



Review of First Nations Legal and Research Services, 2019- 22

National Indigenous Australians Agency

June 2024

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1 Profile of First Nations Legal and Research Services

First Nations Legal and Research Services (FNLRS) is based in Melbourne, providing services to prospective and current native title holders across Victoria

FNLRS is the Native Title Service Provider (NTSP) for the state of Victoria. The organisation was established in 2003¹ as a public company limited by guarantee under the *Corporations Act 2001* (Cth). FNLRS's Representative Aboriginal/Torres Strait Islander Body (RATSIB) area covers about 227,416 square kilometres of land and sea accounting for all of Victoria.

Traditional Owners in Victoria can achieve land title recognition and rights under the *Native Title Act 1993* (Cth) (the NTA) and through alternative state-based mechanisms including the *Traditional Owner Settlement Act 2010* (the Settlement Act) and the *Victorian Aboriginal Heritage Act 2006* (Aboriginal Heritage Act). The passing of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (the Treaty Act) provides another potential avenue for land rights and the ability for Traditional Owners to engage in formal Treaty negotiations. These factors contribute to Victoria's complex policy and legislative landscape and have shaped the operating environment of FNLRS.



As of 30 June 2022:

- There had been four determinations of native title within Victoria since the passage of the NTA, none of which occurred between 1 July 2019 to 30 June 2022 (the Review period). There had also been two comprehensive settlement agreements under the Settlement Act², both entered into prior to the Review period (which are both considered native title outcomes for the purposes of NIAA funding).
- There were four active claims in FNLRS's RATSIB area awaiting a determination as of 30 June 2022, with FNLRS acting for the applicant in two of these claims. One of these claims – Eastern Maar People – was determined (in part) after the Review period, in March 2023.
- There were four Prescribed Body Corporates (PBCs) within the RATSIB area (which were also Registered Aboriginal Parties under state legislation) and two Traditional Owner Group Entities (TOGEs) formed under the Settlement Act, all of which were supported by FNLRS during the Review period. While formation of the TOGE is not formally a native title outcome, reaching a comprehensive settlement under the Settlement Act is considered a native title outcome for the purposes of NIAA funding, given these groups chose not to pursue a native title determination because they had achieved a comprehensive settlement.
- FNLRS received variable levels of funding during the Review period. It received about \$3.7 million in financial year (FY) 2019-20, \$3.4 million in FY2020-21 and \$4.3 million in FY2021-22.

Over the course of the Review period, Directors on FNLRS's Board were appointed by the Federation of Victorian Traditional Owners (the Federation), which was the sole member of FNLRS. The Board had five Directors as of 30 June 2022, with each serving a two-year term. The governance structure changed at the end of the Review period as the organisation formally "de-coupled" from the Federation. This change meant that from 1 July 2022, Directors were no longer appointed by the Federation.

FNLRS has six senior management positions, including the Chief Executive Officer (CEO), Chief Financial Officer (CFO), Principal Legal Officer (PLO), Deputy PLO, Research Manager and Corporate Services

¹ Under the previous name Native Title Services Victoria, which was changed to FNLRS in 2017.

² One of these was deregistered under the NTA (not under the state legislation) during the Review period (detailed under TOR 1).

Manager. As at 30 June 2022, 20 per cent of employees identified as Aboriginal and/or Torres Strait Islander. There is one office, based in North Melbourne, Victoria, with two staff located regionally.

2 Scope of the Review

The National Indigenous Australians Agency (NIAA) has engaged Nous Group (Nous) to undertake an independent review of 13 Native Title Representative Bodies and Service Providers (NTRB-SPs).

The purpose of this Review was to assess the individual and comparative performance of NTRB-SPs in delivering native title outcomes for Aboriginal and Torres Strait Islander people and communities under the NTA over a time period of 1 July 2019 to 30 June 2022.

The Review is an opportunity to assess all the organisations over a consistent time period to understand performance during and post the COVID-19 pandemic and the extent to which organisations have addressed recommendations from previous organisational performance reviews.

The Terms of Reference (TOR) provided by the NIAA for the Review are to determine the extent to which each organisation:

- has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19
- assesses and prioritises applications for assistance in a manner that is equitable, transparent and robust and is well publicised and understood by clients and potential clients
- deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints
- performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation
- has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery
- is adequately supporting PBCs towards self-sufficiency
- has developed its planning for a post-determination environment.

The complete TOR are included in Appendix A.

Methodology

Nous originally designed the methodology for the previous round of Reviews conducted from 2017 to 2021, which was reviewed at that time by NTRB-SPs and the NIAA. The methodology has been modified to incorporate lessons learned, streamline some previously repetitive elements, reflect current context and be consistent with the current TOR.

The method draws on a defined set of performance indicators under each TOR. These indicators combine qualitative and quantitative performance assessment and include external factors to account for the unique context within which each NTRB-SP operates, based on broader social and geographical factors that impact performance.

Nous used a mixed method approach to undertaking this Review, including an analysis of quantitative data on the progress of claims, Future Acts and Indigenous Land Use Agreements (ILUA), performance against milestones, budgetary performance and staffing. A list of the data and documents that informed the Review can be found at Appendix C.

The quantitative analysis was complemented by stakeholder interviews. As required by the NIAA, and in accordance with the TOR, this Review involved consultations with persons affected by the activities of each NTRB-SP, including Traditional Owners, PBCs, staff of the NTRB-SP, state governments, NIAA, the Federal Court and legal stakeholders. A list of the stakeholder consultations undertaken for this Review is set out in Appendix B.

A full description of the methodology and the performance indicators under each TOR was provided to each NTRB-SP. Nous used a variety of methods to contact stakeholders, including Traditional Owners, for feedback. The approach to stakeholder consultation for the Review was set out in the Consultation Plan, which was also provided to each NTRB-SP at the outset.

Limitations

Nous acknowledges that, despite best efforts to seek broad feedback:

- only a limited number of stakeholders provided feedback (see Appendix B for further detail)
- stakeholders who responded to the call for feedback were, in the main, those who were dissatisfied with the process or outcome of their native title claim.

Accordingly, Nous appreciates that the views of the consulted stakeholders may not be representative of the views of most stakeholders who actually interacted with, or used the services of, each NTRB-SP.

As part of the consultation process, Nous listened to the views of Traditional Owners across all regions of Australia, including Traditional Owners who were dissatisfied with the process or outcome of their native title claim.

These concerns and complaints have been acknowledged and reported (as communicated to Nous) as part of this Review.

It is acknowledged that Nous has not investigated or assessed the merits of these concerns, as part of this Review. This falls outside the scope of Nous' role and the TOR. Accordingly, no statement is made regarding the legitimacy of these concerns or complaints.

NTRB-SPs have been given the opportunity to view the draft reports and to provide feedback to Nous about the issues raised in them. They will also be given the opportunity to make a formal response at the time of publication.

3 List of abbreviations

Abbreviation	Meaning
Aboriginal Heritage Act	<i>Victorian Aboriginal Heritage Act 2006</i>
AGM	Annual general meeting
ARC	Audit and Risk Committee
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CLO	Community Liaison Officer
FAN	Future Act notification
FARAC	Facilitation and Assistance Requests Assessment Committee
FNLRS	First Nations Legal and Research Services
FVTOC	Federation of Victorian Traditional Owner Corporations
GLaWAC	Gunaikurnai Land and Waters Aboriginal Corporation
HR	Human resources
ILUA	Indigenous Land Use Agreements
IRSD	Index of Relative Socio-economic Disadvantage
LGA	Local government area
NIAA	National Indigenous Australians Agency
NNTT	National Native Title Tribunal
Nous	Nous Group
NTRB-SP	Native Title Representative Body and Service Provider
NTSP	Native Title Service Provider
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
PLO	Principal Legal Officer
RAP	Registered Aboriginal Party
RATSIB	Representative Aboriginal/Torres Strait Islander Body

Abbreviation	Meaning
RNTBC	Registered native title bodies corporate
RSA	Recognition and settlement agreement
The Federation	Federation of Victorian Traditional Owners
The NTA	<i>Native Title Act 1993</i> (Cth)
The Review period	1 July 2019 to 30 June 2022
The Settlement Act	<i>Traditional Owner Settlement Act 2010</i>
The Treaty Act	<i>Advancing the Treaty Process with Aboriginal Victorians Act 2018</i>
TOGE	Traditional Owner Group Entity
TOR	Terms of Reference

4 Executive summary of performance and recommendations

The summary and recommendations for each TOR are reproduced here as an overall summary. The detailed performance assessment against each performance indicator follows in section 5.

TOR 1 | Extent to which each organisation has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19.

While there were no native title determinations made during the Review period, FNLRS was the representative for two active claims that progressed through the courts despite COVID-19 lockdowns. This included an individual claim for the Eastern Maar people and a claim for the First People of the Millewa-Mallee. This work culminated in the Eastern Maar determination after the Review period, in March 2023. This was the first determination under the NTA in Victoria in 12 years, although FNLRS had also supported two comprehensive settlements under the Settlement Act (which are both considered native title outcomes for the purposes of NIAA funding) in this time. The Eastern Maar determination immediately after the Review period was a significant milestone for FNLRS, given the difficulty of achieving native title outcomes in Victoria. It brought the total number of native title outcomes to seven (with FNLRS representing all these claims).

Achieving native title rights for Traditional Owners in Victoria is complicated by several factors, including:

- the complex policy and legislative landscape, which includes two alternative state-based rights processes, under the Settlement Act and the Aboriginal Heritage Act, and a third currently developing with Treaty
- the significant impacts of colonisation and the legacy impacts of the Yorta Yorta case, which established high legal thresholds making it difficult to achieve successful native title determinations in Victoria
- the deeply intractable inter- and intra-Indigenous disputes, and the high levels of dispossession and dislocation in Victoria.

Within this context, FNLRS has systematically and strategically continued to fulfil its duties under the NTA, while exploring all options for Traditional Owners including other forms of recognition. FNLRS recognised that the pace and progress of native title in Victoria did not match that of other states and territories and noted that the increasingly conflicted environment has made it difficult to continue to represent clients.

FNLRS initiated a Strategic Review towards the end of 2022 (outside the Review period), to specifically consider the organisation's future role within its complex operating context. The Board fully endorsed the recommendations of the Strategic Review, including the central recommendations that it adopt a more neutral position in active legal disputes, instead placing greater reliance on third-party legal service providers. The associated Strategic Review recommendations propose FNLRS continue to play the role of facilitating funding and establish a panel of approved external legal representatives who can access funding. This Review agrees with this position and supporting recommendations.

The Review interviewed Traditional Owner groups that were represented by and worked with FNLRS closely. Most were satisfied with the organisation's performance. Traditional Owners noted strengths of FNLRS approach, including its deep knowledge of native title and the intersection with other state-based recognition mechanisms, its flexible approach and its dedication to achieving outcomes.

FNLRS did not lodge any new native title claims itself; however, two applications were lodged in Victoria on behalf of groups not represented by FNLRS.

FNLRS dedicated a significant amount of time conducting research in four areas across Victoria that do not have formal recognition under the NTA or state-based mechanisms (the Victorian Mid North West, North East, Central North West, as well as Far East Gippsland). While some progress was made, staff reported there was still much work needed to bring together family groups and chart a path forward. The work was highly resource-intensive, requiring sustained relationship building across communities.

Victoria saw a substantial increase in Future Act activity relative to the previous Review period (FY2014-15 to FY2016-17), notably linked to the progression of gas and offshore wind projects in the state. FNLRS registered two ILUAs during the Review period, noting that one was later deregistered. The Federal Court's decision to deregister the Taungurung Settlement ILUA was a notable event during the Review period and will shape the way FNLRS approaches native title and settlement negotiations in the future.

RECOMMENDATION

1

Continue to build on the steps it has already taken to improve Traditional Owner awareness of changes in the Victorian land rights landscape (noting the emergence of Treaty) to increase Traditional Owners' understanding of the different forms of recognition and FNLRS's role as an NTSP in the changing Victorian landscape.

RECOMMENDATION

2

This Review endorses the following recommendations of the Strategic Review:

- FNLRS should adopt more neutral positioning in active legal disputes between and internal to Traditional Owner groups, instead placing greater reliance on third party legal service providers.
- In repositioning to rely more on third party legal services providers, FNLRS should not move too quickly so as to deplete existing services and potentially alienate the users of those services.
- FNLRS should continue to seek to externalise politically charged decisions or research outcomes, and/or support the authority of such decisions/positions by reference to external and independent expertise.

TOR 2 | Extent to which each organisation assesses and prioritises applications for assistance in a manner that is equitable, transparent, and robust and is well publicised and understood by clients and potential clients.

FNLRS used the Guidelines for First Nations Assistance to Native Title Groups to guide its assessment and prioritisation decisions. The guidelines clearly outlined the process for applying for assistance, including instructions as to how to make an application and the process for ascertaining the facts surrounding an application.

The guidelines were updated during the Review period to refine the assessment practices, expand the criteria for assistance and provide further detail for FNLRS's approach to assessing assistance requests. These adjustments enhanced the transparency, accessibility and effectiveness of the guidelines.

The Review did not receive extensive feedback from Traditional Owners around the assessment and prioritisation process. While some Traditional Owners were positive about the process, other Traditional Owners interviewed viewed FNLRS's performance as less favourable, raising issues around their perceived role as a "gatekeeper" for funding.

Since the Review period, FNLRS has re-evaluated how it approaches providing assistance to native title groups in line with the recommendations of the Strategic Review. The previous approach relied solely on the CEO to make assessment decisions on funding and was only delegated to other executives (for example, the PLO) to make decisions if the CEO was personally conflicted. The new approach aims to expand decision-making to address funding limitations and frequent incidence of conflicts of interest. It also supports FNLRS moving towards the role of facilitator rather than as a legal representative for potential native title holders.

TOR 3 | Extent to which each organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints.

FNLRS's engagement with Traditional Owners was broadly reported to be respectful and transparent. During the Review period, FNLRS did not widely or proactively advertise its successes and key milestones to the community through newsletters or other publications. Staff and external stakeholders saw this as a key future opportunity for FNLRS, to help raise its profile more generally in the community and to help attract the best talent to the organisation.

There was a consensus that FNLRS undertook its work in a culturally appropriate manner and supported its staff to undertake cultural awareness training to build skills in this area. Staff acknowledged that FNLRS could be doing more to expand the role of the Community Liaison Officers (CLOs) to better leverage their skills and deep cultural expertise. During the Review period, the CLO role was relatively administrative; helping to organise claim group meetings and travel arrangements for Traditional Owners, as well as helping to facilitate these meetings in a culturally appropriate way. Staff reflected on the fact that in the future the CLO role could play a much bigger part in helping to work with the community to build trusting relationships, achieve outcomes and to raise the profile of FNLRS in the community.

FNLRS's use of cultural materials was appropriate during the Review period. One Traditional Owner group however reported concerns around the ongoing use of cultural materials and submissions made more generally to FNLRS as part of historical native title claims. FNLRS staff also acknowledged that this issue was top of mind and that during the Review period they received many requests for data and information that was held in their database. Post-Review period, FNLRS is currently undergoing a process to develop processes and policies around the return of cultural materials.

FNLRS received no formal complaints and received one internal review request, which upheld the CEO's decision to not grant assistance.

RECOMMENDATION

3

This Review endorses the following recommendation of the Strategic Review:

- FNLRS should increase communication with the Victorian Traditional Owner communities and celebrate its work and success more openly.

RECOMMENDATION

4

Review the CLO role position description and explore how it can be evolved to go beyond administrative tasks to focus more on building relationships with community and education activities.

TOR 4 | Extent to which each organisation performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation.

Native title funding from NIAA increased throughout the Review period, from \$3.7 million at the start of the period to \$4.7 million at the end of period (an increase of 22 per cent). This increase was mostly due to demand-driven funding for litigation, and, to a lesser degree, in-house staff salary increases.

The Review believes that NIAA funding was used carefully by FNLRS throughout the Review period, with a strong focus on limiting expenditure where possible.

This was achieved by their efficient facilitation of meetings as a result of adhering to robust meeting facilitation guidelines and seeking to address concerns that may detract from claim group meetings prior to the meeting itself. It was also achieved through their travel assistance policy for claim group meetings.

Outside the Review period, in November 2023, FNLRS was in the process of relocating from their current North Melbourne office to a co-working space in Fitzroy. FNLRS expected that the office move will result in a reduction in rental expenses.

RECOMMENDATION

5

Document cost-saving policies for all relevant categories of expenditure.

TOR 5 | Extent to which each organisation has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery.

FNLRS was governed by a Board of five Directors who were accountable for the strategic direction of the organisation and were not involved in day-to-day operations. The Board continued to be a skills-based Board with Aboriginal Directors needing to have traditional interests in Victoria with experience of native title and corporate governance processes and be of good standing in the Aboriginal community. During the Review period, the Board was supported by one sub-committee – the Audit and Risk Committee (ARC).

The Board experienced significant turnover of its membership during the Review period and recruitment was reportedly difficult. Directors believed that the Board would benefit from more members and greater gender diversity. The Review heard feedback from other stakeholders that FNLRS would benefit from the Board having greater visibility, both in terms of raising the profile of FNLRS as well as ensuring that it attracted the best talent in a complex and competitive landscape.

Between 2017 and 2022, the Federation worked in partnership with FNLRS to realise the aspirations and rights of Traditional Owners across Victoria. During this time, the Federation was the sole member (owner) of FNLRS. However, primarily due to community concerns that the Federation was not representative of all Traditional Owners with formal recognition, FNLRS and the Federation decided to de-couple. From 1 July 2022, the Federation was no longer the sole member of FNLRS and was no longer responsible for appointing the Directors of FNLRS. Stakeholders consulted as part of the Review agreed that the de-coupling was a positive move to build FNLRS's trust within the community.

FNLRS had robust financial management in the Review period. FNLRS received funding from both the Australian Government and the Victorian Government to deliver its services. Staff reported that they had mechanisms in place to manage the attribution of funding for work and avoid any cross-subsidisation. Investment was made to automate financial reporting during the Review period. Despite not having an organisation-wide conflicts of interest policy, FNLRS continued to proactively manage real and perceived conflicts of interest through carefully choosing staff to work on specific matters and implementing information firewalls.

There was a consensus among staff that FNLRS was a good place to work, that it was a well-run organisation and had a positive work culture. COVID-19 had a significant impact on the ways of working and hampered collaboration. A significant amount of work was undertaken during the Review period to establish and implement human resources (HR) processes and policies. Ample training opportunities were provided to staff during the Review period. Online onboarding modules included training around cultural awareness, vicarious-trauma and facilitation skills. Staff turnover was low.

RECOMMENDATION

6

This Review endorses the following recommendations made by the Strategic Review:

- FNLRS should seek to diversify the composition and skills of its Board to a wider variety of people and skillsets (for example, this could be achieved by advertising for Directors more proactively and widely using formal advertisement channels and possibly recruiters).
- FNLRS should better communicate its current governance structure and Board membership (this could be achieved by profiling the current Board members on relevant channels including FNLRS's website, social media channels, events).

RECOMMENDATION

7

Implement a mechanism for collecting, understanding and responding to community feedback, which should then be reported to the Board.

RECOMMENDATION

8

Enhance organisational collaboration by implementing activities that encourage the different teams within FNLRS to work together.

TOR 6 | Extent to which each organisation is adequately supporting Prescribed Body Corporates towards self-sufficiency.

FNLRS serviced four PBCs and two TOGEs during the Review period. They were all highly functioning organisations, with between 30 to 80 staff with the PBCs running for over ten years. Some had multiple funding sources and did not require basic support funding. FNLRS allocated at least one lawyer, an anthropologist and a CLO to each PBC and TOGE to provide consistent support during the Review period. Because the PBCs were already well established, FNLRS provided targeted support as required, primarily focused on Future Act support, administrative support for annual general meetings (AGMs) and ad-hoc legal support.

PBCs and TOGEs were mostly satisfied with FNLRS's support. Clients valued the high quality of FNLRS's legal support and the value for money in accessing ad-hoc legal advice. They also cited the strong and trusting relationship that they had with FNLRS. Some clients believed there could be improved clarity around FNLRS's service offering with more consistent communication and greater transparency around decision-making.

Several staff interviewed noted that FNLRS experienced capacity constraints throughout the Review period, which they believed contributed to restricted support provision for PBCs and TOGEs. The funding and staffing level decreases in FY2019-20 contributed to this.

FNLRS formed a Return of Materials Committee during the Review period, which oversaw a pilot initiative to return cultural materials to the Gundiŋjmarra people. Several staff interviewed reported that learnings

from this pilot project would be central to the development of a formal return of materials policy to be used by FNLRS for other PBCs in the future.

FNLRS received \$100,000 per annum in PBC support funding during each year of the Review period, with \$50,000 being provided to two of the four Victorian PBCs. There would be benefit in NIAA clarifying its intentions in relation to PBC funding in the future. Operational funding or fee-for-service arrangements were also used to fund both PBC and TOGE support.

RECOMMENDATION

9

Implement a mechanism to collect client feedback from PBCs and TOGEs on an ongoing basis and improve the way the organisation collects, monitors and responds to informal feedback and issues.

RECOMMENDATION

10

Develop clear communications around the service offering for PBC and TOGE support that outline which services FNLRS offers on a fee-for-service basis.

RECOMMENDATION

11

Clarify with the NIAA its intentions to provide base PBC funding in the future to all PBCs.

RECOMMENDATION

12

This Review endorses the following recommendation of the Strategic Review:

- FNLRS should assess current research practices and consent forms to ensure they provide informants the option for their information to contribute to Treaty negotiations.

TOR 7 | Extent to which each organisation has developed its planning for a post-determination environment.

FNLRS is advanced in its post-determination planning despite having a relatively low number of successful determinations and only six PBCs/TOGEs. Staff thought it was possible for all native title claims to be finalised in the next five to ten years. FNLRS has been very active in supporting Traditional Owners in Victoria achieve their aspirations post-recognition, including negotiating and expanding settlement ILUAs under the Settlement Act.

The priority for FNLRS's leadership team during the Review period was to complete the remaining native title claims for Traditional Owners in Victoria. This was seen as particularly important ahead of Treaty negotiations. However, most staff recognised that once all claims are finalised, FNLRS's role and operating model was likely to be influenced in the future by its contestable environment. FNLRS's aspiration to be the "go to" service provider for post-determination or post-settlement support remains unchanged. However, FNLRS recognises that future support for PBCs and TOGEs may need to be undertaken on a fee-for-service basis.

PBCs and TOGEs were eager to work with FNLRS in the future and were interested in receiving specialist advice around commercial deals and compensation. There was a consensus among PBCs/TOGEs that FNLRS would need to continue to play an important role in providing basic legal services to clients and that it was still the most obvious go-to service for legal advice in Victoria given FNLRS's deep knowledge of the area.

The Strategic Review presented options for how FNLRS could be better structured into the future to progress Traditional Owner aspirations given the upcoming Treaty process and the options which are under consideration by FNLRS. Developing FNLRS's next strategy post-2024, provides an opportunity to reflect on the optimal operating model for the medium- to long-term and to consider what capability is required to deliver the services that are likely to be in demand.

Victoria's Treaty process was raised throughout most consultations as a key change on the horizon that will potentially shape the way self-determination is pursued in Victoria. When asked about FNLRS's role in Treaty, all stakeholders consulted believed that FNLRS was well-positioned to play a valuable role, given their organisational knowledge and the intersection between the NTA, the Settlement Act and Treaty agreements. Stakeholders reflected on the fact that work for FNLRS might increase as a result. This Review acknowledges that, as the Strategic Review concluded, that it was too early to make any major changes to operations given the evolving nature of the process.

No compensation claims were made during the Review period. The focus in Victoria around compensation has primarily been through negotiations under the Settlement Act, where FNLRS has achieved many successes for its clients. Despite most of the financial benefits deriving from settlement packages, FNLRS staff believed that formal compensation claims under the NTA have not been ruled out for the future.

RECOMMENDATION

13

This Review endorses the recommendations of the Strategic Review:

- FNLRS should avoid any significant re-structure until the Treaty process and its associated institutions are more fully established, to avoid locking into unsuitable or inflexible arrangements that do not serve Traditional Owner needs.
- FNLRS should strengthen and build ties with emerging Treaty institutions and remain agile and ready to reflect their needs as new spaces develop.

RECOMMENDATION

14

As part of the development of FNLRS's next Strategic Plan (post-2024), engage with staff and clients to develop clear objectives for post-determination and post-settlement activities for each PBC and TOGE, and for FNLRS as an organisation.

5 Performance assessment

This section assesses performance against the relevant performance indicators for each TOR. See Appendix A for the performance indicators.

5.1 TOR 1 | Extent to which each organisation has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19.

Summary

While there were no native title determinations made during the Review period, FNLRS was the representative for two active claims that progressed through the courts despite COVID-19 lockdowns. This included an individual claim for the Eastern Maar people and a claim for the First People of the Millewa-Mallee. This work culminated in the Eastern Maar determination after the Review period, in March 2023. This was the first determination under the NTA in Victoria in 12 years, although FNLRS had also supported two comprehensive settlements under the Settlement Act (which are both considered native title outcomes for the purposes of NIAA funding) in this time. The Eastern Maar determination immediately after the Review period was a significant milestone for FNLRS, given the difficulty of achieving native title outcomes in Victoria. It brought the total number of native title outcomes to seven (with FNLRS representing all these claims).

Achieving native title rights for Traditional Owners in Victoria is complicated by several factors, including:

- the complex policy and legislative landscape, which includes two alternative state-based rights processes, under the Settlement Act and the Aboriginal Heritage Act, and a third currently developing with Treaty
- the significant impacts of colonisation and the legacy impacts of the Yorta Yorta case, which established high legal thresholds making it difficult to achieve successful native title determinations in Victoria
- the deeply intractable inter- and intra-Indigenous disputes, and the high levels of dispossession and dislocation in Victoria.

Within this context, FNLRS has systematically and strategically continued to fulfil its duties under the NTA, while exploring all options for Traditional Owners including other forms of recognition. FNLRS recognised that the pace and progress of native title in Victoria did not match that of other states and territories and noted that the increasingly conflicted environment has made it difficult to continue to represent clients.

FNLRS initiated a Strategic Review towards the end of 2022 (outside the Review period), to specifically consider the organisation's future role within its complex operating context. The Board fully endorsed the recommendations of the Strategic Review, including the central recommendations that it adopt a more neutral position in active legal disputes, instead placing greater reliance on third-party legal service providers. The associated Strategic Review recommendations propose FNLRS continue to play the role of facilitating funding and establish a panel of approved external legal representatives who can access funding. This Review agrees with this position and supporting recommendations.

The Review interviewed Traditional Owner groups that were represented by and worked with FNLRS closely. Most were satisfied with the organisation's performance. Traditional Owners noted strengths of

FNLRS approach, including its deep knowledge of native title and the intersection with other state-based recognition mechanisms, its flexible approach and its dedication to achieving outcomes.

FNLRS did not lodge any new native title claims itself; however, two applications were lodged in Victoria on behalf of groups not represented by FNLRS.

FNLRS dedicated a significant amount of time conducting research in four areas across Victoria that do not have formal recognition under the NTA or state-based mechanisms (the Victorian Mid North West, North East, Central North West, as well as Far East Gippsland). While some progress was made, staff reported there was still much work needed to bring together family groups and chart a path forward. The work was highly resource-intensive, requiring sustained relationship building across communities.

Victoria saw a substantial increase in Future Act activity relative to the previous Review period, notably linked to the progression of gas and offshore wind projects in the state. FNLRS registered two ILUAs during the Review period, noting that one was later deregistered. The Federal Court's decision to deregister the Taungurung Settlement ILUA was a notable event during the Review period and will shape the way FNLRS approaches native title and settlement negotiations in the future.

5.1.1 TOR 1: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Native title outcomes including from facilitation and assistance, certification, notification, dispute resolution and other relevant functions

FNLRS carried out required functions under the NTA during the Review period, despite there being no determinations

There were no native title determinations made in Victoria during the Review period. As of 30 June 2022, there was a total of four positive determinations under the NTA (which had all been represented by FNLRS) with the last determination before the Review period being the Gunditjmara and Eastern Maar joint determination (VID6004/1998, VID655/2006) in 2011. In addition to the four NTA determinations, FNLRS had also achieved native title outcomes for two groups (Dja Dja Wurrung and Taungurung) through comprehensive settlements under the Settlement Act prior to the Review period. The Taungurung Settlement ILUA agreement was registered with the National Native Title Tribunal (NNTT) on April 2020 before being deregistered in March 2021 after the Federal Court held that the registrar failed to consider relevant material. However, this settlement agreement is still upheld (and is currently subject to a further research and submission process) and the associated ILUA may be reregistered under the NTA.

FNLRS did not lodge any new native title claims during the Review period. However, two native title claims were lodged in Victoria on behalf of groups represented by external legal representation. FNLRS was the representative for two active claims that progressed through the courts during the Review period (the Eastern Maar People Claim VID21/2019 and the First People of the Millewa-Mallee Claim VID630/2015). An overview of the active claims in Victoria, and their status as of 30 June 2022, is provided in Table 1. FNLRS's performance of specific functions as an NTRB-SP under the NTA (for example, facilitation and assistance, dispute resolution), led to moderate native title progress during the Review period. This was for both active claims and pre-claim work for upcoming claims.

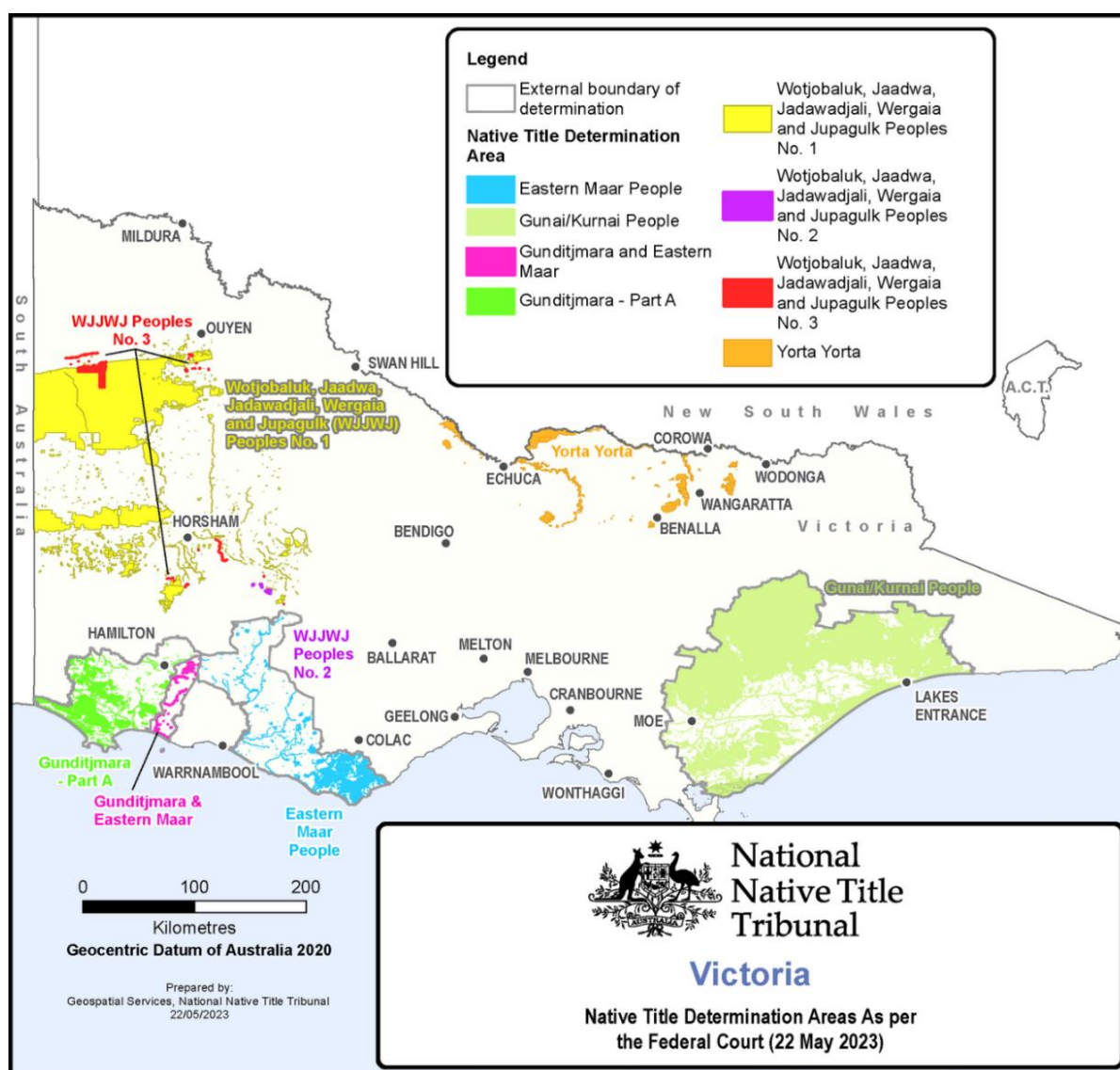
The second, individual claim filed by the Eastern Maar People made substantial progress through the Federal Court and involved FNLRS undertaking additional research to resolve disputes. This work culminated in the Eastern Maar People determination in March 2023. This was a significant milestone for FNLRS recognising the difficulty of achieving native title in Victoria (as discussed further below). FNLRS's

work for the First Peoples of the Millewa-Mallee claim included providing connection materials to the state government and mediation for disputes.

Despite FNLRs not providing legal support to the Boonwurrung People and Wamba Wemba claims during the Review period, they supported these claims through some work, including research and administration of funding³.

Figure 1 illustrates the areas of the region where native title has been determined as of May 2023.⁴

Figure 1 | Victoria determination areas at May 2023⁵



³ N.B. FNLRs only administered funding for the Boonwurrung People Claim and not for the Wamba Wemba Claim (detailed further below).

⁴ National Native Title Tribunal. Victoria Claimant Application and Determination Areas. 2023. Accessed Nov 2023.
http://www.nntt.gov.au/Maps/QLD_Northern_NTDA_Schedule.pdf

⁵ Includes negative determinations in diagram, including the entirety of areas for Yorta Yorta, WJWJP No. 1 and No. 2, and for parts of Gunditjmara and Eastern Maar.

Table 1 | Active claims in Victoria as of 30 June 2022

Case name	Applicant representative	Date filed	Status commentary
Eastern Maar People (VID21/2019; partly determined after Review period, 2023)	FNLRS	14/12/2012	The majority of the claim area was determined (post-Review period) through litigation in 2023 and covers 3,734 square kilometres of parcels of land and waters in the South West of Victoria, stretching from Northern Grampians Shire in the north, to Moyne Shire in the south, from Ararat Rural City in the east, to Warrnambool City in the west. Two other areas of overlap were determined by consent in 2024, following mediation. One remaining overlap area remained to be litigated.
First People of the Millewa-Mallee Claim (VID630/2015)	FNLRS	08/10/2015	The claim is complex and negotiation of a consent determination was well progressed. It covers 7,859 square kilometres of parcels of land and waters in the North West of Victoria, in and around the vicinity of Mildura.
Boonwurrung People (VID363/2020)	Massar Briggs Law	29/05/2020	The claim requires litigation to be determined and covers 13,077 square kilometres of parcels of land and waters along the southern coast of Victoria, generally in the coastal district of Melbourne and including Wilson's Promontory.
Wamba Wemba (VID14/2022)	Massar Briggs Law	23/12/2021	The claim requires litigation to be determined and covers 12,992 square kilometres of land and waters in the vicinity of Lake Tyrrell and Birchip, Victoria extending to Deniliquin, NSW.

Although there were no determinations made during the Review period, FNLRS undertook a significant amount of work for its clients across a range of activities, detailed in Table 2. The work included administering funding, pre-claim work for several groups, early research and facilitating family group meetings for areas without formal recognition (Central North West, Mid North West, North East and Far East Gippsland), help with dispute resolution and Future Acts administration.

Unique to the Victorian landscape is the existence of the Victorian Government's two alternative mechanisms for "formal" recognition of Traditional Owner land rights and one potential emerging mechanism for rights (Treaty):

1. Recognition as a TOGE through the Settlement Act.
2. Recognition as a Registered Aboriginal Party (RAP) through the Aboriginal Heritage Act.
3. Recognition through the Treaty process.⁶

These mechanisms provide alternative state-based processes for Traditional Owners to be "formally recognised" and granted land rights (see section 5.1.2 for a more detailed explanation of these mechanisms). FNLRS also worked with its clients to achieve recognition under these state-based mechanisms.

⁶ While the Treaty framework was in early development during the Review period, early consideration of Treaty was factored into relevant parts of FNLRS's activities during the Review period.

Table 2 | Summary of FNLRS's work under the NTA during the Review period⁷

Group/region	Summary of work during the Review period
Boonwurrung/ Bunurong	FNLRS is an inactive respondent party to the Boonwurrung People's claim, assisting with research information requests and administration of funding, including for the applicant and all Indigenous respondents (including Bunurong respondents).
Central North West	FNLRS undertook intensive research and claim group development. However, this ceased with lodgement of the "factional" Wamba Wemba native title claim in 2022. FNLRS sought to ensure that Indigenous respondents (notably Barapa Barapa and Wadi Wadi Traditional Owners) had representation and were assisted with mediation, information requests and administration of funding.
Eastern Maar	FNLRS provided legal representation for the Eastern Maar claim and for the contested hearing with the Gunditjmarra People. FNLRS also provided funding to some respondents and engaged researchers (in-house and consultant) to prepare targeted research reports to the parties in mediation at the request of the parties and the Federal Court native title registrar. Further, FNLRS provided meeting and community liaison support to the parties in mediation and to the on-Country hearings.
First Peoples of the Millewa-Mallee	FNLRS represented First Peoples of the Millewa-Mallee in negotiations towards a consent determination, in mediation and potential litigation with individuals identifying as Nyeri Nyeri. In addition, FNLRS provided ongoing governance assistance on a fee-for-service basis, pursuant to a services agreement.
Far East Gippsland	FNLRS conducted research and claim group development work in the region.
Gunaikurnai	FNLRS administered funding to Gunaikurnai in their capacity as respondents to the Boonwurrung claim. FNLRS provided ongoing Future Act and governance assistance pursuant to a services agreement. FNLRS provided discounted fee-for-service assistance regarding the renegotiation of the Gunaikurnai recognition and settlement agreement (RSA), noting that in 2010 Gunaikurnai only entered into a partial settlement with the State.
Gunditjmarra	FNLRS provided ongoing Future Act and governance assistance on an ad-hoc basis. FNLRS rejected a request for assistance in relation to Gunditjmarra's status as respondents to the Eastern Maar claim on the basis the request failed to satisfy the Guidelines for Assistance to Traditional Owner Groups.
Mid North West	FNLRS undertook intensive research and claim group development in this region, with anticipated lodgement of a native title claim in 2024 or 2025.
North East	FNLRS undertook research and claim group development work in the region.
Taungurung	FNLRS supported the Settlement Act RSA in late 2018, which saw the registration of a linked ILUA under the NTA in 2020. This was then deregistered in 2021 and may be reregistered (post-Review period) pending the outcome of a research and reconsideration process as agreed by the parties in mediation. FNLRS also provided ad-hoc legal advice for various matters.
Wathaurung/ Wadawurrung	FNLRS offered to engage in a conflict-resolution process with Wadawurrung families to address a long-standing group membership dispute.
WJJWJ Nations ⁸	FNLRS provided the Barenji PBC with Future Act and ad-hoc governance assistance.

⁷ Data provided directly to the Review by FNLRS; FNLRS 2019-2022 Annual Reports; FNLRS 2019-2022 Operational Plans.

⁸ Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Nations.

Group/region	Summary of work during the Review period
Wurundjeri	Wurundjeri have independent legal representation and have commenced preparation to file a native title claim since the Review period. FNLRS had a role in administering funding to the Wurundjeri in their capacity as Indigenous respondents to the Boonwurrung claim and in the preparation of a Wurundjeri claim. FNLRS talked informally with external representation to help Wurundjeri formulate a claim that has good prospects for success, noting a group composition dispute has disrupted progress to date.
Yorta Yorta	Limited native title support was provided for the Yorta Yorta during the Review period.

There are a number of reasons that the progress of native title in Victoria is much more limited; FNLRS has performed well given these circumstances

Within Victoria's complex policy and legislative landscape, FNLRS has worked closely with Traditional Owners to explore all options for them with a very clear mandate of supporting self-determination. Interviewed Traditional Owners generally showed an appreciation for FNLRS's progression of all mechanisms of recognition.

The Review heard feedback from many stakeholders that ultimately, it was up to the Traditional Owner group what outcome are they seeking, the form of recognition they would like to pursue and if it is in their interest to do so. Agency in decision-making is key to the principles of self-determination. FNLRS's capacity to support these family groups to educate them on the various avenues for formal recognition will be increasingly important.

FNLRS has awareness of the potential limitations around progress and has been strategic in considering its future role

FNLRS recognised that the pace and progress of native title in Victoria did not match that of other states and territories. FNLRS staff also noted the increasingly conflicted environment that it finds itself in which has made it difficult for FNLRS to continue to represent clients. As a result, FNLRS initiated a Strategic Review towards the end of 2022 (outside of the Review period), which was published in October 2023. The Strategic Review was funded by the NIAA and was undertaken by external consultants to specifically consider FNLRS's future role within this operating context and how it could best continue to perform its native title functions.

The Strategic Review considered and made recommendations on⁹:

- The extent to which the operation of the legislative regimes and associated Victorian Government programs inhibit the performance of FNLRS under the NTA, including their contribution to intra and inter-Indigenous disputes regarding native title rights and interests; and the perceived conflicts of interest with respect to the performance of its functions.
- How FNLRS can mitigate these impacts and perceptions, including any structural changes, to maximise the likelihood that NTA functions will be performed to a high standard in Victoria over the next five years, while considering the rapidly changing operating environment in Victoria.

The Strategic Review engaged widely with FNLRS staff, the FNLRS Board, Traditional Owners and government bodies, including the Federal Court of Australia and the First People's Assembly of Victoria. It made nine recommendations, all of which were fully endorsed by the Board.

Central to these recommendations was a proposed shift in FNLRS's role given the extensive intra- and inter-Indigenous disputes that continue in Victoria: "Recommendation 2: FNLRS should adopt more

⁹ FNLRS 2022-2023 Annual Report.

neutral positioning in active legal disputes between and internal to Traditional Owner groups, instead placing greater reliance on third party legal service providers.”¹⁰ This would involve FNLRS briefing out representation to third party legal service providers for most parties involved in a Traditional Owner dispute.

The associated Strategic Review recommendations propose FNLRS continue to play the role of facilitating funding and establish a panel of approved external legal representatives who can access funding. While FNLRS has stated its intention to adopt more neutral positioning and place greater reliance on third party legal service providers, FNLRS will still play an important role in helping to administer the funding for these claims and support pre- and post-claim activities. FNLRS’s more neutral role would naturally shift to focus more on targeted research, community liaising and certification. This Review agrees with this position including Recommendation 3 of the Strategic Review and supporting recommendations. FNLRS had progressed the implementation of these recommendations at the time of writing this report, including establishing a Board sub-committee to assess assistance requests and engage external expertise and peer review on a case-by-case basis.

There is an opportunity for FNLRS to improve Traditional Owner awareness of changes in the Victorian land rights landscape (noting the emergence of the potential Treaty negotiations) and of FNLRS’s own role as an NTSP. FNLRS developed easy-to-understand guides to formal recognition processes in Victoria alongside the Victorian Government during the Review period. Incorporating new elements of Treaty and FNLRS’s changed role in these guides and promoting them appropriately would be beneficial to Traditional Owners.

FNLRS advised that following the Review period it had developed a fact sheet and guide: Formal Recognition Resources – First Nations Legal and Research Services.¹¹

Anthropological research

FNLRS’s research focussed on active claims and areas without formal recognition under the NTA or alternative mechanisms

As noted, the history of colonisation and dispossession of Aboriginal people in Victoria continued to significantly impact Traditional Owner’s likelihood of achieving native title determinations. The removal of Aboriginal people through various government laws and policies, paired with the high standard of evidence required for a native title determination and the impact of unfavourable previous claims (1999 Yorta Yorta determination) has resulted in the need for extremely thorough and detailed research to prove ongoing connection.

FNLRS’s Research Team of five staff, headed by a Research Manager, conducted research for anthropology, historical, cultural and related research matters. The team also used consultant researchers, who were contracted based on capacity constraints or where independence was required. Staff appreciated the contribution of research consultants, highlighting that their work was generally of high quality and added independence to research, addressing any perceptions of bias.

During the Review period, a significant proportion of the Research Team’s work was for FNLRS’s active native title claims, Eastern Maar People and the First People of Millewa-Mallee Claim. This work mostly comprised targeted research to address conflicts, especially for the highly disputed Eastern Maar claim (more than 160 respondents), with disputes generally linked to group membership and claim boundaries. The relative difficulty of meeting the evidentiary standard for establishing continual connection to Country in Victoria was a further challenge for this work.

¹⁰ <https://www.fnls.com.au/strategic-plan>

¹¹ <https://www.fnls.com.au/formal-recognition-resources>

FNLRS also undertook research on areas where there was no formal recognition under the NTA or state-based mechanisms. FNLRS formed working groups – which included a researcher, a CLO and a lawyer – to facilitate research for four regions: the Victorian Mid North West, North East, Central North West and Far East Gippsland regions). Central North West research was discontinued by FNLRS in the latter part of the Review period after Wamba Wemba registered a claim (not represented by FNLRS).

Research in areas without formal recognition was funded by various sources, including the Victorian Government's Traditional Owner Nation-building Program, Treaty Readiness Support funding and by the NIAA. The aim was to foster agreement about group identity and governance for Victorian Traditional Owners. While some progress was made, several staff reported that there was still a lot of work needed in these areas to bring together family groups and chart a path forward. Staff reported that the work was highly resource-intensive and required sustained relationship building across communities.

Opinions varied on the quality of FNLRS's research

The Review spoke to many stakeholders, including many Traditional Owners, who expressed mixed views on the quality of FNLRS's research. Traditional Owners with positive experiences with the outcomes of research (for example, regarding group membership) expressed satisfaction with research quality when interviewed by the Review.

Conversely, those with less positive outcomes (who believed that their family group's history was not being endorsed by the research) felt that FNLRS's research quality could be better. This is a systemic issue present for all NTRB-SPs with the nature of native title. Some FNLRS staff also reported that there were doubts about the quality of research because of the deregistration of the Taungurung ILUA (explained below). However, staff were confident that FNLRS research was of high quality and believed that the outcome of a research and reconsideration process as agreed by the parties in mediation would validate this.

Traditional Owners typically expressed satisfaction with FNLRS's performance, with some suggested improvements

Most of the Traditional Owner groups the Review interviewed that were represented by and worked with FNLRS closely, were satisfied with the organisation's performance during the Review period. Satisfaction was largely attributed to FNLRS's focus on working flexibly with Traditional Owners and helping them to understand and progress in the complex Victorian landscape.

Traditional Owners particularly commented on the fact that FNLRS was very understanding of the aspirations of groups and that they believed there was clear dedication and strong alignment with what they were trying to achieve. Several Traditional Owner groups valued the deep expertise of FNLRS in native title matters and its understanding of the intersection of native title with various other state-based mechanisms. Others raised the positive relationship they had built with FNLRS and the organisation's openness to respond to requests, proactively meet face to face and work through challenges.

The Review heard feedback from some stakeholders that FNLRS could be more assertive in its approach to disputes and claim direction more generally. While it was acknowledged that FNLRS operated in a highly complex environment, some stakeholders believed that FNLRS could be more proactive to help resolve disputes or to bring together groups, for example with mediators, to help progress native title outcomes.

This feedback from Traditional Owners was consistent with reflections from external stakeholders interviewed who suggested there was a clear need for effective mediation and dispute resolution services. These stakeholders believed that while groups might think they need to approach the Court to resolve disputes, often they are looking for resolution of their disputes which could be carried out by other means than a court process.

When asked whether FNLRS could play a more active and assertive role, FNLRS disagreed with this view. Staff believed they were proactive in their approach and struck the right balance between being true to the findings of the research while facilitating outcomes appropriately for all Traditional Owners.

“There are so many ways to settle a matter – isn’t always about the evidence or meeting the test. The role of mediation is important – outcome may be native title, may be settlement, may be something else... it’s about having a conversation with people about what do they need.”

External stakeholder

Future Acts and ILUAs

There were a high number of Future Acts relative to the previous Review period, though this number is low compared to other NTRB-SPs

Victoria saw a substantial increase in Future Act activity relative to the previous Review period,¹² with a total of 304 Future Acts in three financial years (compared to 81 during the previous Review). Some of this increase was reported as linked to the progression of gas and offshore wind in the state. Future Act activity was concentrated in FY2020-21 and FY2021-22. It is likely that the lower numbers in FY2019-20 are a result of the impact of COVID-19 lockdowns. A breakdown of Future Act notifications (FANs) is provided in Table 3.

Table 3 | Number of FANs received during the Review period

Financial year	FANs		
	All notifications	Section 29 notifications	Section 24 notifications
2019-20	17	0	17
2020-21	142	30	112
2021-22	145	67	78

Multiple staff and Traditional Owners noted that FNLRS diligently provided notification for required notices (for example, section 29 notices). FNLRS also typically provided legal assistance to PBCs in response to the notifications. However, legal assistance for Future Acts did not result in registration of any Future Act determination applications or Future Act objection applications during the Review period.

¹² FY2013-14 to FY2016-17.

FNLRS registered two ILUAs during the Review period, though one was later deregistered

FNLRS successfully negotiated and registered one ILUA in late 2019 that resulted in the establishment of a playground in Gundijtmara Country, specifically located in the Shire of Glenelg in south-west Victoria.

The Taungurung Settlement ILUA (resulting in an agreement not to lodge native title or compensation claims within the ILUA area for negotiated benefits) was short lived, with registration existing from April 2020 until its deregistration in August 2021. The application for the ILUA was lodged by the State of Victoria in December 2018 after successful negotiation with Taungurung (represented by FNLRS) for an RSA under the state's Settlement Act for the same area. FNLRS had supported Taungurung Traditional Owners to reach an agreement with the Victorian Government under the Settlement Act, after a long period of negotiation for 20,210 square kilometres across central Victoria. The registration of the Taungurung Settlement ILUA was later subject to a judicial review in March 2021 and after consideration of further information the Native Title Registrar decided the agreement should not be registered¹³.

According to Justice Mortimer, the decision to deregister the ILUA,

...is not about whether the Court agrees with the delegate's decision to register the ILUA. The Court's decision only concerns whether the delegate properly understood and applied the legislation and other law governing the decision; whether the delegate adopted a legally fair process.¹⁴

The matter is currently being settled through a research and reconsideration process agreed by the parties in mediation. FNLRS staff expected reregistration to occur in 2024, pending the outcome of the research and reconsideration process.

Number of claims resulting in a determination of native title or ILUA settlement as a proportion of total filed claims

There were no claims resulting in a determination of native title during the Review period. FNLRS registered two ILUAs during the Review period, though the Taungurung Settlement ILUA was later deregistered in August 2021 (ILUAs are detailed earlier under TOR 1).

Number of claim groups the NTRB-SP has acted for or assisted via brief out arrangements in a native title determination application proceeding during the Review period

FNLRS did not assist any claim groups through brief out arrangements during the Review period. The two active claims represented by external providers were not briefed out, seeking external representation independent of FNLRS.

Proportion of claimable land within the RATSIB area not subject to a registered claim or a determination

Approximately 26 per cent of land within the FNLRS RATSIB area was not subject to a registered claim or a determination as of 30 June 2022

The land area of the FNLRS RATSIB area is 227,416 square kilometres. Fifty-seven per cent (129,627 square kilometres) of claimable land in Victoria was determined under the NTA and about 17 per cent was subject

¹³ VI2018/002 Taungurung Settlement ILUA: not accepted for registration, <http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Taungurung-Settlement-ILUA.aspx>

¹⁴ Gardiner v Taungurung Land and Waters Council [2021] FCA 80 (9 February 2021), <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/80.html>

to an active claim as of 30 June 2022¹⁵. Therefore, about 26 per cent (59,128 square kilometres) of land in Victoria was not subject to a registered claim or a determination at the end of the Review period.

Average time between filing an application for a determination of native title to the date a determination is made

The Eastern Maar People Claim took approximately ten years

The Eastern Maar People's Claim, which was largely determined in March 2023 (post-Review period), took approximately 10.2 years from lodgement¹⁶. This is slightly longer than FNLRS's average time of 9.3 years for the five successful¹⁷ determinations in Victoria since the passage of the NTA.

The Federal Court has expressed a claim resolution target of five years for all claims lodged since 2011; claims lodged before 2011 had a ten-year benchmark. The performance of FNLRS does not meet this benchmark for the Eastern Maar claim, lodged after 2011, though it does meet the benchmark for previous successful determinations lodged prior to 2011.

Number of common law native title holders/registered native title bodies corporate (RNTBCs) the NTRB-SP has acted for in a native title compensation application proceeding

There were no native title compensation claims during the Review period.

5.1.2 TOR 1: External factors

This section presents an analysis of factors that impacted on performance that were beyond FNLRS's control.

State government policy and legislation

Victoria has a complex policy and legislative landscape regarding recognition for Traditional Owners

The Victorian Government continued to play a central role in supporting Traditional Owners to achieve formal recognition, through the relevant legislation (see Table 4) during the Review period. This support flowed through to FNLRS as the primary organisation in Victoria assisting clients to achieve this recognition.

The Traditional Owner Settlement Act 2010

The Settlement Act is an alternative avenue to recognise Traditional Owner rights in Victoria. The Settlement Act was established in response to the outcome of the 1998 Yorta Yorta decision which made it very difficult for Traditional Owners in Victoria to achieve native title outcomes in highly colonised areas where traditional law and customs had been significantly disrupted by dislocation and dispossession. The introduction of the Settlement Act in 2010 sought to remedy the precedent set by the Yorta Yorta decision

¹⁵ N.B. These numbers are approximate, though this is particularly true for the Wamba Wemba claim, which partly extends across the Victorian border into New South Wales. Therefore, the listed claim area in the Wamba Wemba claim used in this calculation would be larger than the actual claimed area in the FNLRS RATSIB area.

¹⁶ The Eastern Maar People's Claim was largely dormant from 2011 to 2019 while Eastern Maar were pursuing a settlement agreement with the State of Victoria. It was only after the claim was notified in 2019 that active resolution of the claim through the Federal Court began.

¹⁷ Determinations resulting in native title being found to exist in the entire or part of an area.

by adopting a different standard of proof which did not require evidence of continuous connection to Country from pre-colonisation.

The original purpose of the Settlement Act was for the Victorian Government to take a non-adversarial approach to negotiate outcomes more quickly for Traditional Owners through dispute resolution outside the NTA. While originally the Victorian Government encouraged groups to forgo filing a native title claim to pursue alternative mediation under the Settlement Act, negotiations under the Settlement Act are no longer seen as an exclusive alternative and the understanding of its role has evolved to allow for parties to pursue both. This can be seen through the Gunaikurnai achieving a successful native title determination and signing an RSA under the Settlement Act at the same time, or the Eastern Maar pursuing an RSA after previous determinations under the NTA.

As reported in the Strategic Review and raised by stakeholders interviewed as part of this Review, it seems that the aspirations of the Settlement Act to easily resolve disputes through mediation have not been realised – particularly as many cases involve inter-group disputes or have a high number of objections, as in the Taungurung case. Staff raised the fact that, despite moving away from native title after the introduction of the Settlement Act, Traditional Owner groups were now returning to the native title process as their preferred approach and lodging new native title claims to progress outcomes and resolve disputes through the Federal Court process.

The Review heard that the state's position on the relationship between the Settlement Act and the NTA has therefore become clearer in recent years. Native title processes are now being seen as the avenue to determine boundaries and group composition for Settlement Act progress and post-determination settlement benefits. Government stakeholders interviewed as part of the Review noted that views around what establishes "connection" have also evolved over time compared to the early years of the NTA and that the courts were also more sympathetic to working through questions around group membership and boundaries.

The Review believes that this has resulted in more native title claims being lodged in recent years and is likely to result in more native title claims being lodged in the future.

The Victorian Aboriginal Heritage Act 2006

The Aboriginal Heritage Act allows for the appointment of a RAP who are recognised as the primary guardians of Aboriginal cultural heritage and have formal Traditional Owner status. RAP status is the easiest form of formal recognition to obtain and requires a lower standard of evidence focused particularly on cultural heritage. RAPs are responsible for important functions such as evaluating Cultural Heritage Management Plans and entering into Cultural Heritage Land Agreements with public land managers. There were 11 RAPs at the end of the Review period, which covered approximately 75 per cent of Victoria.

While this form of recognition is generally seen to be positive, particularly in recognising more Traditional Owner groups with high levels of disconnection and dispossession, the additional layer of formal recognition adds complexity to the system. Groups with RAP status are essentially recognised as Traditional Owners by the Victorian Government; however, do not have the same set of rights as those under the NTA; if there is a direct conflict the NTA overrides any rights under the Aboriginal Heritage Act. The lower evidentiary threshold for connection via the Aboriginal Heritage Act has resulted in some cases in a mismatch between the groups with RAP status and the likely native title holding group for the same area, further exacerbating group membership disputes.

"We do a substantial amount of work with groups negotiating settlements under the *Traditional Owner Settlement Act (2010)*. In the early years a lot of this work happened in tandem with prosecuting a native title claim. However, in recent years...the state has preferred that if a native title claim is being pursued that this is resolved first and then settlement negotiations with the determined group happens afterwards."

FNLRS staff member

Advancing the Treaty Process with Aboriginal Victorians Act 2018

Treaty is also shaping the recognition system in Victoria. Victoria's Treaty process was raised throughout most consultations as a key change on the horizon that will significantly shape the way self-determination is pursued in Victoria and subsequently impact FNLRS as an organisation. Treaty provides a path to negotiate the transfer of resources to Traditional Owners with the aim of delivering long-term solutions for Traditional Owners.

When asked about FNLRS's role in Treaty, all stakeholders consulted believed that FNLRS was well-positioned to play a potentially valuable role in the process, due to FNLRS's deep organisational knowledge and the intersection between the NTA, Settlement Act and Treaty agreements. Stakeholders noted that if Traditional Owners seek services from FNLRS using the funding that will flow from the Self-Determination Fund, work for FNLRS might increase. Many stakeholders including PBCs noted that while the First People's Assembly of Victoria plays an important role in facilitating negotiations, expert advice (including legal advice from FNLRS) will likely be needed to progress Treaty negotiations.

At the time of the Review, Treaty was only just starting to begin the negotiation phase. More can be found under TOR 7 around the likely impact of Victoria's Treaty process on FNLRS into the future.

Table 4 | Relevant Victorian legislation

Legislation	Description
<i>Traditional Owner Settlement Act 2010</i> (VIC)	The Settlement Act provides an alternative avenue to the NTA to recognise Traditional Owner rights in Victoria. The process relies on mediation to resolve disputes with the standard of proof required less than that required by the Federal Court under the NTA. Applicants do not need to prove "continuous connection" to Country pre-colonisation. The NTA and Settlement Act processes are connected in that the Settlement Act also provides for ILUAs to be part of any settlement package. ILUAs are statutory agreements created by the NTA and must be registered under the NTA.
<i>Victorian Aboriginal Heritage Act 2006</i>	The Aboriginal Heritage Act recognises Traditional Owner corporations as RAPs. RAPs are another form of formal recognition in Victoria and recognises these groups as the primary guardians and holders of Aboriginal cultural heritage in the region. RAPs receive base funding and have the right to collect fees for cultural heritage management activities.
<i>Advancing the Treaty Process with Aboriginal Victorians Act 2018</i>	Victoria's Treaty Act is Australia's first Treaty Act. It outlines the pathway towards achieving Treaty negotiations in Victoria. The Treaty Act establishes the First People's Assembly of Victoria, which comprises 31 members (Traditional Owners) across Victoria and is the key body to progress Treaty negotiations. The Treaty Act also sets out a Treaty Negotiation Framework, establishes a Treaty Authority and the Self-Determination Fund. The Self-Determination Fund provides funding for Traditional Owners to progress Treaty negotiations and help to build communities.

Complexity of remaining claims

The complexity of remaining claims is largely caused by inter- and intra-family group disputes

Staff reported it was possible for all native title claims in Victoria to be finalised in the next five to ten years, with the major barrier to progressing claims being inter- and intra-family group disputes. Areas prioritised to date have been areas with more cohesive family group composition and less disputed boundaries. FNLRS staff reported that native title progress in areas with no formal determinations to date is likely to be slow and difficult. Government stakeholders also recognised the complexity of these remaining areas which have long-standing inter-family group disputes, which unless resolved, will affect FNLRS's ability to perform its native title functions.

History of previous claims

The negative Yorta Yorta determination continued to have an impact on the achievement of native title

As noted above, the unfavourable 1998 Yorta Yorta decision (VID6001/1995) and unsuccessful High Court appeals significantly impacted the likelihood of achieving native title recognition in Victoria, given the high bar of evidence required to prove continuous connection with Country since pre-colonial society. Many stakeholders who spoke to the Review believed that the Yorta Yorta case continued to cast a long shadow over the native title system and increased uncertainty around the likelihood of success of native title claims. However, over the last 20 years, both the Victorian Government and the Federal Court have adopted a more favourable and flexible approach to native title which, although still difficult, has resulted in claims being successfully determined.

Complexity of land use and tenure

Complexity of land use and tenure did not significantly impact FNLRS's performance

The intensity of Victoria's colonisation means that areas with substantial potential for land use and activity were exploited before the Mabo decision and are thus not the subject of native title claims. As a result, land use complexity was not cited by stakeholders as an influence on FNLRS's ability to achieve positive native title outcomes.

COVID-19

FNLRS implemented appropriate measures to respond to COVID-19, though native title progress was delayed by lengthy lockdowns

FNLRS developed a COVID-19 Safe Plan which was established in response to the pandemic to maintain the health, safety and wellbeing of all employees as well as contractors, volunteers and visitors. FNLRS implemented several measures, including closure of the office and a mandate to work from home for all staff. The provision of laptops to all staff just before COVID-19 as part of a general IT upgrade for the office helped the office smoothly transition to working from home.

COVID-19 resulted in a slowdown of the mediation process for all FNLRS cases, with no face-to-face meetings with Traditional Owners in Victoria given the strong lockdown. Despite this, FNLRS was able to continue to progress active claims before the Federal Court (the Eastern Maar People's claim and the First Peoples of the Millewa-Mallee claim). FNLRS staff reported that there was a strong focus on trying to keep community groups engaged during this time and conducted meetings online where they could, although some meetings were rescheduled till later financial years. Research activity continued, but this was also limited by lockdowns. Overall, the shift in meeting and research timelines impacted FNLRS's progression of active claims moderately and prospective claims considerably during the Review period.

Amount of funding

Funding did not have a significant impact on performance for FNLRS during the Review period

Many FNLRS staff interviewed by the Review mentioned that the reduction in NIAA funding that occurred a year before the Review period had led to downsizing of the research and legal functions. Base funding that was received was then relatively stable to those levels over the Review period.

Table 5 Table 5 | Total NIAA funding relative to factors of interest

shows the ratio of FNLRS’s funding to other factors of interest.

Table 5 | Total NIAA funding relative to factors of interest¹⁸

Factor of interest (denominator)	Ratio
FNLRS’s total land area: 227,416 square kilometres	\$49.41 per square kilometre
Total number of active claims (3) ¹⁹ and ILUA settlements (1) ²⁰ at 30 June 2022: 4	\$2,809,267 per claim (and for one ILUA settlement)

FNLRS’s funding to factor ratios were slightly higher than other NTRB-SPs, but still fell within a comparable overall range. It is unlikely that amounts of funding played a major role in the success or challenges faced by FNLRS.

5.1.3 TOR 1: Recommendations

RECOMMENDATION

1

Continue to build on the steps it has already taken to improve Traditional Owner awareness of changes in the Victorian land rights landscape (noting the emergence of Treaty) to increase Traditional Owners’ understanding of the different forms of recognition and FNLRS’s role as an NTSP in the changing Victorian landscape.

RECOMMENDATION

2

This Review endorses the following recommendations of the Strategic Review:

- FNLRS should adopt more neutral positioning in active legal disputes between and internal to Traditional Owner groups, instead placing greater reliance on third party legal service providers.
- In repositioning to rely more on third party legal services providers, FNLRS should not move too quickly so as to deplete existing services and potentially alienate the users of those services.
- FNLRS should continue to seek to externalise politically charged decisions or research outcomes, and/or support the authority of such decisions/positions by reference to external and independent expertise.

¹⁸ These estimates are calculated based on the total funding received from the NIAA excluding PBC support during the Review period, which was \$11,237,070.

¹⁹ Active claims exclude the Wamba Wemba claim recognising a lack of dedicated NIAA funding for it during the Review period.

²⁰ The Taungurung ILUA has been included despite its deregistration given FNLRS’s considerable focus on it during the Review period.

5.2 TOR 2 | Extent to which each organisation assesses and prioritises applications for assistance in a manner that is equitable, transparent, and robust and is well publicised and understood by clients and potential clients.

Summary

FNLRS used the Guidelines for First Nations Assistance to Native Title Groups to guide its assessment and prioritisation decisions. The guidelines clearly outlined the process for applying for assistance, including instructions as to how to make an application and the process for ascertaining the facts surrounding an application.

The guidelines were updated during the Review period to refine the assessment practices, expand the criteria for assistance and provide further detail for FNLRS's approach to assessing assistance requests. These adjustments enhanced the transparency, accessibility and effectiveness of the guidelines.

The Review did not receive extensive feedback from Traditional Owners around the assessment and prioritisation process. While some Traditional Owners were positive about the process, other Traditional Owners interviewed viewed FNLRS's performance as less favourable, raising issues around their perceived role as a "gatekeeper" for funding.

Since the Review period, FNLRS has re-evaluated how it approaches providing assistance to native title groups in line with the recommendations of the Strategic Review. The previous approach relied solely on the CEO to make assessment decisions on funding and was only delegated to other executives (for example, the PLO) to make decisions if the CEO was personally conflicted. The new approach aims to expand decision-making to address funding limitations and frequent incidence of conflicts of interest. It also supports FNLRS moving towards the role of facilitator rather than as a legal representative for potential native title holders.

5.2.1 TOR 2: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Equity, transparency and robustness of assessment and prioritisation process

FNLRS's assessment and prioritisation process took account of its unique operating environment

FNLRS's Guidelines for First Nations Assistance to Native Title Groups outlined FNLRS's policies and procedures in determining whether FNLRS would provide assistance to native title groups. The guidelines covered the process for applying for assistance, including instructions as to how to make an application and ascertain the facts surrounding an application. Explicit reference to FNLRS's commitment to a fair assessment of applications is made in the documents, which FNLRS supported with a set of comprehensive general criteria. These general criteria included:

- compatibility of the native title matter with the Operational Plan of FNLRS
- potential strength of the claim
- coherence and capacity of the native title group
- existence of overlapping claims
- cost

- benefits
- current state of preparation of the native title matter.

FNLRS's guidelines also openly acknowledged the influence of funding constraints and the potential for conflicts of interest. Two iterations of these guidelines were used during the Review period, with the guidelines being updated in November 2021. The latter iteration refined the assessment practices, expanded the criteria for assistance and provided further detail about FNLRS's approach for assessing assistance requests. These adjustments enhanced the transparency, accessibility and effectiveness of the guidelines.

FNLRS has reconsidered how it assesses and provides assistance, post-Review period

FNLRS has re-evaluated how it approached providing assistance to native title groups in line with the recommendations of the Strategic Review (see TOR 1). The previous approach relied solely on the CEO to make assessment decisions on funding and was only delegated to other executives (for example, the PLO) to make decisions in the event the CEO was personally conflicted.

The new approach, implemented after the Review period, aims to expand decision-making to address funding limitations and frequent incidence of conflicts of interest. It sees FNLRS moving towards the role of facilitator rather than a legal representative for potential native title holders. Key changes include:

- Decision making for applications for assistance to be made by a dedicated sub-committee (Facilitation and Assistance Requests Assessment Committee (FARAC)). The FARAC's role is to assess and decide on NTA requests for assistance made to FNLRS by Traditional Owners. The FARAC is made up of members of the ARC plus an independent expert member selected by FARAC.
- A Third-Party Provider Panel to be established with an approved set of professionals that are endorsed to be able to work with native title claimants and respondents to native title claims.
- A Third-Party Provider Panels Assessment Committee to be established to assess and decide on applications made by lawyers and other professionals to join FNLRS's Third-Party Provider Panel.
- Adjusting guidelines in use during the Review period to recognise FNLRS's shift in role.

The Review believes this is a positive development and agrees with the relevant recommendations from the Strategic Review. These changes should provide more equitable assistance through the increased number of decision-makers, greater independence through the expert member and enhanced quality of external representation. FNLRS has since implemented these key changes post-Review period.

Client and potential client awareness of the process

Overall awareness of assessment and prioritisation processes was varied and could be communicated more effectively

Traditional Owners who spoke to the Review expressed mixed awareness of the FNLRS's prioritisation process during the Review period. Some were aware of FNLRS's policy, while others could not remember seeing a policy, despite going through the process. While FNLRS included its guidelines on its website, the Review believes that FNLRS could improve the navigation to access the policies.

Traditional Owner satisfaction with the assessment and prioritisation process and its outcome

Client and potential client sentiment was varied regarding the assessment processes

The Review did not receive extensive feedback from Traditional Owners around the assessment and prioritisation process. Traditional Owners who received assistance for various matters reported that they were generally pleased with the assistance process and the associated outcome.

Traditional Owners who were dissatisfied with the assistance process and related outcome identified this was a result of slow or non-response to funding requests for external legal representation. They raised issues around FNLRS's apparent opposition to the registration of some claims and its decision not to assist some clients to proceed with their claims.

Stakeholders reported this primarily occurred in instances where FNLRS was conflicted, or believed more work was needed to undertake research and demonstrate evidence of connection to Country. Traditional Owners in these instances believed that FNLRS communication and rationale around not assisting some clients was poor. Interviews revealed that these groups were frustrated by the perceived bias of what they saw as FNLRS's role as the gatekeeper for funding and the provider of legal services to clients and sought external counsel with or without support from FNLRS.

FNLRS's increased facilitation role and introduction of the Third-Party Provider Panel post-Review period aims, in part, to address this issue. Specifically, FNLRS will be able to provide potential claimants access to external legal representation who they consider well-equipped and readily available to assist claimants.

5.2.2 TOR 2: External factors

This section presents an analysis of factors that impacted on performance that were beyond FNLRS's control.

Number of claims relative to NTRB-SP size and resourcing

FNLRS's assessment and prioritisation was influenced by resourcing constraints

While FNLRS had only two active claims during the Review period, each claim had significant workloads, as noted earlier under TOR 1.

5.3 TOR 3 | Extent to which each organisation deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints.

Summary

FNLRS's engagement with Traditional Owners was broadly reported to be respectful and transparent. During the Review period, FNLRS did not widely or proactively advertise its successes and key milestones to the community through newsletters or other publications. Staff and external stakeholders saw this as a key future opportunity for FNLRS, to help raise its profile more generally in the community and to help attract the best talent to the organisation.

There was a consensus that FNLRS undertook its work in a culturally appropriate manner and supported its staff to undertake cultural awareness training to build skills in this area. Staff acknowledged that FNLRS could be doing more to expand the role of the CLOs to better leverage their skills and deep cultural expertise. During the Review period, the CLO role was relatively administrative; helping to organise claim group meetings and travel arrangements for Traditional Owners, as well as helping to facilitate these meetings in a culturally appropriate way. Staff reflected on the fact that in the future the CLO role could play a much bigger part in helping to work with the community to build trusting relationships, achieve outcomes and to raise the profile of FNLRS in the community.

FNLRS's use of cultural materials was appropriate during the Review period. One Traditional Owner group however reported concerns around the ongoing use of cultural materials and submissions made more generally to FNLRS as part of historical native title claims. FNLRS staff also acknowledged that this issue was top of mind and that during the Review period they received many requests for data and information that was held in their database. Post-Review period, FNLRS is currently undergoing a process to develop processes and policies around the return of cultural materials.

FNLRS received no formal complaints and received one internal review request, which upheld the CEO's decision to not grant assistance.

5.3.1 TOR 3: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Respectful and transparent engagement

FNLRS's engagement was broadly seen as respectful with some areas of improvement regarding complex cases

Generally, stakeholders consulted as part of the Review agreed that FNLRS had a good reputation and undertook its work in a respectful way. Most Traditional Owners engaged through the Review period reported that FNLRS was professional and communicated respectfully with them and their communities. Many Traditional Owner groups reported that they had open lines of communication with FNLRS staff and always felt comfortable directly contacting the CEO to raise and resolve any issues together.

"All the lawyers we have on board have been really good – they are understanding and accommodating to how the community operates."

Traditional Owner

Several stakeholders did note the difficult position FNLRS was in to effectively carry out its functions while navigating complex community dynamics. For example, in Victoria there are several long-running group composition disputes such as that between the Wamba Wemba, Barapa Barapa and Wadi Wadi Peoples in the Central North.

This was raised in interviews with Traditional Owner groups where the Review heard feedback that some community members were concerned about the way FNLRS responded to their claims regarding where they believed their family was from. Although these stakeholders recognised that FNLRS had a difficult task undertaking research particularly in areas with high levels of dispossession, they believed FNLRS could be more respectful of Traditional Owners' stories when investigating where families were historically located. Some Traditional Owners reported that FNLRS could place more emphasis on explaining what story the available research and artefacts were telling, rather than implying that Traditional Owners' beliefs about their own family stories were wrong when the available research did not align with their stories.

FNLRS should seek ways to raise the profile of the organisation with the community and communicate its services and successes

Several stakeholders, including both FNLRS staff and external stakeholders, felt that FNLRS did not clearly communicate what services it provided to the community and its key successes. Previously, FNLRS had sent communications and a newsletter to its clients and the community, however this communication did not occur during the Review period and reportedly had ceased in recent years.

One staff member said that better use of social media and communications highlighting the work of FNLRS would be beneficial. Staff acknowledged that more proactive communication and engagement would have positive flow-on effects for staff in terms of being proud to work with FNLRS.

Several stakeholders also reported they believed there was low visibility of FNLRS's leadership and management team amongst the community. One Traditional Owner group raised the fact that they were surprised that they did not know who was on the Board or who the Chair was and thought that the leadership of the organisation should be more visible. This sentiment was echoed by some staff who believed that there was low visibility of the CEO, the senior management team and the Board within the community, and that raising their profile, particularly of the Board, would help with transparency and community engagement more generally.

It is the view of the Review that raising the profile of FNLRS will help other organisations to understand FNLRS's role (as it exists in a complex system with a multitude of other organisations progressing Traditional Owner rights in Victoria), understand the role of native title more generally and educate stakeholders on what FNLRS can and cannot provide to its clients.

Culturally appropriate engagement

FNLRS undertook its work in a culturally appropriate manner but could be doing more to draw on the expertise of the CLO role

There was a consensus among the stakeholders consulted that FNLRS undertook its work in a culturally appropriate way during the Review period. Staff undertook cultural awareness training when onboarding and participated in cultural awareness activities and workshops during FNLRS's annual organisational training retreat. Several Traditional Owners interviewed as part of the Review commented that they had respect for FNLRS and that they believed that FNLRS really understood the native title landscape and worked well with their community. Most Traditional Owners who had participated in group meetings broadly reported that these were undertaken respectfully.

FNLRS's two Aboriginal CLOs were an important part of FNLRS's approach to ensuring they are working with community groups in a culturally appropriate and supportive way. The CLO role was viewed as critical

in making warm introductions between family groups and other FNLRS staff including lawyers and anthropologists.

Staff acknowledged that FNLRS could be doing more to expand the role of the two CLOs to better leverage their skills and deep cultural expertise. During the Review period, the CLO role was relatively administrative; for example, helping to organise claim group meetings and travel arrangements for Traditional Owners. Staff suggested that in the future the CLO role could play a much bigger part in helping to work with the community to build trusting relationships, achieve outcomes and to raise the profile of FNLRS in the community.

The Review encourages FNLRS to expand current efforts to reshape the role to better use the expertise of the CLO in community building activities. This seems to be one of the primary efforts needed in the remaining areas that have complex family dynamics and have not yet achieved a native title determination. Staff supported CLOs playing more of a role to educate family groups as to what types of formal recognition are and the processes to achieve these forms of recognition. The Review understands that FNLRS is currently exploring how it can evolve the role of the CLO in the future to have more responsibilities and work more closely with communities.

Complaints

FNLRS received no complaints during the Review period

FNLRS has a clear Handling of Complaints Policy in its Policies and Procedures Manual. This policy is available on FNLRS's website. The policy outlines the process undertaken by FNLRS to receive and respond to complaints. There were no formal complaints made during the Review period. FNLRS did not provide any documentation or record of any informal complaints made to the Review. When asked whether any recording of this information existed, FNLRS reported that they did not capture and monitor this feedback in a systematic way. The Review therefore believes that FNLRS could improve the way it collects, monitors and responds to this information.

Throughout the interviews, the Review heard several instances where Traditional Owners and the lawyers who represented them were not happy with the approach of FNLRS. As the Strategic Review found, there were several Traditional Owner groups who have "high levels of institutional distrust and reputational issues"²¹ with FNLRS, who were in active legal disputes about the findings of FNLRS's research. While these groups did not make formal complaints per se, there were some groups who did not engage with FNLRS. FNLRS reported that many of these cases had been directly raised with the CEO and responded to. FNLRS also noted that it continued to offer dispute resolution services (for example, funding for independent mediation and facilitation) despite distrust and reluctance to engage with FNLRS.

Internal review

FNLRS received one internal review request – Gundijtmara as respondents to the Eastern Maar claim. The internal review upheld the CEO's decision to not grant assistance. No further review rights were pursued.

Use of cultural materials

Consent was adequately obtained for cultural materials; however, FNLRS is still developing a policy for ongoing access to these materials

FNLRS's Research Information Policy outlines FNLRS's obligations around information management including ensuring FNLRS has the free, prior and informed consent from Traditional Owners for

²¹ Strategic Review, page 21.

information collected for research purposes, and that FNLRS properly manages and protects all the information it receives.

Several Traditional Owners reported that FNLRS dealt respectfully with their cultural materials and followed proper procedure to obtain consent for the use of cultural materials. Some Traditional Owner groups however expressed concerns around the ongoing use of cultural materials and submissions made more generally to FNLRS as part of historical native title claims. One group was unhappy that once information was obtained as part of a claim process, that information was often not able to be accessed for other uses by other family members for legal privilege and privacy reasons. For example, this was cited as a major impediment for those families who wished to access their recorded genealogy and family history. FNLRS staff acknowledged that this issue was top of mind. Information on return of cultural materials is discussed further in TOR 6.

5.3.2 TOR 3: External factors

No external factors have been identified for TOR 3.

5.3.3 TOR 3: Recommendations

RECOMMENDATION

3

This Review endorses the following recommendation of the Strategic Review:

- FNLRS should increase communication with the Victorian Traditional Owner communities and celebrate its work and success more openly.

RECOMMENDATION

4

Review the CLO role position description and explore how it can be evolved to go beyond administrative tasks to focus more on building relationships with community and education activities.

5.4 TOR 4 | Extent to which each organisation performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation.

Summary

Native title funding from NIAA increased throughout the Review period, from \$3.7 million at the start of the period to \$4.7 million at the end of period (an increase of 22 per cent). This increase was mostly due to demand-driven funding for litigation, and, to a lesser degree, in-house staff salary increases.

The Review believes that NIAA funding was used carefully by FNLRS throughout the Review period, with a strong focus on limiting expenditure where possible.

This was achieved by their efficient facilitation of meetings as a result of adhering to robust meeting facilitation guidelines and seeking to address concerns that may detract from claim group meetings prior to the meeting itself. It was also achieved through their travel assistance policy for claim group meetings.

Outside the Review period, in November 2023, FNLRS was in the process of relocating from their current North Melbourne office to a co-working space in Fitzroy. FNLRS expected that the office move will result in a reduction in rental expenses.

5.4.1 TOR 4: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Expenditure on salaries (legal, anthropological, Board, CEO, HR, etc.), operations (travel, legal, offices, etc.) or other relevant items

NIAA funding for FNLRS varied across the Review period

Funding provided to FNLRS by the NIAA declined by \$264,200 from FY2019-20 to FY2020-21 and increased significantly by \$1,264,686 in FY2021-22, as shown in Table 6. NIAA base funding (\$3,249,800 per annum) and PBC funding (\$100,000 per annum; \$50,000 each for the two client PBCs receiving the funding) received by FNLRS was consistent across the Review period. Additional NIAA funding was provided for unforeseen litigation (demand-driven funding).

Table 6 | FNLRS's NIAA funding FY2019-20 to FY2021-22²²

Funding	FY2019-20	FY2020-21	FY2021-22
Base agreement ²³	\$3,249,800	\$3,249,800	\$3,249,800
PBC support	\$100,000	\$100,000	\$100,000
Mid-year	\$375,000	\$0	\$95,875
Demand-driven	\$0	\$110,800	\$905,995

²² FNLRS. Annual Reports 2019-20 to 2021-22.

²³ NIAA funding (provided to the Review) includes base, PBC support, mid-year and demand-driven funding; excludes carried-forward funding.

Funding	FY2019-20	FY2020-21	FY2021-22
Total	\$3,724,800	\$3,460,600	\$4,351,670

Demand-driven funding provided was variable across each year of the Review, with none provided in FY2019-20, \$110,800 provided in FY2020-21 and \$905,995 provided in FY2021-22. This increase between FY2020-21 to FY2021-22 is largely a result of the Boonwurrung (approximately \$659,000) and Taungurung (approximately \$246,675) contested litigation proceedings.

Overall, total expenditure increased year on year by approximately 22 per cent from FY2019-20 to FY2021-22

Figure 2 shows the breakdown of key line items throughout the period.

Figure 2 | FNLRS expenditure FY2019-20 to FY2021-22²⁴

Expense category	FY2019-20	FY2020-21	FY2021-22
Salaries and wages – attributable	\$1,423,843	\$1,513,084	\$1,525,823
Consultants – attributable	\$266,670	\$286,924	\$663,925
Meetings – attributable	\$115,247	\$36,654	\$46,264
Claimant travel – attributable	\$52,185	\$16,712	\$11,111
Staff travel – attributable	\$45,051	\$34,257	\$43,435
PBC support	\$100,000	\$100,000	\$100,000
Contested litigation	\$0	\$95,800	\$390,441
Total attributable	\$2,002,996	\$2,083,431	\$2,780,999
Total corporate (for example, corporate salaries, communications, etc.)	\$1,568,187	\$1,760,377	\$1,746,890
Total expenditure (inc. GST and capital costs)	\$3,973,663	\$4,224,635	\$4,967,881

Staff salaries were FNLRS's greatest expenditure in each financial year, making up around 60 per cent of expenditure on average. Increases in employee salaries, which rose by 18 per cent between FY2019-20 and FY2021-22, were attributed by staff to the 2018-2021 enterprise agreement coming into effect in July 2021 and promotions for staff.

Competitive market conditions for professionals in the native title space contributed to high salary expenditure. Consultant expenditure, which almost tripled from FY2019-20 to FY2021-22, was mostly due to funding required for external legal representation in litigation matters and is described below.

²⁴ Data provided by FNLRS (unpublished).

Cost-saving actions, strategies and/or discussions

FNLRS implemented a range of measures to constrain expenditure during the Review period

Consultations with staff indicated that FNLRS was highly cost-conscious and continued to search for ways to reduce costs throughout the Review period. Travel assistance policies (see below) were in place to support cost-effectiveness. FNLRS staff reported seeking the best value for meeting expenses, such as through sourcing multiple quotes for catering and seeking the most affordable accommodation.

FNLRS could benefit from formalising cost-saving policies (for example, procurement policies for meetings) for categories of expenditure that currently do not have one. This would help to ensure a consistent approach to expenditure is applied across the organisation. It also lessens reliance on staff that possess knowledge of informal cost-saving policies.

Documentation for FNLRS's Third Party Provider Panel did not mention the imposition of spending caps for legal fees. Caps should be required by FNLRS to ensure that NIAA funding is used carefully, with maximum fees ideally being similar to FNLRS's current pricing for legal services (avoiding "typical" law firm charges).

FNLRS's planned move to a co-working office should result in significant cost savings

At the time of consultation in November 2023, FNLRS was in the process of relocating from their current North Melbourne office to a co-working space in Fitzroy. FNLRS management expected that the office move will result in a significant reduction in rent expenses. The relocation was enabled by FNLRS's separation from the Federation in FY2021-22, who FNLRS had shared offices with, and the sustained use of hybrid working during and after the COVID-19 pandemic.

Appropriate processes for claim group meetings

Claim group meeting processes were appropriate, underpinned by formal meeting facilitation guidelines and pre-group-meeting engagement

FNLRS's guidelines for claim group meetings aimed to encourage meeting facilitators to plan for meetings and, post-meeting prompt reflection about meeting efficiency and effectiveness for future meeting improvement. The guidelines include content on:

- Introduction – outlined the use of the document, notably highlighting FNLRS's commitment to undertake a healing approach to service delivery.
- The role of the facilitator – how facilitators ensured the meeting purpose was achieved, and the process of timely and respectful facilitation to enable this achievement.
- Values – FNLRS's values which were embedded in meeting facilitation.
- Skills and strategies – details ways to help run a meeting, including pacing: a skill to ensure timely meeting progression.
- Pitfalls – behaviours that could detract from successful meeting facilitation, with detail of best practice to mitigate behaviour impact.
- Relevant policies and further information – references to material complementary to the meeting facilitation guidelines that were recommended to be read by the facilitator.
- Templates – guidance to be tailored for claim group meeting planning and reflection purposes.

Additionally, several interviewed staff noted that it was typical to attempt to resolve Traditional Owner concerns prior to full group meetings. For example, staff held smaller family group meetings to address

disputes between families, which would otherwise be discussed at length during the group meeting and delay a successful outcome.

Annual yearly expenditure per claimant group

Annual yearly expenditure increased year on year for each claimant group

Average cost for the two active claims supported by FNLRS over the Review period was \$375,000 per annum, as seen in Table 7. The costs for each of the two claims increased year on year, in line with increased progression through the courts. Notably, the Eastern Maar People's Claim, which was partly determined shortly after the Review period, required more than double the amount of funding it received at the start of the Review period (FY2019-20) compared to the end of the Review period (FY2021-22).

Table 7 | Annual yearly expenditure per claimant group²⁵

	FY2019-20	FY2020-21	FY2021-22	Average yearly cost for the Review period
Eastern Maar	\$312,000	\$418,000	\$677,000	\$469,000
First Peoples Millewa-Malleee	\$257,000	\$269,000	\$319,000	\$281,000

Travel assistance policies for claim group meetings

The travel assistance policy for native title holders, claimants and potential claimants was straightforward and publicly available on the website

FNLRS's travel assistance policy for native title meetings comprised travel assistance, accommodation and meals assistance, and data allowance (if attending virtually). Each type of assistance set out conditions for eligibility, with detail on what was and was not covered by FNLRS. During interviews, some stakeholders noted that travel assistance had recently increased to \$0.55 per litre for travel using a private vehicle, now capped at \$550 per meeting. This change was made in view of feedback from Traditional Owners, though one stakeholder did comment that they believed this should be increased further.

Despite being publicly available, the travel assistance policy for Traditional Owners could be more visible on the website

FNLRS listed several policies (for example, Traditional Owner travel assistance policy) that were publicly available on their website. The previous Review of FNLRS found that policies on the website could be more obvious, which the Review believes is still the case, including the travel assistance policy. This view is supported by several FNLRS staff mentioning that they were frequently questioned by Traditional Owners about travel assistance. Traditional Owner feedback suggests that further consideration of how policies are communicated and distributed to them may also be worthwhile.

Appropriate rationale for use of external consultants

FNLRS used external consultants appropriately during the Review period, including for conflicts of interest in claim group representation

Average expenditure for external consultants over the Review period was \$662,071 per annum, as seen in Table 8. Many legal, anthropology and managerial staff attributed the high degree of conflicts of interest

²⁵ FNLRS. Annual Reports 2019-20 to 2021-22.

as a key driver in consultant expenditure. This was acutely evident in FY2021-22, with FNLRS directing almost \$1 million in funding to law firms for matters where they were conflicted. Further, staff identified capacity as another significant driver of consultant expenditure.

Table 8 | Overview of total consultant expenditure for FY2019-20 to FY2021-22

FY2019-20	FY2020-21	FY2021-22	Average yearly cost for the Review period
\$373,340	\$487,655	\$1,125,219	\$662,071

5.4.2 TOR 4: External factors

This section presents an analysis of factors that impacted on performance that were beyond FNLRS's control.

Size and remoteness of RATSIB area

FNLRS's RATSIB area covers all of Victoria, with most claimants located in Melbourne but travelling to remote parts of the state to meet on Country

The FNLRS RATSIB area accounts for all of Victoria, about 227,416 square kilometres of land and waters. Additionally, the level of remoteness in a RATSIB area affects the native title service delivery expenditure (for example, through providing travel assistance). FNLRS said that Traditional Owners would often need to travel to areas on Country for in-person claim group meetings and that the large majority would be eligible for travel assistance (travelled over 50 kilometres), considering most lived in Melbourne. This also meant FNLRS needed to cover higher staff travel costs for in-person meetings on Country compared to those held in Melbourne. The degree of in-person meetings was limited in the Review period, however, due to COVID-19 restrictions. This assisted with keeping meeting expenditure low due to the increase in virtual meetings for most of the Review period.

Average number of people within a claim group

The average claim group membership was approximately 200 people

Data provided by FNLRS revealed that the average claim group size was 200 people during the Review period, though the average attendance of claim group meetings was 30. This attendance contributed moderately to in-person meeting costs (venue hire, catering, accommodation) and most notably impacted total meeting expenditure in FY2019-20, given later shifts to virtual meetings during lockdowns.

Interpreters

FNLRS did not utilise interpreters for the delivery of native title functions during the Review period.

5.4.3 TOR 4: Recommendations

RECOMMENDATION

Document cost-saving policies for all relevant categories of expenditure.

5

5.5 TOR 5 | Extent to which each organisation has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery.

Summary

FNLRS was governed by a Board of five Directors who were accountable for the strategic direction of the organisation and were not involved in day-to-day operations. The Board continued to be a skills-based Board with Aboriginal Directors needing to have traditional interests in Victoria with experience of native title and corporate governance processes and be of good standing in the Aboriginal community. During the Review period, the Board was supported by one sub-committee – the ARC.

The Board experienced significant turnover of its membership during the Review period and recruitment was reportedly difficult. Directors believed that the Board would benefit from more members and greater gender diversity. The Review heard feedback from other stakeholders that FNLRS would benefit from the Board having greater visibility, both in terms of raising the profile of FNLRS as well as ensuring that it attracted the best talent in a complex and competitive landscape.

Between 2017 and 2022, the Federation worked in partnership with FNLRS to realise the aspirations and rights of Traditional Owners across Victoria. During this time, the Federation was the sole member (owner) of FNLRS. However, primarily due to community concerns that the Federation was not representative of all Traditional Owners with formal recognition, FNLRS and the Federation decided to de-couple. From 1 July 2022, the Federation was no longer the sole member of FNLRS and was no longer responsible for appointing the Directors of FNLRS. Stakeholders consulted as part of the Review agreed that the de-coupling was a positive move to build FNLRS's trust within the community.

FNLRS had robust financial management in the Review period. FNLRS received funding from both the Australian Government and the Victorian Government to deliver its services. Staff reported that they had mechanisms in place to manage the attribution of funding for work and avoid any cross-subsidisation. Investment was made to automate financial reporting during the Review period. Despite not having an organisation-wide conflicts of interest policy, FNLRS continued to proactively manage real and perceived conflicts of interest through carefully choosing staff to work on specific matters and implementing information firewalls.

There was a consensus among staff that FNLRS was a good place to work, that it was a well-run organisation and had a positive work culture. COVID-19 had a significant impact on the ways of working and hampered collaboration. A significant amount of work was undertaken during the Review period to establish and implement HR processes and policies. Ample training opportunities were provided to staff during the Review period. Online onboarding modules included training around cultural awareness, vicarious-trauma and facilitation skills. Staff turnover was low.

5.5.1 TOR 5: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Breakdown of roles, responsibilities and decision making between the organisation's Board, Chairperson, CEO and senior staff

FNLRS de-coupled from the Federation due to community concerns about perceived bias

Between 2017 and 2022, the Federation worked in partnership with FNLRS to realise the aspirations and rights of Traditional Owners across Victoria. The primary objective of the Federation is to support Traditional Owner corporations through advocacy, policy reform and economic development. Its members are six Traditional Owner corporations. The Federation is involved in a wide variety of activities including developing plans and strategies for the Traditional Owner corporations, as well as advocacy and being involved in reviewing proposed policy and legislation. Federation Enterprises, a wholly owned subsidiary of the Federation, also focuses on economic development for Traditional Owners.

"We have and will continue to operate as separate bodies, striving to realise a shared vision through our very different work. Today we have enacted our commitment to listening and responding to Traditional Owners, making our process more robust and outcomes stronger."

Paul Paton, CEO, Federation

Under the joint arrangement with FNLRS, the Federation was the sole member of FNLRS. However, during the Review period, FNLRS and the Federation decided to de-couple. From 1 July 2022, the Federation was no longer the sole member of FNLRS and was no longer responsible for appointing the Directors of FNLRS. The reason for this change was primarily a result of community concerns around the perceived bias of the Federation and its membership base. At the time of the Review, the membership of the Federation did not include all formally recognised Traditional Owner groups in Victoria. Several internal and external stakeholders, who were consulted as part of the Review agreed that the de-coupling was a positive move to build FNLRS's trust within the community by being more representative of the Traditional Owner "sector". The change has also helped to delineate the roles and responsibilities of the Federation and FNLRS.

Going forward, FNLRS and the Federation will maintain some connection through the sharing of resources. For example, they currently share HR and financial services which FNLRS administers on behalf of both organisations. Staff from both FNLRS and the Federation continue to be covered under a joint Enterprise Agreement that came into effect from July 2021.

"As the native title services provider for Victorian Traditional Owners, FNLRS has a responsibility to Traditional Owners that is legal, statutory and cultural. Today we have shown our commitment to realise change in their interests."

Tony Kelly, CEO, First Nations

FNLRS is governed by a relatively small Board of Directors

After the de-coupling, FNLRS has been governed by a Board of five Directors, the CEO and the rest of the management team. The Board is accountable for the strategic direction of the organisation and is not involved in operational activity. The management team comprises the CEO, CFO, PLO, the Deputy PLO, the Research Manager and the Corporate Services Manager.

FNLRS retained its same organisational structure during the Review period and continued to be organised into three primary functions (see Figure 3):

1. Corporate services.
2. The research function.
3. The legal function.

The Board continued to be a skills-based Board with Aboriginal Director membership consisting of five Aboriginal Directors from across the state at the end of the Review period. Board membership requires Directors to have "traditional interests" in Victoria (that is, it is not necessary to be a Traditional Owner),

experience of native title and corporate governance processes, and be of good standing in the Aboriginal community. It met formally four to five times a year and met for resolutions as needed outside of these meetings. The de-coupling of governance from the Federation saw a change in how Board Directors were appointed – by the FNLRS Board through a consensus vote.

FNLRS had role descriptions for Board Directors which clearly identified the legal and ethical responsibilities of the Directors and expectations around governance and strategic leadership, as separate from the CEO. While the role description sets the expectation to “build relationships across the Traditional Owner groups, government, community and other sectors”, there is no explicit reference to hearing and listening to feedback from key stakeholders, as recommended by the Australian Institute of Company Directors.²⁶ The Review finds that more frequent reporting to the Board on client feedback would be beneficial.

The role description for the CEO was included in the CEO’s employment contract rather than existing as a separate document and sets out the duties and responsibilities of the role. FNLRS has adequate role descriptions for senior staff.

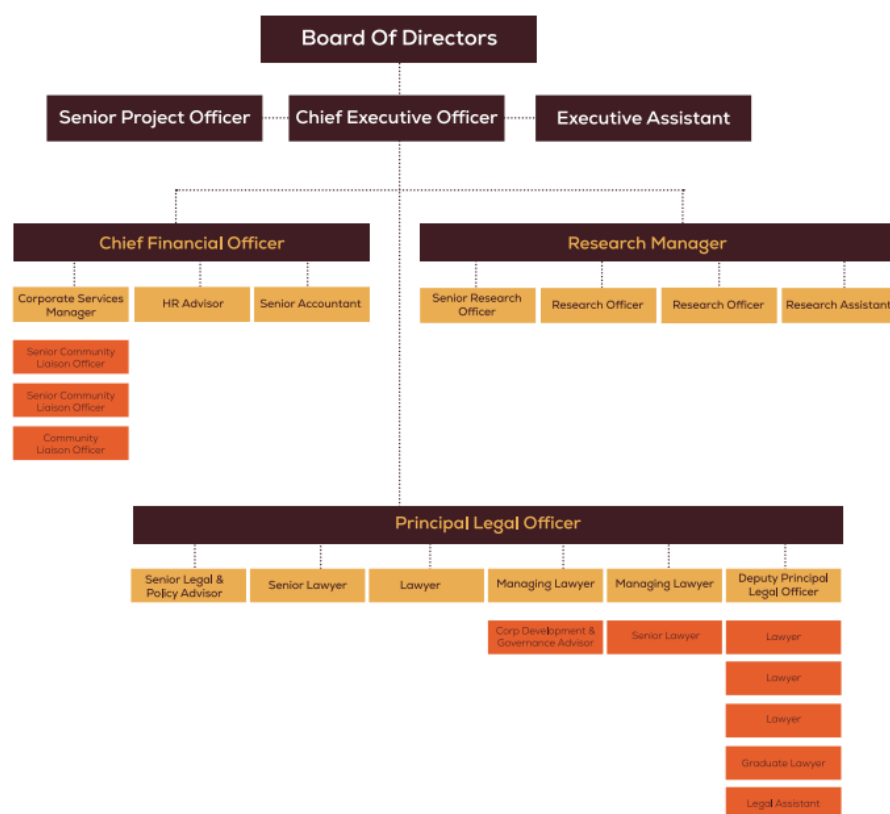
The Board was supported by one sub-committee during the Review period, with two additional sub-committees being established post-Review period

The Board was supported by one sub-committee during the Review period – the ARC. The ARC’s role was to assist and advise the Board on areas such as reporting financial information, audits, risk management, corruption and fraud prevention, remuneration and performance of the CEO. The ARC comprised three members of the Board and drew on other invitees as required with specific qualifications (for example, audit or law).

Since the Review period, and as discussed under TOR 1, two additional committees have been established: the FARAC and the Third-Party Provider Panels Assessment Committee. Although established after the Review period, these are two important mechanisms which sought to improve FNLRS’s operations as discussed under TOR 2.

²⁶ Australian Institute of Company Directors. Governance Analysis Tool. Accessed September 2023.

Figure 3 | FNLRS organisational chart²⁷



Board integrity and capability

The Board performed its functions well, however, could be more visible in the community

There was consensus among staff and Directors that the FNLRS Board fulfilled its duties and provided sound strategic advice on the direction of the organisation. During the Review period, there was turnover in Board membership including four members resigning and five new members joining. This appeared to be the result of movement following the de-coupling from the Federation and natural attrition. This turnover did not appear to disrupt the performance of the Board, and Directors considered it to be positive to have a combination of long-tenured Directors and new Directors with fresh perspectives. The Chair and the CEO did not change over the Review period.

Some stakeholders thought that FNLRS struggled to recruit for the Board during the Review period and have struggled in the past to recruit. When asked about the recruitment process, Directors noted that FNLRS historically had not widely advertised for Director positions and prospective Board Directors were generally referred to FNLRS through existing connections or found through word of mouth. Several staff and Directors reflected that the difficulty of recruiting is likely due to a competitive landscape in Victoria for skilled Aboriginal Directors. Several staff thought the Board was too small and believed that it would benefit from having more Directors.

FNLRS competed for recruiting talent with other representative bodies including the First People's Assembly of Victoria and the Yoorrook Justice Commission. Several stakeholders interviewed believed that these more newly established organisations were more visible and had a higher profile than FNLRS which helped to attract talent. Some Traditional Owner groups also mentioned the fact that they were unaware

²⁷ FNLRS Annual Report 2020-2021.

of who was on the FNLRS Board and that they would have thought FNLRS's Directors would be better known amongst the community.

All Directors agreed that the Board would benefit from greater gender diversity as it currently only has one female Director. Raising the profile of FNLRS, and the Board more generally, would be beneficial to ensuring FNLRS is able to recruit skilled Directors in the future. Implementing a more formal and transparent process, including possibly engaging a recruiter, to identify and hire qualified Directors would also help with recruitment. These findings are in line with the findings of the Strategic Review and related recommendations. The Review notes that the Office of the Registrar of Indigenous Corporations (ORIC) provides some guidance around selection criteria and required skills of independent Directors which FNLRS might find useful.

Conflicts of interest

FNLRS operated in a highly conflicted environment and proactively managed conflicts of interest

FNLRS continued to operate in a conflicted environment during the Review period and was sensitive to how it managed its role. Conflicts of interest or perceived conflicts of interest were common, primarily since the small number of FNLRS staff had historical relationships working with many Traditional Owners in Victoria as former clients.

While FNLRS had a dedicated conflicts of interest policy for Directors, it did not have an approved conflicts of interest policy for staff. Staff noted that the development and approval of a staff conflict of interest policy was on the agenda for the Board's February 2024 meeting. FNLRS did have a Whistle Blower Policy that applied to staff and outlined protection mechanisms.

Despite not having an organisation-wide policy, conflicts of interest were proactively addressed in various ways during the Review period. Where conflicts of interest arose regarding the representation of claimants, FNLRS briefed matters out to external lawyers if they had represented the applicant. For example, in the Eastern Maar native title claim, all respondents were represented by external lawyers, given that FNLRS represented the applicant.

The supervision of staff and how particular staff members were allocated to various matters was managed carefully to maintain clear boundaries. For example, FNLRS made sure two separate lawyers were working for the same Traditional Owner group – one providing advice to the Traditional Owner corporation on governance and corporate advice, and another working on the pending native title claim for the same group. FNLRS made sure a firewall was established so no information could be shared between them. Additionally, the CEO, rather than the PLO, was responsible for assessing and making decisions on funding applications to manage conflicts or perceived conflicts of interest. At times FNLRS sought external advice on how specific conflict risks should be managed. As discussed previously, after the Review period in 2022, the FARAC was established to address further concerns around perceived conflicts of interest regarding funding decisions. FNLRS de-coupling from the Federation, was another example of how FNLRS managed perceived conflicts of interest more broadly during the Review period.

Culture and values

Staff reported that FNLRS was a very positive place to work

FNLRS clearly articulates its “vision” and “mission” to support Traditional Owner groups to realise and exercise native title rights and interests in Victoria.

There was a consensus among staff that FNLRS was a good place to work, that it was a well-run organisation and had a positive work culture. Staff thought that leadership of the organisation fostered a respectful and open workplace and that all staff shared a common passion for achieving outcomes for Aboriginal Victorians. Staff valued the willingness of the organisation to approve part time work. There were no reports of bullying or harassment by staff.

“FNLRS is the best culture I have worked in... I think FNLRS creates an environment where people are able to respect each other and get along even if they don’t always see eye to eye.”

FNLRS staff member

During the Review period, FNLRS administered regular hybrid working surveys covering staff culture and engagement throughout and after COVID-19. Collecting this feedback periodically helped FNLRS to identify engagement trends and improvement opportunities. FNLRS historically provided a physical feedback box which was converted into an anonymous staff survey during COVID-19 that was available for staff to complete to provide feedback at any time. Staff reported that this feedback was usually taken on board and addressed through staff meetings.

During the Review period, the HR function, comprising one part-time staff member, also provided HR services to the Federation. Staff believed the function was under resourced and struggled to balance strategic HR planning above and beyond the operational activity that occurs. Staff reported that there were plans for the HR team to implement internal culture surveys in the near future to identify organisational strengths and areas for improvement.

Figure 4 | FNLRS’s vision and mission

Vision
All Traditional Owner groups in Victoria are formally recognised and supported.
Mission
To be the service provider of choice for supporting Traditional Owner groups to realise and exercise their native title rights and interests.

FNLRS would benefit from greater internal team collaboration

When asked what improvements could be made regarding organisational culture, staff suggested that there could be greater collaboration between teams, with teams often working in silos. During the Review period, COVID-19 had a significant impact on the ways of working which hampered collaboration. FNLRS staff were provided with laptops just before COVID-19 restrictions were implemented, which helped the organisation to adapt quickly to working from home and continue to work collaboratively. Several staff, however, acknowledged that FNLRS was still trying to find the right balance of hybrid working to maintain flexibility while encouraging collaboration. FNLRS implemented designated days for staff to work from the office to improve staff engagement. Staff were hopeful that the move to the new office site which is smaller and on one level will enhance collaboration.

Financial management

FNLRS had sound policies in place for financial management

FNLRS fulfilled its financial requirements to report to the NIAA in a timely manner. FNLRS's ARC assists FNLRS with its financial management through advising on accounting policies, internal control systems, risk management systems, asset management and acted as the Remuneration Committee to review the remuneration and performance of the CEO.

During the Review period, FNLRS received funding from both the Australian Government and the Victorian Government to deliver native title and broader services. Staff reported that they had effective mechanisms in place to manage the attribution of funding to support the organisation to comply with all funding agreements and not have any cross-subsidisation. Financial systems improved during the Review period to automate reporting and efficiently track budgets and funding. FNLRS's accounting software was connected to PowerBI dashboards to monitor budgets in real time, which helped to enhance the transparency around funding used from the Australian and Victorian governments.

Despite some of the systems automating processes, there were still too many IT systems. Different systems were used for accounting, payroll and a specialised system for time sheeting and invoicing from the legal team. This created complexity in the day-to-day financial management and there was support for consolidating these systems. FNLRS spoke to other NTRB-SPs to discuss better practice, however it is unclear how helpful these sessions were as other NTRB-SPs had similar issues. FNLRS continues to investigate how it could consolidate its financial systems in the future.

Training and professional development

Ample training opportunities were provided to staff during the Review period

FNLRS's HR function oversaw operations regarding staff training and professional development during the Review period. Prior to the Review period disruptions due to HR staff changes resulted in some policies and practices being out of date. The recruitment of the new HR Manager and the implementation of a digital HR platform led to an improved HR function, notably due to improved onboarding and offboarding processes, and management of policies. This allowed FNLRS to adequately support its staff through HR issues, training and professional development. Staff reported positively about these developments.

FNLRS staff were provided with several different training opportunities both at induction and ongoing throughout their employment. Onboarding online modules included training around cultural awareness, vicarious-trauma and facilitation skills. FNLRS staff were supported to undertake various vocational and tertiary qualifications related to their roles at FNLRS, including having access to study leave. Several staff reported that they were supported by FNLRS to undertake some additional training related to their role, including payment to attend conferences. The Review heard feedback that FNLRS would like to undertake more specific training to support roles through the year (for example, managerial training), however, limited budgets have constrained FNLRS from implementing these more targeted, ongoing training programs.

Due to the nature of trauma and vicarious trauma that is involved in working in native title and with communities, FNLRS decided to implement "healing-informed practice" throughout the organisation. This involved establishing a Healing-informed Committee in late 2019. Throughout 2020, FNLRS ran several workshops with external trainers with staff and developed a policy that was implemented to embed a healing-informed approach across the organisation more generally.

Level of staff turnover

FNLRS had relatively low turnover during the Review period

During the Review period, FNLRS had between 26 to 28 staff (Table 9). Turnover was relatively low at approximately 22 per cent. Staff reported that FNLRS had broadly been successful in retaining its staff over the Review period and believed the low turnover was a testament to FNLRS's positive work culture. The legal team was reportedly one of the most difficult teams to recruit for and it was not uncommon for FNLRS to recruit legal staff from interstate. Several Traditional Owners thought FNLRS had been disadvantaged by losing some very senior and expert lawyers during the Review period. Some Traditional Owner groups believed that FNLRS has struggled to recruit expert lawyers and was too reliant on junior legal staff who in their view did not always have the professional experience or expertise.

Table 9 | FNLRS staff profile June 2019 to June 2022

Financial year	Indigenous		Non-Indigenous		Total staff
	Male	Female	Male	Female	
2018-19	3	2	12	11	28
2019-20	3	2	12	9	26
2020-21	5	2	9	12	28
2021-22	4	2	9	11	26

5.5.2 TOR 5: External factors

No external factors were identified for TOR 5.

5.5.3 TOR 5: Recommendations

RECOMMENDATION

6

This Review endorses the following recommendations made by the Strategic Review:

- FNLRS should seek to diversify the composition and skills of its Board to a wider variety of people and skillsets (for example, this could be achieved by advertising for Directors more proactively and widely using formal advertisement channels and possibly recruiters).
- FNLRS should better communicate its current governance structure and Board membership (this could be achieved by profiling the current Board members on relevant channels including FNLRS's website, social media channels, events).

RECOMMENDATION

7

Implement a mechanism for collecting, understanding and responding to community feedback, which should then be reported to the Board.

RECOMMENDATION

8

Enhance organisational collaboration by implementing activities that encourage the different teams within FNLRS to work together.

5.6 TOR 6 | Extent to which each organisation is adequately supporting Prescribed Body Corporates towards self-sufficiency.

Summary

FNLRS serviced four PBCs and two TOGEs during the Review period. They were all highly functioning organisations, with between 30 to 80 staff with the PBCs running for over ten years. Some had multiple funding sources and did not require basic support funding. FNLRS allocated at least one lawyer, an anthropologist and a CLO to each PBC and TOGE to provide consistent support during the Review period. Because the PBCs were already well established, FNLRS provided targeted support as required, primarily focused on Future Act support, administrative support for AGMs and ad-hoc legal support.

PBCs and TOGEs were mostly satisfied with FNLRS's support. Clients valued the high quality of FNLRS's legal support and the value for money in accessing ad-hoc legal advice. They also cited the strong and trusting relationship that they had with FNLRS. Some clients believed there could be improved clarity around FNLRS's service offering with more consistent communication and greater transparency around decision-making.

Several staff interviewed noted that FNLRS experienced capacity constraints throughout the Review period, which they believed contributed to restricted support provision for PBCs and TOGEs. The funding and staffing level decreases in FY2019-20 contributed to this.

FNLRS formed a Return of Materials Committee during the Review period, which oversaw a pilot initiative to return cultural materials to the Gunditjmarra people. Several staff interviewed reported that learnings from this pilot project would be central to the development of a formal return of materials policy to be used by FNLRS for other PBCs in the future.

FNLRS received \$100,000 per annum in PBC support funding during each year of the Review period, with \$50,000 being provided to two of the four Victorian PBCs. There would be benefit in NIAA clarifying its intentions in relation to PBC funding in the future. Operational funding or fee-for-service arrangements were also used to fund both PBC and TOGE support.

5.6.1 TOR 6: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Satisfaction of PBCs/RNTBCs supported by the NTRB-SP

PBCs and TOGEs were mostly satisfied with FNLRS's support

PBC and TOGE clients who spoke to the Review were generally happy with the support they received from FNLRS throughout the Review period. Observations from interviews included:

- Most clients highlighted the strong and trusting relationship that they had with FNLRS, including with the management team and the CEO.
- Many clients highlighted the quality of FNLRS's legal support and the value for money in accessing legal advice.
- Most clients appreciated the deep expertise and knowledge that FNLRS had developed over time.

Despite most clients being satisfied with FNLRS's support during the Review period, clients raised areas for improvement. Observations from interviews included:

- Most clients believed there could be more clarity around what FNLRS's service offering was in terms of PBC support. Most clients were interested in exploring other services on offer from FNLRS, such as broader governance and strategy advice, although they did not know whether this was in scope.
- Some clients thought that FNLRS could be more consistent in its communications and enhance its transparency regarding its decision-making about the staff allocated to clients for ongoing support.
- Some clients felt that FNLRS's legal staff could improve in some administrative areas (for example, minute-taking).

The Review believes that having more purposeful and regular conversations with PBCs and TOGEs to understand what level of service they are seeking and to assess what support FNLRS can provide within the resources it has available would benefit FNLRS's relationship with them.

FNLRS did not have a formal, dedicated mechanism to collect PBC or TOGE feedback in place during the Review period or at the time of staff consultations in November 2023. Staff noted that the Strategic Review (conducted after the Review period) was undertaken with the intention of using feedback to inform FNLRS's future service delivery. The Review believes that a culturally appropriate feedback mechanism should be introduced by FNLRS to guide refinement of service delivery for PBCs and TOGEs on an ongoing basis. This aligns with staff sentiment observed during interviews, which placed high value on an ongoing feedback mechanism for clients building off the one-off exercise undertaken by the Strategic Review.

Percentage of PBCs/RNTBCs supported by the NTRB-SP who have had intervention from ORIC or other regulator

No PBC or TOGE supported by FNLRS during the Review period received intervention from ORIC or other regulator.

Progress towards self-sufficiency for PBCs/RNTBCs supported by the NTRB-SP

The PBCs and TOGEs were generally self-sufficient during the Review period

The four PBCs and two TOGEs²⁸ that FNLRS serviced during the Review period were all fully functioning organisations that had been running for over ten years. They had well established governance mechanisms with approximately 30 to 80 staff each. The PBCs and TOGEs have grown over time to take on more responsibilities and work with government to achieve outcomes for Traditional Owners.

The four PBCs had RAP status prior to achieving a positive determination of native title²⁹ and one was also a TOGE. RAP status meant that they could receive funding from the state government and generate revenue prior to PBC incorporation. The PBCs were therefore well placed to take on additional responsibilities under the Aboriginal Heritage Act, the NTA and the Settlement Act, and develop their organisation post-determination. These factors markedly contributed to the PBCs displaying a high degree of autonomy during the Review period. This high degree of autonomy was mirrored for the two TOGEs (which also had RAP status), Taungurung Land and Waters Council (TLaWC) and Dja Dja Wurrung Aboriginal Corporation).

FNLRS provided targeted support to the PBCs/TOGEs due to internal capacity constraints and PBC autonomy

FNLRS's Strategic Plan (2021-2024) was underpinned by yearly operational plans during the Review period which outlined the detailed activities undertaken for PBCs each quarter as aligned to their post-

²⁸ TOGEs are the bodies established as an outcome of agreements made under the Settlement Act, similar to a PBC in native title.

²⁹ All determinations and PBC incorporations occurred prior to the Review period, noting that the most recent determination at the time of the Review for the Gunditjmara and Eastern Maar Peoples was in 2011.

determination goals and the progress made to date. Each PBC/TOGE was allocated at least one FNLRs lawyer, an anthropologist and a CLO to provide consistent PBC support during the Review period. Planning for the services to be provided to PBCs was undertaken within teams, at weekly managers meetings and through ad-hoc planning sessions throughout the year.

FNLRs's annual reports and documents provided to the Review outlined the types of support FNLRs provided to client PBCs/TOGEs during the Review period. This included but was not limited to:

- notification of activities on Crown land under the NTA
- negotiation and agreement-making under the NTA (and the Settlement Act)
- professional services to support native title agreement-making and self-determination, including technical advice and planning support, corporation development and governance
- ad-hoc advice for general commercial matters, with FNLRs directing the client to external counsel in instances where specialist knowledge would be required
- secretariat services, including policy, governance and technical advice to PBCs and TOGEs.

Because the PBCs/TOGEs were already well established, FNLRs provided basic administrative support, such as for AGMs. FNLRs did not provide any training to the PBCs/TOGEs throughout the Review period.

FNLRs provided a mix of free and fee-for-service support. Areas in which FNLRs provided fee-for-service support include:

- advice on Future Act related agreement making and implementation
- Land Use Activity Agreement compliance
- non-Future Act native title related agreement drafting and implementation
- governance advice to Boards and their sub-committees including meeting notifications, attendance, minute taking
- general legal advice, within FNLRs areas of practice
- anthropological, historical and other research support for membership applications and other native title purposes upon request.

For example, FNLRs worked with Gunaikurnai to expand their settlement outcomes from the partial settlement negotiated when they received their native title determination to include a Land Use Activity Agreement, in place of the Future Act regime. Part of this work was undertaken on a fee-for-service basis, while some was covered out of operational funding. FNLRs previously worked with Eastern Maar to do the organisation's bookkeeping under a fee-for-service arrangement; however, this stopped just before the Review period when Eastern Maar had the funding to hire their own accountant.

Several staff interviewed noted that FNLRs experienced capacity constraints throughout the Review period, contributing to restricted support for PBCs/TOGEs. The Review notes that funding and staffing level decreases in FY2019-20 likely contributed to this by reducing the availability of support.

PBCs/TOGEs reported starting to consider developing or had already developed their own in-house legal teams to process day-to-day matters during the Review period. Some had also already started to use various external lawyers for some of their work noting that FNLRs did not always have the capacity in their legal team to help them with the broad range of legal advice that they were seeking.

Table 10 | FNLRS's PBC support during the Review period³⁰

PBC/TOGE	Date of PBC incorporation	Summary of support during the Review period
Barengi Gadjin Land Council Aboriginal Corporation RNTBC	16/03/2005	• Ad-hoc legal advice • Under the Settlement Act: assistance with negotiation of RSA
Eastern Maar Aboriginal Corporation RNTBC	11/07/2011	• Future Act support • Governance support • Assisted with expansion of staffing profile and building capacity • Under the Settlement Act: assistance with negotiation of RSA
Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC) RNTBC	15/05/2007	• Future Act support • Board and subcommittee support • Under the Settlement Act: legal advice for the re-negotiated RSA
Gunditj Mirring Traditional Owners Aboriginal Corporation RNTBC	21/07/2006	• Future Act support • Native title full group meeting coordination
Dja Dja Wurrung Clans Aboriginal Corporation (Djaara)		• Ad-hoc legal advice • Fee for service work • Under the Settlement Act: Land Use Activity Agreement support
Taungurung Land and Waters Aboriginal Corporation		• Ad-hoc legal advice • Fee for service work • Ongoing litigation support • Under the Settlement Act: Land Use Activity Agreement support

NTRB-SP's progress in returning cultural materials to PBCs/RNTBCs and Traditional Owners

FNLRS piloted a formal return of cultural materials and sought to return materials upon request

During the Review period, FNLRS staff received many requests for data and information that was held in their databases. FNLRS staff explained the complexity of providing data as there were many legal and privacy considerations involved in each information request and that greater certainty in this area would help to process these requests. FNLRS staff mentioned that these requests take up a considerable amount of time and are likely to grow in the future, particularly for the Treaty negotiations that may occur. On at least three occasions when FNLRS has engaged with post-determination/settlement groups to agree a return of materials process the groups have called a pause once they realise the complexities, particularly

³⁰ Data provided directly to the Review by FNLRS.

those relating to their own management of the materials and those relating to on-going litigation. FNLRS is currently developing processes and policies around accessing materials and for the return of cultural materials; it remains ongoing.

FNLRS formed a Return of Material Committee during the Review period, which oversaw an initiative to pilot the return of cultural materials to the Gunditjmara people. Several staff interviewed recognised that learnings from this pilot project, which was progressing throughout the Review period, would be central to the ongoing development of a formal return of materials policy that could be used by FNLRS in the future.

The pilot involved an in-depth exercise of retrieving the materials from the database, and systematically assessing and cataloguing each piece. The exercise raised complex questions regarding the privacy of various materials, including interviews with deceased family members, which were still being explored by FNLRS staff. FNLRS reported that the next stage, transferring the materials back to the PBC, would need careful planning. FNLRS staff thought that they would need to provide support to PBCs to safely catalogue and store these materials in secure databases in line with information security and privacy policies in the future.

FNLRS also sought to return cultural materials upon request for individual family groups within the Gunditjmara native title holding groups during the Review period. However, some FNLRS stakeholders said during interviews that these requests were sometimes difficult to fulfill due to privacy and other considerations that needed to be worked through on a case-by-case basis.

Percentage of PBCs/RNTBCs supported by NTRB-SP with formal service agreements in place with NTRB-SP

Some formal service agreements were in place with PBCs/TOGEs as well as with the peak body for PBCs in Victoria

A formal service agreement was in place between FNLRS and GLaWAC, entered into in February 2021. Service agreements were also in place for each of the two TOGEs (that were not also PBCs), with TLaWC, and two with the Federation. The GLaWAC agreement outlined how FNLRS was to support GLaWAC in matters relating to Future Acts and PBC governance of the Board and a subcommittee. The agreement with TLaWC centred on FNLRS's support for Land Use Activity Agreement matters and ceased shortly after the Review period.

FNLRS's two service agreements in place with the Federation set out terms on:

- administration and finance support on request to FNLRS
- corporate support
- ad-hoc legal services charged on an hourly fee at discounted rates
- HR, and communication and media services.

Satisfaction of PBCs/RNTBCs with the process of negotiating service agreements between the NTRB-SP and the PBC/RNTBC

The Review did not receive any negative feedback around the role of FNLRS in negotiating its service agreements.

5.6.2 TOR 6: External factors

This section presents an analysis of factors that impacted on performance that were beyond FNLRS's control.

Extent to which self-sufficiency for PBCs/RNTBCs is achievable

Self-sufficiency may be easier to develop for PBCs and TOGEs in coastal regions compared to those inland, though this did not have much impact during the Review period

The socio-economic profile of a region can impact the extent to which self-sufficiency is feasible. Victorian PBCs in areas with lower Index of Relative Socio-economic Disadvantage (IRSD) scores may experience limited economic development opportunities relative to those in areas with higher IRSD scores. Table 11 data indicates that coastal regions may have better economic development opportunities than inland areas in Victoria. However, it is unlikely that the four Victorian PBCs and two TOGEs were impacted by this during the Review period, acknowledging they were all highly autonomous.

Table 11 | Average IRSD decile for Victorian PBC local government areas (LGAs)^{31,32}

PBC	Average LGA IRSD decile ³³
Barengi Gadjin Land Council Aboriginal Corporation RNTBC	4.50
Eastern Maar Aboriginal Corporation RNTBC	6.33
Gunaikurnai Land and Waters Aboriginal Corporation RNTBC	5.25
Gunditj Mirring Traditional Owners Aboriginal Corporation RNTBC	6.50
Overall average (approximation)	5.64

5.6.3 TOR 6: Recommendations

RECOMMENDATION

9

Implement a mechanism to collect client feedback from PBCs and TOGEs on an ongoing basis and improve the way the organisation collects, monitors and responds to informal feedback and issues.

RECOMMENDATION

10

Develop clear communications around the service offering for PBC and TOGE support that outline which services FNLRS offers on a fee-for-service basis.

RECOMMENDATION

11

Clarify with the NIAA its intentions to provide base PBC funding in the future to all PBCs.

RECOMMENDATION

12

This Review endorses the following recommendation of the Strategic Review:

³¹ Australian Bureau of Statistics. SEIFA by LGA. 2021.

³² IRSD information for TOGEs are not included due to the absence of relevant data sources.

³³ Average IRSD scores are approximate and consider the individual IRSD scores for all LGAs relevant to a PBC.

- FNLRs should assess current research practices and consent forms to ensure they provide informants the option for their information to contribute to Treaty negotiations.

5.7 TOR 7 | Extent to which each organisation has developed its planning for a post-determination environment.

Summary

FNLRS is advanced in its post-determination planning despite having a relatively low number of successful determinations and only six PBCs/TOGEs. Staff thought it was possible for all native title claims to be finalised in the next five to ten years. FNLRS has been very active in supporting Traditional Owners in Victoria achieve their aspirations post-recognition, including negotiating and expanding settlement ILUAs under the Settlement Act.

The priority for FNLRS's leadership team during the Review period was to complete the remaining native title claims for Traditional Owners in Victoria. This was seen as particularly important ahead of Treaty negotiations. However, most staff recognised that once all claims are finalised, FNLRS's role and operating model was likely to be influenced in the future by its contestable environment. FNLRS's aspiration to be the "go to" service provider for post-determination or post-settlement support remains unchanged. However, FNLRS recognises that future support for PBCs and TOGEs may need to be undertaken on a fee-for-service basis.

PBCs and TOGEs were eager to work with FNLRS in the future and were interested in receiving specialist advice around commercial deals and compensation. There was a consensus among PBCs/TOGEs that FNLRS would need to continue to play an important role in providing basic legal services to clients and that it was still the most obvious go-to service for legal advice in Victoria given FNLRS's deep knowledge of the area.

The Strategic Review presented options for how FNLRS could be better structured into the future to progress Traditional Owner aspirations given the upcoming Treaty process and the options which are under consideration by FNLRS. Developing FNLRS's next strategy post-2024, provides an opportunity to reflect on the optimal operating model for the medium- to long-term and to consider what capability is required to deliver the services that are likely to be in demand.

Victoria's Treaty process was raised throughout most consultations as a key change on the horizon that will potentially shape the way self-determination is pursued in Victoria. When asked about FNLRS's role in Treaty, all stakeholders consulted believed that FNLRS was well-positioned to play a valuable role, given their organisational knowledge and the intersection between the NTA, the Settlement Act and Treaty agreements. Stakeholders reflected on the fact that work for FNLRS might increase as a result. This Review acknowledges that, as the Strategic Review concluded, that it was too early to make any major changes to operations given the evolving nature of the process.

No compensation claims were made during the Review period. The focus in Victoria around compensation has primarily been through negotiations under the Settlement Act, where FNLRS has achieved many successes for its clients. Despite most of the financial benefits deriving from settlement packages, FNLRS staff believed that formal compensation claims under the NTA have not been ruled out for the future.

5.7.1 TOR 7: Assessment of performance

This section presents an assessment of performance against the performance indicators for this TOR. To see the performance indicators please see Appendix A.

Adequacy of post-determination strategic planning

FNLRS is mature in its post-determination strategic planning

Despite having a relatively low number of successful determinations and only six PBCs/TOGEs, FNLRS is appropriately advanced in its post-determination and post-settlement planning. Staff reported it was

possible for all native title claims in Victoria to be finalised in the next five to ten years. However, this has been the optimistic outlook for a while (the 2015-2016 Annual Report stated that FNLRS was “On track to resolve native matters across Victoria by 2018-19”) with staff noting that progress heavily depends on dispute resolution and the aspirations of family groups.

FNLRS has been very active in supporting Traditional Owners in Victoria achieve their aspirations post-recognition, including negotiating and expanding settlement ILUAs under the Settlement Act. FNLRS was guided by two Strategic Plans during the Review period – the Strategic Plan 2017-2020 and the Strategic Plan 2021-2024. Both strategic plans outlined FNLRS’s commitment to anticipating and servicing the needs of its clients in a “post-settlement” environment (see Figure 5). FNLRS refers to post-settlement rather than “post-determination” given the state-based mechanisms for formal recognition that often precedes native title outcomes in Victoria.

Given the complexity of the Victorian landscape and the various forms of recognition, it is difficult to view post-determination support for PBCs in isolation from the other supports that are in place under state-based agreements. FNLRS nevertheless continued to support its six well-established PBCs/TOGEs to navigate the post-determination and post-settlement environment by supporting them with activities as outlined under TOR 6 through the Review period. Emerging Treaty negotiations are likely to add further complexity to the type of support PBCs and TOGEs might require from FNLRS in the future.

Figure 5 | FNLRS’s objectives and priorities from its two Strategic Plans that were active during the Review period

1. Objectives (2017 to 2020)

- Working to resolve outstanding native title issues and to create new Traditional Owner corporations (and Federation members).
- To become the service provider of choice for Traditional Owner Corporation Development.
- To anticipate and service our client’s legal, research, financial and governance needs in the post-settlement environment.
- Return research materials and evidence in a culturally appropriate way.
- Seek continuous improvement to agreement-making processes including the Settlement Act.

2. Strategic priorities (2021 to 2024)

- Achieve formal recognition across Victoria.
- Provide professional legal, research and corporate support to groups post-settlement.
- First Nations has the capacity to support Traditional Owner groups prepare for and negotiate treaties and other future agreements, upon request.
- Victorian Traditional Owners benefit from improved settlement outcomes, including in relation to rights recognition, compensation and cultural heritage protection.
- A collaborative process for the return of research materials to Traditional Owner clients is established within legal and ethical frameworks.
- First Nations has an increased profile within the Traditional Owner community.
- A healthy, nurturing, culturally safe and responsive work environment with a diverse staff group is established.

PBCs and TOGEs were keen to work with FNLRS in the future and explore additional services

PBCs and TOGEs who were consulted as part of the Review were interested in the role FNLRS was likely to play in the future. There was a consensus among both PBCs and TOGEs that FNLRS would continue to play

an important role in providing basic legal services to those PBCs and TOGEs that wanted to use FNLRs's services. Clients believed that FNLRs's historical knowledge and experience working under the NTA and the Settlement Act resulted in FNLRs still being the most obvious go-to service for legal advice in Victoria. All clients agreed that it was important for new PBCs and TOGEs to have access to FNLRs's services as more areas are determined across Victoria in the future.

When asked what additional advice they would like to receive from FNLRs in the future, clients thought it would be valuable to access specialist advice as it related to native title or Settlement Act agreements. Examples provided included legal advice around commercial deals and compensation. While clients noted that they were able to access private law firms for this kind of work, they believed that having lawyers with a native title background would be beneficial.

FNLRs recognised that its operating model will need to evolve to adapt to changing client needs

FNLRs's leadership's priority during the Review period was to complete the remaining native title claims for Traditional Owners in Victoria. However, most staff recognised that once the claims are finalised, FNLRs's role and operating model was likely to change and would also need to respond to the contestable environment it exists in. FNLRs's position to be the go-to service provider for post-determination or post-settlement support remains unchanged. However, FNLRs recognises that future support for PBCs and TOGEs will need to be undertaken on a fee-for-service basis. This aligns with clients' aspirations to be self-sufficient and able to choose their own providers.

Developing FNLRs's next strategy (post-2024), provides a valuable opportunity to reflect on the optimal operating model for the medium- to long-term and to consider what capability is required to deliver the services that are in demand. Key to this will be to explore how FNLRs could pursue a model where, in line with the endorsed recommendations of the Strategic Review, FNLRs adopts more neutral positioning and briefs out more cases to external lawyers, while retaining its valuable and knowledgeable staff, particularly lawyers. While experienced lawyers may no longer be needed to represent clients, their skills and historical knowledge will be critical to helping the PBCs and TOGEs execute their strategies over the long term.

Undertaking an in-depth planning exercise that considers the leadership's view and that of staff and other relevant stakeholders including clients, would be valuable. A clear vision for the future will help to provide clarity to clients and to staff to ensure that FNLRs's employee value proposition to attract and retain staff remains strong. While uncertainty around future funding decisions from both state and federal sources and the Treaty process (see below) is an obstacle to effective planning, scenario-planning exercises would be valuable to investigate options.

The Strategic Review presented options for how FNLRs could be better structured into the future to progress Traditional Owner aspirations given the upcoming Treaty process. The Strategic Review proposed that it was still too early to make any significant re-structuring decisions until after there was more clarity around the Treaty process and after its associated mechanisms were fully established. This Review agrees but urges FNLRs not to wait for Treaty negotiations to start, before undertaking more comprehensive planning exercises for the future. The Strategic Review and the proposals put forward, can help FNLRs with its post-determination strategic planning and effectively design its operating model to best service the system in the future.

FNLRs's role in Treaty was yet to be determined

During the Review period, Victoria achieved rapid progress in establishing key elements under Victoria's Treaty Act: a Self-Determination Fund, a Treaty Negotiation Framework, a Treaty Authority and a dispute resolution process. Stakeholders interviewed as part of the Review were uncertain as to how the current

work of FNLRS and the work of Treaty negotiations would intersect, however, noted it was likely to become clearer in the next year when Treaty negotiations formally commence.

The Review notes that those Traditional Owner corporations that are already well established, including all four PBCs and the two TOGEs, are well-placed to play a major role in Treaty negotiations given their maturity and self-sufficiency. This will likely put pressure on these organisations and FNLRS as their key partner to help progress negotiations. External stakeholders viewed FNLRS's research function as a key asset that could be leveraged for this process. FNLRS's ability to certify ILUAs was also acknowledged as a critical function that may be needed as part of Treaty land negotiations. During the Review period, it was top of mind for FNLRS as to how they would be involved in Treaty, however, it was too early to make any major changes to operations given the evolving nature of the process.

No compensation claims have been made under the NTA, however, there has been substantial work negotiating settlements

No compensation claims were made during the Review period (or subsequently) in Victoria. Rather, the focus in Victoria around compensation has primarily been through negotiations under the Settlement Act, where FNLRS has done a significant amount of work. Staff reflected that this is because settlement outcomes have historically been equal to or better than what might be achievable from a compensation claim. The Settlement Act enables the Victorian Government to enter a settlement with Traditional Owners, which can include a Funding Agreement which provides financial benefits, akin to compensation. FNLRS facilitated comprehensive settlement packages, which have included substantial financial benefits for Traditional Owner groups in the past; however, most of this activity (aside from the Taungurung settlement) occurred outside of the Review period.

Despite the financial benefits deriving from settlement packages being generally superior from those that could be achieved from a successful compensation claim under the NTA, FNLRS staff believed that compensation claims were not ruled out in the future. The policy positions adopted by the Australian Government and the Victorian Government will be critical in FNLRS's decisions about the prospects of success, especially given the amount of funding already provided under the Settlement Act.

Staff were open to progressing compensation claims for clients if resources allowed for it, but not at the expense of finalising native title claims. Treaty is likely to play a key role regarding compensation claims for Traditional Owners in a broader sense. What this looks like, and the extent to which compensation can be sought and for what reasons, is still to be determined through the Treaty negotiations process.

5.7.2 TOR 7: External factors

This section presents an analysis of factors that impacted on performance that were beyond FNLRS's control.

Progress towards a post-determination environment

There are likely to be more native title claims lodged in the future, particularly in the areas currently without formal recognition under any of the various schemes in Victoria

With approximately 25 per cent of its claimable land determined, there is still progress to be made in Victoria to achieve native title determinations. At the time of the Review two of the active claims were progressing well (Eastern Maar and the Millewa-Mallee claims), while the other two (Boonwurrung and Wamba Wemba claims) were evolving as complex claims with critical questions around adequate research and claim group composition.

Staff believed that there were likely to be more native title claims lodged in the future, particularly in the areas currently where there have been no determinations to date. However, it is unlikely that native title claims will be filed for areas that already have significant settlement agreements as the compensation achieved under the state agreements is often equal to or better than what might be achievable from a compensation claim.

5.7.3 TOR 7: Recommendations

RECOMMENDATION

13

This Review endorses the recommendations of the Strategic Review:

- FNLRS should avoid any significant re-structure until the Treaty process and its associated institutions are more fully established, to avoid locking into unsuitable or inflexible arrangements that do not serve Traditional Owner needs.
- FNLRS should strengthen and build ties with emerging Treaty institutions and remain agile and ready to reflect their needs as new spaces develop.

RECOMMENDATION

14

As part of the development of FNLRS's next Strategic Plan (post-2024), engage with staff and clients to develop clear objectives for post-determination and post-settlement activities for each PBC and TOGE, and for FNLRS as an organisation.

Appendix A Project Terms of Reference and performance indicators for individual reports

The methodology for the Review was developed by Nous against the TORs, as discussed in the Scope of the Review, see section 2. For each TOR the methodology listed a number of performance indicators and external factors to ensure a consistent approach across all the NTRB-SP reviews and to enable a comparison of performance. The TOR and associated performance indicators and external factors are listed below.

1. Focussing on the period 1 July 2019 to 30 June 2022 and addressing developments since the previous Review of each organisation the Service Provider will:

- a. Review and assess the extent to which each organisation:

- i. Has achieved positive native title outcomes for persons who hold or may hold native title in its region taking account, where relevant, of disruptions caused by COVID-19.

Performance indicators:

- Native title outcomes including from facilitation and assistance, certification, notification, dispute resolution and other relevant functions.
- Anthropological research.
- Future Acts and ILUAs.
- Number of claims resulting in a determination of native title or ILUA settlement as a proportion of total filed claims.
- Number of claim groups the NTRB-SP has acted for or assisted via brief out arrangements in a native title determination application during the Review period.
- Proportion of claimable land within the RATSIB area not subject to a registered claim or a determination.
- Average time between filing an application for a determination of native title to the date a determination is made.
- Number of common law native title holders/RNTBCs the NTRB-SP has acted for in a native title compensation application proceeding.

External factors:

- State government policy and legislation.
- Complexity of remaining claims.
- History of previous claims.
- Complexity of land use and tenure.
- COVID-19.
- Amount of funding.

- ii. Assesses and prioritises applications for assistance in a manner that is equitable, transparent and robust and is well publicised and understood by clients and potential clients.

Performance indicators:

- Equity, transparency and robustness of assessment and prioritisation process.
- Client and potential client awareness of the process.
- Traditional Owner satisfaction with the assessment and prioritisation process and its outcome.

External factors:

- Number of claims relative to NTRB-SP size and resourcing.

- iii. Deals respectfully, equitably, transparently and in a culturally appropriate manner with persons who hold or may hold native title in its region, including by adequately investigating and resolving complaints.

Performance indicators:

- Respectful and transparent engagement.
- Culturally appropriate engagement.
- Complaints.
- Internal review.
- Use of cultural materials.

External factors:

No external factors have been identified for TOR 3.

- iv. Performs its functions in a cost-effective manner, including by identifying the key cost drivers for the organisation.

Performance indicators:

- Expenditure on salaries (legal, anthropological, Board, CEO, HR, etc.), operations (travel, legal, offices, etc.) or other relevant items.
- Cost-saving actions, strategies and/or discussions.
- Appropriate processes for claim group meetings.
- Annual yearly expenditure per claimant group.
- Travel assistance policies for claim group meetings.
- Appropriate rationale for use of external consultants.

External factors:

- Size of RATSIB area.
- Remoteness of RATSIB area.
- Average number of people within a claim group.
- Interpreters.

- v. Has governance and management structures, and organisational policies and an organisational culture that support efficient and effective project delivery.

Performance indicators:

- Breakdown of roles, responsibilities and decision making between the organisation's Board, Chairperson, CEO and senior staff.
- Board integrity and capability.
- Conflicts of interest.
- Culture and values.

- Financial management.
- Training and professional development.
- Level of staff turnover.

External factors:

No external factors have been identified for TOR 5.

- vi. Is adequately supporting Prescribed Body Corporates towards self-sufficiency.

Performance indicators:

- Satisfaction of PBCs/RNTBCs supported by the NTRB-SP.
- Percentage of PBCs/RNTBCs supported by the NTRB-SP who have had intervention from ORIC or other regulator.
- Progress towards self-sufficiency for PBCs/RNTBCs supported by the NTRB-SP.
- NTRB-SP's progress in returning cultural materials to PBCs/RNTBCs and Traditional Owners.
- Percentage of PBCs/RNTBCs supported by NTRB-SP with formal service agreements in place with NTRB-SP.
- Satisfaction of PBCs/RNTBCs with the process of negotiating service agreements between the NTRB-SP and the PBC/RNTBC.

External factors:

- Extent to which self-sufficiency for PBCs/RNTBCs is achievable.

- vii. Has developed its planning for a post-determination environment.

Performance indicators:

- Adequacy of post-determination strategic planning.

External factors:

- Progress towards a post-determination environment.

- 2. The Service Provider will provide the following reports, reflecting the Service Provider's independent views, to assist with Agency decision-making:
 - a. An individual report for each organisation reviewed, including recommendations on what changes, if any, the organisation could make to improve its performance against each of the criteria listed in 1(a) above.

Appendix B Stakeholders consulted

The Review held consultations in person and virtually with a range of stakeholders in relation to FNLRS's performance. The Review's approach to consultations was documented in the Consultation Plan, provided to all NTRB-SPs in advance of the Review. Nous used various approaches to engage with stakeholders who might wish to be involved with the Review. Surveys were distributed on behalf of the Review by FNLRS to all staff and to Traditional Owners. Where feasible, notices were placed in relevant newspapers and other media to inform Traditional Owners of the opportunity to speak to the Review.

Face-to-face consultations took place between the weeks commencing 13 November 2023 and 11 December 2023. All consultations were conducted in confidence and with the full consent of participants.

Those consulted included:

- over 22 Traditional Owners including:
 - clients who have been represented by FNLRS (including members of PBCs)
 - potential clients in FNLRS's RATSIB area
- the Federal Court of Australia
- the NIAA
- representatives of Victorian Government
- FNLRS staff and contractors, including:
 - FNLRS Board Directors
 - FNLRS CEO and Executive
 - current FNLRS staff
- First Peoples' Assembly of Victoria
- Federation of Victorian Traditional Owner Corporations.

Appendix C Documents reviewed

Category	Description
Annual reports	FNLRS Annual Report 2019-2020
	FNLRS Annual Report 2020-2021
	FNLRS Annual Report 2021-2022
Policies	Complaints Policy
	Conflict of Interest – Directors Policy
	Delegation Policy (October 2023)
	Draft Conflict of Interest Policy
	First Nations – Staff Travel and Accommodation Allowances Policy
	FNLRS Future Act Guidelines (April 2022)
	FNLRS Research Information Policy
	Fraud Control Policy)
	Handling of Complaints Policy
	Healing Informed Policy
	Meeting Facilitation Guidelines
	Privacy Policy
	Travel Assistance Policy
Operational documents	Whistleblower Policy
	2019-2022 First Nations - Assistance To Native Title Holders Attending Meetings Policy (pre-November 2021)
	2021 Guidelines for First Nations Assistance Groups (November 2021)
	Audit and Risk Committee Terms of Reference
	COVID-19 Safe Plan
	Facilitation and Assistance Requests Assessment Committee Terms of Reference
	Facilitator database
	Federation of Victorian Traditional Owner Corporations Strategic Plan 2017-2020
	First Nations - Code of Conduct
	FNLRS Strategic Plan 2021-2024
	FNLRS Third-Party Provider Panels Assessment Committee Terms of Reference (Oct 2023)
	Future Act Tracker 2019
	Future Act Tracker 2020-2022
	CEO position description
	Chief Financial Officer position description
	Corporate Services Manager position description
	DPLO position description
	Managing Lawyer position description
	PLO position description
	Research Manager position description

Category	Description
Financial documents	Certified NIAA Acquittal FY20
	Certified NIAA Acquittal FY21
	Certified NIAA Acquittal FY22
	Expenditure by function
Other documents	Final Report – FNLRS Strategic Review (October 2023)
	FNLRS Responses to Review of Performance as a Native Title Service Provider March 2021
	Nous Review Memorandum

Appendix D Glossary

Throughout this document, the following terms have the meaning prescribed in Table 12.

Table 12 | 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 a Native Title Representative Body and Service Provider (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</i> (Cth) (the CATSI Act)	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 Court or High Court of Australia. A determination is made either when parties have reached an agreement (consent determination) or following a trial process (litigated determination). In the context of the Review, a “positive” determination is where the court finds that native title exists and a “negative” determination is a finding that native title has been extinguished or does not exist.
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 Indigenous Land Use Agreement 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 Native Title Representative Bodies and Service Providers.
National Native Title Tribunal (NNTT)	An independent statutory body established under section 107 of the <i>Native Title Act 1993</i> (Cth) to assist people in resolving native title issues by: - mediating between the parties to native title applications at the direction of the Federal Court - acting as an arbitrator in situations where the people cannot reach agreement about certain Future Acts

Term	Meaning
	c) helping people to negotiate Indigenous Land Use Agreements. The National Native Title Tribunal maintains three registers relating to native title applications, determinations and Indigenous Land Use Agreements. 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 (section 223 of the <i>Native Title Act 1993</i> (Cth)).
<i>Native Title Act 1993</i> (Cth) (the NTA)	The <i>Native Title Act 1993</i> (Cth) established the procedure for making native title claims and is the primary piece of Australian 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> (Cth).
Native Title Service Provider (NTSP)	Organisations funded by the Australian Government to perform all or some of the same functions as Native Title Representative Bodies in areas where Native Title Representative Bodies and Service Providers have not been recognised in law.
Native Title Representative Bodies and Service Providers (NTRB-SPs)	Native Title Representative Bodies and Service Providers refers to the cohort of Native Title Representative Bodies and Native Title Service Providers that are being evaluated by the Review.
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.
Pastoral leases	A pastoral lease is a title issued for the lease of an area of Crown land to use for the limited purpose of grazing of stock and associated activities. It is a limited property right and does not provide the leaseholder with all the rights that attach to freehold land. Native title rights often co-exist with pastoral lease rights.
Post-determination	At a claim level, refers to the period following a determination that native title exists. At a Native Title Representative Body and Service Provider life cycle level, refers to the period following the resolution of all active applications within a Representative Aboriginal/Torres Strait Islander Body area.
Prescribed Body Corporate (PBC)	A body, established under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth), nominated by native title holders which will 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. Once an application is registered, applicants can exercise the procedural rights stipulated in the Future Act provisions of the <i>Native Title Act 1993</i> (Cth).
Representative Aboriginal/Torres Strait Islander Body (RATSIB) area	The area over which a Native Title Representative Body and Service Provider holds jurisdiction.

Term	Meaning
Terms of Reference (TOR)	Refers to the Terms of Reference provided by the National Indigenous Australians Agency which govern the scope of the project. These can be found in Appendix A.
Traditional Owners	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.

This document refers to the functions of NTRB-SPs outlined under the NTA and captured in Table 13.

Table 13 | NTRB functions under the NTA

Reference	Function	Detail
s203BB	Facilitation and assistance	NTRB-SPs provide assistance to native title interest holders 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 with a possible native title interest 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 clients can seek a review of decisions and actions they have made and promote access to this process for clients.
s203BJ	Other functions conferred by the <i>Native Title Act 1993</i> (Cth) 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.



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A bigger idea
of success

750

PEOPLE

75

PRINCIPALS

5

COUNTRIES

+80.7

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