

FAMILIES, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (NORTHERN TERRITORY EMERGENCY RESPONSE AND OTHER MEASURES) ACT 2007 (CTH)

Act No 128, 2007

Assented to 17 August 2007

The *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007* (Cth) ('the Act') amends a number of other Acts, as part of the Northern Territory Emergency Response, in the following areas:

- permits and access to Aboriginal land;
- infrastructure on Aboriginal land;
- prohibited material; and
- law enforcement.

Permits and access to Aboriginal land

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA') creates a general prohibition on access to Aboriginal land and provides for the Northern Territory to make laws regulating access to such Aboriginal land. This is achieved through the *Aboriginal Land Act 1980* (NT) ('ALA'), which creates what is generally described as the permit system. Certain persons, such as Members of Parliament, do not require a permit, while other persons, such as persons employed under or by virtue of an Act, may be granted permits by the Northern Territory Minister. Other persons can apply for a permit through the traditional Aboriginal owners or the relevant Land Council.

The Act modifies ALRA with respect to permits in two ways. First, it describes a group of people who have a defence to a charge of entering Aboriginal land, primarily Commonwealth, Territory and local Government employees and officers where that entry is in the course of carrying out their functions. These provisions capture a slightly larger group than that captured by the Government permit provisions of the ALA. They commenced on 18 August 2007.

Second, ALRA is modified to create a public right of access to the following Aboriginal land:

- roads within communities;
- 'common areas' within communities;
- the landing places for vessels used by a community;
- the aerodrome used for access to a community;
- other access roads to a community as specified by the Minister in a determination; and
- any area being used for a court hearing.

These provisions relate to 52 communities on Aboriginal land. The areas affected are described in a new schedule to ALRA using latitude and longitude points.

These amendments come into effect on 18 February 2008, or at an earlier date if declared by the Minister. More than simply removing the application of permits, which would have still allowed for other methods for removing unwanted persons from what is private land, the amendments create a right of public access, provided that the access is not for a purpose that is unlawful.

There is some uncertainty about the scope of the term 'common areas'. It is defined as an area that is generally used by members of the community but not including a building, sacred site or area prescribed by regulations. While this would appear to exclude buildings, fact sheets prepared by the Commonwealth continue to refer to common areas as 'public buildings and facilities, shops, art centres and the like'.

Statutory rights in infrastructure on Aboriginal land

The Act also amends ALRA to create a means for the

Commonwealth and Northern Territory Governments to obtain rights over certain Government-funded infrastructure and the land on which it is built. These rights are called 'statutory rights'.

Statutory rights will apply where:

- the proposed works are on Aboriginal land;
- the Minister has by written determination identified an area over which the rights will apply;
- the relevant Land Council has consented in writing to the works and given the Minister a copy of the consent; and
- the works are either wholly Government-funded, or are partly Government-funded and the Minister has determined in writing that the provisions apply.

'Works' in this context means either the construction of new buildings or infrastructure, or more than \$50 000 worth of restoration, refurbishment, fitting out or alteration to existing buildings or infrastructure.

Under *ALRA* a Land Council cannot consent to any proposal on Aboriginal land unless it is satisfied that the traditional Aboriginal owners of the land understand the proposal and as a group consent to it, and that any affected Aboriginal community or group has been consulted.

The Act requires the consent of the Land Council to the works, and not to the statutory rights themselves. However, in practice it is likely that a Land Council will find itself unable to consult to its satisfaction without knowing the area over which the Minister proposes that statutory rights will apply and without explaining the effect of statutory rights in the course of consultations.

The rights of the statutory rights holder include the exclusive right to use and occupy the area identified in the determination and the right to maintain, repair, improve or replace the buildings or infrastructure.

The Act provides that where statutory rights exist, the holder of those rights and the relevant Land Council must negotiate in good faith for the grant of a lease. The subsequent grant of a lease will suspend the operation of statutory rights; however, when that lease expires the statutory rights resume and continue until the holder determines in writing that they are no longer required.

In practice, it is likely that Land Councils on behalf of the traditional Aboriginal owners will prefer to negotiate and consult in relation to lease over new infrastructure rather than consent to works for the purposes of statutory rights. Whereas a lease is able to provide for clear and identified terms, a statutory right is broad, does not contain provisions in favour of the land owners and continues at the discretion of the statutory rights holder.

Prescribed materials

The Act amends the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), adding a new Part 10, which provides that publications, films and computer games which have been, or are likely to be, classified at certain levels (such as X18+ for films), or have been refused or are likely to be refused classification, are prohibited in prescribed areas as defined by the *Northern Territory National Emergency Response Act 2007* (Cth).

Police may seize any material that is suspected of being prohibited. New offences are also created for having prohibited material in or bringing prohibited material into a prescribed area and for providing prohibited material to a person in a prescribed area.

Law enforcement

The Act also amends the *Australian Crime Commission Act 2002* (Cth), with the primary effect of broadening the powers of the Australian Crime Commission ('ACC') in relation to Indigenous violence or child abuse.

In July 2006 the Commonwealth set up the National Indigenous Violence and Child Abuse Intelligence Task Force to be headed by the ACC. The ACC has special coercive powers available to it, such as the power to summon witnesses, compel evidence and compel the production of documents, but only where given special authorisation by the ACC Board.

The ACC Board can only provide special authorisation for a 'federally relevant criminal activity', which prior to the changes referred to 'serious and organised crime'. That definition has now been expanded to include 'Indigenous violence or child abuse'.

As a result of the changes, the ACC Board is now able to provide special authorisation to the ACC in relation to Indigenous violence or child abuse.

The Act also amends the *Australian Federal Police Act 1979* (Cth) to clarify that Federal Police deployed to the Northern Territory as part of the Emergency Response can exercise all the powers of a member of the Northern Territory Police.

Suspension of the operation of the *Racial Discrimination Act 1975* (Cth)

The *Racial Discrimination Act 1975* (Cth) ('RDA') provides that discrimination is not prohibited where it is a 'special measure', defined with reference to the 1965 *International Convention on the Elimination of all Forms of Racial Discrimination*. The question of whether a particular action is a special measure ultimately falls to be determined through the complaints process. There is an existing body of case law around what constitutes a special measure.

The Commonwealth accepts that certain aspects of the Emergency Response are discriminatory, but asserts that every action pursuant to the Emergency Response should be regarded as a special measure. If this is the case the actions would not be prohibited discrimination under the RDA. While this would normally fall to be determined according to law in each case, the Act instead provides that the RDA will not apply to it or to actions taken pursuant to it. Any laws of the Northern Territory that deal with discrimination are also excluded.

The full text of this Act is available online at <<http://www.austlii.edu.au>>. The Second Reading speech may be found at <<http://www.aph.gov.au/bills/index.htm>>.