

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Aboriginal Land Act (NT)

**GRANT OF COMMERCIAL FISHING LICENCES AND PERMITS RE TIDAL
WATERS OVERLYING ABORIGINAL LAND**

This instrument is dated the 2nd day of March in the year 2007.

WHEREAS:

- A. On 2 March 2007 the Full Court of the Federal Court (French, Finn and Sundberg JJ) upheld an appeal in proceedings no NTD33 of 2005 prosecuted by the Arnhem Land Aboriginal Land Trust, the Northern Land Council (“the Land Council”), Gawirrin Gumana and others (on behalf of various Yolngu groups) against the Northern Territory of Australia (“the Territory”), Director of Fisheries (NT) (“the Director”) and the Northern Territory Seafood Council Inc (“the Seafood Council”), with the Commonwealth of Australia intervening.
- B. The effect of the Court's orders were that:
- (i) The *Fisheries Act* (NT) has no application in relation to tidal waters (in the intertidal zone or in tidal rivers) overlying Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (“the *Land Rights Act*”).
 - (ii) The Director under the *Fisheries Act* has no power to grant a licence which would authorise or permit the holder to enter and take fish or aquatic life from such tidal waters.
 - (iii) The *Fisheries Act* is invalid and of no effect insofar as it purports to operate with respect to such tidal waters.
- C. On 2 March 2007 the parties to the proceedings advised the Court of their consent to orders with a view to preserving the status quo pending the outcome of any special leave application and any subsequent High Court appeal.
- D. On 16 March 2007 the Court declined to make the proposed orders on the basis that it had no power to stay or suspend its orders.
- E. On 30 March 2007 the Territory and the Director filed an application seeking special leave to appeal to the High Court against the Court's decision (proceedings no D4 of 2007).
- F. The parties are desirous of implementing an alternative legal mechanism whereby the status quo will be preserved pending the outcome of any special leave application and any subsequent High Court appeal.
- G. The alternative legal mechanism involves each Aboriginal Land Trust in the Land Council's region which owns Aboriginal land with overlying tidal waters granting a licence authorising commercial fishing in those tidal waters pursuant to s 19(4A) of the

Land Rights Act to every person possessing a licence or a permit under the *Fisheries Act* on 2 March 2007 on terms and conditions corresponding to the terms and conditions which on that date purported to apply in relation to those tidal waters, with each such person also being issued a permit under the *Aboriginal Land Act* by the Land Council to enter and remain on those tidal waters.

- H. These licences will not apply regarding Aboriginal land with overlying tidal waters which is subject to a lease (eg for a private wharf, mining, pipeline or industrial facility), consistent with the fact that commercial fishing under the *Fisheries Act* legally cannot and does not occur in tidal waters within the boundary of such leases. The Land Council is presently in receipt of development proposals involving leases of such Aboriginal land for such facilities, and in due course will consider those proposals.

GRANT OF LICENCES UNDER LAND RIGHTS ACT

1. DEFINITIONS AND INTERPRETATION

1.1 In this instrument:

“Aboriginal land” has the same meaning as in the *Land Rights Act*.

“Closure Line”, in relation to the delineation of the mouth of a river overlying Aboriginal land, has the same meaning as specified as of 2 March 2007 by or under the *Fisheries Act*, notwithstanding that that Act and subordinate legislation made under it were held by the Federal Court to be invalid or ineffective regarding tidal waters overlying Aboriginal land.

“Commercial Licensee” means every person who possessed a Fisheries Licence on 2 March 2007, whether or not that Fisheries Licence was invalid or ineffective (or partially so) in relation to Tidal Aboriginal Land.

“Fisheries Licence” means a licence or a permit granted under the *Fisheries Act* which was held by a Commercial Licensee on 2 March 2007.

“Fisheries Officer” has the same meaning as in the *Fisheries Act* (NT).

“*Land Rights Act*” means the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

“Land Council” means the Northern Land Council.

“Land Trust” means each Aboriginal Land Trust established pursuant to s 4(1) of the *Land Rights Act* and in the Land Council’s region which are listed in schedule 1.

“Tidal Aboriginal Land” means the Aboriginal land vested in each Land Trust which, from time to time or permanently, has tidal waters overlying that Aboriginal land (ie the intertidal zone or tidal rivers).

1.2 In this instrument, unless the context otherwise requires:

- (i) the singular includes the plural and vice versa;
 - (ii) a reference to one gender includes a reference to all genders;
 - (iii) a reference to a piece of legislation means that legislation as amended from time to time;
 - (iv) “including”, “in particular” and similar words and expressions are not words of limitation;
 - (v) a reference to “person” includes a firm, company, corporation, authority or body corporate whether incorporated or not;
 - (vi) a reference to any Act or law shall be read as a reference to any Act or law amending, or in substitution for, that Act or law;
 - (vii) the headings in this instrument are not part of this instrument and shall not be used in its interpretation or construction.
- 1.3 All of the functions and powers of the Land Trust under or in connection with this instrument shall be fulfilled solely by the Land Council on behalf of the Land Trust.
- 1.4 A member of staff of the Land Council or a person duly authorised by the Land Council may fulfil each of the functions of the Land Council under or in connection with this instrument.

2. GRANT AND TERM

- 2.1 Each Land Trust hereby grants to each Commercial Licensee a non-exclusive licence to enter, and take fish or aquatic resources from, Tidal Aboriginal Land pursuant to s 19(4A) of the *Land Rights Act* on the terms and conditions specified in this instrument.
- 2.2 A person exercising the rights of a temporary transferee (as defined in s 4 of the *Fisheries Act*) of a Fisheries Licence on 2 March 2007 is authorised to exercise the rights granted by the licence for the duration of the temporary transfer agreement.
- 2.3 The term of each licence shall commence on 2 March 2007.
- 2.4 Subject to clauses 2.5 and 2.6 the term of each licence shall expire on either:
- (i) two months after the date on which the High Court refuses special leave to appeal against the Federal Court's decision; or
 - (ii) two months after the date on which the High Court finally determines any appeal for which special leave is granted.
- 2.5 In the event that the Territory and the Director discontinue their application for special leave to appeal to the High Court, or consequent notice of appeal, the term of each licence shall expire:

- (i) two months after the date of discontinuance for the application or notice of appeal; or
- (ii) if the Land Council has, instead, determined a later date, the term of each licence shall expire on that later date.

2.6 In the event that the High Court has not determined the special leave application, or consequent notice of appeal, by 2 March 2009:

- (i) the term of each licence shall expire on that date; or
- (ii) if the Land Council has, instead, determined a later date, the term of each licence shall expire on that later date.

3. AREA OF OPERATION

3.1 Subject to clauses 3.2 and 3.3 each licence applies only in relation to Tidal Aboriginal Land.

3.2 A licence does not apply to any Tidal Aboriginal Land which is presently, or from time to time, the subject of a lease granted pursuant to s 19 of the *Land Rights Act*.

3.3 A licence does not apply to any Tidal Aboriginal Land which is landwards of a Closure Line which, as of 2 March 2007, was applicable to the Fisheries Licence held by the Commercial Licensee upon whom a licence is granted by this instrument.

3.4 Clause 3.3 has effect notwithstanding that the *Fisheries Act* and subordinate legislation made under it were held by the Federal Court to be invalid or ineffective regarding tidal waters overlying Aboriginal land.

3.5 The licence does not authorise:

- (i) entry to Aboriginal land other than that referred to in clause 3.1 (whether for the purpose of obtaining access to Tidal Aboriginal Land or for any other purpose);
- (ii) the taking of fish or aquatic life from non-tidal waters overlying such Aboriginal land;
- (iii) entry to a sacred site located on Tidal Aboriginal Land.

4. TERMS, CONDITIONS AND RESERVATIONS

4.1 Each licence granted to each Commercial Licensee pursuant to clause 2 is subject to the same terms, conditions and reservations (including as specified in s 53 of the *Fisheries Act*) as are applicable from time to time to the Fisheries Licence granted to the Commercial Licensee under the *Fisheries Act* and held on 2 March 2007 (including terms and conditions imposed by the licence or imposed by the *Fisheries Act* or other statute), whether or not that licence, Act, or subordinate legislation made under that Act are invalid or ineffective (or partially so) in relation to Tidal Aboriginal Land.

- 4.2 Without derogating from the breadth of clause 4.1 it is a condition of each licence that a Fisheries Officer may exercise the same enforcement powers as are specified in ss 30, 31, 32 and 33 of the *Fisheries Act* in relation to each licensee when on any Aboriginal land in the Land Council's region.
- 4.3 It is a condition of each licence that the respective licensee shall comply with the provisions of the *Northern Territory Aboriginal Sacred Sites Act* (NT) and the *Land Rights Act*.
- 4.4 Each Land Trust reserves the right during the term of each licence granted pursuant to this instrument to grant a lease of any Tidal Aboriginal Land to any person pursuant to s 19 of the *Land Rights Act*, in which case (if operative regarding such land) each licence shall cease to apply to that Tidal Aboriginal Land.
- 4.5 The Land Council, on behalf of each Land Trust, reserves the right during the term of each licence granted pursuant to this instrument to impose additional and specific terms and conditions for the sole purpose of ensuring that the terms and conditions accurately apply the terms and conditions as are applicable from time to time to each Fisheries Licence.
- 4.6 The Land Council shall exercise its power to impose additional and specific terms and conditions pursuant to clause 4.3 only in consultation with the Director and the Seafood Council.
- 4.5 Each licence authorises the licensee and its employees, contractors, agents and bona fide guests (where those guests are engaged in activities pursuant to the licence) to undertake the activities permitted by the licence.

5. PERMIT

- 5.1 The grant of each licence pursuant to this instrument constitutes the issue by the Land Council to the licensee, and its employees, contractors, agents and bona fide guests (where those guests are engaged in activities pursuant to the licence) of a permit pursuant to s 5(1) of the *Aboriginal Land Act* (NT) to enter or remain on Aboriginal land subject to the licence, for the purpose of engaging in activities pursuant to the licence.
- 5.2 This permit does not authorise:
- (i) entry to Aboriginal land other than that referred to in clause 3.1 (whether for the purpose of obtaining access to Tidal Aboriginal Land or for any other purpose);
 - (ii) entry to a sacred site located on Tidal Aboriginal Land;
 - (iii) entry to any seas adjacent to Aboriginal land which have been determined by the Administrator to be closed seas pursuant to s 12(1) of the *Aboriginal Land Act* (noting that a Commercial Licensee may otherwise possess rights to enter and fish in closed seas pursuant to s 18 of the *Aboriginal Land Act*).

6. TERMINATION

- 6.1 A licence may be terminated by the Land Council, on behalf of the Land Trust:
- (i) for any breach of the terms and conditions specified in clause 4;
 - (ii) for any act by the licensee on or in relation to Tidal Aboriginal Land where such act would be a breach of the Fisheries Licence granted to the Commercial Licensee under the *Fisheries Act* and held on 2 March 2007, or a breach of that Act or subordinate legislation made under that Act, if done in relation to non-Aboriginal land.
- 6.2 The Land Council shall exercise its power to terminate a licence:
- (i) in consultation with the Director and the Seafood Council, with a view to the extent feasible to exercising the power in the same fashion as would the Director if the *Fisheries Act* was applicable to tidal waters overlying Aboriginal land;
 - (ii) reasonably, including by providing reasonable notice of any proposed termination to the licensee which to the extent feasible will be the same notice as would be provided by the Director if the *Fisheries Act* was applicable to tidal waters overlying Aboriginal land.
- 6.3 Each licence is terminated, without further action by the Land Council or the Land Trust, if the Fisheries Licence granted to a Commercial Licensee expires and is not renewed within the terms of the *Fisheries Act*.

7. ASSIGNMENT

- 7.1 The Land Council consents to the transfer, mortgage, charge or assignment of a licence by a licensee to another person, provided that the Fisheries Licence is also the subject of transfer, mortgage, charge or assignment to that other person.
- 7.2 The licensee shall notify the Land Council and the Director within 28 days of any transfer, mortgage, charge or assignment of a licence pursuant to clause 7.1.

8. NATIVE TITLE

- 8.1 This instrument and grant of licences hereunder is not intended to extinguish or otherwise affect any customary or native title that may exist in relation to any land or waters affected by the licences.

9. LIABILITY AND RISK

- 9.1 Each licensee (and its employees, contractors, agents and bona fide guests) enters Tidal Aboriginal Land at its own risk on condition that it bear all risk, and the Land Council and each Land Trust shall not be under any liability of any kind to the licensee (or its employees, contractors, agents and bona fide guests) whether in negligence or otherwise in respect of death, injury, loss or damage of any kind whatsoever and howsoever arising and which occurs during or as a result of entry to or licensing in relation to Tidal Aboriginal Land.

10. SEVERANCE

- 10.1 If any provision of this instrument or any part thereof is held or declared to be a violation of public policy, illegal, unenforceable, void, voidable or invalid at law or in equity, or to be in breach of any Act, rule, regulation, ordinance or by-law, then such provision or part or parts thereof will be severable and of no force or effect and will be deemed to be omitted from the instrument without affecting the validity of the remaining provisions of the instrument or any part or parts thereof, which other provisions or part or parts thereof will remain in full force and effect.