

National Native Title Tribunal

REGISTRATION TEST MINUTE
and
DELEGATE DECISION SUMMARY

TO DELEGATE	Simon Nish
FROM CASE MANAGER	Monica Khouri
DATE	6 October 1999

Application Name	Ngarrindjeri and Others Native Title Claim		
Name(s) of Applicant(s)	Mr Matthew(Matt) Rigney; Mrs Rhonda Agius; Mr Tom Edwin Trevorrow; Mr Henry J Rankine OAM, Mr George Trevorrow; Mr Basil Sumner; Mrs Eileen McHughes; Ms Laura Agius; Mr Darrell Phillip Sumner; Mr Richard Hunter; Mr Peter Rigney; Ms Violet Deuschle		
Region	SA	NNTT No	SC98/4
Date Application Made	6 th July1998	Fed Court No	SG6027/98

The Delegate has considered the application against each Registration Test condition contained in s.190B and s.190C of the *Native Title Act* 1993 and makes the following decision:

Brief History of the application

The original application was lodged with the Adelaide Registry on 6th July 1998. Leave to amend the application was granted by the Federal Court on 21st September 1999. The amendments to the application included the following:

- Application SG6027/98 be amended in terms of the amended Form 1 application dated 14th September 1999, including the attachments thereto as filed as annexure “FGT1” to the affidavit of Frederick George Tanner dated 15th day of September 1999, in substitution for the original Form 1 application received by the Adelaide Registry of the National Native Title Tribunal on 6th July 1998
- Application SG6027/98 shall hereafter be referred to as the “Ngarrindjeri and Others Native Title Claim”

Information considered in making the decision

In determining this application I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- ◆ Working files SC98/4;
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ The Native Title Register;

Date	Brief description of document
7/8/98	Discussion Paper, Department for Environment, Heritage and Aboriginal Affairs: Coorong and Lower Lakes Ramsar Management Plan
17/6/99	Letter from [name deleted] : Concerning certain genealogies.
June 1999	Draft for Public Consultation, Department for Environment, Heritage and Aboriginal Affairs: Coorong and Lower Lakes Ramsar Management Plan
3/8/99	Certification document from ALRM
16/9/99	Amended Form 1 filed with the Federal Court
21/9/99	Order of the Federal Court
21/9/99	Letter from Aboriginal Legal Rights Movement: providing further information, being: <ul style="list-style-type: none">• Signed sworn Affidavit from [name deleted], dated 29/8/99• Signed sworn Affidavit from [name deleted], dated 26/8/99• Signed sworn Affidavit from [name deleted], dated 29/8/99• Signed sworn Affidavit from [name deleted], dated 29/8/99• Signed sworn Affidavit from [name deleted], dated 8/9/99
1/10/99	Letter from [name deleted] : Concerning certain genealogies.
6/10/99	Letter from ALRM: responding to [name deleted] submission.
6/10/99	Map and written description of the claimed area, prepared by the Tribunal's Geospatial Unit, but provided to the Tribunal by the applicants as further information.

A. Procedural Conditions

190C2	<i>Information etc required by section 61 and section 62</i>	<i>FAIL</i>
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s.61(3)	<i>Names of applicant(s) and address for service</i>	<i>Requirements are met</i>
s.61(4)	<i>Description of persons in native title claim group</i>	<i>Requirements are met</i>
s.61(5)	<i>Application in prescribed form, lodged in Federal Court, contains prescribed information and is accompanied by any prescribed documents¹</i>	<i>Requirements are met</i>
s.62(1)(a)	<i>Affidavit(s)</i> <i>The affidavits do not provide the information required by s.62(1)(a)(v).</i>	<i>Requirements are NOT met</i>

Details required in section 62(2)

62(2)(a)(i)	<i>Information which identifies the boundaries of the area covered by the application</i>	<i>Details provided</i>
62(2)(a)(ii)	<i>Information which identifies any areas within those boundaries that are <u>not</u> covered</i>	<i>Details provided</i>
62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>	<i>Details provided</i>
	<i>Map(s) and textual or other information are consistent in their description of the area</i>	<i>YES</i>
62(2)(c)	<i><u>IF</u> there is information alerting the CM about searches carried out by the applicant to determine existence of any non-native title interests, are details provided?</i>	<i>Details provided</i>
62(2)(d)	<i>A description of the native title rights and interests claimed in relation to particular land or waters (and see below)</i>	<i>Details provided</i>
	<i>Is the description <u>more than</u> a claim to all those native title rights and interests that have not been extinguished at law?</i>	<i>YES</i>

¹ Note that pre 30.09.98 applications are deemed to have been filed in the Federal Court. Note that “prescribed information” is that which is required by s.62(2) as set out in the text of this minute document.

62(2)(e)	<i>A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:</i>
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62(2)(e)(i)	<i>the claim group have, and their predecessors had, an association with the area</i>	<i>Details provided</i>
62(2)(e)(ii)	<i>traditional laws and customs exist that give rise to the claimed native title</i>	<i>Details provided</i>
62(2)(e)(iii)	<i>the claim group has continued to hold native title in accordance with laws and customs</i>	<i>Details provided</i>
62(2)(f)	<i><u>IF</u> there is information alerting the CM that activities are carried on, are details of those activities provided?</i>	<i>Details provided</i>
62(2)(g)	<i><u>IF</u> there is information alerting the CM that the applicant is aware of other applications to the High Court etc, are details provided?</i>	<i>Details provided</i>
62(2)(h)	<i><u>IF</u> there is information alerting the CM that the applicant is aware of any Future Act Notices given pursuant to the amended Act over the area, are details provided?</i>	<i>Details provided</i>

s.62(1)(b)	<i>Details required in s.62(2) above</i>	<i>Requirements are met</i>
s.62(1)(c)	<i>Details of physical connection</i>	<i>Requirements are met</i>

Decision of Delegate (whole of s.190C2)	<i>FAIL</i>
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190C3	<i>No previous overlapping native title claim group</i>
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Because there are no overlapping applications I am not required to consider this criterion
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Decision of Delegate	<i>PASS</i>
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190C4(a)	<i>Application has been certified by relevant Representative Body</i>	<i>PASS</i>
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The application has been certified by the relevant representative Aboriginal/Torres Strait Islander body. I note that the certificate has been signed by Sydney Sparrow, Director, Aboriginal Legal Rights Movement, who would have the proper authority to sign such a document. I am satisfied that the certification fulfils the requirements of s.190C(4) of the Act.

Decision of Delegate	<i>PASS</i>
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B. Merits Conditions

190B2	<i>Identification of area subject to native title</i>
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Reasons for the Decision

Map and External Boundaries

The application at Attachment C provides a map depicting the external boundaries of the claim area which has a locality diagram and clearly marked grid references.

I am satisfied that the map submitted with the application meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.

Written description

In addition to the provision of a map defining the external boundaries of the claim, the applicants at Schedule B and Attachment B1 and B2 have provided a detailed written description of the external boundary, accompanied by a list of coordinates of 74 points defining the external boundary. The applicants have received confirmation from the National Native Title Tribunal that the coordinates match the plotted boundary on the map, but to remove any doubt, the applicants have further provided that to the extent of any inconsistency between the written description and the coordinates, the coordinates shall prevail.

There are some minor technical discrepancies between the map and written description provided with the amended application. The applicants provided the Tribunal a further map and written description on 6 October, which have been prepared by the Tribunal's Geospatial Unit, and which I am satisfied address the minor discrepancies in the amended application. I am further satisfied that the additional information provided by the applicants is purely to clarify the material lodged with the Federal Court and in no way alters the amended application. The applicants may however wish to lodge this further information with the Federal Court at a future date for completeness sake.

I am satisfied that the physical description of the external boundaries meets the requirements of s62 (2)(a)(i).

Internal Boundaries

At Attachment B3, the applicants have provided information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area, being all areas within the claim area, excluding:

- Category A past acts, as defined by s. 229 of the Native Title Act 1993
- Previous exclusive possession acts, as defined by s.23B of the Native Title Act 1993
- Areas over which native title has been extinguished by common law or statute, **save** for those areas over which prior extinguishment may be

disregarded in accordance with the provisions of either s. 47, 47A or 47B of the Native Title Act 1993. (Note: see Attachment B(3) for a full description of the exclusions).

The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant. I consider that the description provides a reasonable level of certainty.

I note that the applicant makes exceptions to the particular exclusions cited in the application by claiming the benefit of s47, s47A and s47 of the *Act* as they apply to any part of the area contained within the application. At Schedule L the applicant does not identify specific “parcels” of land where any of s47, s47A or s47B apply, but rather, relies on reference to class tenures. Consistent with the reasoning set out above in respect of identifying areas excluded from the claim, I am of the view that identifying the areas so excepted from the exclusions in the manner done by the applicant does allow specific geographic location subject to tenure research.

Decision of Delegate	<i>PASS</i>
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190B3	<i>Identification of native title claim group</i>
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Reasons for the Decision

To meet this condition of the registration test the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

Attachment A defines the claim group as comprising:

- Named apical ancestors, and
- Those related to the above by means of a traditional principle of descent, and
- Persons of Aboriginal descent who are adopted into the claim group.

It appears from Attachment A that descent is the principle means of recruitment under the Ngarrindjeri traditional laws and customs into the native title claim group. To remove any uncertainty as to whether a person belongs to the native title claim group the application authorises the

Ngarrindjeri and Others Native Title Claim Group Management Committee, based on those traditional laws and customs, to determine whether a person can be identified as belonging to the native title claim group.

Attachment A further names individuals who are excluded from the claim group. I have considered the submission of V/Chairperson of the Ngarrindjeri Native Title Management Committee and conclude that there is a proper basis for these persons to be excluded from the native title claim group.

In my view the description of the claim group is sufficiently precise so that it can be ascertained whether any particular person is a member of the native title claim group.

Decision of Delegate

PASS

190B4

<i>Identification of claimed native title</i>
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Reasons for the Decision

Schedule E of application particularises the native title rights and interests claimed by the applicants.

These rights and interests are subject to all valid non- native title rights and interests, and laws of South Australia made in accordance with sections 19, 22F, 23F, 23E or 123 of the Native Title Act 1993. I take this exclusion clause to be qualifying the full beneficial rights asserted in Schedule E para 1.1 such that exclusive rights are not being asserted where there exist valid non-exclusive possession acts.

Further, I take the first exclusion clause in Attachment B1 to mean that the applicants are not asserting exclusive rights over areas subject to previous non-exclusive possession acts

At Schedule Q the rights and interests claimed are further qualified: no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas owned by the Crown under valid laws of the Commonwealth or State.

Decision of Delegate

PASS

Reasons for the Decision

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the applicants' assertion about the existence of the native title rights and interests listed at Schedule E of this application.

(a) An association with the area;

To be satisfied under this criterion, it must be evident that the association with the area is shared by a number of members of the native title claim group and was shared by their predecessors.

In considering this condition, I have had regard to the affidavits of **[name deleted]**, **[name deleted]** (not named in application, ancestor is), **[name deleted]**, **[name deleted]** and **[name deleted]** (not named in application, ancestor is), five members of the native title claim group. On the basis of their affidavits it is clear that these people have an association with the claim area and are descended from people who also had an association with the claim area:

- **[name deleted]**, paras 1-17,
- **[name deleted]**, paras 1-17,
- **[name deleted]**, paras 1-16,
- **[name deleted]**, paras 1 - 21,
- **[name deleted]**, paras 1 -17.

I have considered **[name deleted]** submission to the Tribunal of 1 October 1999 disputing the genealogies of some of the named applicants. I have taken into account that **[name deleted]** is not a member of the native title claim group, the comparative weight of his letter and the evidence of the applicants and have concluded that the evidence of the applicants is of sufficient weight for me to be able to find that a factual basis for their association with the claimed area can be made out.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

This subsection requires me to be satisfied that traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

- I have had regard to the affidavits [name deleted], [name deleted] (not named in application, ancestor is), [name deleted], [name deleted] and [name deleted] (not named in application, ancestor is), five members of the native title claim group. On the basis of their affidavits, and Schedule G of the application, it is clear that there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests. The laws and customs include rights to access, utilising and trading the resources of Ngarrindjeri land, preserving culture, including stories and language, learning and passing on knowledge of Ngarrindjeri country and exercising responsibility for Ngarrindjeri country.

190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in 190B(5)(b) and having regard to the same affidavit material, and Schedule G of the application, I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

Decision of Delegate	PASS
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190B6	<i>Prima facie case</i>
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Reasons for the Decision

In considering this condition I have had particular regard to the affidavits of [name deleted], [name deleted], [name deleted], [name deleted] and [name deleted], five members of the native title claim group, as well as Schedule G of the application.

Those affidavits and Schedule provide sufficient material and information to satisfy me on a prima facie basis that each of the native title rights and interests claimed by the applicants at Schedule E of the application can be established as follows:

1.1 Full beneficial ownership of the claim area, including possession, occupation, use and enjoyment of rights;

1.2 Carriage and responsibility for the care and maintenance of the claim area;

- 1.3 *The right to hold the claim area as cultural property and the source of the native title group and its identity;*
- 1.4 *The capacity to transmit ownership of and identification with the claim area, for example, to descendants;*

The entire affidavits of the five members of the native title claim group above provide evidence of the members of the native title claim group exercising these rights.

2.1 *Right to access and occupy the claim area, including to live on and erect residences on the land;*

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below

- [name deleted], paras 1-3, 5-12, 14-17,
- [name deleted], paras 1-3, 5, 6, 8-11, 13, 14, 16, 17,
- [name deleted], paras 1-3, 5-11, 15, 16,
- [name deleted], paras 1-8, 10-16, 19, 21,
- [name deleted], paras 1, 2, 4-9, 11, 12, 15, 17.

2.2 *Right to take, use, enjoy and develop the natural resources of the claim area;*

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 8, 11,
- [name deleted], paras 9, 10, 11, 14,
- [name deleted], paras 6, 8, 9, 11,
- [name deleted], paras 7, 8, 10, 11, 14,
- [name deleted], paras 7-9.

2.3 *Right to make a living and derive economic benefit from the claim area, including to dispose of resources or products of the claim area by commerce or exchange;*

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 11, 14, 16,
- [name deleted], paras 5, 8, 13,
- [name deleted], paras 10-13, 19.

2.5 *Right to make decisions over, manage and conserve the claim area and its natural resources;*

The affidavits provide evidence of members of the native title claim group exercising these rights, some of which is detailed below.

- [name deleted], paras 3, 5, 11, 12, 15-17,
- [name deleted], paras 1, 8, 16, 17,
- [name deleted], paras 1, 15,
- [name deleted], paras 3, 10, 15, 19, 21,
- [name deleted], paras 3, 11, 15.

2.6 Right to control access, occupation, use and enjoyment of the claim area and its resources by others;

The affidavits provide evidence of members of the native title claim group exercising these rights, some of which is detailed below.

- [name deleted], paras 11, 12, 16,
- [name deleted], paras 8, 16, 17,
- [name deleted], paras 1, 15,
- [name deleted], paras 3, 10, 15, 16, 19,
- [name deleted], paras 3, 11, 15.

2.7 Right to obtain, control, maintain, transmit to others, protect and prevent the dissemination and misuse of cultural knowledge associated with the claim area;

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 1-17,
- [name deleted], paras 1-4, 6-12, 14-17,
- [name deleted], paras 1-4, 6-11, 13-17,
- [name deleted], paras 3-12, 14-21,
- [name deleted], paras 2-17.

2.8 Right to conduct social, cultural and religious activities including burials on the claim area;

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 5, 7-10,
- [name deleted], paras 9-11, 13, 14,
- [name deleted], paras 6-11, 13, 15,
- [name deleted], paras 5-8, 10, 11, 14, 16, 17,
- [name deleted], paras 4, 5, 7-9, 11, 12.

2.9 Right to speak and teach the languages associated with the claim area;

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 1, 6, 13,
- [name deleted], paras 4, 15,
- [name deleted], paras 12, 13, 16, 17,
- [name deleted], paras 4, 17,
- [name deleted], paras 12, 13.

2.10 Right to inherit and bestow native title rights and interests;

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 1-5, 7-11,
- [name deleted], paras 1-4, 6-10, 14, 15,
- [name deleted], paras 1, 2, 4, 6-12, 14-16,

- [name deleted], paras 2-8, 10, 14, 15, 17,
- [name deleted], paras 2-13, 15, 16.

2.11 Right to resolve ambiguities or disputes concerning the claim area or membership of the native title claim group, subject to any right or authority to participate held by the neighbouring groups under Aboriginal traditional law and custom.

The affidavits, as well as Attachment A, provide evidence of members of the native title claim group exercising these rights, some of which is detailed below.

- [name deleted], paras 3, 12,
- [name deleted], paras 1, 8, 17,
- [name deleted], paras 1, 16,
- [name deleted], paras 3, 15, 16, 19, 20,
- [name deleted], paras 3, 16.

I could not find prima facie evidence to establish the following native title right and interest:

2.4 Right to a share of the benefit of resources taken on the claim area by others;

Decision of Delegate	PASS
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190B7	<i>Physical connection</i>
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Reasons for the Decision

Under s 190B(7)(a) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

The affidavit material provided by the applicants satisfies me that a number of members of the native title claim group currently have and have had traditional physical connection to parts of the claim area. I refer specifically to :

- [name deleted], paras 1, 3-5, 7-12, 16,
- [name deleted], paras 1, 9-11, 13-16,
- [name deleted], paras 1, 5-11, 15,
- [name deleted], paras 1, 4-8, 10-17, 19,
- [name deleted], paras 1, 4, 5-9, 11, 12, 15.

Decision of Delegate	PASS
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190B8	<i>No failure to comply with section 61A</i>
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62A(1)	<i>Approved determination of native title</i>	<i>No</i>
61A(2)	<i>A previous exclusive possession act has been done in relation to the area</i>	<i>No</i>
61A(3)	<i>A previous non-exclusive possession act has been done in relation to the area <u>and</u> a right of exclusive possession has been claimed</i>	<i>No</i>
61A(4)	<i>The application states that section 47, 47A or 47B applies to it</i>	<i>No</i>

Decision of Delegate	PASS
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190B9(a)	<i>Native title rights and interests claimed do not include ownership of minerals, petroleum or gas wholly owned by the Crown</i>
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Reasons for the Decision

At Schedule E of the application the applicants have asserted a right to natural resources – including the right to use and enjoy the resources of the area and the right to control the use and enjoyment of others of resources of the area.

However, at Schedule Q of the application, the applicants state that no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by and under the valid laws of the Commonwealth or State.

Decision of Delegate	PASS
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190B9(b)	<i>No claim to exclusive possession of waters in an offshore place</i>
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Reasons for the Decision

The claimed area extends to an area 1.5 nautical miles into the sea from the coast line (“the sea portion”) (Schedule B and Attachment B2). At Schedule P the applicants have indicated “not applicable”. The applicants have not provided any submissions or further information supporting the proposition that sea portion is not an offshore area, which is the only basis on which they could provide “not applicable” in Schedule P.

I have considered whether the sea portion comprises internal waters. Having briefly considered *Raptis (A) & Sons v South Australia*, 138 CLR 346, the sea portion doesn’t appear to be an historic bay. The remaining question is whether the sea portion comprises internal waters at common law. I have considered the map at Attachment B2 and an Atlas depicting the South Australian coastline. Nothing in the geography of the coastline supports the view that the sea portion is internal waters. The doctrine of *intra fauces terra* (within the jaws of a bay) appears to be not applicable.

I conclude that some, if not all, of the sea portion covers offshore waters and that the applicants’ claim to exclusive rights (Schedule E, para 1.1) extends offshore and therefore does not meet this condition of the registration test.

Decision of Delegate	<i>FAIL</i>
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190B9(c)	<i>No other extinguishment (except that to be disregarded under s.47, s.47A or s.47B)</i>
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Reasons for the Decision

The application and accompanying documents do not disclose, nor am I otherwise aware, that the application contravenes the criteria set out in s.190B(9)(c).

Decision of Delegate	<i>PASS</i>
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Decision of Delegate

1. The application IS NOT ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993*

If the claim is not accepted for registration, written notice of the decision and the reasons for the decision, are to be provided to the applicant and to the Federal Court, in accordance with s.190D of the *Native Title Act*.

The Registrar is to give notice of the decision, as required by s.66(3) of the *Native Title Act*, whether or not the claim has been accepted for registration.

DELEGATE

DATE

End of Document