or Aboriginal people or RNTBCs (native title corporation). TSILA – Trustees, Torres Strait Islander people or RNTBCs (native title corporation).	Inalienable freehold or leasehold.	No.	Yes.
Western Australia					
<i>Aboriginal Affairs Planning Authority Act 1972</i>	Designates reserve land for the 'use and benefit' of Aboriginal inhabitants.	Aboriginal Lands Trust.	Crown reserve.	No.	Yes, subject to conditions.
<i>Land Administration Act 1997</i>	Provides for leases to Aboriginal communities and Aboriginal corporations for pastoral activity and the advancement of Aboriginal persons.	Aboriginal person or approved Aboriginal corporation.	Conditional freehold or lease and Crown reserves.	No.	Yes, subject to conditions.

Statute	Aim	Landowner	Form of title	Private sale	Leasing or subleasing
New South Wales					
<i>Aboriginal Land Rights Act 1983</i>	Allows Aboriginal Land Councils to claim certain Crown land.	Local Aboriginal Land Councils.	Alienable freehold, including certain limited mineral rights.	Yes, subject to conditions.	Yes, subject to conditions.
Victoria					
<i>Traditional Owner Settlement Act 2010</i>	Provides for out-of-court settlement packages, including recognition of certain rights in Crown land. Traditional owners must agree to withdraw any native title claim and not make any future claims.	Aboriginal Lands Trust.	Can include freehold title for cultural and economic purposes, or 'Aboriginal title' jointly managed with the state.	No.	No.
South Australia					
<i>Aboriginal Lands Trust Act 1996 and 2013</i>	Provides for the establishment of the Aboriginal Lands Trust to hold titles of existing Aboriginal reserves.	Aboriginal Lands Trust.	Alienable freehold title.	Yes, subject to conditions.	Yes, subject to conditions.
<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i>	Provides for the vesting of title to certain lands.	Body corporate.	Inalienable freehold.	No.	Yes.
<i>Maralinga Tjarutja Land Rights Act 1984</i>	Provides for vesting of title to certain lands.	Body corporate.	Inalienable freehold.	No.	Yes.
Tasmania					
<i>Aboriginal Lands Act 1995</i>	Provides for the granting of certain parcels of land of historic or cultural significance.	Aboriginal Land Council of Tasmania in trust.	Alienable freehold and Crown leasehold.	No.	Yes, subject to conditions.
Commonwealth					
<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)</i>	Provides for the application of grants of Territory land.	Wreck Bay Aboriginal Community Council.	Aboriginal land.	No.	Yes, subject to conditions.

Attachment C



Attachment D

PM&C funding for native title bodies

<i>Funding stream</i>	<i>Description</i>	<i>Funding amount</i>
Native title and land rights allocation (under the Indigenous Advancement Strategy)		
NTRB/SP operational funding	PM&C provides funding for NTRB/SPs to perform their core functions in line with Part 11 of the NTA. This funding is provided under the Native Title and Land Rights allocation.	\$74 million for 2018-19 for 14 NTRB/SPs ¹⁵
PBC basic support funding	Provided through the NTRB/SPs. NTRB/SPs are required to enter into PBC Development Plans with PBCs to build their capacity toward self-sustainability (generally over a 4-year period).	\$6.8 million for 103 PBCs in 2018-19 (as at 22 January 2019). \$66,000 per PBC on average
Aboriginal Benefit Account (ABA)		
The ABA is a statutory fund established under s62 of ALRA. The Commonwealth provides money equivalent to the sum of royalties paid by mining companies for activity on ALRA land. The purposes of the funding are: <ul style="list-style-type: none"> • Administration of the four Northern Territory Land Councils • 30% of royalty equivalents go to communities impacted by mining • Payments for the benefit of Aboriginal people living in the NT • Payments for the acquisition and administration of leases • Administration of the ABA 		\$338.5 million was provided to the ABA by the Commonwealth in 2017-18 Total equity in the ABA at 30 June 2018 was \$814.2 million
ABA funding provided for administration of entities established under ALRA		
Northern Land Council		\$25.169 million in 2018-19.
Central Land Council		\$18.705 million in 2018-19.
Tiwi Land Council		\$3.826 million in 2018-19.
Anindilyakwa Land Council		\$4.113 million in 2018-19.
Executive Director of Township Leasing		\$10.1 million from 2016-17 to 2018-19.
Narrariyal Aboriginal Corporation		\$0.4 million in 2018-19.

¹⁵ The Torres Strait Regional Authority meets its native title costs from its overall budget.

Northern Australia White Paper funding, land-related measures		
PBC Capacity Building	<p>Funding is available to support the capacity of PBCs to take advantage of economic opportunities, build long term organisational capacity and support effective native title agreement making.</p> <p>Funding can be given directly to PBCs, or to a service provider (such as an NTRB/SP or the NNTC).</p>	As at 22 January 2019, the Minister has approved funding totalling \$10.6 million since 2016.
Land Tenure Reform Pilots	Funding is available for proposals which deliver practical outcomes for Indigenous land holders and their communities. The proposals will support a process of learning that provides lessons that can be applied to other communities across the north.	\$8.6 million is allocated over four years.
Township Leasing	Funding has supported township lease negotiations in the NT, resulting in three township leases being executed in 2017 in the communities of Gunyangara, Pirlangimpi and Mutijulu.	\$17 million for land administration and township leasing in the NT over three years.

Attachment E

Pathway to development – Commonwealth engagement with PBCs				
	<i>Building of governance capacity</i>			<i>Capacity to take advantage of economic opportunities</i>
	Incubation	Transition	Self-sufficiency ²	Entrepreneurship
Status of PBC organisational capacity ¹	Reliant on external support Native title statutory and corporate obligations are undertaken by NTRB-SP/other ('incubator') with the agreement, and on instructions, of the PBC.	Developing capacity Agreed obligations transitioned from incubator to PBC.	Autonomous Attain operational and financial autonomy. Seek services of advisors as needed.	Growing Operational and financial independence. Seek services of advisors as needed. Proactive engagement with economic opportunities.
Focus of this stage	<ul style="list-style-type: none"> • Governance capacity building. • Identify aspirations and opportunities. • Planning. 	<ul style="list-style-type: none"> • Continued focus on governance capacity building. • New focus on operational and financial independence. • Commence building partnerships with the implementation of development projects – 'learning by doing' projects. 	<ul style="list-style-type: none"> • Consolidation of activities and governance capacity. • Planning for next stage of growth and development. • Strengthening partnerships. 	<ul style="list-style-type: none"> • Initiate commercial activity. • Generate commercial (and government) finance. • Deliver socio-economic dividend to community.
Commonwealth support measures	Northern Australia White Paper: <i>PBC capacity building measure:</i> <ul style="list-style-type: none"> • Training and development. • Access to information. • Regional PBC forums. ORIC: <ul style="list-style-type: none"> • Governance training. • PBC helpline. Indigenous Advancement Strategy <ul style="list-style-type: none"> • Community-led applications. 	Northern Australia White Paper: <ul style="list-style-type: none"> • PBC capacity building - engage potential investors/proponents. • Land tenure reform pilots. • NAIF, City Deals and northern Australia & beef roads packages. Indigenous Advancement Strategy <ul style="list-style-type: none"> • Community-led applications. 	Indigenous Entrepreneurs Package: <ul style="list-style-type: none"> • Indigenous procurement policy. • Indigenous business sector strategy. • Indigenous Business Australia (Business Development and Assistance Programme). • Indigenous Land Corporation. 	Austrade. Indigenous Business Australia. Indigenous Land Corporation.

Attachment F

Source – Office of Township Leasing, 27 February 2019

Township Leasing - Commercial subleases

Township	NT Gov	Regional Council	NGO	Land Council	Business	Local Indigenous business	Traditional Owner Organisation/ business	Home Ownership	Director National Parks	Cwth Gov
<i>Groote Eylandt</i>										
Angurugu	11	17	4	10	2	9	23	1	-	1
Umbakumba	16	13	1	4	1	3	13	-	-	2
Milyakburra	14	5	-	1	1	-	6	-	-	-
<i>Tiwi Islands</i>									-	
Wurrumiyanga	28	22	30	-	7	27	13	16	-	1
Pirlangimbi	13	26	2	-	2	10	2	-	-	1
Milikapiti	18	16	2	-	-	20	2	1	-	1
Wurankuwu	5	1	2	-	1	1	2	-	-	-
Mutitjulu	2	-	9	5	4	21	11	-	47	6
Total	107	100	50	20	18	91	72	18	47	6

Grand total = 529 subleases

