

Guidelines for Delegates Considering Claims for Registration under ss 190A-190C Native Title Act 1993 (Cth)

Background

From time to time the Native Title Registrar (Registrar) is sent information and/or other material (material) from an external source, which material relates to a claim made in a native title determination application (claim). At the time that the material is received, the claim in question is being considered, or is scheduled to be considered, for registration purposes pursuant to ss 190A – 190C of the *Native Title Act 1993* (Cth) (the Act). The material in question has not been sought by the Registrar and it is not of a type prescribed by s 109A(3) (a) – (c) or by s 190A(4) of the Act; in other words, it is unsolicited (unsolicited material).

The question then arises as to the extent to which, if at all, the Registrar or a member of staff assisting the National Native Title Tribunal (Tribunal) who has been appointed by the Registrar under s 99 of the Act (delegate), when considering a claim for registration purposes, should have regard to the unsolicited material.

Section 190A of the Act is headed ‘Registrar to Consider Claims’ and the concluding words of s 190A(3), which subsection is extracted below, expressly provide for the Registrar to have regard to ‘such other information as [the Registrar] considers appropriate’ when considering claims for registration under the Act:

‘Information to be considered

- (3) In considering a claim under this section, the Registrar must have regard to:
- (a) information contained in the application and in any other documents provided by the applicant; and
 - (b) any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory; and
 - (c) to the extent that it is reasonably practicable to do so in the circumstances—any information supplied by the Commonwealth, a State or a Territory, that, in the Registrar’s opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied in relation to the claim;
- and may have regard to such other information as he or she considers appropriate.’ (emphasis added)*

Please note:

- The concluding words of s 190A(3) of the Act confer a broad discretion in the Registrar when considering a claim under s 190A, to have regard to material not otherwise described in s 190A(3)(a), (b) and (c);
- No requirement or duty is imposed upon the Registrar, in considering a claim, to have regard to other material that the Registrar thinks appropriate;
- In particular, where there is an evident and intelligible justification for not considering unsolicited material, it is open to the Registrar to decline to look at such material, even where it might be relevant, on the basis that the Registrar may properly consider that it is not appropriate to do so;

- If, in considering a particular claim, the Registrar has looked at unsolicited material, and formed the view that it is appropriate to have regard to it, the Registrar is obliged to inform the affected party and give that party an opportunity to provide a submission about the unsolicited material.

Accordingly, and generally, in applying the conditions of s 190A-190C of the Act to a claim, the Registrar and the Registrar's delegates should read/look at material which is likely to contain information the Registrar would consider appropriate, in particular on the basis that it is relevant to the decision. Case law suggests that a failure to do so might be unreasonable and irrational.

Guidelines

Note: each decision made by a delegate in respect of a claim pursuant to ss 190A-190C of the Act will be made on its merits having regard to the Act, the relevant case law, these guidelines and any other relevant documents and material.

1. Without limiting the delegates' discretion in any particular case:
 - a. unsolicited material received by a delegate will not normally be:
 - i. returned to the sender unopened and/or unseen; or
 - ii. retained by the delegate or provided by the delegate to any other Tribunal officer unopened and/or unseen; or
 - iii. disposed of, unopened and/or unseen.
 - b. generally, a delegate should read, view or otherwise access unsolicited material, with a view to ascertaining whether it constitutes material to which it might be appropriate to have regard, for the purposes of ss 190A-190C of the Act;
 - c. subsequently, in considering the claim, the delegate should have regard to the unsolicited material, or not have regard to the unsolicited material, as appropriate.
2. Delegates should only exercise a discretion not to read/look at unsolicited material, with a view to determining whether it is appropriate to have regard to it, where there is an evident and intelligible justification for so doing (e.g. where unsolicited material is received from a known vexatious claimant or is provided to the delegate at a point where the delegate has almost finished considering the claim, and therefore to consider the material, with the potential need to provide procedural fairness to the applicant, would involve a significant delay).
3. Guideline 1a. does not purport to be exhaustive of every possible factual situation: where different or novel but relevant facts arise with respect to the receipt of unsolicited material (whether actual or foreshadowed) delegates are to use their own judgment, informed by these guidelines.

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2 October 2014