

EXPLANATORY STATEMENT

Select Legislative Instrument No. 272, 2013

Issued by the authority of the Minister for Indigenous Affairs

Aboriginal Land Rights (Northern Territory) Act 1976

Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013

General outline

The *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) provides for the granting of Traditional Aboriginal land in the Northern Territory for the benefit of Aboriginal people. Land is granted under the Act to Aboriginal Land Trusts to hold title to the land for the benefit of Aboriginal people entitled by Aboriginal tradition to the use or occupation of the land. Aboriginal Land Councils are established under the Act to carry out a range of functions and powers in relation to Aboriginal land. Land Trusts may only deal with the land in accordance with directions given to it by the Land Council for the area in which the land is situated.

Section 78 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Background

Subsection 28(3) of the Act provides that a Land Council may delegate certain functions and powers to an Aboriginal and Torres Strait Islander corporation.

Subsection 28A(1) of the Act provides that an Aboriginal and Torres Strait Islander corporation may apply to a Land Council for a delegation of certain Land Council functions or powers. Subsection 28A(2) provides details of the information which must be included in an application. Paragraph 28A(2)(c) provides that an application must contain any other information prescribed by the regulations. The *Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013* (the Regulation) prescribes certain information which must be included in an application under paragraph 28A(2)(c).

Subsection 28A(5) of the Act provides that a Land Council is taken to have refused to make a delegation if it has neither made nor refused to make the delegation within the period worked out in accordance with the regulations (or such longer period as is agreed by the Minister). The Regulation provides that the relevant period for subsection 28A(5) is 3 months from the day the Land Council receives an application for the delegation of functions or powers. Under subsection 28C(1) of the Act, if a Land Council refuses, or is taken to have refused, under section 28A to make a delegation, the applicant corporation may send a copy of the application concerned to the Minister and request the Minister to decide it is appropriate for the Land Council to make the delegation sought by the corporation.

Subsection 28B(4) of the Act provides that an Aboriginal and Torres Strait Islander corporation may apply to a Land Council for a variation of an existing delegation to apply to all of the Land Council's functions or powers that are delegable to the corporation, or to add specified delegable functions or power, or to add specified delegable functions or powers in relation to specified matters. Subsection 28B(6) provides that a Land Council is taken to have refused to vary the delegation if it has neither varied nor refused to vary the delegation within the period worked out in accordance with the regulations (or such longer period as is agreed by the Minister). The Regulation provides that the relevant period for subsection 28B(6) is 3 months from the day the Land Council receives an application to vary a delegation of functions or powers. Under subsection 28C(1) of the Act, if a Land Council refuses, or is taken to have refused, under section 28B to vary the delegation, the applicant corporation may send a copy of the application concerned to the Minister and request the Minister to decide it is appropriate for the Land Council to make the variation of the delegation sought by the corporation.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Commencement

The Regulation commences on the day after it is registered.

Consultation

The Northern Land Council, the Central Land Council, the Tiwi Land Council, the Anindilyakwa Land Council, the Northern Territory Government, the Minerals Council of Australia and the Northern Territory Cattlemen's Association have been consulted in relation to the preparation of the Regulation. The consultation included circulation of an exposure draft of the Regulation. Responses to the Regulation exposure draft were considered in the finalisation of the Regulation.

A number of Aboriginal corporations were also approached regarding consultations on issues relevant to the Regulation. Consultative meetings were held with those Aboriginal corporations that were interested and available.

Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the Regulation is compatible with human rights because it is a special measure, designed to secure to Aboriginal people the full and equal enjoyment of human rights and fundamental freedoms. The Statement appears at the end of this Explanatory Statement.

Regulatory Impact Analysis

The Office of Best Practice Regulation (the OBPR) has been consulted and advises that the changes made by the Regulation do not have a regulatory impact on business or the not-for-profit sector. No further regulatory impact analysis was required. The OBPR consultation reference number is 15362.

Explanation of the provisions

Section 1 (Name of regulation)

This section provides that the name of the Regulation is the *Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013*.

Section 2 (Commencement)

This section provides for the Regulation to commence on the day after it is registered.

Section 3 (Authority)

This section provides that the Regulation is made under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Section 4 (Schedule(s))

This section provides that each instrument that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

Schedule 1 – Amendments

Schedule 1, item 1

This item inserts new regulations 7, 8 and 8A after the existing regulation 6A of the *Aboriginal Land Rights (Northern Territory) Regulations 2007* (the Regulations).

New regulation 7 of the Regulations prescribes, for the purposes of paragraph 28(2)(c) of the Act, certain information which must be included in an application by an Aboriginal and Torres Strait Islander corporation for a delegation of Land Council functions or powers.

New regulation 7 provides that such an application must include the following:

- (a) the names of the corporation's members;
- (b) evidence that the majority of the members of the corporation are either the traditional Aboriginal owners of land in the part of the area of the Land Council set out in the application or Aboriginal people who live in that part;
- (c) information explaining the reason why the corporation seeks the delegation;
- (d) why the corporation selected the part of the area of the Land Council set out in the application;
- (e) a description of any consultation by the corporation with traditional Aboriginal owners of land in the relevant area and any other Aboriginal community or group that may be affected by the delegation;
- (f) a description of any conflict of interest arrangements the corporation has in place;
- (g) the qualifications and experience of the corporation's officers and employees that are relevant to the delegation;

- (h) how the corporation proposes to make decisions in relation to the delegated functions or powers;
- (i) an estimation of the resources required to perform or exercise the delegated functions or powers; and
- (j) a breakdown of the estimation of resources, into the resources the corporation has at its disposal, the resources the corporation proposes to obtain from the Land Council and the resources the corporation proposes to obtain from another source and the name of that source.

In regulation 7 'employee' and 'officer' have the same meaning as in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

A note to new regulation 7 provides that examples of resources are money, employees, premises and equipment.

New regulation 8 of the Regulations provides that the relevant period for subsection 28A(5) of the Act is 3 months from the day the Land Council receives an application for the delegation of functions or powers.

New regulation 8A of the Regulations provides that the relevant period for subsection 28B(6) of the Act is 3 months from the day the Land Council receives an application to vary a delegation of functions or powers.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013

The *Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013* (the Regulation) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Regulation amends the *Aboriginal Land Rights (Northern Territory) Regulations 2007* (the Regulations).

Overview of the Regulation

Subsection 28A(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) provides that an Aboriginal and Torres Strait Islander corporation may apply to a Land Council for a delegation of certain Land Council functions or powers. This provision was inserted by the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* with the objective of enabling Northern Territory Aboriginal people to have more control over development decisions by allowing for the devolution of decision-making to local Aboriginal communities. To date, there have been no instances of a Land Council making a delegation to a corporation under section 28A.

The Regulation will create a more certain pathway for Aboriginal and Torres Strait Islander corporations to seek a delegation of Land Council functions or powers under section 28A of the Act, which will support greater local-level decision-making and support the 2006 amendments to the Act.

Australian Government officials discussed the drafting of the Regulation with representatives of the Northern Territory Land Councils, Northern Territory Government officials, the Minerals Council of Australia and the Northern Territory Cattlemen's Association. Feedback received was considered before finalisation of the Regulation. A number of Aboriginal corporations were also approached regarding consultations on issues relevant to the Regulation. Consultative meetings were held with those Aboriginal corporations that were interested and available.

New regulation 7 of the Regulations (pursuant to paragraph 28A(2)(c) of the Act)

Paragraph 28A(2)(c) provides that an application for the delegation of Land Council functions or powers must contain any other information prescribed by the regulations. The Regulation provides that an application must include the following information:

- (a) the names of the corporation's members;
- (b) evidence that the majority of the members of the corporation are either the traditional Aboriginal owners of land in the part of the area of the Land Council set out in the application or Aboriginal people who live in that part;
- (c) why the corporation seeks the delegation;
- (d) why the corporation selected the part of the area of the Land Council set out in the application;

- (e) a description of any consultation by the corporation with traditional Aboriginal owners of land in the relevant area and any other Aboriginal community or group that may be affected by the delegation;
- (f) a description of any conflict of interest arrangements the corporation has in place;
- (g) the qualifications and experience of the corporation's officers and employees that are relevant to the delegation;
- (h) how the corporation proposes to make decisions in relation to the delegated functions or powers;
- (i) an estimation of the resources required to perform or exercise the delegated functions or powers; and
- (j) a breakdown of the estimation of resources, into the resources the corporation has at its disposal, the resources the corporation proposes to obtain from the Land Council and the resources the corporation proposes to obtain from another source and the name of that source.

In prescribing additional information that must be included in an application, the Regulation will assist decision-makers (Land Councils under subsection 28(3) or the Minister under subsection 28C(2)) to determine in an informed and timely manner whether the proposed delegation is likely to be of benefit to relevant Aboriginal people, whether the corporation that applies for a delegation of Land Council functions or powers has the support of relevant Aboriginal people and whether the corporation will be able to satisfactorily perform the functions and exercise the powers sought in the application.

New regulations 8 and 8A of the Regulations (pursuant to subsections 28A(5) and 28B(6) of the Act)

Subsection 28A(5) of the Act provides that a Land Council is taken to have refused to make a delegation if it has neither made nor refused to make the delegation within the period worked out in accordance with the regulations (or such longer period as is agreed by the Minister). The Regulation provides that the relevant period for subsection 28A(5) is 3 months from the day the Land Council receives an application for the delegation of functions or powers. This is an appropriate default time period which will allow for proper consideration of applications by the Land Council following consultation with relevant stakeholders. Where more time is required by a Land Council to consider more complex applications, the Minister is able to extend the period of time under subsection 28A(5) of the Act.

Subsection 28B(4) of the Act provides that an Aboriginal and Torres Strait Islander corporation may apply to a Land Council for a variation of an existing delegation to apply to all of the Land Council's functions or powers that are delegable to the corporation, or to add specified delegable functions or power, or to add specified delegable functions or powers in relation to specified matters. Subsection 28B(6) provides that a Land Council is taken to have refused to vary the delegation if it has neither varied nor refused to vary the delegation within the period worked out in accordance with the regulations (or such longer period as is agreed by the Minister). The Regulation provides that the relevant period for subsection 28B(6) is 3 months from the day the Land Council receives an application to vary a delegation of functions or powers. This is an appropriate default time period which will allow for proper consideration of applications by the Land Council following consultation with relevant stakeholders. Where more time is required by a Land Council to consider more

complex applications, the Minister is able to extend the period of time under subsection 28B(6) of the Act.

Human rights implications

Careful consideration was given to the relevant international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* in the development of the Regulation, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The long title of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) is ‘An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes’. The Act is discriminatory in nature as it confers rights and privileges upon Aboriginal Australians, which are discriminatory as against non-Aboriginal Australians. That discrimination is the essence of the Act; it is the foundation on which it is structured. However, the beneficial nature of this discrimination enables the Act, the Regulations and the Regulation to be each classified as a ‘special measure’ within the meaning of paragraph 4 of article 1 of the CERD (and subsection 8(1) of the *Racial Discrimination Act 1975*).

The CERD provides that special measures are deemed not to be discriminatory. Special measures are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms’.¹ The limitation on the rights of non-Aboriginal Australians is reasonable, necessary and proportionate to the policy desire to promote the equal enjoyment of the engaged rights by Aboriginal Australians.

The Regulation is designed to promote effective self-determination and decision-making by relevant Aboriginal people over matters that materially affect them (such as development, leasing and land use). The Regulation engages and advances the following human rights:

- the right to equality and non-discrimination (recognised in article 2 of the CERD and article 26 of the ICCPR);
- the right to self-determination (recognised in article 1 of the ICCPR and article 1 of the ICESCR);
- the right to freedom of opinion and expression (recognised in article 19(2) of the ICCPR); and
- the right to enjoy and benefit from culture (recognised in article 27 of the ICCPR).

Conclusion

The Regulation is compatible with human rights.

Senator the Hon Nigel Scullion
Minister for Indigenous Affairs

¹ Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (August 2009), at paragraph [11].