



Chapter 9

Northern Territory intervention and Indigenous land

The federal government on 21 June 2007 announced measures to tackle sexual abuse against Aboriginal children in the Northern Territory. The legislation it passed to implement the measures has significant implications for Aboriginal owned and controlled land.

This chapter sets out the main provisions in that legislation that affect land. Concerns are identified. A more comprehensive analysis of the intervention in the Northern Territory and human rights is set out in my *Social Justice Report 2007*. In that report I provide an overview of the main human rights standards and legal obligations relevant to the government's intervention. In this *Native Title Report 2007* I focus on native title and land issues.

The areas addressed are:

- compulsory five-year leases;
- town camps;
- effects of other laws; and
- rights in construction areas and infrastructure.

Overview

Legislation giving effect to the Australian Government's intervention into Aboriginal communities in the Northern Territory received Royal Assent¹ on 17 August 2007.

The main provisions dealing with the federal government's acquisition of rights, titles and interests in land are contained in Part 4 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act).

There are also provisions dealing with infrastructure in Schedule 3 (Infrastructure) of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (FCSIA(NTNER) Act). That Act amends the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) inserting Part IIB (Statutory rights over buildings or infrastructure).

Broadly, under the legislation the federal government acquires rights, titles and interests in the Northern Territory in Aboriginal land,² community living areas,³ Canteen Creek, Nauiyu (Daly River), town camps, and construction areas⁴ and infrastructure constructed on Aboriginal land.



Concerns

I am concerned at the federal government's all encompassing acquisition of interests in land. The rights, titles and interests the federal government has acquired include:

- compulsory acquisition of five-year leases over certain lands;⁵
- control of leases for town camps in Darwin, Katherine, Tennant Creek and Alice Springs including the power to forfeit the lease and resume the land;
- power to acquire all rights, titles and interests in the land subject to a town camp lease; and
- rights in construction areas, and buildings and infrastructure constructed on Aboriginal land.

Compulsory five-year leases

A central aspect of the previous federal government's legislative intervention in the Northern Territory is the compulsory acquisition by the government of five-year leases over Aboriginal owned land. This is affected by Division 1 of Part 4 of the NTNER Act.

On 18 August 2007,⁶ the day after the NTNER Act received Royal Assent, the federal government compulsorily acquired five-year leases over:

- 47 specified areas of Aboriginal land;⁷
- 16 specified community living areas;⁸
- Canteen Creek;⁹ and
- Nauiyu (Daly River).¹⁰

The federal government also compulsorily acquires five-year leases, once the land is prescribed by regulation, over:

- any other Aboriginal land in the Northern Territory;¹¹
- any other community living areas in the Northern Territory;¹² and
- land in which, as at 18 August 2007, an estate in fee simple or a lease was held by the/The Aputula Social Club Incorporated [sic], the/The Aputula Housing Association [sic], the Daguragu Community Government Council or the Pine Creek Aboriginal Advancement Association Inc.¹³



Concern: ministerial powers

Wide-ranging powers have been delegated to the federal minister to deal with Indigenous land. In many instances the mechanism by which the federal minister exercises powers (for example by giving notice in writing to a relevant party) is deemed not to be a legislative instrument. This precludes scrutiny by the Parliament of the instrument giving effect to the minister's decision. It also precludes Parliament's disallowance of the instrument.

Relevant owner

The legislation uses the term 'relevant owner' to describe the owners of land who are affected by the legislation. The federal government has compulsorily acquired five-year leases from the following relevant owners.¹⁴

Lease over	Acquired from
Aboriginal land	the Aboriginal Land Trust that holds the <i>estate in fee simple</i> in the land
Community living areas	the person or body that holds the <i>estate in fee simple</i> in the land (this will usually be an association)
Canteen Creek	the Northern Territory
Naiyu (Daly River)	the Catholic Church of the Diocese of Darwin Property Trust
Land in which, as at 18 August 2007, a lease was held by the/The Aputula Social Club Incorporated [sic], the/The Aputula Housing Association Incorporated [sic] or the Daguragu Community Government Council	the Northern Territory

Lease period

The starting date of each lease is staggered and depends on the area.¹⁵ All the leases end five years from 18 August 2007.¹⁶

There is no express provision in the legislation for the period of the five-year lease to be extended or renewed.

However, there is provision for the federal minister to make other terms and conditions of the five-year lease.¹⁷ Potentially this allows the federal minister to make a term or condition extending the period of the lease or for renewal of the lease.



The federal government (acting as the lessee) can terminate the lease at any time. To do this, the federal minister would give notice in writing to the owner of the land.¹⁸ The notice is deemed not to be a legislative instrument.¹⁹

The owners of the land (the lessor) cannot terminate the lease.

Starting dates for five-year leases		
Starting date		Leases over
18 August 2007	20 Aboriginal lands and 6 community living areas. ²⁰	<p>Aboriginal land – Ali Curung, Amoonguna, Ampilatwatja, Areyonga, Daguragu, Gapuwiyak, Gunbalanya, Gunyangara, Hermannsburg, Kaltukatjara, Kintore, Ngukurr, Nyirripi, Papunya, Pmara Jutunta, Ramingining, Santa Teresa, Wallace Rockhole, Yirrkala, Yuendumu</p> <p>Community living areas – Alpururulam, Atitjere, Minyerri, Titjikala, Wutunugurra, Yarralin.</p>
Date proclaimed by the Government (or if not proclaimed then at the end of 6 months from 18 August 2007)	27 Aboriginal lands, 10 community living areas, ²¹ and Canteen Creek	<p>Aboriginal land – Acacia Larrakia, Amanbidji, Barunga, Belyuen, Beswick, Bulman, Galiwinku, Haasts Bluff, Lajamanu, Maningrida, Manyallaluk, Milikapiti, Milingimbi, Minjilang, Mt Liebig, Nturiya, Numbulwar, Palumpa, Peppimenarti, Pigeon Hole, Pirlangimpi, Robinson River, Wadeye, Warruwi, Weemol, Willowra, Yeulamu</p> <p>Community living areas – Binjari, Bulla, Engawala, Imangara, Imanpa, Jilkminggan, Laramba, Rittarangu, Tara, Wilora</p> <p>Canteen Creek</p>
The first day after the end of the disallowance period for the regulations prescribing the land	Land prescribed by regulation	<p>Land that may be prescribed by regulation:</p> <p>Aboriginal land – any Aboriginal land that is held by an Aboriginal Land Trust for an <i>estate in fee simple</i></p> <p>Community living areas – any community living areas where an estate in fee simple has been granted to an association</p> <p>Land in which, as at 18 August 2007, an <i>estate in fee simple</i> or a lease was held by the/The Aputula Social Club Incorporated [sic], the/The Aputula Housing Association Incorporated [sic] (this includes lease of land at Finke), the Daguragu Community Government Council (this includes lease of land at Kalkarindji) or the Pine Creek Aboriginal Advancement Association Inc.</p>



The first day after the end of the disallowance period for the regulations prescribing the commencement of the lease		Naiyu (Daly River) ²²
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Area excluded from the lease

Land that is already covered by a lease at the time the compulsory five-year lease comes into effect, is excluded from the five-year lease.²³

However, the federal government may terminate the earlier lease²⁴ and vary the compulsory five-year lease to include the area previously excluded.²⁵ This does not apply to leases of Naiyu (Daly River), Finke or Kalkarindji which are dealt with separately in the legislation²⁶ (see later in this chapter under the heading 'special provisions').

The termination of the earlier lease takes place by the federal minister giving notice in writing to the person who holds the lease.²⁷ The variation of the compulsory five-year lease to include the area previously excluded takes place by the federal minister giving notice in writing to the relevant owner of the land.²⁸ Both notices are deemed not to be legislative instruments.²⁹

The federal minister may, at any time, vary the five-year lease to exclude land from it.³⁰ This also is done by the federal minister giving notice in writing to the landowner.³¹ The notice is deemed not to be a legislative instrument.³²

Pre-existing rights, titles or other interests

Generally, a right, title or interest that existed in relation to the area covered by the compulsory five-year lease immediately before the time the lease takes effect is preserved.³³ This includes any licences.³⁴

However the federal minister may, at any time, terminate the right, title or interest by giving notice in writing to the person who holds it.³⁵ Compensation may be payable but is not guaranteed.³⁶ The notice is deemed not to be a legislative instrument.³⁷

The preservation of pre-existing rights, titles or other interests does not apply to native title rights and interests. Any native title rights and interests, to the extent that they may occur over the area covered by the lease, are not expressly preserved by the legislation.

However, to the extent that the granting of a compulsory five-year lease is an act that may affect native title rights and interests that may exist in the leased area, the legislation states that the non-extinguishment principle applies within the meaning of the *Native Title Act 1993* (Cth) (Native Title Act).³⁸ The non-extinguishment principle also applies to other specified acts (along with the act of granting a five-year lease) (see later in this brief under the heading 'Effect of other laws-Native Title Act').³⁹



Terms and conditions of lease

Under the compulsory five-year lease the federal government gains 'exclusive possession and quiet enjoyment of the land' while the lease is in force.⁴⁰

This is subject to:

- any pre-existing right, title or other interest that is preserved;⁴¹
- the granting of a lease of a township for 99 years by an Aboriginal Land Trust under Section 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA);⁴² and
- the granting of a lease under Section 19 of the ALRA.

The federal government's exclusive possession and quiet enjoyment will also be subject to Sections 70C to 70G of the ALRA⁴³ from a date to be proclaimed or if not proclaimed then on the first day at the end of six months from 17 August 2007.⁴⁴

The federal minister may determine additional terms and conditions of the lease and may vary these.⁴⁵

A determination of other terms and conditions, and a variation, are legislative instruments, however, the provisions in the *Legislative Instruments Act 2003* allowing Parliament to disallow the legislative instrument have been excluded.⁴⁶

On 17 August 2007 the federal minister made a determination of additional terms and conditions for compulsory five-year leases granted under Section 31 of the NTNER Act. The determination came into effect on 18 August 2007. The additional terms and conditions are that the federal government:

- is entitled to use, and permit the use of, the land under lease for any use the federal government considers is consistent with the fulfilment of the object of the NTNER Act;⁴⁷
- is entitled to enter and access, and permit entry to and access to:
 - all buildings, structures, fixtures, fittings, plant and equipment, signs and other items which are on or under the land under lease; and
 - all utilities and services which are on or under the leased land, including sewerage, drainage, water, electricity, gas and telecommunications services.
- may carry out any activity on or in relation to the leased land consistent with fulfilment of the object of the NTNER Act.

The federal government may carry out on the land, activities that include:

- maintaining, repairing, upgrading, refurbishing, fitting out, landscaping, clearing, dismantling, demolishing, removing and replacing:
 - buildings, structures, fixtures, fittings, plant and equipment, signs and other items which are on or under the land (other than erected or attached by or on behalf of the federal government after 21 June 2007); and



- utilities and services which are on or under the leased land including sewerage, drainage, water, electricity, gas and telecommunications services (other than those installed by or on behalf of the federal government after the commencement of the lease).
- constructing, erecting, installing, placing, altering, refurbishing, fitting out, landscaping, dismantling and clearing:
 - buildings, structures, fixtures, fittings, plant and equipment, signs and other items erected on, or attached to, or under the leased land by or on behalf of the federal government;
 - utilities and services installed on or under the leased land by or on behalf of the federal government including sewerage, drainage, water, electricity, gas and telecommunications services.

The federal government also has the power to, at any time prior to the end of the lease, remove or demolish certain improvements⁴⁸ it may have made to the land under lease and certain utilities and services it may have installed.

Ownership of improvements made by the federal government will, subject to certain conditions, at the end of the lease pass to the relevant owner of the land.

The federal government is liable to pay all rates and taxes payable in respect of the land the subject of the compulsory five-year lease.

Dealing with land under compulsory five-year leases

The federal government may, at any time, sublease, license, part with possession of, or otherwise deal with its interest in the five-year lease. It cannot transfer the lease.⁴⁹

The legislation does not authorise an Aboriginal Land Trust to deal with an estate or interest in land covered by a compulsory five-year lease other than by granting a lease under Sections 19 or 19A of the ALRA.⁵⁰

An Aboriginal Land Trust may, despite the grant of a compulsory five-year lease, grant another lease in accordance with Section 19 of the ALRA that covers part of the land.⁵¹ This requires the consent, in writing, of the federal minister.⁵² If the Land Trust grants a lease under Section 19 the compulsory five-year lease is varied to exclude the area of the Section 19 lease.⁵³

The Aboriginal Land Trust for the land over which a compulsory five-year lease has been granted may, in accordance with Section 19A of the ALRA, grant a lease of a township for 99 years.⁵⁴ If such a lease is granted then the compulsory five-year lease is terminated if it covers all of the same area. If the lease of the township only covers part of the area covered by the compulsory five-year lease then that area is excluded from the compulsory five-year lease.⁵⁵



Rent

Effectively it is up to the lessee, that is the federal government, whether it pays rent. The federal government is not liable to pay the owner of the land any rent in relation to the five-year lease the federal government has compulsorily acquired.⁵⁶

The federal minister may, however, from time to time, request the Valuer-General to determine a reasonable amount of rent to be paid by the federal government to the relevant owner (not the Northern Territory) of the land covered by the five-year lease.⁵⁷ If such a request is made the Valuer-General must comply and the federal government must pay the amount determined.⁵⁸

The Valuer-General must not take into account in determining a reasonable amount of rent the value of any improvements on the land.⁵⁹

There is nothing to compel the federal minister to request a rental determination from the Valuer-General. Without a request no rent is payable by the federal minister to the land owner for the five-year lease.

Variation of the lease

The federal government may vary the compulsory five-year lease by:

- excluding land from it; and
- including land excluded at the time the five-year lease takes effect (because it was covered all or in part by a pre-existing registered lease).⁶⁰

Variation takes place by the federal minister giving notice, in writing, to the relevant owner of the land.⁶¹ The notice is deemed not to be a legislative instrument.

There does not appear to be any other express provision in the NTNER Act allowing the federal minister to vary the terms and conditions set out in the Act. However if the federal minister exercises the power in Section 36 of the NTNER Act to make additional terms and conditions then he may vary these.⁶²

The owner of the land covered by the lease may not vary the compulsory five-year lease.⁶³

Special provisions – Traditional land claim at Canteen Creek

The legislation provides for the continuation of the traditional land claim under the ALRA at Canteen Creek.⁶⁴ It does this by providing that the grant of a compulsory five-year lease of Canteen Creek has effect—despite the provisions in the ALRA⁶⁵ that estates or interests not be granted while land is subject to traditional land claims under that Act.⁶⁶

The legislation also provides that the grant of a compulsory five-year lease does not affect any application to an Aboriginal Land Commissioner under the ALRA for a traditional land claim of Canteen Creek. However, if the claim is successful and the Governor-General executes a deed of grant in fee simple in the land at Canteen Creek, the deed is of no effect until the compulsory lease ends.⁶⁷



Special provisions – Earlier lease at Nauiyu (Daly River)

As at 18 August 2007, when a compulsory five-year lease was granted over Nauiyu (Daly River), any earlier lease covering that area in force immediately before the compulsory five-year lease was granted is varied to exclude land covered by the later lease.⁶⁸

Once the compulsory five-year lease ends, if the earlier lease is still in force it is varied to include the land excluded when the five-year lease was granted.⁶⁹

It would appear that the provisions enabling the federal minister to subsequently extend the boundaries of a compulsory five-year lease to include areas excluded at the time it was granted⁷⁰ do not apply to the Nauiyu (Daly River) five-year lease.⁷¹

Special provisions – Leases of Finke and Kalkarindji

Special provisions apply in regard to the leases of Finke (known also as Aputula) and Kalkarindji (known also as Wave Hill) held at 18 August 2007 by The Aputula Social Club Incorporated, The Aputula Housing Association Incorporated, and Daguragu Community Government Council.⁷² These leases are suspended while the compulsory five-year leases granted over the land are in force. This is provided that the compulsory five-year leases cover all of the land the subject of the earlier leases. Once the compulsory leases end, the suspension ceases.

The five year compulsory leases over land at Finke and Kalkarindji already leased by The Aputula Social Club Incorporated, The Aputula Housing Association Incorporated, and Daguragu Community Government Council commence on the first day after the end of the disallowance period for the regulations that prescribe the land.

Rights of way

The federal minister and federal government employees and agents have the right to use the shortest practicable route between areas of land covered by compulsory five-year leases.⁷³

They also have the right to use a road over land granted to an association for a community living area that is not covered by a compulsory five-year lease to gain access to that area of the land that is covered by such a lease.⁷⁴ A similar right exists over land owned by the Catholic Church of the Diocese of Darwin Property Trust.⁷⁵



Summary

Implications for Aboriginal human rights resulting from compulsory five-year leases

The compulsory five-year leases have wide-ranging implications for Aboriginal human rights. Some of these are:

- Any existing Aboriginal land in the Northern Territory may be subject to a compulsory five-year lease without any consent needed by the owner of the land.
- There is no unconditional guarantee for compensation on just terms.
- Significant interruption to community living can be expected.
- The minister is able to make wide-ranging decisions that are not answerable to Parliament.
- Traditional rights of use and occupation (under Section 71 of the ALRA) in compulsorily leased Aboriginal lands will be displaced by the existence of the compulsory lease.
- The right for an Indigenous person to even reside on compulsorily leased Aboriginal lands will be capable of being cancelled by the federal government at any time.
- The federal government is not compelled to pay rent.

Town camps

There are a number of areas in and around centres in the Northern Territory known as town camps. These town camps are established by leases granted under the *Special Purposes Leases Act 1953 (NT)* (SPLA) and the *Crown Lands Act 1992 (NT)* (CLA). They are granted by the Northern Territory Minister or the Administrator of the Northern Territory.

Division 2 of Part 4 of the NTNER Act deals with the acquisition by the federal government of rights, titles and interests relating to town camps. In essence, Division 2 provides for the federal minister to take over the leases from the Northern Territory and to do such things as terminate the leases and resume the land under lease.

Under the NTNER Act the federal minister is able to:

- forfeit the lease establishing the town camp, resume the land under lease, and reserve the resumed land for a wide range of purposes; and
- specify that all rights, titles and interests in the land subject to a lease under the SPLA or the CLA, including town camp leases, are vested in the federal government. This is regardless of whether the lease has first been forfeited or the land resumed.



Lands affected

The lands affected by the NTNER Act are:

- 33 town camps under SPLA and CLA leases listed in Part 4 of Schedule 1 of the NTNER Act. These are:

Darwin	Bagot, Knuckey Lagoons, Kulaluk/Minmirama Park, Palmerston Town Camp, Railway
Katherine	Miali Brumby, Warlpiri Transient Camp
Tenant Creek	Kargaru, Marla Marla, Munji-Marla, Ngalpa Ngalpa, Sorry Camp, The Village, Tinkarli, Village Camp, Wuppa
Alice Springs	Akngwertnarre, Anthelk-Ewlpaye, Anthepe, Aper-Alwerrkngge, Basso's Farm, Ewyenper-Atwatye, Ilperle Tyathe, Ilpeye Ilpeye, Ilyiperenye, Inarlenge, Irklanacha Atwacha, Karnte, Mount Nancy, Mpwetyerre, New Ilparpa, Nyewente, Yarrenyty-Arltere
- any land in the Northern Territory that is the subject of a lease granted under the SPLA or the CLA, including a lease for a town camp, that is prescribed by the regulations.⁷⁶

Forfeiture of town camp leases and resumption of land

Under the NTNER Act the federal minister has the same powers as the Northern Territory Minister or the Administrator of the Northern Territory under the SPLA and the CLA to do certain things in relation to leases granted under those Acts over the affected lands.⁷⁷ These powers include:

- to forfeit the lease where there have been specified breaches or where the purpose for which the lease was granted has been fulfilled or is no longer capable of fulfilment;⁷⁸
- to determine the amount of compensation to be paid by the federal government to the lessee for any buildings left on the land if the lease is forfeited;⁷⁹
- to resume and reserve land comprising, or included in, the lease for:
 - any public purpose (in the case of land subject to a SPLA lease); and
 - any purpose (in the case of land subject to CLA lease), the federal minister thinks fit, including a number of specified purposes.⁸⁰

The federal minister is required to give 60 days notice, in writing, when resuming land comprising or included in a town camp lease. This has been reduced from the previously required notice of 6 months.⁸¹

Where land the subject of a lease under the SPLA or the CLA has been resumed compensation is payable to the lessee for:

- improvements on the resumed land that are the property of the lessee;
- the loss of the lease; and
- depreciation in the value of the land comprised in the lease which is not resumed.⁸²



Vesting of rights, titles and interests in town camp land in the federal government

The federal minister may specify that all rights, titles and interests in land that is the subject of a lease under the SPLA or the CLA, including a lease for a town camp, are vested in the federal government. The rights, titles and interests are freed and discharged from all other rights, titles and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.⁸³

This is done by the federal minister giving to the Northern Territory a notice specifying certain land. The land must be the subject of a lease under the SPLA or the CLA. The lands the federal minister may specify are:

- any of the 33 town camps listed in Part 4 of Schedule 1; and
- any land in the Northern Territory under a SPLA or CLA lease that is prescribed by the regulations.⁸⁴

Once specified, all rights, titles and interests in the land are vested in the federal minister.

The federal minister may specify land whether or not the land has been resumed or forfeited under the SPLA or the CLA.

The act of specifying land is not one to which the future act regime in Division 3 of Part 2 of the Native Title Act applies.⁸⁵ To the extent that the act of specifying land, and the vesting of all rights, titles and interests in the federal government that flows from that, affects native title, the non-extinguishment principle applies (see later in the brief under the heading 'Effect of other laws – Native Title Act').⁸⁶

Rights, titles or interests in the land, at the time the land is specified, may be preserved. This requires that the notice specifying the land specify that a right, title or interest in the land is preserved, in which case it does not vest in the federal government.

However, so long as the federal government's interest in the land exists, the federal government may terminate the preserved right, title or interest at any time by giving notice in writing to the persons who holds the right, title or interest. Such a notice terminating a preserved right, title or interest is deemed not to be a legislative instrument.⁸⁷ Compensation may be payable.⁸⁸



Concerns: town camps

The acquisition of rights, titles and interests in town camps has implications for Indigenous human rights:

- There may be little or no compensation.
- Allows the minister to make wide-ranging decisions that are not answerable to Parliament.
- The notice period for lease resumption is reduced from 6 months to 2 months demonstrating less favourable treatment of town camp special purpose leases.
- Lack of conventional safeguards for compulsory acquisition suggests less favourable treatment for the leases over town camp areas.

Compensation

The NTNER Act does not provide an unconditional guarantee for compensation on just terms for acquisition of property by the federal government under the Act.

Under Section 60 of the NTNER Act the federal government is liable to pay 'a reasonable amount of compensation' in certain circumstances. If the federal government and the person to be compensated do not agree on the amount of compensation then the person may institute court proceedings to recover from the federal government a reasonable amount.

In determining what is a reasonable amount the court must take into account:

- any rent paid or payable in relation to the land;
- any amounts of compensation paid or payable by the federal government under the SPLA or CLA; and
- any improvements to the land funded by the federal government (whether before or after a lease is granted to, or all rights, titles or interests are vested in the federal government). This includes the construction of, and improvements to, any building or infrastructure on the land.

A number of points arise from compensation provisions in Section 60:

- the federal government's liability to pay 'a reasonable amount of compensation' is only where the acquisition of the property is an acquisition to which the just terms requirements in Section 51(xxxi) of the Constitution applies;
- the NTNER Act refers to 'a reasonable amount' rather than to compensation on just terms;
- the issue of whether Section 51(xxxi) of the Constitution applies to the exercise of power under Section 122 of the Constitution and the acquisition of property by the federal government in the Territory is the subject of conflicting case law;⁸⁹



- the NTNER Act displaces the requirement in the *Northern Territory (Self-Government) Act 1978* (NT(SG)A) that the acquisition of certain property in the Territory must be on just terms;⁹⁰
- with the displacement of the NT(SG)A requirement for just terms compensation it opens the way for the federal government to more easily challenge the application of the constitutional just terms protection in the Northern Territory in any court case seeking compensation.

Concern: compensation provisions

The compensation provisions have serious implications for Indigenous human rights.

- ‘a reasonable amount’ of compensation rather than ‘just terms’ compensation is referred to in the legislation.
- Displacing the requirement under *Northern Territory (Self-Government) Act 1978* that acquisition of certain property in the Territory be on just terms.
- The requirement that the court is compelled to take into account improvements to the land funded by the federal government, rent paid or payable, and other amounts.

Effect of other laws

The federal government’s acquisition of rights, titles and interests in land under Part 4 of the NTNER Act impacts upon, and is affected by, other federal and Northern Territory laws. Part 4, Division 3 of the NTNER Act deals with how these laws interact with the acquisition of rights, titles and interests in the land by the federal government.

Native Title Act

Section 51(1) of the NTNER Act provides that Part 2, Division 3 of the Native Title Act, which deals with future acts, does not apply to:

- any act done by, under or in accordance with any provision in Part 4 of the NTNER Act⁹¹ including:
 - the grant of a compulsory five-year lease; and
 - the vesting of rights, titles and interests in land subject to a lease under the SPLA or the CLA, including a lease for a town camp, in the federal government.⁹²
- any act done by the federal government, the Northern Territory or an Authority, within five-years from 18 August 2007, on land that has been resumed, or on land in respect of which a lease has been forfeited, in accordance with Division 2 of Part 4 of the NTNER Act;⁹³



- any act done by the federal government, the Northern Territory or an Authority on land in which a federal interest exists; and
- any act that is related to any of the above acts.

The non-extinguishment principle applies to these acts.⁹⁴

In essence, the affect of this is that procedures set out in the future act regime in Part 2, Division 3 of the Native Title Act, that would have had to be followed if the acts were future acts, do not have to be followed.

However, as the non-extinguishment principle applies, to the extent that any of these acts affect any native title rights and interest that may exist in the land, those native title rights and interests are not extinguished.

If the future act regime had not been expressly excluded these acts may have been 'future acts' and hence subject to that regime.

A 'future act' is defined in Section 233 of the Native Title Act. Essentially, a 'future act' is an act ('act' is defined in Section 226 of the Native Title Act) which affects native title (or would affect native title if it were valid) and:

- consists of the making, amendment or repeal of legislation which takes place on or after 1 July 1993; or
- is any other act taking place on or after 1 January 1994.

The future act regime set out in Part 2, Division 3 of the Native Title Act provides for procedures to be followed to ensure that a future act is valid and prescribes the affect of future acts on any native title rights and interests. In some cases compliance with procedural requirements is a precondition for a future act to be valid. Notification to those who hold, or may hold, native title in the land in question may be required and the parties may be required to negotiate in good faith for the doing of the act. Where procedural requirements must be followed failure to do so will mean the future act is invalid.⁹⁵

Aboriginal Land Rights (Northern Territory) Act

Despite the grant of a compulsory five-year lease over Aboriginal land, an Aboriginal Land Trust may grant a lease in accordance with Sections 19 or 19A of the ALRA over the land. This is dealt with earlier in the chapter under the heading 'Dealing with land under compulsory five-year leases'.

Application of federal laws

Under the NTNER Act the federal minister may, by legislative instrument, prevent any law or a provision of a law from applying in relation to the following land in the Northern Territory:⁹⁶

- land covered by a compulsory five-year lease;
- land in which a federal interest exists; and
- land resumed or forfeited in accordance with Division 2 of Part 4⁹⁷ (other than land in which a federal interest exists).⁹⁸



This is done by the federal minister specifying a law, or a provision of a law, of the Australian Parliament. The law or provision then has no effect to the extent that it would regulate, hinder or prevent the doing of an act in relation to the land.

Modification of certain NT laws for land covered by Part 4

The regulations may make modifications of any law of the Northern Territory relating to:

- planning;
- infrastructure;
- the subdivision or transfer of land;
- local government; and
- other prescribed matters.

to the extent that the law applies to land:

- covered by a compulsory five-year lease;
- in which a federal government interest exists; and
- resumed or forfeited in accordance with Division 2 of Part 4 (other than land in which a federal interest exists).

Concern: interaction with other laws

I have concerns about the provisions dealing with the interaction with other laws:

- Removal of the future act regime and the loss of rights under that regime.
- The federal minister is able to prevent any law or a provision of a law from applying to certain lands thus bypassing Parliament (albeit that it is by way of legislative instrument).

Rights in construction areas and infrastructure

The FCSIA(NTNER) Act amended the ALRA, inserting Part IIB (Statutory rights over buildings or infrastructure),⁹⁹ to provide for the acquisition (by the federal government, the Northern Territory, or one of their authorities) of extensive statutory rights in relation to areas of Aboriginal land designated as *construction areas*.

The relevant provisions of Part IIB of the ALRA are Division 1 (Preliminary), Division 2 (Federal rights) and Division 3 (Northern Territory rights).



Area over which rights are acquired – the ‘construction area’

A *construction area* is an area of Aboriginal land held by an Aboriginal Land Trust for an *estate in fee simple* which:

- the federal minister has identified in a written determination (where the rights are acquired by the federal government or a federal authority); or
- the Chief Minister of the Northern Territory or a delegate of the Chief Minister has identified in a written determination (where the rights are acquired by the Northern Territory or a Northern Territory authority).

Circumstances in which the rights are acquired

The rights are acquired where:

- works are proposed to be carried out on a *construction area*; and
- the Aboriginal Land Council for the area in which the land is situated consents in writing;¹⁰⁰
- immediately before the Land Council consents the area is not covered by a lease under Sections 19 or 19A of the ALRA; and
- the federal government, the Northern Territory or one of their authorities wholly or partly¹⁰¹ funds the works.

The works¹⁰² must be:

- the construction of one or more buildings or infrastructure; or
- the major alteration, extension, restoration, refurbishment or fitting out of one or more buildings or infrastructure, the total estimated cost of which exceeds \$50,000.¹⁰³

Rights acquired

The statutory rights acquired in relation to the *construction area* are exclusive¹⁰⁴ to the body funding the works and are the right to:

- carry out works on the construction area;
- occupy, use, maintain, repair or replace the buildings or infrastructure covered by the works;
- occupy or use the construction area;
- construct, maintain, repair or replace minor improvements on the construction area; and
- provide services to the construction area.

During the period a person has the statutory rights the buildings or infrastructure is taken to be the property of the person.¹⁰⁵



Who acquires the rights

The rights are acquired by the body that funds the works.¹⁰⁶

Funding body	Body acquiring the rights
The federal government (where fully funded by the federal government)	The federal government
A federal authority (where fully funded by a federal authority)	The federal authority
The Northern Territory (where fully funded by the Northern Territory)	The Northern Territory
A Northern Territory authority (where fully funded by a Northern Territory authority)	The Northern Territory authority
Partly funded by the federal government or a federal authority or both (whether or not there is to be funding from another source)	The federal minister determines in writing whether the funding body is the federal government or the authority
Partly funded by the Northern Territory or a Northern Territory authority or both (whether or not there is to be funding from another source)	The Chief Minister of the Northern Territory must determine, in writing, whether the funding body is the Northern Territory or the authority ¹⁰⁷

Transfer of rights

The statutory rights may be transferred by the party who has acquired them to the federal government, a federal authority, the Northern Territory or a Northern Territory authority (depending on who has acquired them).¹⁰⁸

Exercise of rights by others

A person who has the statutory rights may permit, in writing, a person or persons to exercise some or all of the statutory rights in relation to the whole or a part of the *construction area*.¹⁰⁹ A person who is authorised to exercise the statutory rights does not acquire them.¹¹⁰

Compulsory negotiations for lease under Section 19 of the ALRA

It would appear that the relevant Land Council must negotiate in good faith with:

- the person who has acquired the statutory rights for that person to be granted a lease of the construction area under Section 19 of the ALRA. This is unless a lease is granted under Section 19A of the ALRA.¹¹¹



- a funding body that has not acquired the statutory rights because there is already a compulsory five-year lease at the time a *construction area* has been created.

So, once the Land Council has agreed in writing to the works taking place (and the other statutory requirements for the acquisition of statutory rights have occurred) it would appear the Land Council is compelled to enter into negotiations in good faith for a lease of the land under Section 19 of the ALRA.

If a lease is granted under Section 19 of the ALRA then the federal government, federal authority, Northern Territory or Northern Territory authority (as the case may be) is authorised to dispose of an interest in land covered by the lease granted under Section 19 of the ALRA in accordance with the terms and conditions of the lease.¹¹²

Prohibition on leases under Section 19 of the ALRA

The Land Trust which holds the Aboriginal land for an *estate in fee simple* must not grant any other lease under Section 19 of the ALRA of the *construction area* other than to:

- the person who has the statutory rights;¹¹³ and
- the funding body which has not acquired the statutory rights because there is already a compulsory five-year lease at the time a *construction area* has been created.

Effect of leases on rights		
Type of lease	Relevant circumstances	Effect on statutory rights
Compulsory five-year lease	<ul style="list-style-type: none"> ▪ A compulsory five-year lease is in force; and ▪ works are proposed to be carried out on a <i>construction area</i>; and ▪ the Land Council for the area consents, in writing, to the works; and ▪ the works are to be wholly or partly funded by the federal government, a federal authority, the Northern Territory or a Northern Territory authority. 	The acquisition by the funding body of the statutory rights is suspended for the period the compulsory five-year lease is in force.



Section 19 ALRA leases	<p>Where a lease has been granted under Section 19 of the ALRA to:</p> <ul style="list-style-type: none"> ▪ a person who has acquired the statutory rights; ▪ a funding body that has not acquired the statutory rights because there is already a compulsory five-year lease at the time a <i>construction area</i> has been created. 	The acquisition by the funding body of the statutory rights is suspended while the lease is in force.
Section 19A ALRA leases	<ul style="list-style-type: none"> ▪ A lease is in force under Section 19A of the ALRA covering the construction area; and ▪ a person has acquired the statutory rights in relation to the construction area immediately before the lease took effect; ▪ a sublease is granted to the person who has the statutory rights. 	Immediately before the sublease is granted the Division 2 (federal rights) or Division 3 (Northern Territory rights), as appropriate, ceases to apply in relation to the <i>construction area</i> .

Displacement of traditional rights of use and occupation

The FCSIA(NTNER) Act amendments¹¹⁴ to the ALRA displace the protection, given in Section 71 of the ALRA,¹¹⁵ to the traditional rights of use and occupation of Aboriginal land.

Concern

I am very concerned about the displacement of the protection given in Section 71 of the ALRA, to the traditional rights of use and occupation of Aboriginal land.

An Aboriginal or a group of Aboriginals is no longer entitled to enter upon Aboriginal land and use or occupy that land in accordance with Section 71(1) of the ALRA if to do so would interfere with the use or enjoyment of the statutory rights of a government (or authority or a third party with a permit to exercise those rights) acquired under Part IIB of the ALRA.



Conclusion

From a native title perspective, it is the removal of the future acts regime and the loss of rights under that regime that is particularly concerning. The preamble to the Native Title Act states:

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

The provisions of the intervention legislation appear to pay no attention to the preamble. It is given no weight. This approach to native title treats native title as a hindrance rather than as a necessity. Something to be legislated away where it looks like it may block a desired course of action. This is of deep concern.



- 1 There are 5 pieces of legislation, 2 of which deal with appropriations: *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007 – 2008 2007*; *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007 – 2008 2007*; *Families, Communities Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) 2007*; *Northern Territory National Emergency Response Act 2007* (NTNER Act); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.
- 2 The term 'Aboriginal land' is used in the legislation to refer to:
 a) land held by an Aboriginal Land Trust for an estate in fee simple; or
 b) land the subject of a deed of grant held in escrow by an Aboriginal Land Council. This is the definition in s3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).
- 3 Broadly, community living areas (sometimes also referred to as Aboriginal community living areas) are areas of land taken out of pastoral leases for the benefit of Indigenous people. An estate in fee simple is granted to associations established or nominated to hold the title. They are created by the operation of the *Pastoral Land Act 1992* (NT) (PLA) (and prior to the operation of that Act, the *Crown Lands Act 1992* (NT)) (CLA), and the *Lands Acquisition Act 1978* (NT) (LAA). The owners of the land described as Aboriginal community living areas (in so far as they hold the estate in fee simple in the land) are associations formed or approved under Part 8 of the PLA (or Part IV of the CLA). The process for making an application to the Northern Territory Minister for the excise of land from a pastoral lease for a community living area is set out in Part 8 of the PLA (or Part IV of the CLA as in force before the commencement of the PLA). This works in conjunction with Part V of the LAA.
- 4 A 'construction area' is defined in s20T of the ALRA and is considered in this briefing paper under the heading 'rights in construction areas and infrastructure'.
- 5 The lands are set out in s31(1) of the NTNER Act.
- 6 One day after the legislation received the Royal Assent (s2(1) of the NTNER Act).
- 7 NTNER Act, s31(1)(a) and Schedule 1 Part 1.
- 8 NTNER Act, s31(1)(a) and Schedule 1 Part 2.
- 9 NTNER Act, s31(1)(a) and Schedule 1 Part 3.
- 10 NTNER Act, s31(1)(a) and Schedule 1 Part 3.
- 11 NTNER Act, s31(1)(b)(i).
- 12 NTNER Act, s31(1)(b)(ii).
- 13 NTNER Act, s31(1)(b)(iii).
- 14 *relevant owner* is defined in s3 of the NTNERA.
- 15 See the NTNER Act, s31(2) for the different commencement times for each lease.
- 16 NTNER Act, s31(2)(b).
- 17 NTNER Act, s36.
- 18 NTNER Act, s35(7).
- 19 NTNER Act, s35(11).
- 20 These are listed in the NTNER Act Schedule 1 Parts 1 and 2.
- 21 These are set out in the NTNER Act Schedule 1 Parts 1 and 2.
- 22 This is the effect of the NTNER Act s31(1)(a) and s31(1)(2)(a)(iv).
- 23 NTNER Act, s31(3).
- 24 NTNER Act, s37(1)(b).
- 25 NTNER Act, s35(6)(b).
- 26 They are dealt with in the NTNER Act, ss38, 39, 40.
- 27 NTNER Act, s37(3).
- 28 NTNER Act, s35(8).
- 29 NTNER Act, s37(5).
- 30 NTNER Act, s35(6).
- 31 NTNER Act, s35(8).
- 32 NTNER Act, s35(11).
- 33 NTNER Act, s34.
- 34 NTNER Act, s34(10).
- 35 NTNER Act, s37(1)(a).
- 36 See note to s37 and s60 of the NTNER Act.
- 37 NTNER Act, s37(5).
- 38 NTNER Act s51(2). The non-extinguishment principle is set out in s 238 *Native Title Act 1993* (Cth). In essence, where the non-extinguishment principle is said to apply then if the act affects any native title in relation to the land or waters concerned the native title is nevertheless not extinguished, either wholly or partly by the act.
- 39 The acts under the NTNER Act to which the non-extinguishment principle applies are set out in s 51(1) of the NTNER Act.
- 40 NTNER Act, s35(1).
- 41 That is, preserved under NTNER Act, s34.



- 42 Despite the compulsory five-year lease of Aboriginal land an Aboriginal Land Trust may grant a head lease of a township in accordance with s 19A of the ALRA (under s 37(6) of the NTNER Act). If this occurs the five-year lease is terminated or varied to the extent of area covered by the township lease. This takes place at the time the township lease takes effect.
- 43 These sections were inserted in the ALRA by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (FCSIA(NTNER) Act). They provide for changes to requirements for accessing Aboriginal land and the need for permits.
- 44 NTNER Act s35(1) as amended by Schedule 5, item 7 of the FCSIA(NTNER) Act.
- 45 NTNER Act, s36.
- 46 NTNER Act, s36(2) states that s 42(disallowance) of the Legislative Instruments Act 2003 does not apply.
- 47 NTNER Act, s5 states the object of the Act as 'to improve the well-being of certain communities in the Northern Territory'.
- 48 Improvements are defined as 'all buildings, structures, fixtures, fittings, plant and equipment, signs and other items which are on or under the leased land' in para 1.1.8 of the Additional Terms and Conditions for Leases Determination 2007 dated 17 August 2007 made pursuant to s36 of the NTNER Act.
- 49 NTNER Act, s35(5).
- 50 NTNER Act, ss52(1), (5), 37(6).
- 51 NTNER Act, ss52(1), (5). Section 19 of the ALRA makes provision for a Land Trust to grant an estate or interest in land vested in it to certain parties, including:
- an Aboriginal or an Aboriginal and Torres Strait Islander corporation:
 - (a) for use for residential purposes by the Aboriginal and his or her family; or an employee of the Aboriginal or the corporation, as the case may be;
 - (b) for use in the conduct of a business by the Aboriginal or the corporation, not being a business in which a person who is not an Aboriginal has an interest that entitles him or her to a share in, or to a payment that varies in accordance with, the profits of the business; or
 - (c) for any community purpose of the Aboriginal community or group for whose benefit the Land Trust holds the land.
 - the federal government, the Northern Territory or an Authority for any public purpose (s19(3) of the NTNER Act)
 - a mission for any mission purpose (s19(3) of the NTNER Act)
 - to any person for any purpose (s19(4A) of the NTNER Act).
- 52 NTNER Act, s52(2).
- 53 NTNER Act, s52(3).
- 54 NTNER Act, s37(6). Section 19A of the ALRA provides for a Land Trust to grant a headlease over a township to an approved entity if the Minister consents in writing to the grant of the lease and the Land Council for the area directs, in writing, the Land Trust to grant the lease. The Land Council must not give such a direction unless it is satisfied that:
- (a) the traditional Aboriginal owners of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
 - (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
 - (c) the terms and conditions of the proposed lease (except those relating to matters covered by s19A) are reasonable (s19A(2) of the ALRA).
- 55 NTNER Act, s37(8).
- 56 NTNER Act, s35(2).
- 57 NTNER Act, s62(1).
- 58 NTNER Act, s62.
- 59 NTNER Act, s62(4).
- 60 NTNER Act, s35(6).
- 61 NTNER Act, s35(8).
- 62 NTNER Act, s36.
- 63 NTNER Act, s35(4).
- 64 NTNER Act, s38.
- 65 NTNER Act, s67A.
- 66 NTNER Act, s38(1).
- 67 NTNER Act, s38.
- 68 NTNER Act, s39.
- 69 NTNER Act, s39(4).
- 70 NTNER Act, s35(6)(b).
- 71 See note to s31(3), and ss35(6)(b), 39(3) of the NTNER Act.
- 72 NTNER Act, s40.
- 73 NTNER Act, s42(1).



- 74 NTNER Act, s42(2).
 75 NTNER Act, s42(2).
 76 NTNER Act, ss43, 45.
 77 The affected lands are the land referred to in Part 4 of Schedule 1 to the NTNER Act (the 33 town camps), and any land in the Northern Territory the subject of a lease granted under the SPLA or the CLA prescribed by the regulations (ss43, 45 of the NTNER Act).
 78 *Special Purposes Leases Act* (SPLA), ss23, 24 and *Crown Lands Act* (CLA), s38.
 79 With regard to improvements on land subject to a lease under the SPLA that has been forfeited the federal government is only liable to pay as compensation the value, in the opinion of the federal minister, to the federal government of the buildings on the land (see s44(1) NTNER Act, s26 of the SPLA).
 80 With regard to town camps under SPLA leases: s44(1)(iii) NTNER Act, and s28 SPLA. With regard to town camps under CLA leases: s46(1)(a)(ii) NTNER Act, and s76 CLA.
 81 NTNER Act, ss44(1)(b), 46(1)(b), SPLA s29, CLA s80.
 82 NTNER Act, ss44, 46, CLA s82, SPLA s32.
 83 NTNER Act, s47.
 84 NTNER Act, s47(1).
 85 NTNER Act, ss47(3), 51(1).
 86 NTNER Act, ss47(3), 51(2).
 87 NTNER Act, ss48, 49.
 88 Under the NTNER Act, s60.
 89 The High Court, by a 4:3 majority, did however say in the *Kakadu Case (Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513* that constitutional just terms protection did apply in the Northern Territory.
 90 The requirement under the s50(2) of the *Northern Territory (Self-Government) Act 1978* (NT(SG)A) that the acquisition of any property in the Territory must be on just terms has been removed with respect to:
 - the operation of Part 4 of the NTNER Act;
 - any act done in relation to:
 - land covered by a compulsory five-year lease;
 - land resumed, or in respect of which a lease has been forfeited, by the Commonwealth under the SPLA or the CLA; and
 - land in which a federal government interest exists
 - any act done by the federal minister under the SPLA or the CLA.
 The requirement under the NT(SG)A normally applies to the acquisition of property in the Northern Territory, which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution applied.
 91 This includes:
 - the grant of a compulsory five-year lease; and
 - the vesting of rights, titles and interests in land subject to a lease under the SPLA or the CLA, including a lease for a town camp, in the federal government (done by specifying the land under s47 of the NTNER Act).
 92 This is done by specifying the land under s47 of the NTNER Act.
 93 Other than land in which a Commonwealth interest exists (s51(1)(c) of the NTNER Act).
 94 NTNER Act s51.
 95 *Native Title Act 1993 (Cth)*, s28.
 96 NTNER Act, s54.
 97 Division 2 of Part 4 makes provision for the resumption by the Commonwealth Minister of land under SPLA or CLA leases (including 33 town camps listed on Schedule 1 of Part 4) and the forfeiture by the Commonwealth Minister of leases granted under the SPLA or the CLA.
 98 NTNER Act, s54.
 99 Schedule 3 (Infrastructure) of the FCSIA(NTNER) Act inserted Part IIB (Statutory rights over buildings or infrastructure) into the ALRA.
 100 See ALRA, s23(3) (which deals with Land Council consultation with traditional Aboriginal owners and Aboriginal communities or groups).
 101 Where the works are partly funded by the Commonwealth or the Northern Territory or one of their authorities (whether or not there is to be funding from other sources) the Commonwealth Minister must determine, in writing, whether the *funding body* is to be considered to be the Commonwealth, the Northern Territory or one of their authorities (ss20V(3), 20ZG(3) of the NTNER Act).
 102 ALRA, s20T.
 103 Or a higher amount if specified in the regulations (ALRA 20T-definition of *works*).
 104 NTNER Act, s20W(3).
 105 ALRA ss20Z, 20ZK.
 106 ALRA ss20V, 20W, 20ZG, 20ZH.



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- 107 ALRA ss20ZG, 20ZW.
108 ALRA ss20X, 20ZI.
109 ALRA ss20Y, 20ZJ.
110 ALRA ss20Y(2), 20ZJ(2).
111 ALRA ss20ZC, 20ZN.
112 ALRA ss20ZC(4), 20ZN(4).
113 ALRA ss20ZC, 20ZN.
114 FCSIA(NTNER) Act schedule 3 item 3 which amends s71 of the ALRA by adding at the end of s71:
(3) A reference in this section to an estate or interest in Aboriginal land includes a reference to the statutory rights a person has under section 20W, 20X, 20ZH or 20ZI or a person may exercise under section 20Y or 20ZJ.
(4) Subsection (3) does not limit section 66.
115 ALRA s71 provides:
(1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.
(2) Subsection (1) does not authorise an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an incorporated association of Aboriginals.