

ILUAs and section 199C

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Weribone on behalf of the Mandandanji People v State of Queensland (No 2) [2013] FCA 485

*The importance of the Court resolving matters under s 225 timeously is reinforced by the effect of s 199C(1)(b). That provision requires the Registrar to remove the details of an ILUA from the ILUA Register if any holder of native title that the Court determines under s 225 was not a person who authorised the ILUA. That is, the Parliament intended that the true owners' rights, when determined under s 225, would immediately supervene over those of mere claimants of those rights who were permitted to exercise them by procedures in Subdiv C of Div 3 of Pt 2 while the title remained in doubt. **Therefore, the Act recognises in s 199C(1) an immediate relationship between a determination under s 225(a) of who the persons holding native title are and the rights of parties to an ILUA over the lands and waters the subject of that determination to continue to be entitled to the benefits of the ILUA.***

199C Removal of details of agreement from Register

Cases requiring removal

(1)

...

(b) in the case of an agreement under Subdivision C of Division 3 of Part 2--**an approved determination of native title is made** in relation to any of the area covered by the agreement, **and any of the persons who, under the determination, hold native title** in relation to the area **is not a person who authorised the making of the agreement as mentioned in:**

(i) if the application relating to the agreement was certified by representative Aboriginal/Torres Strait Islander bodies as mentioned in paragraph 24CG(3)(a)--**paragraph 203BE(5)(b)**; or

(ii) if the application relating to the agreement included a statement as mentioned **in paragraph 24CG(3)(b)** to the effect that certain requirements have been met--that paragraph; or

...

24CD Parties to area agreements

...

(2) If there is a registered native title claimant, or a registered native title body corporate, in relation to any of the land or waters in the area, the native title group consists of:

(a) all registered native title claimants in relation to land or waters in the area; and

Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of registered native title claimant in section 253.

Note 2: The agreement will bind all members of the native title claim group concerned: see paragraph 24EA(1)(b).

(b) all registered native title bodies corporate in relation to land or waters in the area; and

(c) if, for any part (the non-claimed/determined part) of the land or waters in the area, there is neither a registered native title claimant nor a registered native title body corporate--one or more of the following:

(i) any person who claims to hold native title in relation to land or waters in the non-claimed/determined part;

(ii) any representative Aboriginal/Torres Strait Islander body for the non-claimed/determined part.

24CG Application for registration of area agreements

Certificate or statement to accompany application in certain cases

(3) Also, the application must either:

(a) **have been certified** by all representative Aboriginal/Torres Strait Islander bodies for the area in performing their functions under paragraph 203BE(1)(b) in relation to the area; or

(b) **include a statement** to the effect that the following requirements have been met:

(i) **all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified;**

(ii) **all of the persons so identified have authorised the making of the agreement;**

Note: The word authorise is defined in section 251A.

together with a further statement briefly setting out the grounds on which the Registrar should be satisfied that the requirements are met.

203BE Certification functions

General

(1) The certification functions of a representative body are:

(a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body; and

(b) to certify, in writing, applications for registration of indigenous land use agreements relating to areas of land or waters wholly or partly within the area for which the body is the representative body.

Certification of applications for registration of indigenous land use agreements

(5) A representative body **must not certify under paragraph (1)(b)** an application for registration of an indigenous land use agreement unless it is of the opinion that:

(a) **all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and**

(b) **all the persons so identified have authorised the making of the agreement.**

199C Removal of details of agreement from Register

Cases requiring removal

(1) Subject to subsection (1A), the **Registrar must remove the details** of an agreement from the Register if:

...

(b) in the case of an agreement under Subdivision C of Division 3 of Part 2--**an approved determination of native title is made** in relation to any of the area covered by the agreement, **and any of the persons who, under the determination, hold native title** in relation to the area **is not a person who authorised the making of the agreement as mentioned in:**

(i) if the application relating to the agreement was certified by representative Aboriginal/Torres Strait Islander bodies as mentioned in paragraph 24CG(3)(a)--**paragraph 203BE(5)(b)**; or

(ii) if the application relating to the agreement included a statement as mentioned **in paragraph 24CG(3)(b)** to the effect that certain requirements have been met--that paragraph; or

...

Gorringe on behalf of the Mithaka People v State of Queensland [2010] FCA 716 (29 June 2010)

4. having regard to the capacity of the applicant as registered native title claimants (see s 253) to have entered into an indigenous land use agreement (ILUA), or to have otherwise entered into agreements in respect of future acts, whether information should be provided as to any ILUA or any other future act agreement has been entered into by the applicant and if so upon what terms. The amended application refers to a number of notifications under s 29 of the Act. If the proposed discontinuance is on the basis that the claim group does not hold native title rights and interests, that of course would be significant to the Registrar in relation to maintaining on the register any registered ILUA: s 199C. Hence, it may be that the Court should formally be told the basis upon which the proposed discontinuance is sought; having regard to the same matters, as a condition of any discontinuance, whether the applicant should be required to account for the benefits received under any ILUA or other agreement entered into in the capacity as applicant;

251A - Authorising the making of indigenous land use agreements

For the purposes of this Act, persons holding native title in relation to land or waters in the area covered by an indigenous land use agreement **authorise** the making of the agreement if:

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title, must be complied with in relation to authorising things of that kind--the persons authorise the making of the agreement in accordance with that process; or

(b) where there is no such process--the persons authorise the making of the agreement in accordance with a process of decision-making agreed to and adopted, by the persons who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the agreement or of things of that kind.

Kemp v Native Title Registrar [2006] FCA 939;
(2006) 153 FCR 38

[41] Section 251A is not intended to provide, and does not provide, a means whereby a single authorising decision can be obtained which is binding on two or more groups where their respective claims to hold native title in an area are in conflict.

Fesl v Delegate of the Native Title Registrar

[2008] FCA 1469

71 The following may be distilled from these authorities concerning s 251B:

(a) the effect of the s 251B is to **give the word 'all' in, materially, the table which appears below s 61(1) a more limited meaning than it might otherwise have;**

(b) in those cases where there is no relevant traditional decision-making process, s 251B does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the persons in the native title claim group or compensation group;

(c) **"agreed to and adopted by" imports the giving to all of those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process;**

(d) **unanimous decision-making is not mandated;**

(e) agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement.

Examples

1. The native title determination identifies a group of native title holders that are entirely different to the group that authorised the ILUA (**Example 1**);
2. The native title determination identifies a group of native title holders that are significantly different to the group that authorised the ILUA, but there is some minor overlap, say, for example, one of many apical ancestors (**Example 2**);
3. The native title determination identifies a group of native title holders that is substantially the same as the group that authorised the ILUA, but the determined native title holders include within them an additional apical ancestor (**Example 3**);
4. The native title determination identifies the native title holders as exactly the same as the native title claim group that authorised the area agreement ILUA (**Example 4**).