ALRC - Future Acts Regime Review

February 2025

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The Australian Law Reform Commission has been asked to inquire into the future acts regime in the *Native Title Act 1993* (Cth).

Additionally, the ALRC has been asked to consider the socio-economic outcomes and priority reforms of the National Agreement on Closing the Gap and the ongoing efforts to address recommendations from the A Way Forward Report.

The terms of reference ask the ALRC to examine the operation of the Act and the future acts regime, with explicit consideration of its 30 years of operation, including:

- Its potential to significantly contribute to outcomes for First Nations
- The extent to which the future acts regime can serve as a precursor to economic and other activities on native title land.

Introduction

This is a significant opportunity to reflect on the role of native title, specifically the management of monies received by Registered Native Title Bodies Corporate, in the lives of native title holders, who typically live in remote locations and have poorer life outcomes.[1]

Corporations needing ongoing access to Aboriginal land for lease renewals, or governments compensating for the loss of native title rights, will eventually face new discussions with titleholders regarding trust arrangements.

Our research shows that in most cases, PBCs receive no income. When funds are available, native title offers little advantage to titleholders, as the funds are often mismanaged. The current oversight of trusts is largely ineffective. Old trusts are difficult to review, necessitating the establishment of new ones to maximise long-term benefits.

Consequently, we recommend two additional options for future acts under the Native Title Act:

1. An option to return native title rights to the Crown in exchange for scholarships for descendants, and

[1] Productivity Commission, *Closing the Gap: annual data compilation report*, July 2024, 10

2. **Where native title rights are maintained, establishing clearly defined charitable endowment trusts that focus on developing human capital.**

Research reveals poor focus and performance

We have reviewed Registered Native Title Bodies Corporate (RNTBCs) nationally and conducted a more detailed governance and financial analysis of a representative sample of RNTBCs in Queensland.

Australia has 281 RNTBCs, with the highest concentration of 94 located in Queensland and the second highest of 82 found in Western Australia.

An RNTBC's primary role is to hold native title rights in trust for the native title holders. Consequently, the RNTBC assumes all fiduciary duties typically associated with any trustee. While some RNTBCs may benefit from royalty agreements for a limited period, most do not, and any compensation they might receive (for instance, for the prior extinguishment of native title) will be a one-off payment. These funds represent the complete and final residual value of Indigenous interests in the land at the time of non-Indigenous settlement in the region.

This study examines RNTBCs' obligations as trustees of native title interests, how effectively those obligations are being met, and the extent to which they fulfil their purpose and discharge their responsibilities.

The data we used

The study relied on two sets of RNTBC data, both sourced from the Office of the Registrar of Indigenous Corporations (ORIC). Of the 281 RNTBCs across Australia, 182 are in Queensland or Western Australia, accounting for 65 percent of all RNTBCs. Table 1 presents a breakdown of RNTBCs by region.

Table 1. RNTBCs by State or Territory

State or Territory	Number of RNTBCs
Queensland	98
Torres Strait	21
New South Wales	10
Victoria	4
South Australia	27
Western Australia	84
Northern Territory	37

Source: Office of the Registrar of Indigenous Corporations

We analysed all 281 RNTBCs using information submitted to ORIC to determine, at a national level, the percentage of RNTBCs without income and the number heavily dependent on government grant income. This provided a baseline for determining whether these entities were sustainable without continued government support.

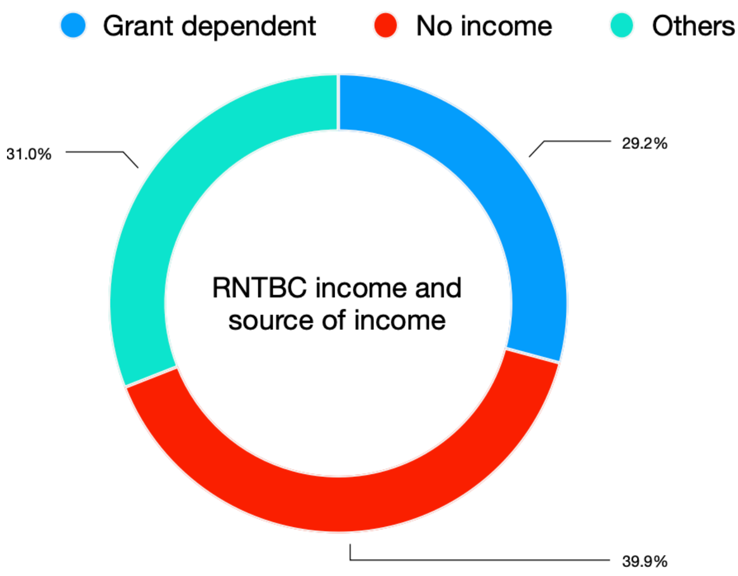
Additionally, we performed a detailed governance and financial analysis of 36 of the 98

RNTBCs in Queensland. This analysis examined the financial lodgement history of the sample RNTBCs to develop an understanding of governance. Then, we conducted a thorough review of their financial accounts to assess their financial health.

What we found nationally

Our national data showed that a significant plurality of RNTBCs (112 out of 281) reported no income. Others reported varying income levels, ranging from modest sums to more than $100 million per annum. However, what was particularly notable was the degree to which most RNTBCs across Australia relied on government grants. Of the 169 RNTBCs with an income, almost half (82) depended on grants for more than 50 per cent of their revenue or had grant income exceeding $500,000 per annum. The data is illustrated in Figure 1.

Figure 1. Income and grant dependence of RNTBCs nationally



Source: Office of the Registrar of Indigenous Corporations

More than two-thirds of RNTBCs either have no income or rely on government grants for their survival.

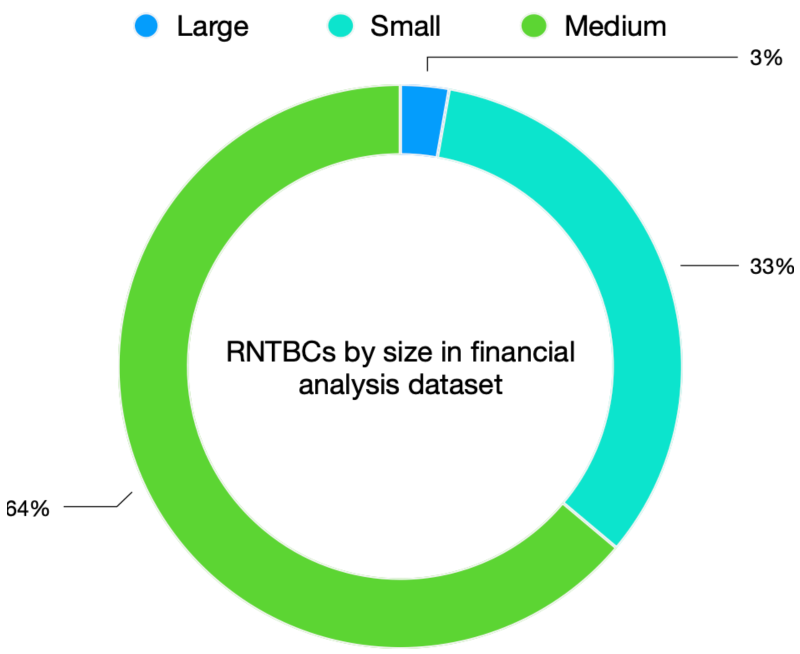
What we found in Queensland

In Queensland, we analysed a sample set of 36 RNTBCs.

Small corporations registered with ORIC are not required to submit complete financial reports; instead, they must provide a General Report that includes details of members and office holders and total income, grant income, expenditure, and assets and liabilities. Medium and large corporations must submit audited financial statements.

Of the 98 RNTBCs in Queensland, ORIC classifies 58 as small, 38 as medium, and two as large. We randomly selected the corporations to create a sample that accurately represented the size distribution of the RNTBCs. However, it became clear that the smaller RNTBCs did not meet their financial reporting obligations, even under the General Report regime. Of the 12 small RNTBCs examined, 10 failed to provide financial information in the last decade. Therefore, we adjusted the sample towards medium-sized RNTBCs to capture more relevant financial information.

Figure 2. The distribution of the sample of Queensland RNTBCs, by size



Source: Office of the Registrar of Indigenous Corporations

In the sample set, 11 of the 36 RNTBCs analysed failed to submit the required financial reports. The remaining 25 provided various forms of economic data that were suitable to interpret. This included two small RNTBCs that submitted only summary financial information in a general report, rendering detailed data analysis impossible. For these reasons, our sample set offers a flattering view of the health of RNTBCs in Queensland.

Our data reveal:

• Thirty per cent of our sample set could not lodge the required financial accounts. Given that this was the case in 10 out of the 12 small RNTBCs, which constitute 55 of Queensland's 94 RNTBCs, it is likely that more than half of the RNTBCs in Queensland are unable to prepare and lodge financial accounts.

• Eight of the 36 RNTBCs reported a decline in net assets during their reporting periods, and for another 10, it was impossible to determine whether net assets had increased or decreased due to their failure to submit financial statements. Only 18 of the 36 indicated increased net assets over their reporting period.

• Eleven of the 25 corporations had wage expenditures exceeding 50 per cent of their total spending.

• Eight of the 25 depended on grants for more than 50 per cent of their revenue, while 12 of the 25 relied on grant income for more than 30 per cent of their revenue.

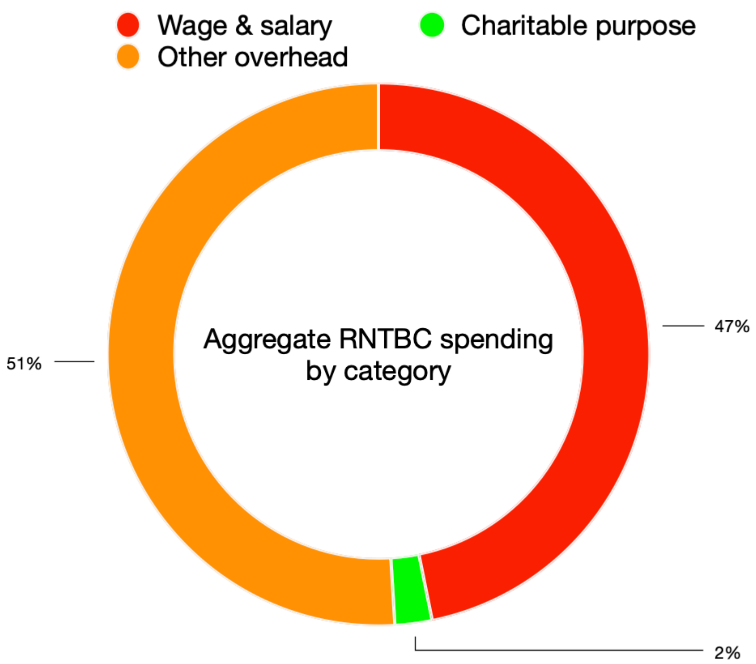
• Eight of the 25 declared charitable spending at some point during the sample years.

• Throughout all the sampled RNTBCs and reported periods, charitable spending accounted for just 1.8 per cent of total revenues and 2.2 percent of total expenditures.

• On the same basis, declared wage and salary expenses accounted for 47 per cent of total expenditures. This likely understates wage and salary expenses considerably, as some RNTBCs use 'meeting fees' to hide directors' remuneration.

• Analysis of wage and salary data against membership information for RNTBCs strongly suggests that these wage and salary payments are made to a narrow class of members at the expense of the vast majority.

Figure 3. Aggregate RNTBC spending by category



Source: Office of the Registrar of Indigenous Corporations

Considering the data

Corporations that struggle to prepare and lodge financial reports also find it difficult to measure performance, let alone assess financial risk. Most RNTBCs do not meet this obligation, so it underscores a systemic issue.

It has been customary that when a corporation comes to the attention of ORIC, although an audit may take place, the 'remedy' is to provide 'governance training'. However, this practice does not resolve many corporations' difficulties in effectively pursuing charitable or commercial purposes.

The result is overreliance on grant income, which is spent on wages, salaries, or other overheads. Further, these funds are not tied to outcomes, let alone reducing recognised risk measures.

Moreover, excessive spending on staff without purpose or commercial gain is too common in many RNTBCs. Governance training does not address the motivation to allocate funds for hiring personnel instead of directing funds to beneficiaries.

RNTBCs are corporate trustees of asset-holding beneficial trusts. Therefore, they should conduct their affairs that align with their prudential obligations. The fact that aggregate expenditure on wages and salaries in the Queensland dataset is more than 21 times total charitable spending leads to only one conclusion: most RNTBCs in Queensland—and likely the majority nationally—are not fit for purpose.

Where RNTBCs in Queensland are involved in commercial arrangements with mining companies, there is minimal accrual of net assets. This leads to the conclusion that members' benefits will cease shortly after mining concludes.

Another finding is that the income and expenditure patterns of many RNTBCs for which we have financial data indicate that trust assets are exposed to unacceptable levels of financial risk from trading activities, wage and salary costs, and other overheads. The fact that only 50 per cent of the dataset recorded any increase in net assets suggests that these RNTBCs are unreliable entities for holding trust assets intended to benefit current and future generations of beneficiaries.

Conclusions

Graeme Neate, a former president of the National Native Title Tribunal, observed in 2010 that collective title is not only a problem but that 'in many parts of Australia where native title might exist, there will be few, if any, opportunities for substantial commercial developments because of the absence of minerals or other resources, or their remoteness from relevant markets and customers.'[2]

We agree with Neate's assessment and, based on our research, recommend

Governments and corporations negotiating with native title holders or claimants must recognise the shortcomings of RNTBCs in delivering meaningful benefits to beneficiaries. They must also recognise the noticeable waste and misallocation of funds within many of these corporations.

- **We conclude that the native title regime has little potential to significantly improve outcomes for First Nations, including serving as a precursor to economic development on native title land.**

[2] ABC television. *Talking Stick: Native Title* ABC 2010

The time is right for a fresh approach to safeguarding and managing native title compensation for the benefit of as many beneficiaries as possible. Maintaining the current arrangements will likely leave Indigenous people no better off than they were before, with no prospects for additional native title compensation income.

- **The regime must be redesigned to realise the aspirations of the descendants of the original holders for whom the original purposes may not hold the same meaning.**

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2. **Where native title rights are maintained, establishing clearly defined charitable endowment trusts that focus on developing human capital.**

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