

## **GUIDELINES FOR ASSISTANCE TO NATIVE TITLE GROUPS**

### **1. INTRODUCTION**

#### **1.1 Purpose of the Guidelines**

- 1.1.1 These guidelines set out the policies and procedures whereby FNLRS will determine:
- (a) whether or not to provide assistance to a native title group in relation to a matter;
  - (b) what type and level of assistance should be provided to a native title group in relation to a matter; and
  - (c) what terms and conditions should apply to the grant of assistance.
- 1.1.2 These guidelines have been developed by FNLRS in order to assist FNLRS allocate the funds it receives from the National Indigenous Affairs Agency (NIAA) to facilitate native title matters in its area in a manner which:
- (a) advances the interests of First Peoples in accordance with FNLRS' Operational Plan;
  - (b) enables FNLRS to manage the provision of assistance to native title groups effectively;
  - (c) accords with the principles of procedural fairness;
  - (d) complies with NIAA's funding terms and conditions; and
  - (e) complies with the *Native Title Act 1993* (Cth) (NTA)
- 1.1.3 The Guidelines acknowledge that the funding provided by NIAA to FNLRS is not sufficient to allow FNLRS to assist all native title groups to undertake the full range of activities for which these groups may seek assistance.
- 1.1.4 FNLRS is committed to ensuring that its structures and processes operate in a fair manner and will endeavour to ensure that grants of assistance are made in an independent and unbiased way, including by:
- (a) delegating responsibility for assessment and review of assistance to a subcommittee of FNLRS' board, the Facilitation and Assistance Request Assessment Committee (FARAC) comprising directors and an independent expert member who have no conflict of interest in relation to the relevant assistance; and
  - (b) where possible, requiring that members of the Board who are members of the native title group or who have any interest in the land or waters the subject of the application for assistance or review, declare their interest and absent themselves from any meeting where the application or review is discussed.

#### **1.2 Avenues of appeal outside FNLRS**

In any of the circumstances set out in these Guidelines in which it is specified that a decision by FNLRS

regarding assistance is deemed to be final, the native title group is to be informed in writing that:

- (a) its rights to an internal review are exhausted; and
- (b) it has the right to seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) as well as a review by NIAA under s203FB of the NTA.

## **2. APPLYING FOR ASSISTANCE**

### **2.1 How to make an application for Assistance**

- 2.1.1 Where a native title group requires assistance in relation to a native title matter, the native title group must apply in writing to FNLRS for such assistance.
- 2.1.2 The native title group shall endeavour to provide FNLRS with as much information in relation to the native title matter as is possible to assist FNLRS assess whether to grant assistance.

### **2.2 Assistance for costs already incurred by Applicant Group**

FNLRS will not reimburse native title groups for work already undertaken or costs incurred prior to the application, unless express written approval for the work was given prior to such work being undertaken.

## **3. ASCERTAINING THE FACTS SURROUNDING THE APPLICATION**

### **3.1 Further Information**

FNLRS may seek further information from the native title group at any time during the assessment of the application by FNLRS.

### **3.2 Seeking external consultation**

FNLRS reserves the right at any stage during the assessment of the application to seek information on matters relevant to the application from people or bodies outside the native title group if it considers that those persons or bodies may have information relevant to the consideration of the application.

## **4. ASSESSMENT OF THE APPLICATION BY FNLRS**

### **4.1 Assessment of the merits of the application**

The FNLRS board subcommittee responsible for consideration of assistance requests (FARAC) will

assess the application for assistance by applying such General Criteria as are relevant to the facts.

## **4.2 Minute of Decision**

4.2.1 FNLRS will then prepare a Minute of Decision including:

- (a) a brief summary of the factual background to the application for assistance including where appropriate and possible:
  - i) the identity of the applicant group;
  - ii) the nature of the assistance sought;
  - iii) if the assistance sought relates to the lodging of an application for a native title determination, the details of the area claimed or to be claimed and its significance;
  - iv) the rights claimed or to be claimed or the negotiations or agreements being pursued; and
  - v) the objectives of the applicant group in requesting assistance.
- (b) the General Criteria which FNLRS considers relevant and has taken into account in assessing the application;
- (c) where the matter relates to an area which overlaps another representative body area, a comment as to whether the other representative body is willing to enter into a written arrangement authorizing FNLRS to provide assistance, and whether the other representative body is prepared to contribute any assistance; and
- (d) FNLRS' decision in relation to the application for assistance.

4.2.2 The Minute of Decision will be provided to the native title group by FNLRS.

## **4.3 Application to NIAA for additional funds**

FNLRS may approve assistance in circumstances where there are insufficient operational funds to give effect to the approval. In these circumstances FNLRS may seek additional funds from NIAA, noting FNLRS is not liable to provide the assistance approved if the additional funds (in part or full) are not provided by NIAA.

## **5. INTERNAL REVIEW OF FNLRS DECISION**

### **5.1 Review by the Board of FNLRS**

5.1.1 The native title group may in writing seek a review of the decision contained in the Minute of Decision. The review will be conducted by the Board. The native title group must inform FNLRS in writing that it requires review of the decision within 30 days of the group being advised of the decision and the group must provide written particulars of the grounds for review.

5.1.2 In conducting the review, the Board may:

- (a) provide an opportunity for members of the assessment subcommittee and representatives of the affected native title group to be heard;

- (b) consider all documents considered when the original decision was made and any other relevant documents, provided that any other documents that are relied upon are provided to the native title group seeking the review with an opportunity to comment;
- (c) obtain independent legal or other professional advice.

5.1.3 The native title group will be notified of the decision of the Board and provided with a brief statement of reasons. They will also be notified of further review rights.

## **5.2 Review of the Board's decision**

5.2.1 The native title group may seek a review of the decision of the Board of FNLRS. The grounds on which a group may apply for review of the Board's decision are limited to the following:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision or that the procedures adopted were otherwise unfair;
- (b) that procedures set out in these Guidelines were not observed;
- (c) that the making of the decision was an improper exercise of power conferred upon the Board under these Guidelines;
- (d) that there was no evidence or other material to justify the making of the decision;  
or
- (e) that the decision was otherwise contrary to law or was subject to error that would entitle the group to judicial review of the decision.

5.2.2 The native title group must inform FNLRS in writing that it requires review of the decision within 30 days of the group being advised of the decision and the group must provide written particulars of the grounds and written reasons why the group believes that the decision should be internally reviewed based on those grounds.

5.2.3 FNLRS will as soon as practicable forward a copy of the Minute of Decision, the Board's decision, and statement of reasons and all the material relating to the application which was before FNLRS to an independent external assessor (the "Assessor").

## **5.3 Review by Assessor**

5.3.1 The Assessor shall review the decision in order to ascertain whether any of the grounds are made out or whether there is a real likelihood that one or more of the grounds could be made out if the matter were further investigated.

5.3.2 The Assessor will conduct their assessment within a reasonable time and will then provide a written report of his or her assessment to FNLRS. The Assessor's report shall state whether, in the Assessor's opinion:

- (a) any of the grounds have been made out; or
- (b) there is a real likelihood that one or more of the grounds could be made out if the making of the decision were further investigated.

5.3.3 The Assessor should set out brief reasons for their decision in the written report.

#### **5.4 Consequences flowing from Assessor's decision**

5.4.1 If the Assessor confirms that:

- (a) none of the grounds have been made out; or
- (b) none of the grounds would be likely to be made out if the making of the decision were further investigated,

then the decision will be deemed to be final.

5.4.2 If the Assessor decides that:

- (a) at least one of the grounds has been made out; or
- (b) there is a real likelihood that one or more of the grounds could be made out if the making of the decision were further investigated, the Assessor will remit the decision to FNLRS with recommendations to ensure that the decision is remade in accordance with the proper application of the Guidelines. Any subsequent determination by FNLRS will be final.

### **6. REVIEW OF ASSISTANCE**

#### **6.1 Right of FNLRS to Review**

In order to ensure that it is always utilising its resources optimally, FNLRS reserves the right to conduct a review of any or all assistance at any time.

#### **6.2 Procedure for review**

6.2.1 In conducting such a review, FNLRS shall give written notice of its intention to conduct a review to the relevant group and shall invite the relevant group to make submissions in relation to the review. Any submissions must be provided to FNLRS within 30 days of provision of notice of the proposed review from FNLRS.

6.2.2 Having provided the native title group with such notice and, where applicable, having reviewed the submissions, FNLRS may then conduct a review following which it may reach a decision that:

- (a) assistance to the group should be maintained at its existing level; or
- (b) assistance should be varied on such terms as FNLRS sees fit, including by ceasing altogether.

6.2.3 Any review conducted by FNLRS under this guideline should be carried out in the same manner in which new applications for assistance are assessed and determined under these Guidelines.

## **7. STANDARD TERMS AND CONDITIONS OF ASSISTANCE**

### **7.1 No guarantee of ongoing Assistance**

FNLRS' decision to provide assistance of a specified nature and level to a native title group does not bind FNLRS to provide assistance of a similar nature or at a similar level in future, or even to continue to provide any assistance at all.

### **7.2 Briefing out work**

#### **i) Briefing out to a third-party legal representative**

Where legal assistance has been approved under clause 4, FNLRS may decide to allocate the matter to a third-party legal representative where:

- (a) FNLRS does not have sufficient in-house resources to undertake the work required;
- (b) FNLRS has a conflict of interest in relation to the work;
- (c) The native title group in question has requested third party legal representation; or
- (d) FNLRS considers it to be appropriate for any other reason in the circumstances.

Where legal assistance has been approved under clause 4 and FNLRS has decided to allocate the matter to a third-party legal representative under this clause 7.2.1, the native title group and FNLRS must jointly agree the identity of the third-party legal representative to be briefed.

If the native title group nominates a third-party legal representative for consideration by FNLRS under this clause 7.2.1, FNLRS must be satisfied that the nominated legal representative:

- (a) has the requisite professional skills, experience and capacity to undertake the work required, including (but not limited to):
  - (i) significant native title expertise and experience;
  - (ii) appropriate dispute resolution and litigation strategies with a focus on professional conduct and timely resolution of claims;
- (b) can demonstrated value for money;
- (c) holds appropriate insurances; and
- (d) has appropriate policies and procedures, including for the management of any conflicts of interest and the management of personal and sensitive information.

A legal representative who has been placed on FNLRS' Third Party Provider Panel (Legal) is deemed to have therequisite professional skills, experience and capacity to undertake the work required.

Any third-party legal representative will be required to enter into a written third-party cost agreement with FNLRS that provides for (amongst other things) appropriate regular reporting to enable FNLRS to comply with its obligations under the Native Title Act and to NIAA.

## **ii) Briefing out to consultant researcher**

Where research assistance has been approved under clause 4, FNLRS may decide to allocate the matter to a consultant researcher where:

- (a) FNLRS does not have sufficient in-house resources to undertake the work required; or
- (b) FNLRS considers it to be appropriate for any other reason in the circumstances.

Where research assistance has been approved under clause 4 and FNLRS has decided to allocate the matter to a consultant researcher under this clause 7.2.2, the native title group and FNLRS must jointly agree the identity of the consultant researcher to be briefed.

If the native title group nominates a consultant researcher for consideration by FNLRS under this clause 7.2.2, FNLRS must be satisfied that the nominated consultant researcher:

- (a) has the requisite professional skills, experience and capacity to undertake the work required, including (but not limited to) relevant expertise and experience undertaking anthropological, historical, or other relevant research for native title claims, with experience in the Victorian context preferred;
- (b) can demonstrate value for money; and
- (c) holds appropriate insurances.

Any consultant researcher will be required to enter into a written consultancy agreement with FNLRS that provides for (amongst other things) appropriate terms and conditions to enable FNLRS to comply with its obligations under the Native Title Act and to NIAA.

## **7.3 Instructions**

Representative members of an assisted group shall attend and participate in consultations to provide instructions. The attendance and participation at consultation meetings may vary from time to time, but the native title group must maintain the ability to consistently provide authoritative instructions in the assisted matter.

## **7.4 Reimbursement of FNLRS Assistance**

7.4.1 If a group is awarded costs in relation to any native title matter in which it received assistance from FNLRS, the group shall repay the costs recovered by it to FNLRS. (In this regard adherence to NIAA conditions of funding will be necessary).

7.4.2 If an assisted group receives financial assistance from a third-party in relation to a particular native title matter in respect of which it has already received assistance from FNLRS, the group shall repay to FNLRS the amount originally provided to it by FNLRS.

## **7.5 Confidentiality**

- 7.5.1 FNLRS undertakes that all information provided to it by native title groups for the purpose of seeking assistance will be held in confidence by FNLRS.
- 7.5.2 Such information may, however, be used for the purpose of assessing an application for assistance, conducting a review, developing FNLRS' Operational Plan and annual budget, or providing assistance to that group, as necessary and appropriate.

## **GENERAL CRITERIA**

### **A. Compatibility of the native title matter with the Operational Plan of FNLRS**

The extent to which FNLRS is prepared to provide assistance to a native title group will be primarily dependent upon FNLRS' priorities as contained in FNLRS' Operational Plan or any other relevant document.

### **B. Potential strength of the claim (or native title interest)**

The potential strength of a particular native title claim (or native title interest) is an important consideration in the decision as to whether to provide assistance. The potential legal strength of the native title group's claim will depend on a number of factors, including the following:

- (a) the extent to which the research or other information which is of evidentiary value supports the conclusion that the native title group constitutes an identifiable Aboriginal people, clan or group;
- (b) the extent to which the research or other information which is of evidentiary value supports the conclusion that a native title group continues to enjoy a connection with the area claimed through the acknowledgement of traditional laws and the observance of traditional customs of the native title group;
- (c) the extent to which the research or other information which is of evidentiary material supports the boundaries of the proposed claim area; and
- (d) the existence of any known legal impediments to the claim (or native title interest), such as the grant of interests inconsistent with the continuing existence of native title.

Where sufficient research or other evidentiary material is not available to the applicants or FNLRS to reach the conclusions required by paragraphs (a) to (d), FNLRS may grant assistance for the sole purpose of conducting this research. However, FNLRS will not grant assistance to any group to lodge a new native title claim in the Federal Court unless it is satisfied that there is research or other evidentiary material that supports the proposed claim group description, native title rights and interests and boundaries.

### **C. Coherence and Capacity of the native title group**

FNLRS will not generally agree to support or continue to support an activity in relation to a native title matter where:

- (a) it is not clear whether an application by or the activity of a native title group



represents the wishes of the relevant native title group as a whole including where the application is made by a sub-group of a native title group;

- (b) it is not clear whether the native title group is capable of consistently providing adequate and proper instructions in accordance with the authorised decision making process of the native title group in a timely fashion;
- (c) the native title group acts or is likely to act against FNLRS or its third-party legal representative's advice; or
- (d) in the event assistance has been granted, progress of the matter does not occur at a reasonable rate. In applying this criterion, the native title group will not be penalised by a delay or omission on the part of FNLRS in relation to the preparation of the native title matter.

Where FNLRS considers that the Native title group's lack of capacity and/or coherence is caused by the vexatious behaviour of a particular individual or sub-group and that the majority of the native title group is supportive of the application and its ongoing prosecution, assistance may be found to be appropriate. In cases where a native title group clearly displays an inability to act in a cohesive manner, FNLRS will not provide substantive assistance to that group, although FNLRS may offer assistance in the form of research and mediation assistance.

#### **D. Existence of overlapping claims**

Where native title rights and interests in relation to a particular area are claimed by more than one native title group or sub-group of a native title group, FNLRS will normally not agree to provide any group with substantive assistance (for example, assistance in making a claim). Any offer of assistance in such circumstances will usually be limited to mediation and dispute resolution services or research. However, in particular circumstances, FNLRS may consider that particular factors make it appropriate for assistance to be provided to a particular native title group, even where there is an overlapping claim. Factors which may affect FNLRS' decision to provide assistance to a native title group in these circumstances include whether:

- (a) the extent of the overlap between the native title groups is minimal;
- (b) there is a need for urgency in undertaking work on the matter as a result of future act activity or other matters;
- (c) one of the overlapping claims in the matter(s) is not well founded in comparison to the other(s); or
- (d) the native title group(s) concerned have made all reasonable efforts to resolve the overlap.

#### **E. Conflict resolution**

In the event of an application for assistance for a matter in which there is a long running dispute, which has been resistant to resolution, a grant of assistance may be considered appropriate despite the dispute compromising the strength of the claim (B above), if it is likely the grant of assistance will lead to resolution of the dispute.

#### **F. Cost**

Cost will be a weighty consideration in any assessment of whether FNLRS will provide assistance to a native title group in relation to a particular native title matter. In particular where the size and

complexity of a native title matter is such that it demands a large proportion of FNLRS' budget; it may be that FNLRS does not have the necessary resources to commit to that matter.

#### **G. Benefits**

Where FNLRS considers that the reasonably achievable outcomes are modest in the benefit they will bestow on the Applicant Group, particularly having regard to the likely financial and strategic costs, an application is unlikely to receive priority.

#### **H. Current state of preparation of the native title matter**

The state of preparation of a matter at any given point in time will be taken into account as a relevant consideration in determining whether assistance is granted. In applying this criterion, the native title group will not be penalised by any delay or omission on the part of FNLRS in relation to the preparation of any matter.

Note: these guidelines are also to be applied to native title groups seeking to become Indigenous respondents to native title claims. In these instances, 'claim' is to be read as meaning 'native title interest'. Further, these guidelines can be applied to native title groups seeking native title outcomes under the *Traditional Owner Settlement Act 2010* (Vic). in these circumstances 'claim' is to be read as meaning 'settlement' and/or 'native title outcome'.