



Parliament of Australia

Senate

Legal and Constitutional Affairs Committee

Inquiry into the provisions of the Northern Territory Emergency Response Bill 2007
and associated bills

Northern Land Council Supplementary Submission

13 August 2007

NORTHERN TERRITORY EMERGENCY RESPONSE BILL 2007 AND OTHER BILLS

SUPPLEMENTARY SUBMISSION: REVOCATION OF PERMITS TO ENTER AND REMAIN ON ABORIGINAL LAND

1. Summary

Clause 14 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007* proposes to insert a new s 74AA into the *Land Rights Act*, which would remove the current power of a land council to revoke a permit to enter Aboriginal land which has been issued by a traditional owner.

This is an important power which enables a land council (ordinarily in consultation with the police) to act as a circuit breaker to resolve disputes within an Aboriginal group.

It is recommended that the power should be retained, and that the proposed s 74AA should be varied so that:

- a land council is explicitly empowered to revoke a permit issued by a traditional owner;
- a traditional owner may not revoke a permit issued by a land council.

2. Current legal position

The *Aboriginal Land Act 1978* (NT) presently provides that a permit to enter or remain on Aboriginal land may be issued either by a land council (s 5(1)) or by the “traditional Aboriginal owners” of the land (s 5(2)). (The NT Minister may also issue permits to government employees (s 6), although this power is not presently relevant.)

Section 24(2)(a) of the *Interpretation Act* (NT) provides that “words in the plural include the singular” and vice versa, and thus the power to issue a permit to enter or remain on Aboriginal land may be exercised by any individual traditional owner of that land.

A land council is empowered to revoke any permit, regardless of whether it was issued by the land council or by traditional owners (s 5(5)). Likewise the traditional Aboriginal owners (including any individual traditional owner) are empowered to revoke any permit, regardless of whether it was issued by the land council or by traditional owners (s 5(6)).

This legislation was made by the NT Legislative Assembly pursuant to power granted by s 73(1)(b) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), being power to make “laws regulating or authorizing the entry of persons on Aboriginal land.” Such laws must be “capable of operating concurrently with the laws of the Commonwealth” (s 73(1) of the *Land Rights Act*).

Arguably the power of traditional owners to revoke a permit issued by a land council in the NT legislation may be invalid, bearing in mind that Aboriginal land is freehold vested in a land trust which, at the direction of a land council, may exercise all the powers of an “owner of land” for the benefit of traditional owners and other Aboriginal persons (s 5(1)(b) of the *Land Rights Act*), and after consideration of the interests of stakeholders or developers. In practice no issue has ever arisen since, insofar as the Northern Land Council is aware, traditional owners have never attempted to revoke a permit issued by a land council.

Land councils, however, from time to time have revoked permits issued by a traditional owner. Ordinarily this occurs in consultation with both the police and other traditional owners and affected Aboriginal persons. In doing so a land council must take into account all relevant considerations (and ignore irrelevant considerations), and any decision to revoke a permit may be reviewed in the courts under administrative law principles (or by complaint to the Ombudsman).

The proper performance of this function by land councils provides an important circuit breaker whereby disputes within an Aboriginal group may be resolved, and ensures that an individual Aboriginal person may not wrongly exercise power over an Aboriginal group by inappropriately authorising entry to Aboriginal land.

3. Proposed restriction on a land council's power to revoke a permit issued by a traditional owner

Clause 14 of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007* proposes to insert a new s 74AA into the *Land Rights Act*, which would provide:

“A permit issued under section 5 of the *Aboriginal Land Act* of the Northern Territory may only be revoked by the issuer of the permit.”

There are three significant difficulties with this proposal.

First, if a traditional owner issues a permit and subsequently dies, it will be impossible for that permit to ever be revoked - since only “the issuer of the permit” can revoke it. This appears to be an unintended consequence of the drafting which should be remedied.

Secondly, as explained above, land councils presently use their power to revoke permits issued by a traditional owner as a circuit breaker to resolve disputes within an Aboriginal group. This is an important function which ordinarily occurs in consultation with both the police and other Aboriginal persons. The proposed amendment removes the capacity of a land council to perform this function.

Thirdly, Aboriginal land is legally vested in a land trust which, at the direction of a land council, must exercise its function as trustee and owner of the land in a responsible fashion for the benefit of Aboriginal persons who are the beneficiaries of the trust. It is a basic principle of trust law that a beneficiary cannot direct a trustee how to perform its functions. The proposed amendment however vests in a beneficiary the power to override the trustee, notwithstanding that s 5(1)(b) provides that a land trust may exercise all the powers of an “owner of land” (including the power to make decisions in the interests of the trust's beneficiaries regarding entry to land).

In short, the proposed amendment is inconsistent with the scheme of the *Land Rights Act* (particularly s 5(1)(b)) and basic principles of trust law.

4. Recommendation

For the above reasons it is recommended that the proposed s 74AA be varied so that:

- a land council is explicitly empowered to revoke a permit issued by a traditional owner;
- a traditional owner may not revoke a permit issued by a land council.