

# First Nations Legal & Research Services

## Strategic Review

### About the Review

To ensure that we (First Nations Legal & Research Services) continue to meet the evolving needs of Victorian Traditional Owners, in late 2022 we commissioned a review to broadly consider our role, operations, and structure, within the changing native title environment of Victoria.

The Review considered and made recommendations on:

- The extent to which the operation of the legislative regimes and associated Victorian Government programs, inhibit the performance of our representative body functions under the *Native Title Act*, 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 our representative body functions.
- How we can mitigate these impacts and perceptions, including any structural changes we can make, so as to maximise the likelihood that representative body functions will be performed to a high standard in Victoria over the next five years, while taking into account the rapidly changing operating environment in Victoria.

### Participation in the Review

The Review was undertaken by the Indigenous Law and Justice Hub at the Melbourne Law School in the University of Melbourne and Redgum Legal & Consulting. Consultations were carried out between January and May 2023 with a total of over 40 individual participants, representing around 20 different native title holders, claimants and Traditional Owner corporations, as well as relevant statutory bodies, the Victorian and Commonwealth Governments, the Federal Court of Australia, the First Peoples' Assembly of Victoria and our directors and staff.

From consultations it became clear that there were at least two principal factors underpinning the views of many participants, these were the complex and challenging nature of the native title environment, and perception of reputational issues.

From the outset it should be noted that the majority of participants held us in high professional regard acknowledging the difficulty of the environment and our breadth of functions, and secondly, the nature of the Review required direct examination of those areas generating the most conflict and dispute.

Notwithstanding the above it became clear during consultations that institutional distrust or reputational issues are to some extent impacting on our ability to undertake our work. Overall, the Review observed that:

- There is no evidence of institutional distrust or reputational issues among the Victorian or Commonwealth bodies that routinely deal with us. The same is true for independent legal professionals (other than those acting for disaffected Traditional Owners) and for the staff of

representative or statutorily empowered Traditional Owner bodies. Indeed, all of these groups appear to respect our professional skill and objectivity.

- There is also little to no evidence of institutional distrust or reputational problems among those Traditional Owner groups or individual Traditional Owners that have recently been represented by or have had close and extended contact with us.
- There are however high levels of institutional distrust and reputational issues among those Traditional Owner groups, their staff and legal representatives who are in active legal dispute with groups represented by us, or otherwise oppose the findings of our research.

A key theme communicated throughout consultations was that our reputation needed rehabilitation, but that was primarily communicated as a matter of a reset in our relationships with Victorian Traditional Owners, rather than a critique of the current governance or call for specific structural reform.

## The Policy context

We operate in a busy policy and legislative environment. Until recently, there were three active pieces of legislation in Victoria which provide acknowledgement of Traditional Ownership, or at least some level of ‘formal recognition’ by the State. These are the *Native Title Act 1993* (Cth), the *Traditional Owner Settlement Act 2010* (Vic) and *Aboriginal Heritage Act 2006* (Vic). The advent of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) has now seen the First Peoples’ Assembly of Victoria develop a fourth method of recognising Traditional Ownership for the purposes of determining composition of the First Peoples’ Assembly of Victoria through the allocation of reserve seats, and soon there will be local treaty making processes that will allow for another form of Traditional Owner recognition.

No other jurisdiction in Australia provides Traditional Owners so many forums through which their group can be ‘recognised’. However, despite the number of pathways, these processes have each made only partial progress in seeing Victorian Traditional Owners achieve the outcomes they allow for, while in some cases group composition and extent of country disputes remain unresolved.

Those spoken to through consultations acknowledged that our role is an extremely difficult one and that *Native Title* is a traumatic system for applicants, and also extremely difficult for those who work in it. *Native Title* was described as ‘a lightning rod for discontent’; an area where unfortunately there are winners and losers, and there are many people who are not happy with outcomes or results delivered on matters of great importance to them. Our difficult position within a ‘messy environment’ was consistently acknowledged by interviewees, both in terms of difficulty in achieving desired legal outcomes for Traditional Owners, as well as working in a context characterised by distress, conflict and trauma.

## Recommendations

The Review concluded that there are two main factors to which we will need to respond over the next 5 years. These are:

1. the continuing development of Treaty processes, and the role native title sector should play in supporting these processes; and
2. the greater propensity for Traditional Owners to seek independent legal representation and their willingness to litigate, matched by an apparent openness from the Federal Court to

address group and boundary conflicts without requiring the parties to proceed to a final determination of native title.

To address these changes, the following recommendations were made.

- We should avoid any significant re-structure until the Treaty process and its associated institutions are more fully established, so as to avoid locking in unsuitable or inflexible arrangements that do not serve Traditional Owner needs.
- We should strengthen and build ties with emerging Treaty institutions and remain agile and ready to reflect their needs as new opportunities develop.
- We should adopt more neutral positioning in active legal disputes between and internal to Traditional Owner groups, and instead place greater reliance on third party legal service providers.
- In re-positioning to rely more on third party legal services providers, we should not move too quickly so as to deplete existing services, and potentially alienate the users of those services.
- We should seek to externalise politically charged decisions or research outcomes and/or support the authority of such decisions / outcomes by reference to external and independent expertise.
- We should increase communication with Victorian Traditional Owner communities and celebrate our work and success more openly.
- We should seek to diversify the composition and skills of our board.
- We should commission a review/project into the research we hold and current and past research practices.
- We should assess current research practices and consent forms to ensure they provide informants the option for their information to contribute to Treaty negotiations.

## Conclusion

Following the Review, we are in the process of developing a strategy to implement its recommendations. Primarily, we are pleased with the way in which our professionalism and sensitivity to the environment are respected by those community members, organisations and government entities that work with us. We will continue to maintain a high benchmark in this regard and broaden our accountability and accessibility in particular through changing our Board composition and expanding our use of suitably qualified and experienced third party legal service providers and research consultants where appropriate.