

# **Review of Performance as a Native Title Representative Body: Yamatji Marlpa Aboriginal Corporation**

March 2021

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

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# 1 About the Review

The Department of the Prime Minister and Cabinet<sup>1</sup> commissioned this Review as part of a series of reviews to assess the efficiency and effectiveness of 14 Native Title Representative Bodies and Service Providers (NTRB-SPs) in carrying out their functions under the Native Title Act 1993 (Cth) (herein NTA). The complete Terms of Reference (TOR) provided for the Review are included in Appendix A. The 14 organisations reviewed are listed in Appendix B.

**Yamatji Marlpa Aboriginal Corporation (YMAC) was reviewed from September 2018 to April 2019 in relation to the previous three-year period (July 2015 to June 2018). This document contains a summary of the Review's overarching findings and recommendations for YMAC. It also includes YMAC's responses to the recommendations made by the Review.**

**Findings and recommendations represent an assessment of performance at the time of the Review and have not been subsequently amended or updated.**

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

Nous has used a consistent methodology for all the Reviews to support a comparative and transparent assessment of YMAC and the other NTRB-SPs. The methodology used a mixed method approach including quantitative data on the progress of claims, future acts and Indigenous Land Use Agreements (ILUAs), performance against milestones, budgetary performance, staffing, and broader social and geographical factors that impact performance. The quantitative analytics was complemented by interviews with clients, potential clients, staff, YMAC's Board Directors, the Federal Court, the National Native Title Tribunal (NNTT) and the Western Australian (WA) Government. A list of stakeholders consulted is included in Appendix C.

YMAC was given the opportunity to review the full report in 2019 and has also provided written responses on actions they are taking in response to recommendations made by the Review which are included in this summary document. A complete description of the methodology is included in Appendix D.

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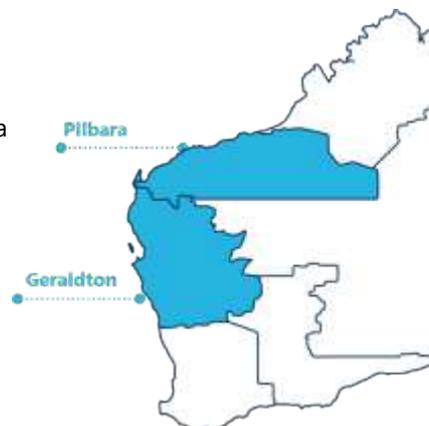
<sup>1</sup> Note in July 2019 the National Indigenous Australians Agency (NIAA) was established to lead Indigenous Affairs Policy for the Australian Government. NIAA has commissioned subsequent NTRB-SP Reviews.

## 2 Profile of YMAC at a glance

**YMAC is based in Perth, Geraldton and Port Hedland and provides services across the Pilbara, Murchison and Gascoyne regions of Western Australia**

YMAC is a Native Title Representative Body which services the combined Pilbara and Geraldton Representative Aboriginal/Torres Strait Islander Body (RATSIB) area in WA. The organisation was incorporated in December 1994 under the name Yamatji Barna Baba Maaja Aboriginal Corporation, but the name was changed in 2008.

YMAC serviced two regions combined into one RATSIB area; the Pilbara representative area and the Geraldton representative area. The cumulative land area of these regions (pictured right) covers approximately 713,369 square kilometres, accounting for approximately 28% of Western Australia.<sup>2</sup>



At the time of the Review (2018 -19), YMAC had a head office in Perth and regional offices in Port Hedland and Geraldton. YMAC

has advised that an office was established in Broome in 2018. Both Geraldton and Port Hedland offices provided in-house legal, anthropological and logistical support staff who support claim work.

At the time of the Review, there had been 40 determinations of native title within the RATSIB area since the passage of the Native Title Act 1993, 17 of which occurred between July 2015 and June 2018. YMAC was the solicitor on record for claimant groups in 11 of the determinations. Since July 2018, an additional eight claims had been determined across the RATSIB area, for which YMAC was the solicitor on record for seven. There were 34 active claims across the Pilbara and Geraldton regions as of 30 June 2018; 22 of which were represented by YMAC. Since 1 July 2018 there had been seven new claims listed as 'active' in the RATSIB area, five of which were represented by YMAC.

Of the 16 Prescribed Bodies Corporate (PBCs) within the RATSIB area, at the time of the Review YMAC were providing NIAA-funded support services to eight, and closely supporting two non-Registered Native Title Bodies Corporate (RNTBC) Aboriginal Corporations. YMAC also provide support to PBCs for corporate development and cultural material management through a mix of fee for service and non-native title grant funding.

While YMAC's base operational funding showed a gradual upward trend over the review period, its overall funding was been more variable, peaking at \$13,573,840 in 2017/18. In addition to NIAA funding, YMAC also sourced a significant amount of activity generated income (AGI) through cost recovery on native title work and providing services which fall outside of its functions under the NTA. YMAC utilised a portion this AGI throughout the review period to supplement its native title activities.

YMAC operates as a single entity but has taken up part ownership (25% share) of Pilbara Solar Pty Ltd.

YMAC's involvement with Pilbara Solar goes back to 2015, when it co-led a feasibility study into the export of solar energy from the Pilbara to Asia with the Pilbara Development Commission. After publishing the findings (which suggested the operation was economically viable), YMAC launched Pilbara Solar in August 2017 and has since applied for funding to enable two of its PBCs to develop solar enterprises.

YMAC is a not-for-profit Aboriginal corporation and has an Aboriginal Board. YMAC's Board comprises 12 Directors and at the time of the Review was led by two Co-Chairpersons. The Board of Directors oversee YMAC's strategic direction, create policies that govern the organisation and is accountable to YMAC's

<sup>2</sup> YMAC Native Title Rep Body Calculations – October 2018.

members. At the time of the Review, YMAC had two Regional Committees. These were formed because of the diversity of Yamatji and Marlpa culture and the need for each area to have its own representation. Their decisions and recommendations are referred to the YMAC Board.

## 3 Findings and recommendations by Terms of Reference

The following sections of the report provide a summary of YMAC's performance against the Terms of Reference for the Review.

### 3.1 TOR 1.1 | Review and assess each organisation's efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with the main focus on recent performance) including: native title claim outcomes achieved for clients.

**YMAC has demonstrated strong performance in achieving positive outcomes for Traditional Owners in the regions, being the solicitor on record for 16 determinations over the review period, with progress on 23 more claims.** In progressing this volume of work YMAC has been highly organised with regional offices delivering strong support to run the significant amount of community engagement required. YMAC has achieved this strong output whilst working in a highly challenging environment.

Feedback from professional and experienced stakeholders has raised some concerns about the quality of the legal work and anthropological research, which YMAC strongly refutes.

YMAC has a well-documented process for managing requests for internal reviews as outlined in its Policy and Procedures Manual that has not been extensively used in the past three years. The Review noted there are opportunities to improve the process including informing clients of the reasons for their decision, including an independent party in the decision-making process, and informing clients who are unhappy with the result of their right to a s203FB review and explaining how to access that process.

#### **YMAC has demonstrated strong performance in delivering native title outcomes for clients**

At the time of the Review, there had been 40 determinations of native title within the RATSIB area since the passage of the NTA.<sup>3</sup> 25 of these occurred since 1 July 2015, with 22 determined by consent and three by litigation. YMAC was listed as the applicant on record for 18 of the 24 claims and all of the 18 were determined by consent. 11 of these claims were determined within the review period, with a further seven determined after 1 July 2018. This represents a strong record of performance and has delivered positive outcomes for clients in the Geraldton and Pilbara regions.

YMAC had a legal team of 19 comprised of the PLO, Deputy PLO, two In-house Counsel, three Senior Lawyers, one Senior Regional Legal Officer and 11 Claim Lawyers.

YMAC's average time from filing to determination for the 18 determined claims it represented since 1 July 2015 was 9 years, 46 weeks. YMAC progressed a varied mix of new and old claims to determination since 1 July 2015, including 10 claims which were more than 10 years old. In this time the longest claim

determined took 20 years, 39 weeks to progress from filing to determination and the shortest took only 22 weeks<sup>4</sup>.

There were 34 active claims across the Pilbara and Geraldton regions as of 30 June 2018; 22 of which were represented by YMAC. Since 1 July 2018 there have been seven new claims listed as 'active' (five of which

<sup>3</sup> NNTT register of native title applications and determinations.

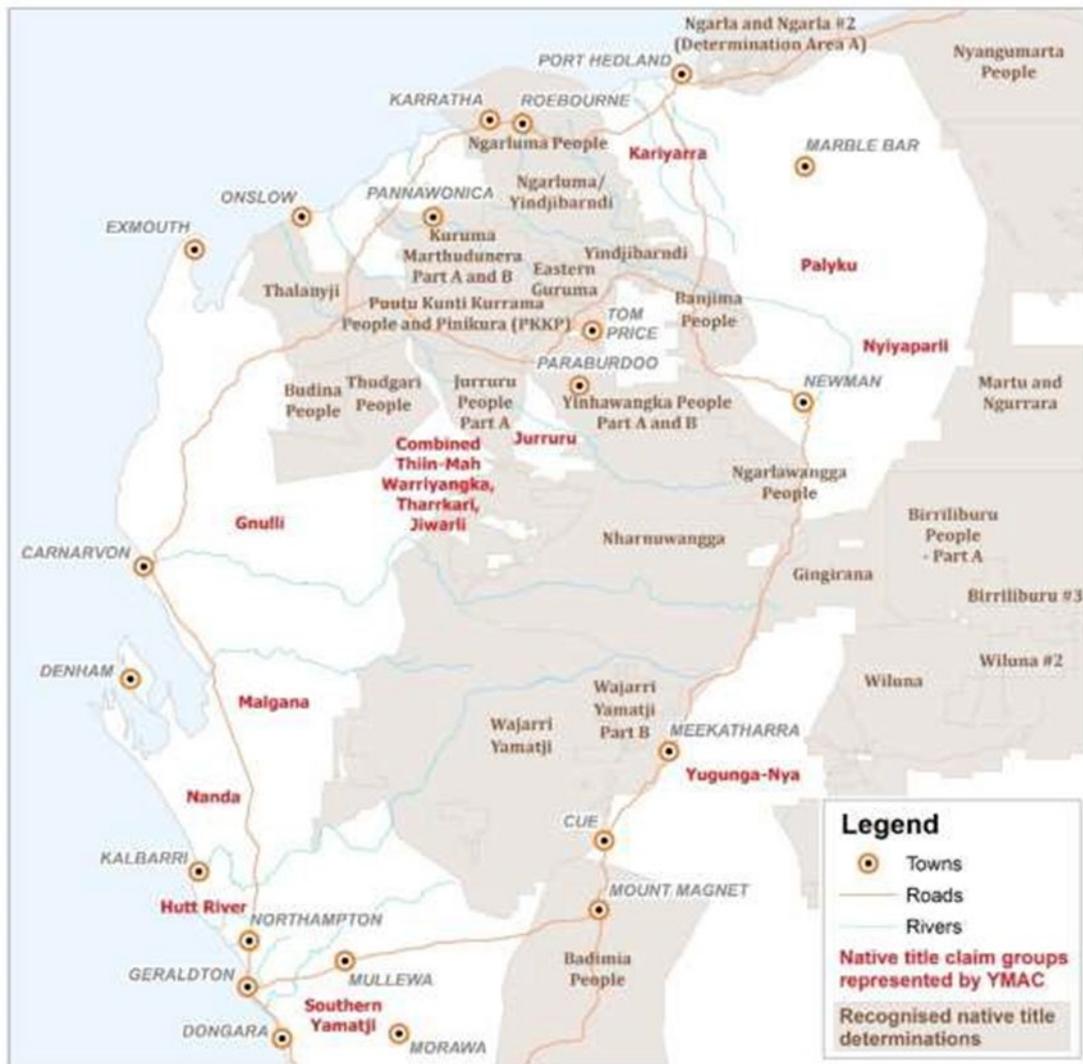
<sup>4</sup> NNTT register of applications and determinations, accessed in January 2019.

are represented by YMAC) and eight determinations (seven represented by YMAC), bringing YMAC's current active claim load to 20. Senior YMAC staff estimate the organisation's claim load will take at least 10 more years to resolve. This estimate was also echoed by the representatives of the state government.

As noted above YMAC's active claims sat across a broad range of age profiles, however most claims were either very new (i.e. less than a year old) or very old (i.e. filed over eight years ago).

In addition to their large pool of active claims, YMAC had a substantial pipeline of ongoing research programs for potential claims. There were 16 research projects that were underway for current claims, as well as eight research projects to determine the merit of potential claims.

Figure 1 | Overview of native title claims and determinations by YMAC<sup>5</sup>



### Recommendations for TOR 1.1

The Review made six recommendations for TOR 1.1 on native title outcomes achieved by clients. These are outlined below, as well as YMAC's response to these recommendations.

<sup>5</sup> YMAC (2018) <http://ymac.org.au/about-us/native-title-groups/>.

### Recommendation 1

YMAC should review its procedures for supervision of legal matters and ensure that legal strategy has input from senior staff, and that all legal documents have been thoroughly quality assured.

#### YMAC response.

YMAC takes its responsibilities as a Native Title Representative Body very seriously and welcomes the review finding of strong performance in achieving positive outcomes for Traditional Owners. We are very proud of the many native title determinations celebrated over our 25-year history. Eleven took place in the review period, seven prior to finalisation of the report in April 2019, and a further four since then.

YMAC has in place a well-established and strongly governed legal reporting structure, a claim team process and a range of experienced lawyers to provide senior supervision of legal matters and quality assurance and review of all of YMAC's legal documents. In the time since this review, YMAC has appointed an additional Deputy Principal Legal Officer to further strengthen supervision and strategy. Additionally, as and when it is deemed necessary, YMAC contracts a range of highly regarded external Senior Counsels and other external legal consultants to advise, represent and mentor in-house legal staff in relation to the legal services YMAC provides.

YMAC notes the review related to a three-year period commencing five years ago. As part of a culture of continuous improvement, YMAC regularly reviews workflow and organisational and governance structures to meet changing client needs. Since this review concluded in mid-2019, an additional Deputy Principal Legal Officer (DPLO) has been employed, further strengthening support to YMAC's legal and anthropological teams. A new Principal Legal Officer (PLO) has also been appointed. The PLO brings to the role extensive native title experience and familiarity with YMAC's representative region, having been in the role of DPLO for seven years prior to his appointment and has continued to refine service provision by his department.

YMAC welcomes further feedback from the NIAA regarding any suggestions it may have for improvement in this area of our work.

### Recommendation 2

YMAC should adopt a less defensive approach to criticism and reach out to legal stakeholders in a spirit of seeking improvement to understand the concerns and build more constructive, collegiate relationships.

#### YMAC response.

YMAC takes its responsibilities as an NTRB very seriously and is focused on delivering the best possible outcomes for Traditional Owners in our representative regions. YMAC is advocating to strengthen native title holders' rights in legislation to empower them to negotiate stronger agreements that enable them to decide how their heritage will be managed. YMAC understands that reform will come from a collective effort with a singular focus and is committed to building and maintaining constructive and collegiate relationships with all stakeholders.

In 2020, YMAC commenced development of a new consultation project involving community consultation to inform implementation of our 2021-2025 Strategic Plan. This is a new initiative for YMAC and we are very excited by the opportunity to listen to and learn from a broad range of people including YMAC members and the PBCs operating in our representative regions.

YMAC is an active member in the native title space, including through memberships on the National Native Title Council and the WA Alliance of Representative Bodies and Service providers. The corporation has long advocated for legislative and procedural reform, promoting the strong need for a fairer environment in which Traditional Owners can protect their rights, and manage and care for Country.

### Recommendation 3

YMAC should reconsider the need for strong senior leadership of its in-house anthropological capability.

#### YMAC response.

YMAC agrees with the need for strong senior leadership of in-house anthropological capacity. YMAC employed a Research and Heritage Director for the majority of the review period. YMAC regularly reviews its structure to ensure strong outcomes for the Traditional Owners we work with. Our 2018 restructure provided a closer connection to the legal process and native title outcomes for our research work, while also maintaining senior leadership of our in-house anthropological capability. An experienced Manager of Research was appointed, who has over 8 years' experience. YMAC has every confidence in our senior Research Manager, who led the team in the final four months of the period under review, and continues to participate in a leadership capacity through regular involvement in Executive Management, Board and Regional Committee meetings, and in strategic planning, budgeting and reporting processes of the organisation.

YMAC's Research Manager and the Research team are proactive and well-regarded, regularly participating in national forums and undertaking ongoing professional development. For example, in the time since this review was undertaken, our Research Manager has led YMAC's involvement in a significant project in partnership with AIATSIS that is identifying industry standards on the Return of Research Materials.

#### **Recommendation 4**

YMAC should consider its management of independent expert reports and provide transparency regarding their 'independent' status.

##### **YMAC response.**

YMAC has the benefit of 25 years of in-house experience in native title and in agreement making and regularly seeks independent, external expert advice, where appropriate.

YMAC provides a range of services, many of which are completed by independent consultants and external advisors. This is to ensure that Traditional Owners are given the best possible advice in relation to cultural, social, legal, commercial and financial issues contained within an agreement. These independent consultants include archaeologists and anthropologists to undertake heritage surveys in collaboration with Traditional Owners.

Every YMAC brief contains the requirement to sign an "expert declaration" as part of taking on any brief and contract with YMAC – this includes declaring suitability as an "independent expert".

For several years (including during the period under review) YMAC has maintained a register of independent legal and anthropological consultants. This independent pool of anthropological consultants includes many respected senior anthropologists that have worked in native title for many years.

Claimants are advised as to the independent status of the experts that are used. These independent experts are introduced to the claim groups, and the consultant reports reflect the independent nature of the consultants in terms of the report writing and as required in terms of their independent court expert status.

YMAC contracts a range of independent law firms and barristers from around Australia that provide best practice advice and representation in relation to YMAC's native title work.

Claimants are advised of the consultants' skillset and the legal consultants are also invited to present and independently advise claimants in relation to key issues affecting the progress of their native title claims or in relation to future act negotiations.

YMAC meets the standard as required by the Federal Court.

YMAC does not benefit in any way or receive any incentive from the appointment of independent consultants or external advisors.

#### **Recommendation 5**

YMAC should amend its policies and procedures manual to direct staff to inform complainants that they have a right to an external review under s203FB of the NTA and provide guidance on how to access the s203FB process. YMAC should make information about the review processes easily available to all its clients.

##### **YMAC response.**

In response to this recommendation, YMAC has updated its website and the relevant materials relating to external review processes from the Policy and Procedure manual to make it more easily available to members, including the right to external review under s203B of the NTA and how to access this process.

To promote accessibility and understanding this information is also available in hard copy from YMAC's offices in Perth, Geraldton and Port Hedland, for those YMAC members who do not have ready access to the internet.

#### **Recommendation 6**

YMAC should change its current process for internal review to include an independent legal counsel to ensure the review process is objective.

##### **YMAC response.**

YMAC would like to reassure NIAA and our stakeholders that its current process for internal review does include an independent legal counsel to ensure the review process is objective. YMAC seeks to reinforce that the corporation was also doing so during the period under review.

YMAC's Policy and Procedures Manual was provided to the review consultant. The manual advises on procedures when matters proceed to an internal review. YMAC briefs independent counsel in circumstances where YMAC is already acting for another claim group or corporation that claims or holds native title over the same, or part of the same, area. Otherwise, YMAC may brief independent counsel in relation to an internal review process if the circumstance of the case, complexity of the matter, and/or matters raised during the independent review process warrant that advice.

### 3.2 TOR 1.2 | Review and assess each organisation’s efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with the main focus on recent performance) including: whether the organisation’s assessment and prioritisation of applications are equitable, transparent and robust.

YMAC has clearly documented policies and processes for assessing and prioritising applications for assistance. Many claimants approached the Review to express dissatisfaction with the assessment and prioritisation processes, claiming they are not equitable, transparent or robust. Others commented that they do not understand the process through which decisions are made.

The Review notes that a level of dissatisfaction is inevitable in the contested environment within which YMAC operates. Nevertheless, the volume and depth of dissatisfaction points to opportunities to improve the process and the way in which results are communicated.

#### Recommendations for TOR 1.2

The Review made one recommendation for TOR 1.2 on the organisation’s assessment process. This is outlined below, as well as YMAC’s response to this recommendation.

#### Recommendation 7

YMAC should improve its engagement with clients to ensure information on assessment and prioritisation of claims is accessible and well-understood. Actions may include:

- Develop guidelines that clearly outline 1) the process YMAC undertakes to assess requests for assistance and prioritising claims and 2) the process for internal review.

Test guidelines with current clients to confirm they are easily understandable.

#### YMAC response.

In 2020, YMAC commenced development of a new consultation project, that will involve member and community consultation and seek feedback from PBCs, to inform implementation of our new 2021-2025 Strategic Plan. This is a new initiative for YMAC and we are very excited by the opportunity to listen to and learn from a broad range of people in our representative regions.

YMAC supports the recommendation about publishing information on our website and we have revised it to ensure that the section from YMAC’s Policy and Procedure Manual relating to applications for assistance, assessment and prioritisation of claims is now more readily available to members.

To promote understanding and accessibility a more comprehensive review of YMAC’s website is planned, to identify further improvements and additions to assist and inform our clients.

In support of our commitment to continuous improvement YMAC’s Policy and Procedures Manual is regularly reviewed, and outlines procedures:

- with respect to applying for assistance from YMAC; and
- for internal review processes with respect to decisions made by YMAC’s Board of Directors, Yamatji or Pilbara Regional Committees, or YMAC staff.

Our staff fulfil these obligations and the information is freely available upon request. Information on applying for assistance is available on YMAC’s website, within the Applications for Assistance form.

YMAC forms advise applicants they can contact their local YMAC office for help if they would like more information or help to complete the application form.

YMAC understands that not all members have ready access to the internet and so makes this information available in hard copy from YMAC’s offices in Perth, Geraldton and Port Hedland. This procedure was in place prior to the review and continues today.

YMAC also keeps claimants regularly informed of progress relating to native title in annual reporting publications, through Claim Updates specific to each claim group, YMAC News, and special publications (e.g. 20th and 25th Anniversary publications).

### 3.3 TOR 1.3 | Review and assess each organisations' efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with the main focus on recent performance) including: whether the organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with clients, persons seeking assistance, and persons refused assistance.

YMAC has developed approaches and procedures to enable respectful and culturally appropriate engagement with clients, persons seeking and refused assistance. However, many stakeholders who approached the Review reported they do not feel YMAC engages respectfully with them. The Review also received a great deal of feedback from people who are highly suspicious of YMAC's motivations, practices and results.

YMAC reports that it endeavours to be as transparent as possible with all clients and persons seeking and refused assistance. Feedback given to the Review suggests that YMAC's way of working often lacks transparency and has resulted in a lack of trust between the organisation, many of its clients and the broader community.

#### Recommendations for TOR 1.3

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

#### Recommendation 8

YMAC should conduct regular independent surveys of their client group to assess their level of satisfaction with the services received. They should use the findings to inform a systematic re-consideration of how to re-build stakeholder relationships and identify topics that require more/clearer communication and transparency.

#### YMAC response.

Just as YMAC is a strong advocate for a more equitable negotiation process that supports transparency, accountability and early and ongoing communication between parties, YMAC also believes this approach should guide our own stakeholder relationships.

In 2020, YMAC commenced development of a new consultation project, that will involve community consultation and seek feedback from PBCs, to inform implementation of our new 2021-2025 Strategic Plan. This is a new initiative for YMAC and we are very excited by the opportunity to listen to and learn from a broad range of people in our representative regions. Through this project we plan to identify new ways to gain client feedback and strengthen relationships, to ensure an ongoing and two-way conversation.

YMAC aims to promote understanding and accessibility by ensuring members know who the Regional Managers and regionally based Project Officers are and how to approach them, as well as legal and other staff, on issues. YMAC continuously reaches out to stakeholders at family meetings, in community/claim meetings, through direct contact by phone and by invitation to come into YMAC offices.

### 3.4 TOR 2 | Review and assess each organisation's cost effectiveness in performing the functions of a native title representative body, including the key cost drivers for each organisation.

YMAC supplements its base funding from the NIAA with activity generated income (AGI) derived from cost recovery on native title activities and revenue generated by activities which do not fall under the NTA. Without the AGI, YMAC would not be able to sustain its high level of output. The Review was not able to closely examine the interaction between base funding and AGI, and the application of the AGI and suggests that this be further investigated by the NIAA.

YMAC has been actively striving to reduce costs during the review period, primarily in response to the reduction in AGI. Measures included a reduction in travel allowances and costs of claim group meetings. A restructure in 2017 resulted in a decrease in staff numbers and associated costs.

Overall, YMAC has done extremely well to manage costs and lower expenditure over the review period, despite operating in a challenging environment where legislation, intra-Indigenous disputes, high numbers of respondents and remoteness all inflate the cost of doing business.

#### Recommendations for TOR 2

The Review made one recommendation for TOR 2 on the organisation's cost effectiveness.

#### Recommendation 9

The NIAA should consider conducting a financial review to better understand the interaction between NIAA funded capacity, activity generated income and application of the activity generated income.

**YMAC has not been asked to respond to this recommendation as it was directed towards NIAA.**

YMAC appreciates the acknowledgement that it has done extremely well to manage costs and lower expenditure over the review period, despite operating in a challenging environment where legislation, intra- Indigenous disputes, high numbers of respondents and remoteness all inflate the cost of doing business.

YMAC is a highly regulated entity, with frequent reviews, examinations and annual independent audits. It also meets its annual reporting obligations under the CATSI Act, as well as biannual reporting obligations to NIAA.

Also worth noting, YMAC has had:

1. 2012: Its books examined by ORIC, the reports of which are publicly available. The report indicated that "the corporation is well governed, the standard of financial management is sound and the corporation is in a solid financial position".
2. 2013/14: A compliance review by the Department of Prime Minister and Cabinet of its funding arrangements compliance.
3. 2018/19: The NOUS review confirm YMACs strong financial management and controls. "YMAC's risk and financial management is highly effective".

2019: Its books examined by ORIC, the reports of which are publicly available. The report indicated that "the standard of corporate governance at the corporation is generally sound and that the corporation is being satisfactorily managed".

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

YMAC uses a clear and consistent approach to tracking its achievement against the KPIs in its funding agreement with the NIAA. The organisation takes an activity-based approach to tracking effort and expenditure against the milestones in its operational plan and collates data from multiple systems to inform its performance reporting to the NIAA. YMAC submitted all its performance reports on time to the NIAA throughout the review period, to a standard which met the requirements of its funding agreement.

**No recommendations were made for TOR 3.**

### 3.6 TOR 4 | Review and assess the extent to which each organisation’s governance structures and organisational policies and practices support efficient and effective project delivery including: the breakdown of responsibilities between the organisation’s Board, Chairperson, Chief Executive Officer and senior staff; its financial management; the standard to which it manages and resolves any conflicts of interest; the standard to which it manages and resolves any complaints.

The YMAC Board is unusually constituted but appears to work well to balance the independence of the two distinct regions. The Board is stable, well supported and clear about its governance role. The Board and the CEO also work closely together. There were some stakeholder concerns, however, that the close relationship may have an impact on the independence of the Board. As reported under TOR 1.3, the Review received a high volume of feedback from a range of stakeholders who do not believe the organisation behaves respectfully at all levels and has at times adopted an unnecessarily acrimonious approach towards internal and external stakeholders. As noted under TOR 1.3, YMAC does not believe these concerns have any basis in fact.

The organisational restructure implemented in 2017 appears to have benefits in terms of communication and cross-fertilisation of activities. YMAC’s risk and financial management is highly effective and YMAC provides a wide variety of professional development opportunities to its staff, Board and Regional Committees.

#### Recommendations for TOR 4

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

#### Recommendation 10

YMAC should consider strategies to clearly report and explain how the income generated through non-native title business interests is spent.

#### YMAC response.

As a not-for-profit entity, YMAC fulfils its requirements under charities law to report on how non-native title funds are spent. YMAC seeks to reinforce that the corporation was also doing so during the period under review.

Income generated through “non-native title business interests” by YMAC is required to ensure that Traditional Owners are given the best possible advice in relation to cultural, social, legal, commercial and financial issues. This income is directed towards native title services and provides greater economies of scale, which ultimately results in better utilisation of scarce resources, in furtherance of YMAC’s charitable objectives.

YMAC is a highly regulated entity, and reports this information in detail to several layers within the organisation, as well as to stakeholders. The internal layers include detailed financial reporting to its managers, to two Committees representing the two regions represented by YMAC as well as to our Board. The reporting is exceptionally detailed - built from a reporting structure introduced by a Grant Controller appointed to YMAC by the Federal Government many years ago. An additional external review conducted in 2019 reflected positive results as has this Review itself confirmed YMAC’s strong financial management and controls.

Externally, our annual reporting through multiple sources provides a high level of detail. Newsletters regularly communicate information to our members and stakeholders on our activities. Drilling down further, other income generated and expended has been produced and presented to the various working groups we have represented.

In 2019 YMAC reviewed its human resources area, and in 2020 appointed a new position – People and Culture Specialist. Duties include enhancing and developing YMAC’s induction, professional development and support programs for staff at every level of the organisation.

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

YMAC provides PBC support to eight PBCs and two non RNTBC Aboriginal Corporations offering corporate governance, strategic planning, and legal services. The YMAC support model is unique whereby teams ‘follow’ groups from claim to PBCs rather than having a separate PBC support unit or group. While this model allows relationships to continue and promotes early resolution of PBC governance arrangements, it can also perpetuate any existing tensions and does not emphasise the independence of PBCs from YMAC.

Some PBCs approached the Review to express dissatisfaction with the support received from YMAC and strong concerns about the tight control YMAC exercises over PBCs, including a perception that YMAC itself might be in competition with PBCs for business. More independent and confidential feedback mechanisms may help to alleviate the considerable degree of PBC dissatisfaction and concern expressed to the Review.

#### Recommendations for TOR 5

The Review made one recommendation for TOR 5 on PBC development strategies. This is outlined below, as well as YMAC’s response to this recommendation.

#### Recommendation 11

YMAC should use a third party to conduct confidential client surveys with PBC representatives to gather feedback on services provided, and YMAC should proactively address any issues raised.

#### YMAC response.

Just as YMAC is a strong advocate for a more equitable negotiation process that supports transparency, accountability and early and ongoing communication between parties, YMAC also believes this approach should guide our own relationships, including with PBCs.

In 2020, YMAC commenced development of a new consultation project, that will involve community consultation and seek feedback from PBCs, to inform implementation of our new 2021-2025 Strategic Plan. This is a new initiative for YMAC and we are very excited by the opportunity to listen to and learn from a broad range of people in our representative regions. Through this project we plan to identify new ways to gain client feedback and strengthen relationships, to ensure an ongoing and two-way conversation to address any issues raised.

As with Recommendation 8, YMAC is open to discussing surveys and welcomes NIAA’s advice on this recommendation.

YMAC has service agreements with the PBC’s it represents. The PBC’s regularly review their service agreements with YMAC and determine whether they are satisfied with services provided. In 2020, as part of our commitment to continuous improvement, YMAC has undertaken extensive review and refinement of service agreements to improve how we seek feedback from clients to ensure we maintain positive and productive relationships.

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

YMAC is well progressed in planning for a post determination environment and is regarded by some stakeholders as very well advanced in post determination thinking among NTRB-SPs. The executive management team (EMT) actively searches for business opportunities and is proactive in positioning YMAC for winning work. YMAC is well organised to offer a suite of business services to PBCs and other Indigenous organisations.

YMAC has a very active focus on building commercial initiatives that will gradually replace the income and activity they currently receive through their work on native title. Among its commercial enterprises, YMAC has a 25% investment share in the recently launched Pilbara Solar, which plans to export solar power from the Pilbara to Asia.

The Review notes that the extent of activity generated income and commercial activities undertaken by YMAC warrants serious consideration of the pros and cons of creating a separate corporate entity to increase transparency between native title and non-native title activities.

#### Recommendations for TOR 6

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

#### Recommendation 12

YMAC should consider strategies to increase the transparency of the range of their activities and assure their stakeholders that their native title interests are the primary driver of the organisation's activities.

#### YMAC response.

"For current and future generations, we work with and for Australian Aboriginal people to protect their rights and manage Country and opportunities": YMAC's mission as articulated in the 2021-2025 Strategic Plan expresses our commitment to native title as the primary driver of our organisation's activities.

YMAC's Strategic Plan will guide our activities over the 2021-2025 period. This plan is designed to ensure YMAC remains relevant to members and clients throughout their native title journey, providing services that support caring for Country, connecting to the land and creating new opportunities for Traditional Owners. While there remains significant claim work to be undertaken, we are entering a new era as an organisation, where the development and delivery of professional services for PBC's and Aboriginal Corporations is becoming increasingly important.

Further and ongoing consultation will be undertaken with Regional Committees, members and clients to inform the implementation of YMAC's strategic plan. We will continue to find new ways of ensuring our activities remain relevant, meaningful and affordable to our native title claim groups, as well as our PBC and Aboriginal Corporation clients.

YMAC is proud of the fee-based services we have developed for Traditional Owners groups. We are able to offer professional, affordable, tailored services for our clients and – importantly – all surplus is invested back into supporting the charitable Objects of the organisation.

YMAC's ORIC reporting documents are available through the ORIC website and YMAC provides annual reports, regular newsletters, Annual Regional Meetings for both regions, and claim updates, all detailing YMAC's native title activities.

To promote accessibility and understanding the entire first section of YMAC's Policy and Procedures Manual has now been incorporated into the YMAC website which clearly articulates YMAC's core business being native title. A deeper review of our website commenced in 2020 to further improve navigation and access to information about the organisation and its activities, as well as educational information on native title.

# Appendix A Terms of Reference

1. Review and assess each organisations' efficiency and effectiveness in performing the functions of a native title representative body over the past 3 years (with the main focus on recent performance) including:
  - Native title claim outcomes achieved for clients.
  - Whether the organisation's assessment and prioritisation of applications are equitable, transparent and robust.
  - Whether the organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with clients, persons seeking assistance, and persons refused assistance.
2. Review and assess each organisation's cost effectiveness in performing the functions of a native title representative body, including the key cost drivers for each organisation.
3. Review and assess each organisation's strategies for driving and tracking its achievement against key performance indicators in its funding agreement with the NIAA.
4. Review and assess the extent to which each organisation's governance structures and organisational policies and practices support efficient and effective project delivery including:
  - The breakdown of responsibilities between the organisation's Board, Chairperson, Chief Executive Officer and senior staff.
  - Its financial management.
  - The standard to which it manages and resolves any conflicts of interest.
  - The standard to which it manages and resolves any complaints.
5. Review and assess each organisation's strategies for and progress in developing self-sufficient Prescribed Bodies Corporate (PBCs), so PBCs have appropriate capacity and capability to manage their own responsibilities and aspirations.
6. Review and assess the adequacy of each organisation's strategic planning for a post determination environment.
7. Examine and report on other relevant issues as identified by the NIAA or in the course of the review, which may be specific to particular organisations.
8. Develop a meaningful set of benchmarks to assess individual and comparative efficiency and effectiveness of organisations.
9. Provide written draft and final reports to the NIAA on the work undertaken for each review and the review findings, making recommendations on what changes, if any, each organisation could make to improve its efficiency and effectiveness. There will be an overarching comparative report and five individual reports.

## Appendix B NTRB-SPs under review

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

Table 1 | NTRB-SPs Review tranches

Tranche	NTRB-SP	Scope of Review	Timing Review conducted
Tranche 1 (2017)	Central Desert Native Title Services	July 2014 – June 2017	June 2017 – March 2018
	First Nations Legal and Research Services		
	Goldfields Land and Sea Council		
	Native Title Services Corporation		
Tranche 2 (2018)	Queensland South Native Title Services	July 2015 – June 2018	September 2018 – April 2019
	Cape York Land Council		
	Carpentaria Land Council Aboriginal Corporation		
	Kimberly Land Council		
	<b>North Queensland Land Council</b>		
South Australia Native Title Services			
Tranche 3 (2020)	Yamatji Marlpa Aboriginal Corporation	July 2016 – June 2019	October 2020 – March 2021
	Central Land Council		
	Northern Land Council		

## Appendix C Stakeholders consulted

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

Stakeholder groups included:

- clients who have been represented by YMAC (including members of PBCs)
- potential clients in YMAC's RATSIB area/people who have engaged private legal representation to register a claim in YMAC's RATSIB area
- persons who have been refused assistance by YMAC
- the Federal Court of Australia
- the National Native Title Tribunal
- representatives of WA State Government
- YMAC contractors, including:
  - barristers
  - anthropologists
- Two Co-chairs of YMAC's Board Directors
- YMAC staff
- people who have worked at YMAC in the past.

# Appendix D Methodology

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

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

Qualitative and quantitative performance indicators and attribution factors were developed to assess each TOR. Attribution factors refer to factors outside the control of the NTRB-SP (external factors) that have a significant impact on the efficiency or effectiveness of their native title operations. Quantitative indicators were integrated into the qualitative examination of performance to ensure the correct inferences were drawn from quantitative metrics. The quantitative performance indicators and attribution factors were selected from a draft list of more than 120 performance and attribution indicators on the basis that they provide good coverage of quantitative indicators for each TOR category. The qualitative performance indicators and attribution factors guided the qualitative data collection.

While some qualitative indicators that were selected are capable of being quantified, they cannot be quantified in a meaningful way for comparative performance purposes. For example, while Indigenous land use agreements can be an effective tool in delivering native title outcomes there are circumstances in which they may not be the best tool.

Complaints received by the NIAA and/or each NTRB-SP formed one part of the material considered in the Review where it concerned: NTRB-SP activity since 2014, the efficiency and effectiveness with which the NTRB-SP has conducted its business, or the transparency and respectfulness of the relationships the NTRB-SP maintained with its clients, potential clients or persons refused assistance. Both the relevant elements of the complaint, and the way in which the NTRB-SP responded were considered.

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

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

# Appendix E Glossary

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

Table 2 | Glossary

Term	Meaning
Applicant	Any person or persons who have been authorised as the selected representative(s) of a native title claim group in native title or determination proceedings.
Client	Any individual or group being provided assistance by an NTRB-SP (including assistance with claims, research and/or PBC support).
Connection evidence	Evidence to establish connection of the native title group to the area over which they have lodged a claim. This evidence must demonstrate that the group have continued to observe and acknowledge, in a substantially uninterrupted way, the traditional laws and customs that give rise to their connection with the claim area, from the time of the proclamation of sovereignty to the present day.
<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (the CATSI Act)</i>	The <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) is the law that establishes the role of the Registrar of Indigenous Corporations and enables Aboriginal and Torres Strait Islander groups to form Aboriginal and Torres Strait Islander corporations.
Determination	A decision by the Federal or High Court of Australia. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination).
Extinguishment	Occurs over a defined area when Australian law does not recognise the existence of native title rights and interests because of legislation or common law precedent. Extinguishment can be whole or partial.
Future act	A legislative or non-legislative act in relation to land or waters that may impact on the ability of native title holders to exercise native title rights; either through extinguishment or creating interests that are wholly or partly inconsistent with the continued existence of native title.
Indigenous Land Use Agreement (ILUA)	A voluntary, legally binding agreement governing the use and management of land or waters over which native title exists or might exist. The conditions of each ILUA are determined by way of negotiations between native title holders and other interest holders (such as a state or mining company). These negotiations are often facilitated by NTRB-SPs.
<i>Mining Act 1978 (WA)</i>	The <i>Mining Act 1978 (WA)</i> outlines WA's law as it relates to mining, and for incidental and other purposes.
National Native Title Tribunal (NNTT)	An independent statutory body established under s 107 of the NTA to assist people in resolving native title issues by: <ul style="list-style-type: none"> <li>• mediating between the parties to native title applications at the direction of the Federal Court</li> <li>• acting as an arbitrator in situations where the people cannot reach agreement about certain future acts</li> <li>• helping people to negotiate ILUAs.</li> </ul>

Term	Meaning
	The NNTT maintains three registers relating to native title applications, determinations and ILUAs. It also maintains databases regarding future act matters and geospatial tools.
Native title	The communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area which is recognised under Australian law (s 223 NTA).
<i>Native Title Act 1993 (Cth)</i> (NTA)	The <i>Native Title Act 1993</i> (Cth) established the procedure for making native title claims, and is the primary piece of Commonwealth Government legislation allowing Indigenous Australians to seek rights over land and waters arising from their original ownership under traditional law and custom.
Native Title Representative Body (NTRB)	Recognised organisations which are funded by the Australian Government to perform functions to assist native title groups in a specific region, according to the provisions in Part 11 of the <i>Native Title Act 1993</i> .
Native Title Service Provider (NTSP)	Organisations funded by the Australian Government to perform all or some of the same functions as NTRBs in areas where NTRBs have not been recognised.
Non-claimant application	An application made by a person, who does not claim to have native title but who seeks a determination that native title does or does not exist.
Post-determination	At a claim level, refers to the period following a determination that native title exists. At an NTRB-SP life cycle level, refers to the period following the resolution of all active claims within a RATSIB area.
Prescribed Body Corporate (PBC)	A body, established under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth), nominated by native title holders which will represent them and manage their native title rights and interests once a determination that native title exists has been made.
Registration test	The registration test is a set of conditions applied to the claims made in native title determination applications. The Native Title Registrar, or the Registrar's delegate, applies the test. If a claim satisfies the conditions of the registration test, details of the application are entered on to the Register of Native Title Claims. This means that the application becomes a registered claim and is able to exercise the procedural rights stipulated in the future act provisions of the NTA.
Representative Aboriginal/Torres Strait Islander Body area (RATSIB area)	The area in which an NTRB-SP performs its functions.
Terms of Reference (TOR)	Refers to the Terms of Reference provided by the NIAA which govern the scope of the project. These can be found in Appendix A.
Traditional Owners (TOs)	Individuals of Aboriginal and/or Torres Strait Islander descent who identify as being a descendant of persons that occupied a particular area prior to European settlement.
Yamatji Marlpa Aboriginal Corporation (YMAC)	YMAC is a Native Title Representative Body which services the combined Pilbara and Geraldton RATSIB area in WA.

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

**Table 3 | NTRB functions under the Act**

Reference	Function	Detail
s203BB	Facilitation and assistance	NTRB-SPs provide assistance to those that hold or may hold native title in relation to native title applications, future acts, agreements, rights of access and other matters.
s203BF	Certification	NTRB-SPs certify applications for native title determinations and certify the registration of ILUAs.
s203BF	Dispute resolution	NTRB-SPs promote agreement and mediate disputes between native title groups.
s203BG	Notification	NTRB-SPs ensure that people that may hold native title are informed of other claims and of future acts and the time limits for responding to these.
s203BH	Agreement making	NTRB-SPs can be a party to ILUAs or other agreements.
s203BI	Internal review	NTRB-SPs have a process by which native title claimants can seek a review of decisions and actions they have made, and promote access to this process for claimants.
s203BJ	Other functions conferred by the Act or by any other law	These are largely concerned with cooperation between NTRB-SPs, consulting with Aboriginal and Torres Strait Islander communities, and providing education to these communities on native title matters.