

**Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund**

OPERATION OF THE NATIVE TITLE ACT

**Inquiry Into Indigenous Land Use
Agreements**

Submission No:17

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**Law Council of Australia
Business Law Section
Resources Energy & Environmental Law Committee**

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on the Inquiry into Indigenous Land Use Agreements**

Introduction

The Resources Energy & Environmental Law Committee of the Business Law Section of the Law Council of Australia (the "Committee") is interested in improving the workability of the Native Title Act by legislative amendments that will address certain practical issues. In particular it considers amendments are necessary to improve the process of registration of an Indigenous Land Use Agreement (ILUA).

Registration

At this stage in the life cycle of the provisions of the Native Title Act dealing with ILUAs, most ILUAs will be area agreements under subsection 24CG(2) of the Native Title Act (NTA). Registration of area agreements are governed by Regulation 7 of the Native Title (Indigenous Land Use Agreements) Regulations 1999.

Before an ILUA can be registered, the relevant representative body (and there are some areas still without a representative body) must have certified that all native title applicants and potential native title applicants have been identified and notified and that each of those people holding native title have authorised the making of the agreement and it being registered (s24CG(3)(a) NTA). "Authorisation" is governed by section 251A and inherently requires some statement by the representative body that the processes have been followed.

The Regulations require certain documents to *accompany* the ILUA, including a statement by each party to the agreement, signed by or for the party, that the party agrees to the application to register the document.

The Committee considers that requiring such a document to "accompany" the ILUA is too prescriptive. All that should be necessary is that the parties to the Agreement state in writing that they agree to registration. Whether that agreement is contained in the ILUA itself or in a separate document should be of no import. The Regulations should be amended so that a statement contained within the ILUA that the authorisation processes have been followed and that there is agreement to registration by the member of the group entering the agreement should suffice.

After certification by the representative body and authorisation by native title holders, further public notification is required and a three month period is provided for others to object to the registration of the agreement. Ultimately the Native Title Registrar has to decide whether or not the agreement can be registered. Once the ILUA is registered it purportedly legally binds all "native title holders" in the area covered by the agreement, regardless of whether or not they are parties to the agreement. "Native title holder" is defined in section 224 as "the person or person(s) who hold native title". However, under section 199C the ILUA must be deregistered if native title is subsequently determined as being held by someone not a party to the original agreement.

The Committee considers that the purpose of the registration provisions of the Act, which require that before the ILUA can be registered the relevant representative bodies must have

given certificates as to notification of the impending registration to all potential native title claimants and as to the authorisation of those holding native title to the registration, is to provide certainty. If the relevant notifications have been given, the relevant period has elapsed, and not only have all those notified either failed to respond or indicated an interest in the matter and then authorised the registration, and then the representative body gives the necessary certificates, in the Committee's view the ILUA should provide the safe harbour from invalidity afforded by Subdivision E of Division 3 of Part 2 of the Act, even if there is a subsequent approved determination of native title made in favour of a person who did not authorise the making of the agreement.

First, such a person might fairly be said to have failed to respond to the notice provided by the Act. Secondly, the parties to the ILUA should not be disadvantaged if the representative body has failed to discharge the responsibility of notifying any such persons. And thirdly, it must be remembered that virtually no approved determination of native title is final. Generally speaking, any such determination may be appealed, or set aside under section 13(4). Under section 199C, however, the Registrar must deregister the ILUA once the relevant approved determination of native title is made, even if it is immediately appealed.

The Committee submits that the legislative and regulatory requirements are such high hurdles to registration that, once registered an ILUA should not be subject to the risk of deregistration (except in circumstances of proven concealment or fraud).