

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister and
Minister for Infrastructure, Transport and Regional Development

Seat of Government (Administration) Act 1910

Australian Capital Territory National Land (Unleased) Ordinance 2022

The *Australian Capital Territory National Land (Unleased) Ordinance 2022* (the Ordinance) deals with unleased National Land that is open to the public, such as parks and roads, and other unleased National Land in the Australian Capital Territory (ACT). Amongst other matters, the Ordinance provides for the grant of permits to use public unleased National Land for various activities including commercial events, provides for the declaration and closure of public roads and provides various measures to protect National Land. Most of the provisions are updated versions of laws that applied to National Land under the *National Land Ordinance 1989* (NLO).

Authority

The Ordinance is made under paragraph 12(1)(d) of the *Seat of Government (Administration) Act 1910*. That provision empowers the Governor-General to make ordinances for the peace, order and good government of the ACT with respect to **National Land**, as defined by the *Australian Capital Territory (Planning and Land Management) Act 1998*.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power in an Act to make a legislative instrument includes the power to repeal or amend the instrument, subject to any conditions that apply to the initial power. The Ordinance repeals and replaces the NLO.

Purpose and operation

Prior to ACT self-government in 1989, a range of Ordinances, regulations and applied NSW laws governed the management by the Commonwealth of land in the ACT. As part of the transition to ACT self-government, most land within the ACT became Territory Land, and most of the land management laws became ACT enactments, able to be amended or repealed by the Legislative Assembly of the ACT.

The NLO gave effect to the provisions of 13 pre-self-government laws in relation to National Land over which the Commonwealth retained responsibility. The *Australian Capital Territory (Planning and Land Management Act) 1988* defines **National Land** to mean land in the ACT declared by the Minister, by notice in the Commonwealth Gazette, to be National Land (section 27(1)). Such land must be used, or intended to be used, by or on behalf of the Commonwealth (section 27(2)). Specified land whose management is vested in a person or

body by an Act is also National Land (section 27(3)). The ACT Government manages the remaining land (*Territory Land*, defined in section 28), which comprises most of the ACT. The initial declarations of National Land were notified on 2 March 1989 and there has been a series of amendments since then.

Under the *Legislative Instruments Act 2003*, all legislative instruments, such as Ordinances, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Sunsetting ensures that legislative instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

The NLO is due to be repealed on 1 April 2022 pursuant to paragraph 51(1)(c) of the *Legislation Act 2003* and the *Legislation (Deferral of Sunsetting – ACT Self-Government Instruments) Certificate 2019*.

The laws applied by the NLO fall into three categories: unleased land (including public places and roads), leased land, and lake areas (Lake Burley Griffin). This Ordinance deals with matters previously covered by the applied provisions of the following 5 laws that were given effect by the NLO:

- *Dedication by User Limitation Act 1902* (NSW) in its application in the Territory
- *Protection of Lands Ordinance 1937* (Protection of Lands Ordinance)
- *Public Roads Act 1902* (NSW) in its application in the Territory (PRA)
- *Roads and Public Places Ordinance 1937* (RPP Ordinance)
- *Trespass on Commonwealth Lands Ordinance 1932* (Trespass Ordinance).

The other laws that were given effect by the NLO are covered by the *Australian Capital Territory National Land (Leased) Ordinance 2022* and the *Australian Capital Territory National Land (Lakes) Ordinance 2022*.

As was the case in 1989 when the NLO was made, consistency in the management of National Land and Territory Land, as far as that is appropriate, has been a key policy aim in developing the Ordinance. The provisions reflect more modern drafting principles and are more consistent with updated ACT legislation applying to Territory Land, but their substance is in large part unchanged.

Consultation

With the Attorney-General’s approval, the Department of Infrastructure, Transport, Regional Development and Communications (the Department) conducted a thematic review in 2018-2019 of the NLO and seven other sunsetting instruments relating to the administration of the ACT. As part of the review, the Department sought comments from a wide range of agencies, including the National Capital Authority (NCA), the Australian Federal Police, the Departments of Finance, Defence, Foreign Affairs and Trade, Prime Minister and Cabinet, and Veterans’ Affairs, the former Department of Environment and Energy, and the ACT Government.

The Department also convened a working group, comprising representatives from the NCA, the Department of Finance and the ACT Government, to consider the provisions of the NLO and the applied pre-self-government laws in detail.

Public consultation was undertaken via the release of exposure drafts of the Ordinance inviting submissions between 23 October and 7 November 2021. Four submissions were received regarding leased and unleased Ordinances and comments related to style and clarity and did not require any content changes to the Ordinance.

The Department has by way of letter to the Office of Best Practice Regulation certified that the NLO is operating effectively and efficiently, and that a Regulation Impact Statement is not required for the NLO to be remade.

Other matters

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth).

The Ordinance commences on 1 April 2022.

A detailed explanation of the provisions of the Ordinance is set out in Attachment A.

The Ordinance is compatible with human rights. A Statement of Compatibility with Human Rights is at Attachment B.

Details of the proposed *Australian Capital Territory National Land (Unleased) Ordinance 2022*

Part 1—Preliminary

Section 1 – Name

Section 1 provides that the name of the Ordinance is the *Australian Capital Territory National Land (Unleased) Ordinance 2022* (the Ordinance).

Section 2 – Commencement

This section provides for the Ordinance to commence on 1 April 2022.

Section 3 – Authority

Section 3 states that the Ordinance is made under the *Seat of Government (Administration) Act 1910*.

Section 4 – Simplified outline of this Ordinance

Section 4 gives a simplified outline of the Ordinance.

Section 5 – Definitions

Section 5 defines terms used in the Ordinance. Definitions of particular note are as follows:

licence means a licence granted, or continued in force, under this Ordinance. Section 80 provides that this Ordinance applies to licences of National Land in force immediately before the commencement of this Ordinance.

Minister is defined so as to allow for the division of responsibilities between the Minister responsible for administering Part II of the *Australian Capital Territory (Planning and Land Management) Act 1988* (being the Minister responsible for the NCA) and the Minister administering section 27 of the Planning and Land Management Act where the land is required for Commonwealth purposes other than for the special purposes of Canberra as the National Capital (being the Minister for Finance).

National Capital Plan means the plan prepared by the NCA under Part III of the *Australian Capital Territory (Planning and Land Management) Act 1988*.

National Land has the same meaning as in the *Australian Capital Territory (Planning and Land Management) Act 1988*.

NCA means the National Capital Authority. The National Capital Authority is established under the Planning and Land Management Act.

Planning and Land Management Act means the *Australian Capital Territory (Planning and Land Management) Act 1988*.

public National Land means unleased National Land that the public is entitled to use, or is open to, or used by, the public.

Section 6 – Application and administration of Ordinance

Subsection 6(1) provides that the Ordinance applies to National Land.

Subsection 6(2) provides that Divisions 1, 2 and 3 of Part 4 contain the only provisions of this ordinance that applies to National Land that is a lake area. Divisions 1 and 2 of Part 4 deal with permits for regulated activities on public National Land. Division 3 of part 4 deals with licences of unleased National Land.

Lake areas are otherwise regulated under the *Australian Capital Territory National Land (Lakes) Ordinance 2022* (Lakes Ordinance). It is not intended that this ordinance regulate activities that are otherwise permitted under the Lakes Ordinance (for example swimming in a designated swimming area) unless that nature and scale of the activity is such that it is properly characterised as an event in which case a permit under this ordinance is required.

Subsections 6(3) and 6(4) deal with the division of responsibility for the management of National Land. Subsection 6(3) provides that, with the approval of the Minister, the NCA is to manage those areas of unleased National Land which are designated in writing by the Minister as land required for the special purposes of Canberra as the National Capital.

Subsection 6(4) provides that all other areas of National Land are to be managed by the Minister administering section 27 of the Planning and Land Management Act in so far as that section relates to the declaration of such areas as National Land.

The section also provides that the management of unleased National Land does not include the management or regulation of water taking as that responsibility sits with the ACT Government. With regards road transport laws on National Land nothing in this section limits the performance of the Minister administering the *National Land (Road Transport) Ordinance 2014*.

Section 7 – Interaction with Territory Acts

Subsection 7(1) provides that unless the contrary intention appears, nothing in the Ordinance has effect in relation to Territory Land, or makes unlawful conduct that is lawful under a Territory Act.

This Ordinance could apply in relation to Territory Land in some circumstances such as where a lessee of Territory Land is given a plant pruning direction in relation to a tree overhanging public National Land.

Subsection 7(2) defines ***Territory Act*** as an Act passed by the Legislative Assembly for the Australian Capital Territory, or a law that is an enactment within the meaning of paragraphs 7(2)(a) and (b). This definition is unchanged from the NLO.

Section 8 – Administrative arrangements with Territory

Section 8 provides that the Minister may enter into arrangements for the Commonwealth with the Territory in relation to administering the Ordinance. Such arrangements may provide for the Territory, its authorities, officers or employees to exercise powers or perform functions or duties on behalf of the Commonwealth.

Part 2 – Public roads

Division 1 – What is a public road?

Section 9 – Meaning of public road

Section 9 defines a *public road* to mean any street, road, lane or thoroughfare that is on National Land and is open to, or used by, the public. A road does not stop being a public road only because it is temporarily closed under Division 3. However, the Minister may make a rule declaring that an area is not a public road and permanently close a road or part of a road.

Division 2 – Creation and alteration of public roads

Section 10 – Unleased National Land may be declared as public road

Section 10 provides for the declaration of public roads on any unleased National Land. The Minister may, by notifiable instrument, declare an area of unleased National Land to be a public road. On the making of a declaration, the area is dedicated as a public road and is open to, and may be used by, the public accordingly.

The Ordinance also allows the Minister to amend or repeal a notifiable instrument made under this section. The use of a notifiable instrument in this section is appropriate as the decision does not alter the law but rather is administrative in nature. Notifiable instruments are used validly in Part 2 of this Ordinance where the decision involved is purely administrative in nature.

A notifiable instrument is an instrument that is likely to be of long-term public interest for which public accessibility and centralised management is desirable. A notifiable instrument made under this Ordinance is available from www.legislation.gov.au.

Section 11 – Fixing or changing level of public road

Section 11 provides the Minister may prepare a proposal to fix or change the level of a public road. To do so the Minister must give notice of a least 20 business days on the NCA's website. The notice must specify the name and location of the public road, where plans of the proposal may be inspected and invite written submissions within the specified time (at least 20 business days).

The Minister must consider any submissions before deciding to fix or change the level of the public road. If the Minister decides to proceed with the proposal they may, by notifiable instrument, fix or change the level of the public road. A copy of the instrument must be published on the NCA's website.

A lessee has the right under subsection 11(9) to have access to their land restored if the fixing or changing of the level results in a loss of access across the boundary between the road and the adjoining land.

Section 12 – Identification of public road boundaries

Section 12 allows the Minister to cause a survey to be carried out to identify the boundaries of a public road if those boundaries have not previously been properly identified or if the survey marks cannot be located or ascertained. After completing the survey, the Minister must publish a notice of the proposed boundaries on the NCA's website and give a copy to each lessee of land that is adjacent to the public road. The notice must include a survey plan

of the proposed boundaries of the public road, specify where a copy of the plan may be inspected and invite submissions within the specified time (at least 20 business days).

After considering submissions, the Minister may by notifiable instrument approve the plan.

Section 13 – Retrospective amendment of notifiable instruments under this Part

Section 13 provides that if a notifiable instrument is amended by another notifiable instrument made under this Part, the amending instrument is taken to have commenced immediately after the commencement of the original instrument, unless the amending instrument provides otherwise.

Section 14 – No liability in relation to alignment of public road

Section 14 provides that neither the Commonwealth nor the Territory is liable for any loss or damage suffered by a person because of any alignment or alteration of alignment of a public road. There is an equivalent provision in ACT legislation relating to Territory Land.

Division 3 – Temporary measures relating to public roads

Section 15 – Temporary closing of public roads

Section 15 provides that the Minister may temporarily close a public road to vehicles and other traffic. Unless the circumstances are urgent, the Minister must give at least 5 business days notice of the proposed closure on the NCA's website and display a notice in a conspicuous place at the road.

Section 16 – Approval to use temporarily closed public road

Section 16 provides that a person may apply to use a public road temporarily closed under section 15. The Minister must consider the application and may give an approval only if reasonably satisfied that the use would not be likely to cause unacceptable risk to people, property or the road. The Minister may impose any condition they reasonably believe necessary to manage traffic or protect people, property or the public road.

Section 17 – Use of temporarily closed public road without approval

Section 17 provides that a person commits an offence of strict liability if they use a temporarily closed public road without approval. The offence is punishable by 10 penalty units. It is appropriate to have strict liability applying to a regulatory offence that is essentially a traffic offence and has a low penalty. Penalty units under the Ordinance are in line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Power*.

Section 18 – Minister may make temporary public road

Section 18 provides where a public road has been temporarily closed under section 15 and the Minister considers it necessary they may make a temporary road for public use while the road is closed. The Minister must give written notice to any occupier or lessee of the land or adjacent land, at least 24 hours in advance (except in urgent circumstances).

Subsection 18(5) provides the Commonwealth is liable for any damage caused in making the temporary road, other than incidental minor damage.

Division 4 – Permanent closure of public roads

Section 19 – Notice of intention to permanently close public road

Subsection 19 provides that the Minister may, by notifiable instrument, give notice of a proposal to close a public road, completely or partly.

The Minister must, within 5 business days of registration of the notice on the Federal Register of Legislation, give a copy of the notice to each lessee or occupier of land with frontage to the road whose name and address is known, publish a copy of the notice on the NCA's website and display a notice in a conspicuous place at the road. The notice must specify objections to the permanent closure must be made within a specified period, being at least 20 business days after the notice is registered.

Section 20 – Permanent closure of public road

Section 20 provides that after considering any objections, the Minister may, by notifiable instrument, declare that the public road is permanently closed, either completely or partly. The road or relevant part of the road then is no longer open to the public or to any person for use as a road. The Minister must publish a copy of the instrument on the NCA's website.

Division 5 – No rights-of-way by user

Section 21 – No right-of-way by user against Commonwealth etc.

Section 21 provides that no right of way can be created only by continuous use against the Commonwealth or a person who holds National Land for a public purpose.

Part 3 – Protection and management of unleased National Land

This part contains provisions to protect unleased National Land, whether public or not. These provisions are based on the applied provisions of the RPP Ordinance and the Protection of Lands Ordinance, updated to promote consistency with ACT laws applying to unleased Territory Land.

Division 1 – Direction to carry out drainage works

Section 22 – Direction to construct surface water drain

Section 22 applies if surface water from land overflows onto public National Land and causes damage.

The Minister may, by written notice (a *drainage direction*) to a lessee of the land from which water has overflowed, direct the lessee to repair the damage and/or construct specified drains. A drainage direction that requires the repair of damage to public National Land must specify the land to which it relates and the damage to be repaired.

Subsection 22(4) provides a drainage direction that requires the construction of specified drains must specify the location and size of the drains to be constructed and require the lessee to maintain the drains in good condition.

Any work must be carried out in the period specified in the direction, being not less than 20 business days after the day the direction is given.

Section 23 – Contravention of a drainage direction

Section 23 provides that it is a strict liability offence for a person who is subject to a drainage direction to fail to comply. The penalty is 5 penalty units.

Section 24 – Repair of damage and construction of drains by Minister

Section 24 applies to a lessee who has been subject to a drainage direction and contravenes that direction.

Subsection 24(2) provides if the damage to public National Land has not been repaired as directed, the Minister may repair the damage and recover the reasonable costs of doing so from the lessee.

Subsection 24(3) provides if a drain has not been constructed or maintained as directed, the Minister may authorise persons to enter onto the lessee's land to construct or maintain the drains and recover the reasonable costs of doing so from the lessee.

Division 2 – Damage to public National Land

Section 25 – Direction to repair damage to public National Land

Section 25 applies if a person causes damages to public National Land or Commonwealth property on public National Land and the damage is not authorised under a permit, licence or works approval.

Subsection 25(2) provides the Minister may, by written notice (a *repair damage direction*) direct the person to repair the damage. The direction must specify certain matters, including the Public National Land and any Commonwealth property to which it relates, the damage to be repaired and the specified period within which the work must be carried out (not less than 20 business days unless urgent repairs are required). In those circumstances, the shorter period specified in the direction applies.

Examples provided of Commonwealth property on public National Land include a street light, a bridge, a footpath, a monument and a park bench, table or barbeque.

Section 26 – Contravention of repair damage direction

Section 26 provides that it is a strict liability offence for the person who is subject to a repair damage direction to fail to comply. The penalty is 20 penalty units.

Section 27 – Interference with or damage to Commonwealth property

Section 27 provides that a person who interferes with or causes unauthorised damage to public National Land or Commonwealth property on public National Land commits an offence. The penalty is 20 penalty units.

Section 28 – Commonwealth may repair damage

Section 28 provides that if a person fails to comply with a repair damage direction, the Minister may repair the damage and recover the reasonable costs of doing so from the person.

Division 3 – Signs on or adjacent to public National Land

Section 29 – Placing of signs on or adjacent to public National Land

Section 29 provides that a person commits an offence of strict liability if they place a sign on or adjacent to public National Land, or on Commonwealth property on or adjacent to public National Land, and the placement is not authorised by a permit, works approval or licence, or permitted under the Signs General Code (under the National Capital Plan). The penalty is 10 penalty units.

Division 4 – Trees and other plants affecting public National Land

Section 30 – Direction to prune tree etc. overhanging public National Land

Section 30 applies where the Minister reasonably believes that a tree or other plant is overhanging public National Land and is likely to obstruct or inconvenience anyone on the land.

Subsection 30(2) provides the Minister may, by written notice (a *plant pruning direction*) to an occupier of the land on which the tree or other plant is growing, direct the person to prune it. The plant pruning direction must specify certain matters, including how the tree or plant must be pruned, and the time by which pruning must be done. The period allowed must be not less than 5 business days, unless the situation is urgent (for example, if there is a public risk).

Section 31 – Contravention of plant pruning direction

Section 31 provides that it is a strict liability offence, punishable by 5 penalty units, to fail to comply with a pruning direction.

Section 32 – Pruning of tree etc. by Commonwealth

Section 32 allows the Minister to take action where the occupier fails to comply with a pruning direction. The Minister may authorise persons to enter the land on which the tree or plant is growing to prune the tree or plant, and recover the reasonable costs of doing so from the occupier of the land.

Section 33 – Direction to remove tree etc. endangering public safety on public National Land

Section 33 applies where the Minister reasonably believes a tree or plant endangers the safety of anyone on public National Land.

The Minister may, by written notice (a *plant removal direction*) to an occupier of the land on which the tree or plant is growing, direct the person to remove it. The plant removal direction must specify certain matters, including the tree or plant causing the danger and the period in which the removal must be carried out. The period must be not less than 3 business days unless the case is urgent.

Section 34 – Contravention of plant removal direction

Section 34 provides that it is a strict liability offence, punishable by 30 penalty units, to fail to comply with a plant removal direction. The higher penalty reflects the increased safety risk where there is failure to comply.

Section 35 – Removal of tree etc. by Commonwealth

Section 35 allows the Minister to take action where the occupier fails to comply with a plant removal direction, or where the Minister reasonably believes that the tree or plant, or part of it, must be removed immediately. The Minister may authorise persons to enter the land on which the tree or plant is growing to remove the tree or plant, or part of it, and recover the reasonable costs of doing so from the occupier.

Division 5 – Removal and disposal of objects on unleased National Land

Section 36 – Object removal directions—unleased National Land

Section 36 provides that the Minister or a police officer may by written notice (an ***object removal direction***) direct a person who places an object on unleased National Land to remove it. An object removal direction must specify certain matters, including the object to be removed and the period within which the object must be removed. That period must be not less than 5 business days after the direction is given, unless the case is urgent.

Without limiting the ways in which a direction may be given, subsection 36(3) provides it may be given by securely attaching it to the object in a conspicuous place. A person who contravenes an object removal direction commits an offence of strict liability, punishable by 10 penalty units.

Section 37 – Object removal directions—exceptions

Subsection 37(1) provides that section 36 does not apply in certain circumstances. It does not apply in relation to an object (that is not a vehicle) where the placement is authorised under a permit, licence or works approval, or permitted under the Signs General Code (under the National Capital Plan).

Subsection 37(2) provides where the object is a vehicle, the section does not apply to a vehicle parked on a public road or road related area in accordance with ACT law as applied by the *National Land (Road Transport) Ordinance 2014*.

A ***road related area*** is defined in subsection 37(3) to include various areas that are not public roads, such as car parks, nature strips, footpaths and road shoulders. This definition is similar to that applying to Territory Land under ACT law.

Subsection 37(4) provides that an area is not a road related area if so declared by the rules.

Section 38 – Removal of objects by the Commonwealth

Section 38 provides that if a person contravenes an object removal direction, or the Minister reasonably believes that an object on unleased National Land is abandoned or is causing an obstruction or hazard on or near the land, the Minister may cause the object to be removed and placed in storage.

If the object is removed, subsection 38(3) provides the Minister must give the person a further notice (a **retrieval notice**) which sets out certain matters, including notice that if the object is not collected and any amount specified in the retrieval notice not paid within 20 business days the object will become the property of the Commonwealth and the Minister may sell or dispose of it as the Minister sees fit.

Neither the Commonwealth nor any person acting under the Ordinance is liable for any reasonable loss or damage caused by the removal or storage of an object.

Section 39 – Disposal of objects by the Commonwealth

Section 39 provides that if an object that is the subject of a retrieval notice is not collected and any amount specified is not paid within 20 business days after the notice is given, the object will become the property of the Commonwealth and the Minister may sell or dispose of it as the Minister sees fit. If the Commonwealth sells the object, the proceeds of the sale must be applied as set out in subsection 39(4), with the Commonwealth first repaid the amount specified in the notice and sale expenses, then any balance paid to the person to whom the notice was given.

Section 40 – Retention area

Section 40 provides that the Rules may declare an area of unleased National Land to be a retention area for the storage of objects removed from unleased National Land. Objects placed in storage may, but need not be, placed in a retention area.

Division 6 – Temporary closing of public National Land to traffic

Section 41 – Minister may temporarily close public National Land to traffic

Section 41 provides that the Minister may temporarily close an area of public National Land, other than a public road, that is open to and used by vehicular and other traffic, such as a path, cycleway or carpark. Subsection 41(3) provides that before temporarily closing such an area, the Minister must at least 5 business days before the closure publish a notice about the proposal on the NCA's website. This requirement does not apply in urgent circumstances.

Division 7 – Emergency management

Division 7 deals with emergency management where a permit has been granted. The provisions are similar to powers given to police in relation to Territory Land under section 102 of the *Public Unleased Lands Act 2013* (ACT), with the aim of having a consistent approach throughout the ACT.

Section 42 – Emergency closure of permitted place

Section 42 provides that a senior police officer may, by written notice (an **emergency closure order**) given to a permit holder, close a permitted place if the officer reasonably believes that a contravention of the Ordinance has happened, or is likely to happen, and the closure of the place is necessary to prevent or reduce undue risk to people or property.

An emergency closure order must specify a range of matters, including the name of the senior police officer making the order, the name of the permit holder (if reasonably able to be ascertained), the grounds on which the order is made, when the order comes into force and

when it ends. The permit is suspended for the period of the order and the senior police officer must, as soon as reasonably practicable, give a copy of the order to the NCA Chief Executive. This will ensure that the NCA can take appropriate further action if, for example, the permit holder has not complied with the permit conditions.

In this section a *senior police officer* has the same meaning as in subsection 23WA(1) of the *Crimes Act 1914*, that is, a constable of the rank of sergeant or higher.

Section 43 – Contravention of emergency closure order

Section 43 provides that a permit holder who fails to comply with an emergency closure order commits an offence of strict liability punishable by 30 penalty units.

Part 4 – Use of public National Land

Division 1 – General

Section 44 – Use of public National Land—regulated activities

Section 44 provides that the use of public National Land for types of activities listed in Column 1 of the table is a *regulated activity*. Examples of each *regulated activity* are provided in Column 2. Subsection 44(2) allows the rules may provide that the use of public National Land for a specified activity is not a *regulated activity* for the purposes of this ordinance.

A note to this section confirms that a permit to use public National Land for a *regulated activity* may authorise closure of the land to the public, or a section of the public, for a period.

Section 45 – Use of public National Land for regulated activity without permit etc.

Section 45 provides that a person commits an offence of strict liability if the person uses public National Land for a regulated activity, and the use is not authorised by a permit, a licence or a works approval. The penalty is 20 penalty units.

Section 46 – Contravention of condition of permit to use public National Land

Section 46 provides that a person commits an offence of strict liability if the person holds a permit that authorises the use of public National Land for a regulated activity, subject to a condition, and the person contravenes the condition. The penalty is 20 penalty units.

Division 2 – Permits to use public National Land for regulated activities

Section 47 – Application for permit to use public National Land for regulated activities

Section 47 provides that a person may apply in writing for a permit to use public National Land. The application must specify the land, the proposed use and time period, and be accompanied by any prescribed fee. An application must also include a plan that shows the location, boundaries and dimensions of the area for which the permit is sought, and where on the land the use will take place.

If the proposed use involves placing an object on the land the application must also include details as to the nature, size and intended use of the object and any risks and how they will be minimised. If the placement of an object requires construction work on the land the

application should also contain further information including the nature of the work involved, any risks of damage or injury and how they will be minimised and any other matter relevant to the suitability of placing the object on the land.

If the proposed use involves holding an event on the land the application must include details as to the nature of the event, the number of people expected to attend, any risks that the event may cause and how they are to be minimised, and any other matter relevant to the suitability of holding the event on the land.

Section 48 – Request for further information

Section 48 provides that the Minister may request an applicant give further information within a reasonable specified period. The Minister may refuse to consider, or further consider, the application until that information is provided. The application is taken to be withdrawn if the applicant does not provide the information within the specified period or any longer period agreed in writing by the Minister.

Section 49 – Withdrawal of application

Section 49 provides that an applicant for a permit may in writing withdraw the application at any time before the Minister makes a decision.

Section 50 – Decision on application for permit

Section 50 applies if the Minister receives an application under section 47 for a permit to use public National Land for a regulated activity for a particular period. In considering an application, the Minister must have regard to all information provided in the application (and any other matter the Minister considers relevant). The Minister must make a decision within 20 business days of receiving the application or, if further information has been requested, within 20 business days of the applicant providing the further information.

The Minister may grant the permit subject to any conditions the Minister reasonably believes are necessary to minimise or manage risks of damage or injury, protect the land or other property, or ensure the applicant is able to satisfy any obligations under the permit and the Ordinance.

If the Minister does not make a decision within the relevant period, Subsection 50(5) provides that the Minister is taken to have refused to grant the permit at the end of that period (that is, there will be a deemed refusal). Subsection 50(6) provides that the Minister must give the applicant written notice of the decision (except in the case of a deemed refusal taken to be made under Subsection 50(5)).

Section 51 – Form and contents of permit

Section 51 provides for the form and content of a permit. A permit must be in writing, and must specify the name of the permit holder, the location of the public National Land permitted to be used, the permitted use of the land, the duration and conditions of the permit, and any other matter the Minister considers relevant. The maximum term of a permit is 5 years.

Section 52 – Application for renewal of permit

Section 52 provides that a permit holder may apply in writing for renewal of their permit for up to 5 years. An application must be accompanied by the prescribed fee and received by the Minister at least 60 days (but not more than 90 days) before the permit expires, or within such a period as the Minister allows. In considering an application, the Minister must have regard to the applicant's use of the public National Land (and any other matter the Minister considers relevant). The Minister must make a decision within 20 business days after receiving the application or, if further information has been requested, within 20 business days of the applicant providing the further information.

The Minister may renew the permit subject to any conditions the Minister reasonably believes are appropriate.

If the Minister does not make a decision within the relevant period, Subsection 52(8) provides that the Minister is taken to have refused to renew the permit at the end of that period (that is, there will be a deemed refusal). Subsection 52(9) provides that the Minister must give the applicant written notice of the decision (except in the case of a deemed refusal taken to be made under Subsection 52(8)).

Section 53 – Replacement of lost, stolen or destroyed permit

Section 53 provides that the Minister may issue a replacement permit if satisfied that the original permit has been lost, stolen or destroyed.

Section 54 – Failure of permit holder to notify change of name or address

Section 54 provides that a permit holder commits an offence of strict liability if the person's name or address changes and the person does not, within 20 business days, notify the Minister in writing. The penalty is one penalty unit.

Section 55 – Rights of permit holder

Subsection 55(1) provides a permit may authorise the permit holder to close the permitted place to the public, or a section of the public, so as to conduct the regulated activity authorised by the permit.

Subsection 55(2) provides that if a permit authorises the placement of an object, the permit holder may restrict the public use of the object as long as the restriction does not contravene the permit or a law in force in the Territory. This is to allow the permit holder to exercise appropriate control over the object.

Subsection 55(3) provides that nothing in subsection 55(1) or (2) prevents a public place for the purposes of a law in force in the Territory from continuing to be a public place for the purposes of that law.

Section 56 – Surrender of permit

Section 56 provides that a permit holder may surrender the permit by giving written notice to the Minister.

Section 57 – Cancellation of permit

Subsection 57(1) provides that the Minister may cancel a permit if the permit was granted in error, or the application for the grant or renewal of the permit contained information that was false or misleading in a material particular, or the permit holder has contravened a condition of the permit.

Before cancelling a permit, the Minister must give the permit holder written notice of the intention to do so, setting out the reasons and inviting the permit holder to make a written submission within the period specified in the notice (at least 24 hours in urgent circumstances or otherwise at least 10 business days). The Minister must have regard to any valid submission made by the permit holder.

If the Minister decides to cancel the permit, they must give the permit holder written notice of the cancellation and provide reasons. Alternatively, if the Minister decides not to cancel the permit, they must also notify the permit holder in writing. Any cancellation takes effect on the day the permit holder is given notice of the decision, or a later day if specified in the notice.

Division 3 – Licences of unleased National Land

Section 58 – Licences of unleased National Land

Section 58 provides that the Minister may grant a licence to occupy or use unleased National Land, including for any building or structure on the land. Any such licence must be consistent with the National Capital Plan. Subsection 58(3) provides that a licence must be in writing and specify the name of the licensee, the location of the land, the time period, the permitted use, the terms and conditions of the licence and any other matters prescribed by the rules.

Section 59 – Use of land for licensed purpose

Section 59 provides that where a licence has been granted National Land must not be used for a purpose other than that authorised by the licence.

Section 60 – Minister’s power to terminate licence

Subsection 60(1) provides that the Minister may terminate the licence by written notice to the licensee (the *termination notice*) if the licensee contravenes the licence and the Minister has complied with the required steps prescribed in section 61.

Subsection 60(2) provides that if the licence does not provide for a period for rectifying the contravention the termination notice takes effect after 10 business days (starting after the day the notice is given). If the licence does provide a period for rectifying the contravention the termination notice takes effect the later of 10 business days (starting after the day the notice is given), or the period specified in the licence for rectifying the contravention.

Section 61 – Steps before giving termination notice

Section 61 provides that the Minister must not terminate a licence under subsection 60(1) unless the notice required by subsection 61(2) has been given and the Minister has considered the reasons (if any) submitted by the licensee as to why they consider the licence should not be terminated. The written notice required under subsection 61(2) must state the Minister is

considering terminating the licence, specify the contraventions and invite the licensee to submit written reasons, within 15 business days, as to why they consider the licence should not be terminated.

Section 62 – Recovery of lands by Commonwealth

Subsection 62(1) defines a person as an **unlawful occupier** if the person was a licensee of National Land and the licence has expired, been surrendered or terminated and the person remains in possession or occupation of the land.

Subsection 62(2) provides the Minister may, by written notice (a **demand notice**) given to an unlawful occupier, demand that the unlawful occupier give possession of the land to the Commonwealth within the reasonable period (not less than 10 business days after the day the demand notice is given) specified in the notice.

Subsection 62(3) provides the Minister may, if a demand notice is not complied with, apply to the Magistrates Court for an order that possession of the land be given to the Commonwealth. The court may issue a warrant authorising a police officer, within the period ending 20 business days after the day the warrant is issued, to enter the land to recover possession of the land for the Commonwealth.

Section 63 – Evidence of ending of licence

Section 63 provides that the Minister may certify in writing that a licence mentioned in the certificate has expired, been surrendered or terminated. The certificate is prima facie evidence of the matters stated in it.

Part 5 – Other activities on unleased National Land

Part 5 of the Ordinance concerns certain offences on unleased National Land (including public National Land). These provisions reflect and update the offences in the applied provisions of the *Trespass on Commonwealth Lands Ordinance 1932*.

Apart from these offences, two general trespass offences in the *Crimes Act 1914* apply to National Land. Section 89 of the *Crimes Act 1914* provides an offence of trespassing on prohibited Commonwealth land, punishable by 10 penalty units (**prohibited Commonwealth land** is defined as land belonging to, or in the occupation of the Commonwealth or a public authority under the Commonwealth, being land upon which is posted a notice to the effect that trespassing is prohibited). Section 90 of the *Crimes Act 1914* provides an offence, punishable by 1 penalty unit, where a person permits livestock to trespass or stray on any land belonging to or in the occupation of the Commonwealth.

Section 64 – Damage to fences, signs or markers

Subsection 64(1) provides that a person commits an offence, punishable by 10 penalty units, if they damage or destroy a fence on unleased National Land without authorisation under a permit, works approval or licence.

Subsection 64(2) provides that strict liability applies to the physical element of circumstance, that the fence, sign or marker is on unleased National Land (that is, the prosecution is not required to prove that the person knew whether the land was unleased National Land).

Section 65 – Leaving gates open

Section 65 contains two offences relating to leaving gates open. Subsection 65(1) provides that a person commits an offence, punishable by 1 penalty unit, if they leave open a gate on unleased National Land on which the Minister has caused to be placed a notice requiring the gate to be closed when not in use. Subsection 65(3) provides that a person commits an offence, punishable by 2 penalty units, if they leave open a gate on any land and, as a result, any livestock stray, wander or are at large on unleased National Land.

For both offences strict liability applies to the physical element of circumstance, that the gate is on unleased National Land. For the first offence, strict liability also applies to another physical element of circumstance, that the gate is one on which the Minister has caused to be placed a notice requiring the gate to be closed when not in use.

Section 66 – Damaging trees etc.

Section 66 provides that a person commits an offence, punishable by 20 penalty units, if they damage or destroy any tree, plant, garden, plantation or afforestation area on unleased National Land without authorisation under a permit, works approval or licence.

Strict liability applies to the physical element of circumstance, that the area where the damage or destruction occurred is on unleased National Land.

Section 67 – Earth etc. not to be taken without permit

Section 67 provides that a person commits an offence, punishable by 20 penalty units, if the person takes from unleased National Land any earth, sand, gravel, stones or clay without authorisation under a permit, works approval or licence.

Strict liability applies to the physical element of circumstance, that the area is unleased National Land.

Section 68 – No unauthorised camping on unleased National Land

Subsection 68(1) provides that a person commits an offence of strict liability if the person camps on unleased National Land without authorisation by a permit. The penalty is 2 penalty units.

A note to the provision explains camping can only be authorised under a permit authorising a separate regulated activity (detailed in section 44).

Subsection 68(2) provides that a person who contravenes subsection 68(1) commits a separate offence each day the contravention continues.

Part 6 – Miscellaneous

Part 6 contains miscellaneous provisions including those dealing with police powers, and delegations. Although drafted, provisions providing for administrative review of the Minister's decisions have not been included at this time. This is due to doubt regarding the ability of the Administrative Appeals Tribunal (AAT) to review decisions made under ACT ordinances. The *Administrative Appeals Tribunal Amendment Act 2005* deleted the definition of **ACT enactment** in subsection 3(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). As it stands the definition of **enactment** in subsection 3(1) of the AAT Act specifically

excludes an Ordinance from the Australian Capital Territory. A subsequent amendment to this ordinance, containing the administrative review provisions, can be made once the AAT Act is amended to confirm the AAT can review decisions made under ACT ordinances.

Section 69 – Police powers

Subsection 69(1) provides that a police officer may prevent a person from committing, or attempting to commit, an offence under Part 5 (other than leaving a gate open under section 65) and remove any person, animal or vehicle on unleased National Land in contravention of Part 5. These provisions update existing powers in the *Trespass on Commonwealth Lands Ordinance 1932*.

Subsection 69(2) provides that a police officer may require any person they reasonably suspect of having committed, committing or being about to commit an offence under Part 5 to provide their name and address. It is an offence, punishable by 5 penalty units, to fail to comply. Police have a similar power to require a person's name and address in relation to the trespass offence in s 89(2) *Crimes Act 1914* (where a person is found on prohibited Commonwealth land).

Section 70 – Delegation

Section 70 provides for delegation of the powers of the Minister under the Ordinance. Subsection 70(1) concerns the Minister administering Part II of the Planning and Land Management Act (being the Minister responsible for the NCA) who may delegate functions, powers or duties under this Ordinance (other than the power to make rules under section 71) to the NCA chief executive, or an SES employee, or acting SES employee, or an APS Executive Level 1 or 2 employee or an equivalent position in the NCA.

Subsection 70(2) concerns the Minister administering section 27 of the Planning and Land Management Act in so far as it relates to the declaration of land as National Land where the land is required for Commonwealth purposes other than for the special purposes of Canberra as the National Capital (being the Minister for Finance). The Minister may delegate functions, powers or duties under this Ordinance to the Secretary of the Department or an SES employee, or acting SES employee, or an APS employee at the Executive Level 2 position, in that Department.

APS employee, SES employee and acting SES employee are defined in section 2B of the *Acts Interpretation Act 1901*.

Section 71 – Rule-making power

Subsection 71(1) allows the Minister to make rules prescribing matters required or permitted by the Ordinance, or as necessary or convenient. Subsection 71(2) provides that the rules may include the setting of fees.

Subsection 71(3) sets limits confirming the rules may not create an offence or civil penalty, provide powers of arrest or detention, or of entry, search or seizure, or impose a tax, or directly amend the text of this Ordinance.

Section 72 – NCA chief executive may prescribe fees

Subsection 72(1) allows the NCA chief executive to prescribe fees by legislative instrument, in relation to those areas of National Land managed by the NCA under subsection 6(3). However, subsection 72(2) provides that subsection 72(1) does not apply where a fee for a matter is prescribed by the rules.

This provision allows for further flexibility while ensuring accountability as any fee set would be way of a disallowable instrument.

Section 73 – NCA chief executive may approve forms

Subsection 73(1) allows the NCA chief executive to approve, by legislative instrument, a form for the purpose of the Ordinance. Subsection 73(2) provides if there is an approved form, it must be used. However, there is no requirement for forms to be formally approved.

Part 7 – Application, saving and transitional provisions

Part 7 of the Ordinance contains application, savings and transitional provisions. It is not necessary to specify certain matters in the Ordinance, due to the saving effect of section 38 of the *Interpretation Ordinance 1967* which applies to the NLO. These matters include the commission of any criminal offence under the NLO applied provisions, the obligation to repair damage or pay the Commonwealth's costs to remediate damage under the RPP Ordinance, and the protection of the Commonwealth from liability under section 15 of the *Protection of Lands Ordinance 1937*. Those provisions continue to have effect in relation to things done before the commencement of this Ordinance.

Section 74 – Transitional—definitions

Section 74 defines terms used in Part 7. Definitions of particular note are as follows:

old law means the *National Land Ordinance 1989*, as in force immediately before the transition time. The *National Land Ordinance 1989* was repealed by the *Australian Capital Territory National Land (Leased) Ordinance 2022*.

transition time means the time at which this Ordinance commences.

Section 75 – Transitional—applications made before transition time

Section 75 provides that the applied NLO provisions continue to apply to an application for the exercise of a power, or the performance of a function or duty, made under the applied NLO provisions before the transition time and still undetermined immediately before the transition time. This provision extends to any review by a court or tribunal of a decision in relation to such an application.

Section 76 – Transitional—actions under applied provisions

Section 76 provides that an action taken under the applied NLO provisions before the transition time is taken to have been done for the purposes of the corresponding provision of this Ordinance and this Ordinance applies accordingly.

Section 77 – Transitional—old permits

Section 77 provides that an old permit issued under the applied NLO provisions continues to be in force after the transition time (subject to any conditions applying to it immediately before the transition time) and has effect as if granted under this Ordinance.

Section 78 – Transitional—instruments other than old permits

Section 78 provides that an instrument made, granted or issued before the transition time, under the applied NLO provisions, has effect as if made under this Ordinance and this Ordinance applies in relation to that instrument.

Section 79 – Transitional—delegations

Section 79 provides that delegations made under the applied NLO provisions and in force immediately before the commencement of this Ordinance continue to be in force after the transition time as if it had been made for the purposes of a corresponding provision of the Ordinance.

Section 80 – Transitional—continuing licences of unleased National Land

Section 80 provides that a licence made, granted or issued under the applied NLO provisions that is in force immediately before the transition time continues to be in force after the transition time (subject to any conditions applying to it immediately before the transition time) and has effect as if granted under this Ordinance.

Attachment B

Statement of Compatibility with Human Rights

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

Australian Capital Territory National Land (Unleased) Ordinance 2022

The *Australian Capital Territory National Land (Unleased) Ordinance 2022* (the Ordinance) 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*.

Overview of the Legislative Instrument

The Ordinance is concerned with unleased National Land in the ACT, both land that is open to the public, such as parks and roads, and other unleased land. Amongst other matters, the Ordinance provides for the grant of permits to use public unleased National Land for commercial events and certain other activities, provides for the declaration, fixing of levels and closure of public roads and contains various measures to protect National Land.

The Ordinance is made under section 12(1)(d) of the *Seat of Government (Administration) Act 1910*. That provision empowers the Governor-General to make ordinances for the peace, order and good government of the ACT with respect to **National Land**, as defined by the *Australian Capital Territory (Planning and Land Management) Act 1998*. The Ordinance repeals the *National Land Ordinance 1989* (NLO), which it replaces.

Prior to ACT self-government in 1989, a range of Commonwealth Ordinances, regulations and applied NSW laws governed the management of land in the ACT. As part of the transition to ACT self-government, most land within the ACT became Territory Land, and most of the existing Commonwealth land management laws became ACT enactments, able to be amended or repealed by the Legislative Assembly of the ACT. The NLO gave effect to the provisions of 13 pre-self-government laws in relation to National Land over which the Commonwealth retained responsibility.

Human rights implication

The Ordinance engages the following rights:

- The right to the presumption of innocence under Article 14(2) *International Covenant on Civil and Political Rights* (ICCPR)
- The right to privacy under Article 17 ICCPR.

Two other rights, the right to freedom of assembly under Article 12(1) ICCPR and the right to freedom of movement under Article 21 ICCPR, were considered in the development of the Ordinance. These rights are not engaged, for the reasons explained below.

The right to the presumption of innocence - Article 14(2) ICCPR

The presumption of innocence imposes on the prosecution the burden of proving a charge beyond reasonable doubt. This fundamental duty is unchanged in the Ordinance. However, some offences are strict liability offences which do not require the prosecution to prove a mental element, such as intention or recklessness, on the part of the offender. These offences

are regulatory in nature, and strict liability is necessary to ensure the integrity of the regulatory regime by allowing for effective enforcement. Many of the strict liability offences in the Ordinance are committed when a permit holder who uses public unleased National Land, or an occupant of land that adjoins public unleased National Land, does not take remedial action as required by a written direction given to them. Such action may be required to prevent or repair damage to the land or prevent danger to a member of the public using the land. Another offence, the use of a temporarily closed public road without approval, is similar to traffic offences that are strict liability offences. Other strict liability offences in the Ordinance deal with erecting a sign without authority and failing to comply with an emergency closure order issued by police. Each of the strict liability offences is punishable only by a financial penalty of 30 penalty units or less, as is reasonable and proportionate.

The Ordinance also has a small number of trespass-related offences which, while they are not strict liability offences, contain an element of strict liability, namely that the land concerned is public National Land. This approach is in accordance with the principles of the Criminal Code. It ensures a workable enforcement regime, as it would often be difficult for the prosecution to prove that a person knew or was reckless about whether the land on which the criminal conduct occurred was National Land rather than Territory Land. The prosecution must prove all other elements of the offence (both physical and mental elements) to the requisite standard of beyond reasonable doubt.

The limitations on the right to the presumption of innocence arising from strict liability elements of certain offences are necessary to allow for effective enforcement of regulatory provisions. The limitations are reasonable and proportionate.

The right to privacy - Article 17 ICCPR

An applicant for a permit to use or occupy public unleased National Land must provide certain personal information, including their name and contact details. A permit holder must also advise changes to their contact details.

As government agencies, the National Capital Authority (NCA) and the Department of Finance are subject to obligations under the *Privacy Act 1988* that limit the collection, use and disclosure of personal information. Accordingly, any limitation on an applicant's right to privacy is reasonable, necessary and proportionate.

The right to freedom of assembly - Article 21 ICCPR and the right to freedom of movement - Article 12(1) ICCPR

Political protests are not uncommon on public National Land, particularly in the Parliamentary zone. The requirement to obtain a permit to use public unleased National Land only applies to gatherings for the purpose of political protest where a structure is to be erected, similar to the requirements for several other types of activities on public National Land. It is the structure that triggers the requirement to obtain a permit, rather than the purpose of the gathering. Hence the right to freedom of assembly and the right to freedom of movement are not engaged by the permit regime in the Ordinance.

Conclusion

The Ordinance is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister
and Minister for Infrastructure, Transport and Regional Development
The Hon Nola Marino MP**