NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON THE TRESPASS ACT

The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.

(Lord Coke, *Semayne's Case* (1605), 3 Rep. 186)

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A. Terms of Reference

1. This report has been prepared in response to a reference from the Attorney-General to the Northern Territory Law Reform Committee (NTLRC) dated 3 June 2009. The terms of reference provided relevantly:

> Should the *Trespass Act* and proceedings that can be commenced under the Act be amended? With particular regard to issues that may arise concerning trespass on housing located on Aboriginal land.

2. It has subsequently been clarified that the second limb of the reference is directed to public housing located on Aboriginal land.

3. The NTLRC referred the reference to a sub-committee for consideration in April 2010. The sub-committee included members from the Solicitor for the Northern Territory, Northern Territory Police, the North Australian Aboriginal Justice Agency and the Northern Land Council. The sub-committee met a number of times over the course of 2010 and 2011.

4. During the course of those meetings the sub-committee agreed on a number of matters, but a number of issues remained unresolved. Those matters required further discussion with representatives of the Northern Land Council. In 2012, the Chairman of the NTLRC convened a meeting with representatives of the Northern Land Council for the purpose of discussing the application of the *Trespass Act* to Aboriginal land.

B. Introduction

5. It is necessary to give some consideration at the outset to the common law concept of trespass to land. At common law, trespass to land "is committed by directly and intentionally … entering or remaining upon or causing some object to come into contact with land in the possession of another, without the consent of the person in possession of the land or other legal justification or excuse".[1]

6. The consent or licence of the person in possession can be withdrawn after entry, but the withdrawal must be advised and a reasonable time to leave allowed.[2] It is the fact of possession that is protected by trespass even absent a formal, legal or equitable interest.[3] The "possession" protected by the tort of trespass includes possession of an interest in land such as an easement or a *profit a prendre*.[4] Remedies for trespass include damages, where loss can be proved, declaration and injunctions. Damage is not a requisite component of the tort of trespass, and the breach is actionable without proof of damage.[5] The *Trespass Act* incorporates the common law notion of trespass, and provides for a range of additional statutory remedies and offences.

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1 Luntz and Hambly, *Torts: Cases and Commentary*, 3rd Ed, Butterworths, 1992. See also *New South Wales v Ibbett* (2006) 229 CLR 638 at [29].

2 *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605.

3 *Concrete Constructions (NSW) Ltd v Builders Labourers Federation* (1988) 83 ALR 385.

4 *Mason v Clark* [1955] AC 778.

5 *Halliday v Nevill* (1984) 155 CLR 1; *Dumont v Miller* (1873) 4 AJR 152 (VSC); *Waters v Maynard* (1924) 24 SR (NSW) 618; *Plenty v Dillon* per Mason CJ, Brennan and Toohey JJ at 645, Gaudron and McHugh

7. This report: (a) details the general operation of the statutory scheme; (b) examines the statutory provisions in other Australian jurisdictions; (c) discusses particular issues concerning the operation of the statutory scheme; (d) examines the relevant operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in relation to ownership and occupation; (e) considers the interaction between Commonwealth and Territory legislation; (f) considers the interaction between the *Aboriginal Land Rights (Northern Territory) Act* and the *Trespass Act*; and (g) outlines current tenure arrangements in relation to public housing on Aboriginal land and examines the interaction with the existing statutory scheme of trespass.

C. Scheme of the *Trespass Act*

8. The *Trespass Act* commenced on 1 July 1987. It repealed and replaced provisions dealing with trespass in the *Crown Lands Act* and the *Summary Offences Act*. It created a mechanism by which a person who trespasses on specified categories of land may commit one of a number of different offences, subject to the satisfaction of certain conditions. In essence, the *Trespass Act* criminalises the tort of trespass in certain circumstances. A copy of the *Trespass Act* is contained at Appendix A.

Offences

9. The *Trespass Act* creates four discrete offences, *viz*:

   (a) s 5 provides that "[a] person who trespasses on *premises* commits an offence";

   (b) s 6 provides that "[a] person who trespasses on *prohibited land* commits an offence";

   (c) s 7(1) provides that "[a] person who trespasses on any *place* and, after being directed to leave that place by an occupier or member of the Police Force acting at the request of the occupier, fails or refuses to do so forthwith or returns within 24 hours to that place, commits an offence";[6] and

   (d) s 8(4) provides that "[a] person who, being a person who has been warned under this section to stay off any *place*, trespasses on that place within one year after the giving of the warning, commits an offence".[7]

   [Emphases added.]

JJ at 654–655; *Al-Kateb v Godwin* (2004) 219 CLR 562 per Hayne J at [241]. Aggravated damages may be awarded where there is a fundamental breach to the enjoyment of exclusive and quiet possession: *New South Wales v Ibbett* (2006) 229 CLR 638 at [31]. Exemplary damages may be awarded where the trespasser has acted in an outrageous and oppressive manner: *New South Wales v Ibbett* at [39].

[6] Section 7(2) provides by way of complement that "[a] direction under subsection (1) may, where the trespass is on Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation, be given by a member of the Police Force whether a request to act has been made by the occupier or not".

[7] Sections 8(1), (2) and (3) provide respectively that where a person is trespassing or has trespassed on any place the occupier may give a warning at the time of the trespass or within a reasonable time afterwards; an occupier with reasonable cause to suspect that a person is likely to trespass on premises may give a warning; and where a person is found guilty of an offence against the *Trespass Act* in respect of any place the court may warn the offender to stay off that place.

10. The term "trespass" is not defined in the *Trespass Act* and must take the same meaning as trespass at common law.

11. The offences have operation in relation to "premises", "prohibited land" (which includes "Crown land") and "place" and, for s 7(1), by reference to the "occupier". Those elements are defined in s 4 of the *Trespass Act* in the following terms:

> ***Crown land*** means all Crown land, including reserved or dedicated land, other than Crown land which has been leased or is occupied under a licence or an agreement.
>
> ***occupier***, in relation to a place, means:
> (a) where the place is Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation – a person in charge of the land; and
> (b) where the place is other than Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation – a person in lawful occupation of the place,
> and includes an employee or other person acting under the authority of a person in charge under paragraph (a) or in lawful occupation under paragraph (b).
>
> ***place*** includes premises and land (including prohibited land and Crown land).
>
> ***premises*** means:
> (a) a building or structure whether permanent or temporary and whether fixed or capable of being moved;
> (b) a dwelling-place;
> (c) any part of a yard, garden or area (whether enclosed or not); or
> (d) a vehicle (including a caravan), vessel, aircraft or hovercraft.
>
> ***prohibited land*** means:
> (a) Crown land;
> (b) land occupied by the Territory or the Commonwealth; or
> (c) land occupied by a statutory corporation,
> upon which is posted a notice in English to the effect that trespassing on the land is prohibited.

12. It may also be noted that s 4(2) of the *Trespass Act* extends the definition of occupier to include the "owner" of a place where there is no occupier.

Purpose of offences

13. Applying those definitions, it may be seen that:

    (a) s 5 creates an offence directed to trespass on buildings, structures, dwelling places, yards and vehicles;

    (b) s 6 creates an offence directed to Crown and other government land on which a "no trespassing" sign has been posted;

    (c) s 7(1) creates an offence which is directed to trespass on all premises and land in certain circumstances. First, the provision will only have application where a direction to leave has been given. The purpose of this qualification would clearly seem directed to public land and commercial premises where in the absence of a direction to leave there would otherwise be an implied licence to enter and remain on the land or premises concerned. Secondly, the offence is directed to what might be described as transgressions in the short term. So much is apparent from

the fact that there will be an offence only where a person fails or refuses to leave a place following a direction to leave, or returns to the place within 24 hours following a direction to leave; and

(d) s 8(4) also creates an offence in relation to trespass on all premises and land, subject to the revocation of any implied licence, but directed to providing a form of long-term relief. So much is apparent from the fact that there will be an offence in circumstances where a person who has been warned to stay off any place trespasses within one year after the giving of the warning.

Defences

14. Section 13 of the *Trespass Act* provides a number of defences of specific application.

15. First, it is a defence to a charge of committing an offence against s 5 if the defendant proves that the trespass was a result of honest and reasonable mistake of fact.[8] As has been seen, s 5 is directed to trespass on buildings, structures, dwelling places, yards and vehicles. This defence requires that the mistake be honest; that the belief forming the basis of the mistake was reasonable to hold in the circumstances; and that the mistake was one relating to fact rather than to law. So, for example, it would be a defence to a charge of bigamy that the accused had believed "bona fide and on reasonable grounds" that he was not married, on the basis that a former marriage was invalid, and therefore a single man entitled to marry.[9] On the other hand, a mistaken belief that bigamy was not a criminal offence would not operate as a defence to a charge of bigamy.

16. In the trespass context, it would be a defence to a charge under s 5 if the accused genuinely and reasonably believed that he or she had entered onto his or her own property rather than, for example, a building or yard belonging to his or her neighbour. On the other hand, a mistaken belief on the part of the accused that he or she was entitled to enter the neighbour's house without permission would not be a valid defence.

17. Secondly, it is a defence to a charge of committing an offence against s 6 which, as has been seen, is directed to Crown and other government land on which a "no trespassing" sign has been posted, if the defendant proves that: (a) he or she did not see and could not reasonably be assumed to have seen the notice; or (b) the trespass was not wilful and was done while hunting or in the pursuit of game.[10] The nature and operation of those defences is self-evident.

18. Thirdly, it is a defence to a charge of committing an offence against s 5 or s 7 (which is concerned with trespass following a direction to leave), if the defendant proves that: (a) it was necessary to remain in or on the place concerned or to return to that place for the defendant's own protection or the protection of some other person; or (b) it was necessary to remain on or return to the place because of some emergency involving the

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8 *Trespass Act*, s 13(1A).

9 *Thomas* (1937) 59 CLR 279.

10 *Trespass Act*, s 13(1).

defendant's property or the property of some other person.[11] Again, the scope and operation of that defence is self-evident.

19. Finally, it is a defence to a charge of committing an offence against s 8 (which is concerned with trespass within one year of a warning), if the defendant proves that: (a) the person who gave the warning is no longer an occupier; or (b) it was necessary to commit the trespass for the defendant's own protection or the protection of some other person, or because of some emergency involving the defendant's property or the property of some other person.[12] Again, the scope and operation of that defence is self-evident.

Ancillary provisions

20. Section 10 of the *Trespass Act* furnishes members of the Police Force with certain powers in relation to trespass. First, a police officer may arrest a person without warrant in circumstances where that person fails or refuses to leave a place after being directed to do so under s 7, or trespasses on a place after being warned to stay off under s 8. Secondly, a police officer may in those same circumstances remove the person, and their property (if any), from the place without arrest but by force if necessary.

21. Section 11 of the *Trespass Act* provides that offences under the Act are regulatory offences; that proceedings for offences under the Act shall only be taken on the complaint of an occupier of the place concerned or a member of the Police Force; that proceedings shall be dealt with summarily; and that a finding of guilt under one provision of the Act is not a bar to proceedings taken against the same defendant in respect of an offence under another provision of the Act in respect of a continuing course of events.

22. Section 14 of the *Trespass Act* provides, so far as it may be relevant to the application of the statutory scheme to Aboriginal land, that nothing in the Act shall derogate from anything that a person is authorised to do by or under any other Act or law in force in the Territory. The term "law in the Territory" must extend to include Commonwealth laws with application to and operation in the Territory.

D. Statutory provisions in other Australian jurisdictions

23. Each of the Commonwealth, the States and the Australian Capital Territory has a statutory provision or provisions criminalising trespass in certain circumstances.[13] The relevant legislation for each jurisdiction is extracted at Appendix B to this report.

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11 *Trespass Act*, s 13(2).

12 *Trespass Act*, s 13(3).

13 *Crimes Act 1914* (Cth), s 89(1); *Public Order (Protection of Persons and Property) Act 1971* (Cth), ss 11 – 12, 20; *Enclosed Lands Protection Act 1943* (ACT), s 4; *Trespass on Territory Land Act 1932* (ACT), s 4; *Inclosed Lands Protection Act 1901* (NSW), s 4; *Trespass Act 1987* (NT), ss 5 – 8, 11; *Summary Offences Act 2005* (Qld), s 11; *Summary Offences Act 1953* (SA), s 17, 17A; *Police Offences Act 1935* (Tas), ss 14A – 14D, 19A; *Summary Offences Act 1966* (Vic), s 9(1)(d) (trespassing in public places); *Criminal Code* (WA), s 70A (found in *Criminal Code Act Compilation Act 1913* (WA), Schedule).

24. The Commonwealth provisions, as might be expected, are confined in their operation to trespass on Commonwealth land and premises, trespass in the dependent Territories (as opposed to the self-governing Territories), and trespass on diplomatic, mission and consular premises. The general model is to prohibit trespass without lawful excuse, without making any provision for different categories of offence, directions or warnings, specific defences or procedural matters.

25. The Australian Capital Territory provisions are limited in their operation to enclosed land (which is essentially land that has been fenced) and land occupied by government. As with the Commonwealth model, the prohibition is directed in general terms to trespass without lawful excuse.

26. The New South Wales provision deals exclusively with enclosed land, and formed the model for and so largely replicates the Australian Capital Territory provisions in relation to enclosed land.

27. The South Australian legislation includes the basic prohibition on trespass without lawful excuse. It also incorporates, in terms similar to s 7(1) of the *Trespass Act*, the offences of failing to comply with an order to leave given by a police officer, and failing to leave premises forthwith upon being asked by an occupier to do so or returning to the premises within 24 hours of that request. The South Australian legislation does not attempt to distinguish between different types of place or premise, contains no equivalent to the offence in s 8(4) of the *Trespass Act*, and does not prescribe procedural matters.

28. The Tasmanian legislation contains the usual prohibition directed to trespass without lawful excuse. It then incorporates two variations unique to Tasmania. First, it provides for a number of circumstances of aggravation, including the possession of a firearm, and the use of an aircraft, vehicle or vessel, during the commission of the trespass. Secondly, it creates specific offences in relation to the entry onto a sports ground, and remaining on a sports ground after a request to leave by a police officer or some other person in authority.

29. The Victorian legislation creates three specific offences. The first extends to circumstances where a person wilfully trespasses in any public place (other than a Scheduled public place) and neglects or refuses to leave that place after being warned to do so by the owner or occupier. The second extends to circumstances where a person wilfully enters any private place or Scheduled public place without express or implied authority given by the owner or occupier, or some other lawful excuse. The third offence covers circumstances where a person neglects or refuses to leave a private place or Scheduled public place after being warned to do so by the owner or occupier, again unless the person has some lawful excuse. The legislation then goes on to provide for averments, examples where express or implied authority will be absent (consistent with common law principles), and exceptions for honest claims of right and unintentional trespass committed in the hunting or pursuit of game ((which has been picked up in the Territory legislation, but only in respect of trespasses on Crown or government land).

30. The Western Australian legislation contains the usual prohibition on trespass without lawful excuse. It adopts a slightly different model in defining "trespass" to mean entry

or presence without the consent or licence of the owner or occupier, or remaining in the place or part of the place after being requested by a person in authority to leave.

Issues for Discussion 1: The general structure of the Territory provisions

(a) Should the criminal trespass provisions in the Territory be simplified to provide only for a general prohibition on trespass without lawful excuse?

(b) Should the criminal trespass provisions in the Territory be amended such that matters of procedure are dealt with in accordance with the criminal law provisions of general application?

31. The scheme found in the *Trespass Act* is not apparently modelled or based on legislation from any other Australian jurisdiction. In fact, the Territory is the only jurisdiction which has an Act directed singularly to the criminalisation of trespass, including in relation to private land.[14] Rather than adopting any other scheme, the *Trespass Act* appears to pick up various aspects of the legislation from other jurisdictions, to extend and introduce provisions in relation to directions and warnings, to introduce an offence based upon compliance with directions of 12 month duration, to provide a specific regime in respect of such things as police powers, defences and and averments, and generally to codify the law as it pertains to criminal trespass.

32. The law in most other jurisdictions is simpler, dealing only with the basic offence of entry upon land without permission. The law in most other jurisdictions, draws no distinction between different types of place and premise. The law in all other jurisdictions largely leaves matters of procedures and powers to be dealt with in accordance with the general criminal law. Those differences notwithstanding, there is nothing in the legislation in force in any other Australian jurisdiction which commends itself to the NTLRC for adoption or replication in the Territory.

E. Cases involving consideration of the *Trespass Act*

33. The Northern Territory courts have had occasion to consider the operation of the *Trespass Act* in a number of matters.

Supreme Court

34. The cases in which the Supreme Court of the Northern Territory has considered the operation of the *Trespass Act*, together with the relevant passages from those cases, are extracted at Appendix C to this report.

35. It may be noted in particular that in *Kenwright v Hales* [2000] NTSC 6 the Court identified a potential inconsistency between the designation of offences under the *Trespass Act* as regulatory offences, and the inclusion of a definition of "unlawfully" in s 4(1) of the *Trespass Act* to mean "without authorisation, justification or excuse". The

[14] The *Trespass on Territory Land Act 1932* (ACT) is directed exclusively to Crown land, and also deals with such matters as grazing stock, damage and permits to occupy.

Court opined that this definition appeared to require the application of Part II of the *Criminal Code* and to import the requirement of *mens rea*. That uncertainty, together with a number of other miscellaneous issues, was addressed by the enactment of the Trespass Amendment Bill 2000. In the Second Reading Speech, the Minister described the purpose of the Bill in the following terms:

> The purpose of this bill is to amend the *Trespass Act* to clarify that all offences under the *Trespass Act* are regulatory offences, to provide for the proof of technical matters by averment and to make further minor amendments.
>
> Last year, the Commissioner for Police wrote to me requesting amendments to the *Trespass Act* in order to eliminate difficulties experienced with prosecutions under the Act. In particular, the Commissioner highlighted that the offences appeared to be a combination of both regulatory offences and simple offences. Criminal offences in the Territory fall into two categories. There are those offences that require a guilty mind, which are referred to as simple offences and crimes, for example rape, robbery and murder. There are also those minor offences where the state considers that a criminal sanction is necessary in order to regulate affairs of citizens in an orderly manner regardless of whether the offender intended to actually commit the offence. These offences are referred to as regulatory offences and include offences such as speeding and selling contaminated food.
>
> Under section 11 of the *Trespass Act*, all offences are expressed to be regulatory offences however some offence provisions also contained the word unlawful, which indicates that aspects of a guilty mind are required. This potential conflict is not in accordance with the policy of the act and should be clarified. In the Supreme Court's decision of *Kenright v Hails* early this year, His Honour, Justice Mildren suggested that the conflict could not be reconciled and that it required the attention of legislature. This amendments confirms that all offences under the *Trespass Act* are regulatory by removing all references to the requirement that any offence be committed unlawfully.
>
> Most of the offences under the Act provide that trespass is only committed once a person has been first warned off the relevant premises or given notice. In those cases, it is appropriate that the offence be regulatory. In the case of an offence under section 5, the trespass is committed even if no notice or warning is evident. This means that a person could be found guilty of an accidental but reasonable trespass. While offences under section 5 remain regulatory, section 13 has been amended to provide for a defence of honest and reasonable mistake, for those offences.
>
> An amendment has also been made to section 12 of the Act to provide for the making of averments. Currently this section provides that a statement on oath by any person or the fact that a person is an occupier of land, or a member or the police force, or the direction or warning to leave the land has been given, is evidence of that fact. This enables proof of these technical matters without requiring the physical attendance of witnesses at trial. This is clearly unnecessary in cases where the matters are not in dispute between the parties.
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> It is proposed to amend section 12 to enable these matters to be proven more simply by an averment by the prosecution in a complaint or information. The proposed amendment only provides an averment is prima facie evidence of the fact averred. It does not affect the defendant's right to dispute the matter alleged in the averment and put the prosecution to proof in relation to that fact if he or she does not agree with it.
>
> The offence under section 5 of the Act currently applies to enclosed premises. The Director of Public Prosecutions has identified difficulties with the current definition of enclosed premises. Enclosed premises is defined to include buildings, dwelling places, enclosed yards and vehicles. This means that if a person trespasses on an unfenced private yard, he or she could not be prosecuted under section 5 because the yard is not enclosed.
>
> Many homes in the rural area and on new estates are now being built without fences or side fences only. In most cases, the defined line of the property and the fact that it is a private residence is clear. The Director of Public Prosecutions has raised concerns that section 5 is useless, where a

> trespasser enters on an unfenced property, unless the trespasser actually enters the home or other building on the land. This means that peeping toms could come up to the front windows and look in, but could not be successfully prosecuted for trespass. These amendments therefore omit the definition of 'enclosed premises' and replace it with a definition of 'premises', which is substantially in the same terms.
>
> It is current policy to amend all penalties under the Northern Territory legislation as each act is amended so as to reflect the new penalty unit regime under the *Penalties Act*. This new regime came into operation in 1999. The penalties under the *Trespass Act* have been changed, in this amendment to be expressed as penalty units, but the monetary amounts of the penalties have not changed.

36. The Trespass Amendment Bill 2000 was designed to rectify any anomalies that had been identified in the operation of the legislation since its enactment. There has been no substantive amendment to the *Trespass Act* since that time.

37. The other cases from the Supreme Court extracted in the Appendix do not disclose any difficulty or uncertainty in the operation of the *Trespass Act* that warrants attention in the context of this reference, or legislative amendment. There are only two issues identified in those cases that call for the some brief discussion.

38. First, in *Cintana v Burgoyne* [2003] NTSC 106 the Court found that s 7 of the *Trespass Act* was not properly invoked on the basis that there was no finding by the learned magistrate that police warned the appellant of the consequences of not leaving the place forthwith, and there was no evidence that any such warning was given. It may be noted in this respect that the requirement for a direction to leave is an essential element of the offence created by s 7 of the *Trespass Act*, and the section is clearly intended to have different operation to the offence of trespass on premises *simpliciter* created by s 5 of the *Trespass Act*. Proving that element in any event proceedings is a forensic exercise that falls properly to the Crown, and in appropriate circumstances it is open to the Crown to aver that a direction has been given by using the evidentiary provision contained in s 12 of the *Trespass Act*.

39. Secondly, and in that same case, there is *obiter dictum* suggesting that in view of s 10 of the *Trespass Act*, which provides police with powers of arrest and removal where a person fails or refuses to leave a place after a direction or warning, the general powers of a constable to prevent a breach of the peace may have no application or operation in those circumstances. In making that observation the Court gave no consideration to the operation of s 14 of the *Trespass Act*, which provides that nothing in the Act shall derogate from anything that a person is authorised to do by or under "any other … law in force in the Territory".

Court of Summary Jurisdiction

40. All charges under the *Trespass Act* are dealt with in the first instance by the Court of Summary Jurisdiction. Two recent decisions in that court raise questions appropriately considered in the context of this reference.

41. In *Leigh Cahill v M* [2010] NTMC 011 the defendant was charged with an offence under s 8(4) of the *Trespass Act*. It was alleged that she had trespassed on the Casuarina Shopping Square within 12 months of having been warned off the place. The magistrate found the offence not proved on the basis that the original warning off

notice was ineffective because at the time it was given the defendant was not trespassing as required by s 8(1).[15] The magistrate also found that the warning off notice did not identify the occupier of the place. The notice provided only that the security guard who served the notice was an employee or person acting under the authority of the occupier.[16] The magistrate dismissed the charge on those grounds.[17]

42. There can be no doubt that s 8 of the *Trespass Act* imposes certain preconditions to the issue of a valid warning. A warning which will be effective to ground a charge under that section may only be given where: (a) a person is trespassing or has trespassed on any place; (b) the occupier has reasonable cause to suspect that a person is likely to trespass on that place; and (c) a person is found guilty of an offence against the Act in respect of the place, in which case only the Court may issue a warning.

43. In the course of the reasons the magistrate observed:

> Permission or invitation to enter and be present on premises can be revoked; however that person does not automatically become a trespasser immediately upon permission being revoked. He or she would need to be advised that permission or authority to remain in the shopping centre had been revoked and be given an opportunity to leave. When a licensee is asked to leave private premises, that person is entitled to a reasonable period in the circumstances to leave the premises and is not a trespasser during that period of time *Wu v Sky City Auckland Ltd* [2002] NZAR 441.

44. The principle expressed there is orthodox and, with respect, correct. Nor is there any good policy reason for removing the requirement that a person must be trespassing or have trespassed in order to ground the issue of a valid warning. Rather, there are good policy reasons for not removing that requirement. A person who enters commercial premises under an implied licence is entitled to remain there until the licence is revoked and for such reasonable time as is necessary to leave the premises. It might be considered appropriate that legislation should criminalise conduct in this context only after an implied licence has been revoked, and a reasonable time has been afforded. That is the scheme of the Act.

45. Section 7 creates the offence of failing or refusing to leave a place after being directed to do so by an occupier or member of the Police Force. This offence will have application in circumstances including where an implied licence is revoked and the person concerned does not take the opportunity to leave the premises, and refuses to do so following a direction to that effect.[18] Had the accused in *Cahill* refused to leave the premises on the occasion in question, and maintained that refusal following direction, s 7 could have been deployed. That was not the case.

46. Section 8 is clearly directed to a different category of case. In particular, s 8(1) is directed to circumstances where a person is currently trespassing, or has previously trespassed, and affords a mechanism by which an occupier may impose what is in effect a one year "ban" on any further entry. Had the accused in *Cahill* been advised on the

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15 *Cahill* at [13].

16 *Cahill* at [19].

17 *Cahill* at [21].

18 The operation of this provision does potentially give rise to an anomaly, or at least a difficulty or uncertainty in its practical operation, which will be discussed further below.

occasion in question that she was not permitted to return to the premises (in effect, that the implied licence was generally revoked), and had the accused returned, a warning could then have been given. As already observed, the legislative intention apparently underlying s 8(1) is to create something in the nature of a long term remedy in circumstances where a propensity to trespass has already been established.

47. When considered in that light, the result in *Cahill* cannot be seen as inconsistent with either the subjective or objective legislative intention, and does not disclose any technical defect in the operation of the relevant provision.

48. As the magistrate observed in the reasons, it was not strictly necessary to consider the fact that the warning off notice did not identify the occupier of the place. The observations subsequently made by the magistrate in relation to the issue, subject to that qualification, may be distilled to the following. Section 8(1) requires that the warning be given by an occupier of the place in question; although the averment stated that the security guard was authorised by the occupier, s 12 of the *Trespass Act* does not permit of an averment in those terms; there was no evidence that established the identity of the occupier; there was no evidence that established the authority of the security guard who gave the warning notice; and, accordingly, the offence of trespass following a (valid) warning had not been established.

49. Again, that conclusion cannot be seen as inconsistent with the legislative intention, and does not disclose any technical defect in the operation of the relevant provision. It would seem beyond argument that there must be relatively strict compliance with a provision which operates both to prohibit an individual's entitlement to enter a shopping centre, and to impose a criminal sanction for a breach of that prohibition. The failure of compliance in this case may be attributed to a combination of two factors. The first was a failure on the part of the notice to identify the occupier. The notice was apparently drafted by the security company in generic terms. It provided, "Security, Reflections Group Pty Ltd being an employee or other person acting under the authority of a person in charge of a place specified below" has issued a warning to stay off. That failure was not necessarily fatal by itself; but it was fatal in circumstances where there was a forensic failure on the part of the Crown to aver in accordance with s 12 of the *Trespass Act*, and a further forensic failure to call evidence to establish the identity of the occupier and the fact that the warning notice was given with the authority of the occupier.

50. The magistrate made the following additional comments in conclusion:

> In passing, I observe that the giving of warnings to stay off and the subsequent charging of offences against s 8(4) have become increasingly common in the Youth Justice Court. I do not criticise the need to take action to enforce proper standards of behaviour by young people at the shopping centre. It is entirely proper for that to occur and for young people to suffer a consequence if they cannot behave appropriately. There are undoubtedly young people who do cause problems at the shopping centre and who should be excluded. **I do however question whether the use of effectively a 12 month exclusion pursuant to s 8 of the Trespass Act is achieving that aim and is appropriate in all cases.** Twelve months is a lengthy period of time for young persons. Many of the young persons who are brought before the Court are not behaving badly when said to have been found trespassing. Many have been shopping and/or are in company of an adult at the time. **In my view, an approach that provides for a initial short period of exclusion that is to be followed by express agreement of the young person as to the standard of behaviour they will observe when allowed to return might well achieve better outcomes than is presently being seen**. It would provide an opportunity for young persons to

> demonstrate that they have learned from the experience and can behave appropriately in public areas. If they breach the agreement they have entered, then the period of exclusion could be incrementally increased. If they were to enter whilst expressly excluded they may be subject to the s 5 offence under the Trespass Act. **No legislative change is required for that to occur; a scheme of that nature could simply be implemented by notice and agreement.** I recommend that the occupier of Casuarina Shopping Centre give some consideration to that approach.
>
> [Emphases added.]

51. The magistrate expressly noted that no legislative change would be required to develop a process of individual agreements. The comments do raise the issue of whether the "warning off" provisions in the *Trespass Act* should be amended to allow greater flexibility in respect of the duration and conditions of a warning off notice.

52. The case of *Police v James Patrick Morgan* (unreported, CSJ, No 21211222) is the second recent matter from the Court of Summary Jurisdiction which calls for some examination in this context. The matter involved two notices which were served on the accused.

53. The first notice was executed by the Speaker of the Legislative Assembly on 30 May 2011. The notice (omitting formal parts) provided:

> Take note that I, Jane Leslie Aagard, the Speaker of the Legislative Assembly, under section 16(2) of the *Legislative Assembly (Powers and Privileges) Act*, have directed that you be removed from, or be prohibited from entering, the precincts of the Assembly for a period of twelve (12) months from the date specified below.
>
> If you try to enter or enter the precincts, you may be prohibited from entering or removed by force by any person who is an authorised person under section 5 of the *Legislative Assembly (Security) Act*.

54. The second notice was certified as having been served by Esther Pesti, a security officer employed at Parliament House. The notice provided:

> **NORTHERN TERRITORY OF AUSTRALIA**
> ***Trespass Act***
>
> **TO: JAMES MORGAN**
>
> This is notice that you are warned against trespassing on premises occupied by **PARLIAMENT HOUSE** at **DARWIN CITY**.
>
> If you unlawfully trespass on these premises within the next twelve (12) months then you may be arrested by Police and charged with a trespass offence.

55. The circumstances of the charge were that the accused was served with the notices on 31 May 2011 at the State Library of Parliament House. Service was effected by a security officer authorised under s 5 of the *Legislative Assembly (Security) Act*. On 6 March 2012, the accused attended Parliament House in alleged contravention of the notices. His attendance was captured on CCTV footage. He was arrested at Casuarina Square later that day and charged with an offence against s 8(4) of the *Trespass Act*.

56. The magistrate ultimately dismissed the charge after hearing evidence. The basis for the dismissal was described in the following terms:

> … There seems to me to have been a problem with the way that the notices have been issued to you, which in my view provides you with a technical defence, if I can put it that way. The charge that you face today is one of being a person who was warned on 31 May under s 8 of the *Trespass Act* to stay off a place, namely Parliament House, did trespass on the said place within a year after getting the warning.
>
> Now there are averments there which provide some evidence that some authority was given to Ms Aagard to give that notice. While that might be some evidence, the problem with the evidence is that there are two notices given at the same time which crossover each other. And in my view they put you in an impossible position by giving you one notice which says that you may be prohibited and one which purports to say that effectively you are prohibited.
>
> In the circumstances I am left with a reasonable doubt at the very least, but in my view there's not a case made out in those circumstances which the Crown can rely on.

57. The result in that case cannot be attributed to the any technical or other defect in the operation of the relevant provision. So far as is relevant for these purposes, s 8(4) requires only that the accused "has been warned under this section to stay off any place", and that the accused subsequently trespasses on that place. The following observations may be made concerning the result:

    (a) the evidence and the relevant statutory provisions established that the Speaker had responsibility for the control and management of Parliament House, and it necessarily followed as a matter of law that the Speaker was the "occupier" for the purposes of the *Trespass Act*;

    (b) there was evidence that the Speaker had reasonable cause to suspect that the accused was likely to trespass on the premises within the meaning of s 8(2) of the *Trespass Act*;

    (c) there was evidence that the Speaker had authorised the relevant security officers to warn the accused to stay off the premises within the meaning of s 8(2) of the *Trespass Act*;

    (d) there was clear oral and documentary evidence that the relevant security officers had warned the accused to stay off the premises, including pointing out to him the boundaries of the premises, and as a matter of law the notice given under the *Trespass Act* and the oral direction given by the security officers, either alone or in combination, constituted a "warning" within the meaning of s 8(2) of the *Trespass Act*;

    (e) there was clear oral and documentary evidence that the accused had trespassed on the premises within one year after the giving of the warning;

    (f) there was no material inconsistency or conflict between the notice under the *Trespass Act* warning the accused against trespassing on the premises, and the notice under the *Legislative Assembly (Powers and Privileges) Act* advising the accused that the Speaker had directed that he be removed from or prohibited from entering the precincts of the Assembly for a period of 12 months; and

    (g) the basis on which the magistrate found there to be a "reasonable doubt" (or the nature of the doubt), and the basis upon which the magistrate found there was no case made out, is unclear.

58. It may be accepted that both notices were infelicitously drafted for the purpose; that it is doubtful that the *Legislative Assembly (Powers and Privileges) Act* permits the imposition of a 12 month ban as indicated in one notice; that the notice under the *Trespass Act* should have identified the occupier and given a proper description of the premises; and that it was likely to create problems and confuse issues to serve the notices together. Even accepting those matters, however, the decision in the case is best considered to have been made *per incuriam*.

The case for amendment

59. There are a number of issues arising in the cases surveyed above which give rise to the question whether legislative amendment is necessary or desirable.

Issues for Discussion 2: "Warning off" notices

(a) Do the decided cases, or any issues thrown up by those cases, indicate the need for legislative amendment in relation to warning off notices?

(b) Should the legislation retain the current requirement for the recipient of a warning off notice to be trespassing, have trespassed or be likely to trespass?

(c) Should the qualification to issue a warning off notice be extended beyond the currently defined occupier?

(d) Should the *Trespass Act* be amended so as to allow for greater flexibility in the duration and terms of a warning off notice?

60. As already noted, the *Trespass Act* was substantially amended in 2000 to remedy a number of anomalies identified in its operation up to that point in time. Although some of the cases in which the legislation has been considered since that time have resulted in acquittals on what might be described as "technical" grounds, in the opinion of the NTLRC those cases do not identify any issue which would warrant some legislative amendment in response.

61. First, it might be considered that as a matter of good policy a person who enters commercial premises under an implied licence should be entitled to remain there until the licence is revoked and for such reasonable time thereafter as is necessary to leave the premises.

62. Secondly, the legislative intention underlying the warning off provision in s 8(1) is to create something in the nature of a long term remedy in circumstances where a propensity to trespass has already been established. That intention militates against any amendment which would remove the requirement for some antecedent act of trespass before a warning off notice may be delivered.

63. Thirdly, there is no reason in policy for the removal of the requirement that a direction or warning be given by or under the authority of an occupier. The occupier is the

person with control and management of the land or premises in question. That entitlement and responsibility leads necessarily to the conclusion that the power to exclude a person from land or premises should be vested exclusively in the occupier and its duly authorised agents. That this creates certain evidentiary onera which must be discharged by the Crown in the conduct of certain prosecutions does not lead to any different conclusion. There is also nothing in the cases, or anecdotally within the knowledge of the NTLRC, suggesting either a practical or legal need to extend the current definition of "occupier" to include owners who do not occupy or other persons who may have an "interest" in the land.

64. The review of the legislation has identified one particular anomaly in relation to the operation of s 7. Section 7(1) provides:

> A person who trespasses on any place and, after being directed to leave that place by an occupier or member of the Police Force acting at the request of the occupier, fails or refuses to do so forthwith or returns within 24 hours to that place, commits an offence.

65. Although an antecedent act of trespass might be seen as consistent with the purpose of s 8, it is unnecessary and potentially confounding in the operation of s 7. The determination whether an implied licence should be revoked is one that falls to the occupier. It is not necessary that the entrant has trespassed in order for the licence to be revoked, and in the vast majority of cases there will be no such trespass up to the point of revocation. So, for example, there is an implied licence for a door-to-door salesperson or a proselytiser to enter a yard and knock on the door of a house. That licence may be revoked by the occupier directing the person to leave the premises. There will have been no trespass up to that point, and no trespass can be committed until the effluxion of a reasonable time within which to leave the premises following the direction. There is no requirement at common law for a trespass to have been committed before a direction may be given. In fact, such a requirement would be nonsensical, in that there could be no trespass until the revocation of the implied licence by direction, and there could be no direction without trespass.

66. Leaving aside circumstances where mere presence constitutes trespass or where a sign has been posted (which conduct would generally attract the operation of s 5 or s 6), making trespass a precondition to a direction deprives s 7 of practical operation. So, for example, s 7 would have no application to a person who enters a shopping centre pursuant to an implied licence, is directed to leave the shopping centre by the occupier, and refuses to do so. This is because the person has not perpetrated an act of trespass prior to the point of direction, and as presently configured s 7 seems to make such an act a precondition to the giving of a direction. That anomaly would be removed if s 7(1) was amended to read:

> A person who, after being directed to leave any place by an occupier or member of the Police Force acting at the request of the occupier, fails or refuses to leave that place forthwith or returns within 24 hours to that place, commits an offence.

67. The NTLRC has also given some consideration to the interaction between ss 7 and 8 of the *Trespass Act*, and whether the one provision might be adapted to serve both purposes. As has already been noted, s 7 is directed to what might be described as transgressions in the short term, in that it has application to circumstances in which a person fails or refuses to leave a place following a direction to leave, or returns to the

place within 24 hours following a direction to leave. On the other hand, s 8(4) is directed to the provision of a longer term remedy. In addition, s 8 provides a mechanism by which the court may warn a person to stay off a place. The two sections serve different purposes and for that reason it might be considered appropriate to maintain the distinction.

68. Finally, there is the question whether the *Trespass Act* should be amended to allow for greater flexibility in the duration and terms of a warning off notice. It is unnecessary to legislate for that purpose, in that it is open to occupiers to enter into agreements with entrants outside the legislative regime. The question whether the legislative regime should be amended to recognise such agreements, or to vary the present 12 month term, is a question of policy in the first instance. There would not seem to be any compelling policy reason to pass legislation concerning the matter when it is unnecessary to do so.

69. If the policy determination is that the legislation should be amended to allow some flexibility, it may readily be seen how that could be achieved in relation to the duration of a warning off notice.

70. An amendment in the following terms would largely achieve the principal objective identified in *Cahill*, while leaving it open to occupier and entrant to agree such other terms as may be considered necessary or appropriate:

> **8 Trespass after warning to stay off**
>
> (1) Where a person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time afterwards, warn that person to stay off that place <u>for a period not exceeding one year</u>.
>
> (2) Where an occupier of any place has reasonable cause to suspect that a person is likely to trespass on that place, the occupier may warn that person to stay off that place <u>for a period not exceeding one year</u>.
>
> (3) Where a person is found guilty of an offence against this Act committed on or in respect of any place, the Court may warn that person to stay off that place <u>for a period not exceeding one year</u>.
>
> (4) A person who, being a person who has been warned under this section to stay off any place, <u>after the giving of the warning</u> trespasses on that place within <u>the period specified in the warning</u> ~~one year after the giving of the warning~~, commits an offence.
>
> Maximum penalty: 20 penalty units.

71. It is more difficult to see how the legislation might be amended for the purpose of giving legislative force or effect to agreements which incorporate conditions other than duration. The purpose of the *Trespass Act* is essentially to create a scheme of criminal offences in relation to trespass. The criminal or punitive nature of the legislation does not naturally (or even properly) accommodate provisions for the recognition or enforcement of consensual arrangements between private persons.

F. The relevant operation of the *Aboriginal Land Rights (Northern Territory) Act 1976*

72. The Attorney-General's reference in this matter draws particular attention to the application of the *Trespass Act* to public housing on "Aboriginal land". This calls for

some preliminary examination of the nature of Aboriginal land and the regime currently in place regulating access to such land. It has been assumed for these purposes that the reference to "Aboriginal land" is to land held under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). That is the principal focus of the discussion in this report, although some brief consideration will be given to other forms of Aboriginal tenure.

Ownership and occupation

73. The key concepts of ownership and occupation under ALRA are usefully summarised in *Wurridjal v Commonwealth*, in which French CJ observed: [19]

> 16. The principal property right in issue is the fee simple estate granted to the Land Trust under the *Land Rights Act*. Such grants may be made by the Governor-General upon the recommendation of the Minister.
>
> 17. Key definitions in the Act include the definition of "Aboriginal land" which means land held by a Land Trust in fee simple or land the subject of a deed of grant held in escrow by a Land Council pending the expiry of pre-existing interests held by persons other than the Crown. "Traditional Aboriginal owners" means a local descent group of Aboriginals who:
>
> > "(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
> > "(b) are entitled by Aboriginal tradition to forage as of right over that land."
>
> 18. Land Trusts are bodies corporate, established by gazetted ministerial notice "to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned". They hold title to the land vested in them in accordance with the Act and exercise their powers as owners of the land for the benefit of the Aboriginals concerned. They can only act, in relation to the land, in accordance with directions given by the Land Council for the area.
>
> ….
>
> 22. The Land Councils are bodies corporate established by the Minister for areas in the Northern Territory (of which there shall be at least two) designated by ministerial notice. Their functions include protection of the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the designated areas. A Land Council is not to take any action in connection with Land Trust land unless it is satisfied that the traditional Aboriginal owners understand the nature and purpose of the action and consent to it as a group. Any Aboriginal community or group affected by a proposed action is to have been consulted and to have had adequate opportunity to express its views to the Land Council. The Land Council is required by the Act to give priority to the protection of the interests of traditional land owners and other Aboriginals interested in Aboriginal land in its area.

74. The nature of the "freehold" granted under ALRA and controlled by the Land Trust and Land Council regime is described in *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, where Gleeson CJ, Gummow, Hayne and Crennan JJ stated: [20]

> It is thus apparent that the interest granted under the *Land Rights Act* differed in some important ways from the interest ordinarily recorded under the Torrens system as an estate in fee simple. But despite these differences, because the interest granted under the *Land Rights Act* is described as a "fee simple", it must be understood as granting rights of ownership that "for almost all

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19 (2009) 237 CLR 309.

20 (2008) 236 CLR 24 at [50].

> practical purposes, [are] the equivalent of full ownership" of what is granted. In particular, subject to any relevant common law qualification of the right, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant.

75. In summary, Aboriginal land under ALRA is a form of statutory freehold held by an Aboriginal Land Trust and managed by an Aboriginal Land Council for the benefit of the relevant traditional Aboriginal owners and communities. There are four Land Councils, being the Northern Land Council (NLC) and Central Land Council (CLC) which respectively cover the northern and central parts of the Northern Territory, and the Tiwi Land Council (TLC) and Anindilyakwa Land Council (ALC) which respectively cover the Tiwi Islands and Groote Eylandt (including Bickerton Island).

Access to Aboriginal land

76. Both ALRA and the *Aboriginal Land Act* (NT) (ALA) contain provisions regulating access to Aboriginal land.[21]

77. Section 70(1) of ALRA contains a general prohibition against a person entering or remaining on Aboriginal land. This general prohibition is subject to a number of exceptions and defences. In broad terms, it is unlawful to enter or remain on Aboriginal land unless:

- the entry onto the land is necessary for the use and enjoyment of an estate or interest in the land;[22]
- the entry is authorised under ALRA or a law of the Northern Territory;
- the entry is in accordance with an authorisation by the relevant Land Trust; or
- the entry onto, use and occupation of the land is by an Aboriginal person and is in accordance with Aboriginal tradition.[23]

78. Section 73 of ALRA provides that the Legislative Assembly of the Northern Territory may make laws regulating or authorising the entry of persons onto Aboriginal land. The intention was that the Territory would pass legislation to put a permit system in place, and it subsequently enacted the ALA for that purpose. Section 4 of the ALA provides that a person shall not enter onto or remain on Aboriginal land (within the meaning of ALRA) unless he or she has been issued with a permit.[24] Part II establishes a system by which the Land Council or the traditional owners for the area in which the Aboriginal land is situated may issue permits on condition. The exceptions are:

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21 Sections 73(1)(b) and 74 of ALRA expressly contemplate the parallel operation of both Territory and Commonwealth legislation regulating or authorising the entry of persons onto Aboriginal land.

22 ALRA, s 70(2)(a).

23 ALRA, s 71(1).

24 The prohibition has no application to entry onto Aboriginal land by an Aboriginal person pursuant to Aboriginal tradition: see ALA, ss 4(1), (2) and (3). Section 10 of the ALA also provides, in terms similar to the ALRA, that the prohibition does not authorise interference with the use or enjoyment of an estate or interest in the land.

- the Administrator may issue a permit where the Land Council or traditional owners have refused;

- the responsible Territory Minister may issue a permit to a person employed under Commonwealth or Territory legislation; and

- members of Commonwealth or Territory Parliament, and any candidate for election to those parliaments, may enter Aboriginal land.

79. So far as dwellings are concerned, s 8 provides that the ALA does not authorise entry to a dwelling except with the permission of the owner or occupant. The term "dwelling" is defined in s 8 to include "the living area of a camp occupied by or belonging to an Aboriginal" [sic].

The relevant operation of the "intervention" legislation

80. ALRA was amended by operation of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (FaCSIA). Schedule 4 of FaCSIA removed the requirement for government employees and contractors to have a permit to enter Aboriginal land to perform relevant duties, and introduced limited public rights of access to common areas in the communities affected by the legislation. Those amendments commenced on 17 February 2008. The Explanatory Memorandum described the purpose of the amendments as follows:-

> The bill makes changes to the provisions governing access to Aboriginal land to increase interaction with the wider community and promote economic activity. It removes the requirement for people to obtain permits to enter and remain on certain areas of Aboriginal land, including common areas of townships, road corridors, airstrips and boat landings. It also allows for the placement of temporary restrictions on access to these areas to protect the privacy of cultural events or public health and safety. The Schedule allows government officials and members of Parliament to enter and remain on Aboriginal land when performing relevant duties and for people to attend court hearings on Aboriginal land.

81. Those amendments varied the permit regime in the following manner:-

- They provided a number of specific "defences" for entering onto or remaining on Aboriginal land relating primarily to statutory office holders and elected representatives, and persons performing functions or exercising powers under Commonwealth or Territory laws or in the capacity of a government officer (including a person "in the service or employment" of government or an Authority): ALRA, s 70(2A).

- They provided a specific defence for any person or class of persons authorised in writing by the Commonwealth Minister to enter or remain on Aboriginal land: ALRA, ss 70(2BA) and (2BB). These provisions had a five year sunset clause and automatically ceased to have effect on 17 August 2012.

- They provided a specific defence where a person enters or remains on premises on community land with the permission of the occupier of the premises: ALRA,

s 70(2D). "Community land" is defined in s 70A(2) of ALRA to mean land described in Schedule 7 to ALRA, and land subsequently prescribed by regulation. Schedule 7 identifies by geocentric data the areas covered by the 52 major communities (townships) situated on Aboriginal land.

- They provided an authorisation for persons to enter or remain on roads on Aboriginal land specified by the Commonwealth Minister that provide access to community land: ALRA, s70B. Current Federal government policy is that this form of public access is not in the best interests of Aboriginal people and the wider community. For that reason, the Commonwealth Minister has declined to make any determination specifying roads that can be used to gain access to community land.

- They provided an authorisation for persons boarding or disembarking from an aircraft or vessel on Aboriginal land that is outside community land if there is a road from community land providing access to the aerodrome or landing place, the aerodrome or landing place services the members of the community concerned, and the access is for the purpose of travelling to or from any community land: ALRA, s70C(1); s70D(1). There is a further authorisation for persons boarding or disembarking from an aircraft or vessel within community land for the purpose of travelling to or from that community land: ALRA, s70C(3); s70D(3).

- They provided an authorisation for persons to enter or remain on a road that is within community land for lawful purposes: ALRA, s70E(1).

- They provided an authorisation for persons to enter or remain on an area within community land that is generally used by members of the community concerned (a "common area"): ALRA, s70F(1).

- There is an authorisation for persons to enter or remain on Aboriginal land for the purpose of a court hearing held on the land: ALRA, s70G(1).

82. In each of the cases where ALRA provides for rights of entry to community land, the only qualification in respect of the purpose for such entry is that it not be an unlawful purpose.

Legislative activity in 2008

83. The Rudd Government attempted to repeal the changes to the access regime effected by FaCSIA. It introduced the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008. The operation of the Bill was to repeal the earlier amendments which displaced the permit system, and to introduce a single provision which allowed the Commonwealth Minister to grant authorisation for access to particular parts of Aboriginal land.

84. That legislation went through the House of Representatives but was blocked in the Senate in late 2008.

The relevant operation of the Stronger Futures legislation

85. The Stronger Futures legislation was enacted in 2012. The legislation did not make any substantive amendments to the access regime implemented by FaCSIA.

G. The interaction between Commonwealth and Territory legislation

86. Territory laws will be invalid to the extent of any inconsistency with Commonwealth law (sometimes described as "repugnancy").[25] Inconsistency can arise directly or indirectly.[26] Direct inconsistency will result: (1) when it is impossible to obey both laws; (2) when one law permits what the other law prohibits; or (3) when one law imposes an obligation or confers rights and the other law modifies it. Indirect inconsistency will arise where there is an intention on the part of the Commonwealth to regulate exclusively the activity with which the law is concerned. The Commonwealth law in those circumstances it said to "cover the field".

87. Quite apart from any coincidental inconsistency which might arise, the Commonwealth retains a grant of legislative power under s 122 of the *Constitution* in relation to the Territory that is plenary in quality.[27] This allows the Commonwealth to override Territory enactments by its own legislation notwithstanding the grant of self-government.[28]

H. The interaction between ALRA and the *Trespass Act*

88. It would seem clear that ALRA is intended to cover the field for the purpose of regulating or authorising the entry of persons onto Aboriginal land; subject to the intention that the Territory would pass legislation to put a permit system in place. It is equally clear that the Commonwealth/Territory scheme in relation to the entry of persons onto Aboriginal land is not intended to cover the field concerning trespass on residential premises situate on Aboriginal land. So much is apparent from the fact that the provisions in ALRA deal only with the matter of entering into and remaining on Aboriginal land and do not purport to deal with activity within that land, at least not in any sense material to this question; and the fact that the ALA explicitly does not authorise entry to a dwelling unless with the permission of the owner or occupant.

89. The question then becomes whether the provisions of ALRA operate to displace the *Trespass Act* by reason of some form of direct inconsistency or repugnancy. As already noted, s 74 of ALRA provides expressly that "[t]his Act does not affect the application

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[25] *R v Kearney; ex parte Japanangka* (1984) 158 CLR 395 at 418; *Northern Territory v GPAO* (1999) 196 CLR 553 at 576, 579-580, 581-2, 630; *Pritchard v Racecage* (1996) 64 FCR 96 at 121.

[26] *Northern Territory v GPAO* (supra) at 582.

[27] Although plenary in nature, the power is subject to various restrictions derived from the text of the *Constitution*, including the operation of certain provisions relating to judicial power, freedom of religion, the implied freedom of political communication, and the requirement of just terms found in s 51(xxxi) of the *Constitution*.

[28] *Northern Land Council v Commonwealth* (1986) 161 CLR 1. It had been suggested that the Commonwealth would not exercise that power as to do so would be to derogate from the grant of self-government. The suggestion of a developing convention in those terms was undermined with the enactment of legislation by the Commonwealth Parliament expressly overriding the *Rights of the Terminally Ill Act 1995* (NT), and removing altogether the power of the Legislative Assembly to make laws concerning euthanasia.

to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act". The relevant question in this context is whether or not the *Trespass Act* "is capable of operating concurrently with" ALRA. Although there has been no curial determination of the matter, the better view is that s 74 ALRA operates as a statutory statement of the principle of inconsistency. That is, Territory laws will have application to Aboriginal land except to the extent that such application would be inconsistent with the operation of ALRA.

90. So, by way of example, in *Northern Territory v Arnhem Land Aboriginal Land Trust*[29] (the *Blue Mud Bay case*), the High Court held that the operative question was whether there was some relevant competition between rights derived from the *Fisheries Act* (NT) and the rights of the Land Trust under the relevant grants. The answer to that question was that the *Fisheries Act* did not authorise entry to waters within the boundaries of the grants for the purpose of taking fish or aquatic life. It only operated to proscribe the taking of fish or aquatic life without a licence, and left questions concerning authorisation of entry to the regime established under ALRA. For that reason, the *Fisheries Act* could operate concurrently with ALRA.

91. In the course of their reasons, the plurality made clear that the grant of Aboriginal land to a Land Trust is a grant of a fee simple estate as known to the common law[30], albeit with some statutory modifications.[31] However, this accepted, the plurality also noted that there was nothing in the *Fisheries Act* that was inconsistent with this grant of fee simple.[32] The *Fisheries Act* regulated fishing in waters overlying Aboriginal land but did not purport to authorise such fishing.[33]

92. On this authority it may be concluded as a general proposition that Territory legislation which regulates activity on Aboriginal land can operate concurrently with the grant of a fee simple upon a Land Trust effected by ALRA. Thus, for example, it is generally accepted that Part V of the *Planning Act,* requiring consent authority approval for the grant of an interest in excess of 12 years, applies with respect to Aboriginal land. This operation runs concurrently with the provisions of s 19 of ALRA that go to the procedure required to authorise the grant of such an interest on Aboriginal land. In a similar fashion, a law of general application which criminalises trespass may operate concurrently with a grant of fee simple to a Land Trust made under ALRA.

93. There is nothing clearly inconsistent between the operation of the *Trespass Act* and ALRA. It may be noted in this context that a "trespass" under the *Trespass Act*, consistent with the common law principles discussed earlier in this report, involves entering or remaining upon land without the consent of the occupier of the land in circumstances not otherwise authorised by law. In the event that entry to Aboriginal

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29 (2008) 236 CLR 24.

30 *Blue Mud Bay* at [48], [50].

31 *Blue Mud Bay* at [49].

32 *Blue Mud Bay* at [36], [39].

33 See for example at [36]:" …the *Fisheries Act* does not deal with where persons may fish. Rather, the *Fisheries Act* provides for where persons may *not* fish. And nothing in the Act authorises persons (whether the holder of a licence or otherwise) to enter any particular place or area for the purposes of fishing." (Emphasis in the original).

land was not authorised under ALRA (or the ALA), the entry may constitute both a trespass and an offence under ALRA (or ALA). The exceptions to s 70(1) ALRA provide for a range of circumstances where access to Aboriginal land will be authorised by law and thus not constitute a trespass, but they have nothing to say about housing.

I. Public housing on Aboriginal land

94. The model for public housing tenure on Aboriginal land is complex and evolving.

The historical position

95. Public (or community) housing in communities located on Aboriginal land has historically been funded by the Commonwealth. *De facto* responsibility for the management and control of such housing was generally given over to the local community government council. Those councils held no estate or interest in the land (including the houses). The grant of such an estate or interest by a Land Trust could only lawfully be made in accordance with the mechanism in s 19 of ALRA. There were no relevant grants, but the various Land Trusts appear to have made no objection to the *de facto* arrangements.

96. Under those arrangements, the community government councils allocated houses to particular individuals and collected rent without any formal leases or other tenancy agreements. There was usually some form of "occupation agreement"[34] between the persons to whom the house was allocated and the community government council, but these arrangements did not have the status of a residential tenancy agreement under the *Residential Tenancies Act* (NT) or the predecessor legislation.

Changes under the Intervention and local government regime

97. The *Northern Territory National Emergency Response Act 2007* (Cth) (NTNERA) was enacted in 2007 as part of a suite of "Intervention" legislation. Pursuant to s 31 of NTNERA, the Commonwealth acquired five-year leases over virtually all communities on Aboriginal land. Those leases variously commenced on 18 August 2007 and 17 February 2008, with a common expiry date of 17 August 2007. Section 34 of NTNERA operated to preserve any right, title or interest existing in the area of a s 31 lease at the commencement of the lease.[35]

98. The *Local Government Act* (NT) commenced on 1 July 2008. The Act had the effect of subsuming the previously existing community government councils into newly created shire councils. The *de facto* control and management of public housing in communities on Aboriginal land was thereafter assumed by the Chief Executive (Housing), a statutory authority of the Northern Territory, under a temporary arrangement with the Commonwealth as statutory leaseholder of the land (including the houses). The new shire councils acted as agents for the Chief Executive (Housing) in the control and management of the public housing stock on Aboriginal land. Allocation decisions were formally made by the Chief Executive (Housing) and rents paid to that authority. There

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34 The agreements do not seem to have had a single consistent form or title.

35 This preservation extended to include rights under s 71(1) of ALRA: see *Wurridjal* at [111].

was no immediate change to underlying tenure arrangements. The "occupation agreements" were left in place.

99. In 2009, the Chief Executive (Housing) adopted a policy of seeking formal lease arrangements for public housing over which it had management and control on Aboriginal land. Implementation of this policy focused on communities where there had been, or was to be, significant expenditure on new and renovated housing under the Strategic Indigenous Housing and Infrastructure Program (SIHIP).

The current position

100. The Commonwealth leases expired in 2012 and the Commonwealth did not extend the leases as part of the Stronger Futures legislation. The current position in relation to tenure depends upon the status of negotiations in each community. As matters presently stand, communities fall into one of three broad categories, viz "major" communities in which leasehold arrangements have been negotiated; "minor" communities in which leasehold arrangements have been negotiated; and "minor" communities in which leasehold arrangements have yet to be negotiated.

101. There are 15 major communities, being nine communities in the NLC region (Wadeye, Maningrida, Oenpelli (Gunbalunya), Milingimbi, Galiwinku, Gapuwiyak, Yirrkala, Numbulwar and Ngukurr), three communities in the CLC region (Hermannsburg, Lajamanu and Yuendumu), two communities in the TLC region (Wurrumiyanga (formerly Nguiu) and Milikapiti), and one community in the ALC region (Alyangula). Although there is some variation in the legal arrangements utilised in each Land Council region, in each case the Chief Executive (Housing) has been granted a lease with power to sublease to tenants. In the NLC region the relevant Land Trust has granted the Chief Executive (Housing) an effective 40 year lease (ie a 20 year lease with a 20 year option). In the CLC region the relevant Land Trust has granted the Commonwealth Executive Director of Township Leasing (EDTL) a 40 year lease, and the EDTL has in turn granted a 10 year sublease to the Chief Executive (Housing). In the TLC region the Land Trust has granted 99 year township leases for Wurrumiyanga (formerly Nguiu), Milikapiti and Wurankwu to the EDTL which, in turn, has granted the Chief Executive (Housing) an effective 40 year lease for Wurrumiyanga and a six year lease for Milikapiti (with leasing for Wurankwu under discussion). In the ALC region the relevant Land Trust has granted an 80 year township lease for the three Groote Eylandt and Bickerton Island communities (Alyangula, Umbakumba and Milyakburra) to the EDTL which, in turn, has granted the Chief Executive (Housing) a 40 year lease over those three communities. In those communities, the Chief Executive (Housing) controls and manages the housing stock, including in relation to matters such as allocation, rent payment, maintenance and compliance. Residents occupy public housing in those communities pursuant to a residential tenancy agreement under the *Residential Tenancies Act*.

102. There are approximately 57 other communities in the Territory (on both Aboriginal land and community living areas) which have some form of public or community housing. Again, although there is some variation in the legal arrangements utilised in each Land Council region, in each case the Chief Executive (Housing) receives a head lease with power to sublease to tenants. That lease is presently for six years, given

ongoing discussions between the Commonwealth and the Territory regarding funding and operational issues. .

103. In the NLC region the model identified for the management of public housing stock involves the execution of a housing deed between the relevant Land Trust (or community living area owner) and the Commonwealth requiring a grant of leasehold tenure to the Commonwealth's nominated housing manager over a 40 year period. The Commonwealth's presently nominated housing manager is the Chief Executive (Housing) for a period of six years, with an anticipated renegotiation at the end of that period. Fourteen housing deeds are in place, with three deeds awaiting finalisation. In the CLC region, the model involves the EDTL being granted a 40 year lease over the public housing stock in those communities, with the EDTL in turn granting a lease to the Chief Executive (Housing) for a period of six years. Residents occupy public housing in those communities pursuant to a residential tenancy agreement where the standard of the housing is sufficiently high to comply with the *Residential Tenancies Act*, or pursuant to a service provider/occupant contract where the housing does not comply with the requisite standard.

104. In those other "minor communities" where there is no Housing Deed yet in place, the Chief Executive (Housing) controls and manages the housing stock with the knowledge of the relevant Land Trusts (or community living area owner), including in relation to matters such as allocation, rent payment, maintenance and compliance. Residents occupy public housing in those communities pursuant to a service provider/occupant contract.

Application of Trespass Act *to public housing on Aboriginal land*

105. As is apparent from the foregoing discussion, irrespective of the underlying leasehold arrangements there are currently two different types of arrangement for the occupation of public housing on Aboriginal land. The first is a residential tenancy agreement under the *Residential Tenancies Act*. The second is pursuant to a service provider/occupant contract with the Chief Executive (Housing). In the second situation, the Chief Executive (Housing) either holds a leasehold interest in the land or manages the housing with the knowledge of the Land Trust (or community living area owner) which holds the fee simple interest in the land pending completion of a formal tenure arrangement.

Issues for Discussion 3: Application of the *Trespass Act* to public housing on Aboriginal land

(a) Is there a need for legislative amendment to ensure the effective application of the *Trespass Act* to public housing subject to a residential tenancy agreement under the *Residential Tenancies Act*?

(b) Is there a need for legislative amendment to ensure the effective application of the *Trespass Act* to public housing subject to a service provider/occupant contract with the Chief Executive (Housing)?

(c) Is there a need for legislative amendment to ensure the effective application of the *Trespass Act* to public or community Aboriginal housing on land that is not held under ALRA?

106. There can be no doubt that a resident under either type of tenure arrangement is a person "in lawful occupation" of the public housing in question, and so qualifies as an "occupier" within the meaning of the *Trespass Act*. That being so, the provisions of the *Trespass Act* will have application according to their terms. In particular:

    (a) the general proscription of trespass on "premises" in s 5 will have application;

    (b) the proscription of trespass on "prohibited land" in s 6 will have no practical application; and

    (c) the provisions concerning direction and warning off in ss 7 and 8 will have application, subject to satisfaction of the conditions described in those provisions.

107. There is no apparent need or cause to extend or otherwise modify the definition of "occupier" in the *Trespass Act* in order to give the legislation practical application in relation to public housing on Aboriginal land.

108. There is one possible limitation on the application of the *Trespass Act* which might be argued to arise from the terms of ALRA. Section 71 of ALRA provides in part:

> (1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.
>
> (2) Subsection (1) does not authorise an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an incorporated association of Aboriginals.

109. Section 71(1) gives rise to the potentiality of an argument to the effect that the *Trespass Act* could not be deployed against any Aboriginal person entering public housing, regardless of the consent of the occupants, where that person had an entitlement to enter generally on the Aboriginal land comprising the community in question. Such an argument would be unsustainable for a number of reasons.

110. First, in circumstances where the Chief Executive (Housing) has a leasehold interest in the land and has entered into a residential tenancy agreement or a service provider/occupant contract, the residents of each dwelling would have an estate or interest within the meaning of s 71(2) of ALRA in the land comprised in their dwelling.[36] In those circumstances, the preservation of "traditional usage" rights under s 71(1) of ALRA would have no application.

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[36] See ALRA, ss 19, 19A and 71(3).

111. Secondly, and regardless whether the Chief Executive (Housing) has a leasehold interest in the land, entry to a public housing dwelling without the consent or licence of the occupants could not properly be characterised as "entry, occupation or use … in accordance with Aboriginal tradition" within the meaning of s 71(1) of ALRA. This must necessarily be so in circumstances where the construction and provision of public housing is a post-traditional practice; the management of that public housing in accordance with post-traditional precepts and practices has been authorised by the relevant Land Trust through a lease to the Chief Executive (Housing) (or is occurring with the Land Trust's knowledge pending formal arrangements); and a fundamental principle underlying the ALRA/ALA entry regime is that it has no application to dwellings. It may also be noted in this context that it is a relatively simple matter to establish who is an authorised occupier under the tenancy practices presently in place. The tenancy agreements and contracts expressly and exhaustively identify the persons authorised to occupy the premises.

112. Even if that analysis was incorrect, the matter could not be addressed by an amendment to the *Trespass Act* in any event. Section 71(1) of ALRA would take primacy, and only the Commonwealth Parliament could take steps to redress the matter.

Aboriginal housing on other land

113. A significant number of Aboriginal communities are located on land that is not held under ALRA. Various forms of tenure are utilised in those communities, including freehold, Crown Leases Perpetual and Special Purpose Leases. The common feature of those arrangements is that title is held by an incorporated association[37] whose members comprise (at least some of) the adult members of the community.

114. Irrespective of the underlying tenure, the structure of the public housing arrangements in these communities is the same as that described above in relation to Aboriginal land under ALRA. That is, that the Chief Executive (Housing) has either secured a lease (or sub-lease) over the land comprising the public housing stock, or the Chief Executive (Housing) is exercising control and management of the housing stock in the absence of an underlying estate or interest but with the consent of the "owner" of the land. In either case, the Chief Executive (Housing) will have entered into a residential tenancy agreement or a service provider/occupant contract with the residents of each dwelling.

115. As with Aboriginal land, there can be no doubt that a resident under either type of tenure arrangement is a person "in lawful occupation" of the public housing in question, and so qualifies as an "occupier" within the meaning of the *Trespass Act*. That being so, the provisions of the *Trespass Act* will have application according to their terms.

J. Particular issues arising from the displacement of the permit system

116. Prior to the Attorney-General's reference, there was some concern expressed about the potential for the operation of the access regime under FaCSIA to allow undesirable individuals to reside within communities. Those questions centred primarily upon the

[37] Under either the *Associations Act* (NT) or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (*Cth).

circumstances of a convicted paedophile who was said to have returned to a community against the wishes of the majority of its residents.

117. Under the permit system in place prior to the Intervention, that person (not being an Aboriginal person with traditional rights) would have required a permit from the relevant Land Council or the traditional owners in order to return to the community. Assuming that a permit was refused, that person could not lawfully have returned to the community.

118. The access regime implemented by FaCSIA provided that person with a conditional entitlement to remain on premises in the community; but that entitlement was not as the result of some general authorisation for members of the public to reside on premises in Aboriginal communities. Rather, s 70(2D) of ALRA provides in effect that a person may remain on premises within an Aboriginal township so long as he or she has the permission of the occupier of the premises. So, once that person had the permission of some other person who was entitled to occupy premises within the community -- in that case, his Aboriginal family -- he had an entitlement to remain on the Aboriginal land in question. It should be noted, however, that even before the commencement of FaCSIA it would have been open to that person's family, as traditional owners, to grant him a permit.

119. That issue is entirely unrelated to the application of the *Trespass Act* to public housing located on Aboriginal land. For the reasons detailed above, the *Trespass Act* does have application to housing located on Aboriginal land, and the various remedies and offence provisions under that Act have the same operation in relation to Aboriginal occupiers on Aboriginal land as they do elsewhere in the Territory. As with all land in the Territory, however, there can be no trespass where a person enters or remains on premises with the consent of the occupier.

120. In a similar vein, questions have been raised as to what may be done in relation to non-Aboriginal people who have obtained a written permit under the ALA and then cause disruption on Aboriginal land. The general access regime under ALRA/ALA provides that a traditional owner of an area of Aboriginal land may issue a permit to a person to enter onto and remain on that land subject to such conditions as the traditional Aboriginal owner thinks fit. The notion of "trespass" under the *Trespass Act* is not satisfied where there is consent from the person in possession of the land, or some legal justification or excuse. It would be untenable to suggest that the trespass legislation should be amended to provide otherwise. To the extent that there is a difficulty in relation to persons with a permit causing disruption, the issue is properly addressed by withdrawing the permit or by reporting the matter to the police authorities, depending upon the circumstances of the disturbance.

K. Recommendations

121. The NTLRC recommends:

(a) that there is no need for any amendment to the general structure of the *Trespass Act* or the proceedings that can be commenced under the Act. In particular, there is nothing in the legislation in force in any other Australian jurisdiction which commends itself to the NTLRC for adoption or replication in the Territory;

(b) that s 7(1) of the *Trespass Act* be amended to remove the requirement for an antecedent act of trespass as a precondition to the giving of a direction, so that it reads:

> A person who, after being directed to leave any place by an occupier or member of the Police Force acting at the request of the occupier, fails or refuses to leave that place forthwith or returns within 24 hours to that place, commits an offence.

(c) that the executive give some consideration to whether the *Trespass Act* should be amended to allow for greater flexibility in the duration of a warning off notice under s 8 of the *Trespass Act*. Although it is unnecessary to legislate for that purpose, the matter has been replaced by the Court Summary Jurisdiction; and

(d) that there is no need for any legislative amendment to ensure the effective application of the *Trespass Act* to public housing located on Aboriginal land, whether held under ALRA or some other form of tenure.

NORTHERN TERRITORY OF AUSTRALIA

TRESPASS ACT

As in force at 1 July 2010

Table of provisions

NORTHERN TERRITORY OF AUSTRALIA

This reprint shows the Act as in force at 1 July 2010. Any amendments that commence after that date are not included.

TRESPASS ACT

An Act to amend the law relating to trespass

1 Short title

This Act may be cited as the *Trespass Act*.

2 Commencement

(1) Sections 1 and 2 shall come into operation on the day on which the Administrator's assent to this Act is declared.

(2) The remaining provisions of this Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*.

3 Repeal

Sections 118 and 119 of the *Crown Lands Act* and sections 57(1)(n) and 91A of the *Summary Offences Act* are repealed.

4 Interpretation

(1) In this Act, unless the contrary intention appears:

Crown land means all Crown land, including reserved or dedicated land, other than Crown land which has been leased or is occupied under a licence or an agreement.

occupier, in relation to a place, means:

(a) where the place is Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation – a person in charge of the land; and

(b) where the place is other than Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation – a person in lawful occupation of the place,

and includes an employee or other person acting under the authority of a person in charge under paragraph (a) or in lawful occupation under paragraph (b);

place includes premises and land (including prohibited land and Crown land).

premises means:

(a) a building or structure whether permanent or temporary and whether fixed or capable of being moved;

(b) a dwelling-place;

(c) any part of a yard, garden or area (whether enclosed or not); or

(d) a vehicle (including a caravan), vessel, aircraft or hovercraft.

prohibited land means:

(a) Crown land;

(b) land occupied by the Territory or the Commonwealth; or

(c) land occupied by a statutory corporation,

upon which is posted a notice in English to the effect that trespassing on the land is prohibited.

(2) Where no person is the occupier of any place, the owner of that place shall, for the purposes of this Act, be deemed to be the occupier.

5 Trespass on premises

A person who trespasses on premises commits an offence.

Maximum penalty: 20 penalty units or imprisonment for 6 months.

6 Trespass on prohibited land

A person who trespasses on prohibited land commits an offence.

Maximum penalty: 20 penalty units.

7 Trespass after direction to leave

(1) A person who trespasses on any place and, after being directed to leave that place by an occupier or member of the Police Force acting at the request of the occupier, fails or refuses to do so forthwith or returns within 24 hours to that place, commits an offence.

Maximum penalty: 20 penalty units.

(2) A direction under subsection (1) may, where the trespass is on Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation, be given by a member of the Police Force whether a request to act has been made by the occupier or not.

8 Trespass after warning to stay off

(1) Where a person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time afterwards, warn that person to stay off that place.

(2) Where an occupier of any place has reasonable cause to suspect that a person is likely to trespass on that place, the occupier may warn that person to stay off that place.

(3) Where a person is found guilty of an offence against this Act committed on or in respect of any place, the Court may warn that person to stay off that place.

(4) A person who, being a person who has been warned under this section to stay off any place, trespasses on that place within one year after the giving of the warning, commits an offence.

Maximum penalty: 20 penalty units.

9 Giving directions or warnings

(1) A direction to leave under section 7 or a warning to stay off under section 8 shall be given to the individual person concerned either orally or by notice in writing delivered to that person or sent to that person by post.

(2) Where the person concerned is a member of a group, it is a sufficient compliance with subsection (1) in relation to an oral direction to leave or a warning to stay off if the direction or warning is addressed to the group or members of it and it is clear that the person concerned is included among those persons addressed.

10 Power of removal

Where a person fails or refuses to leave a place after being directed to do so under section 7 or trespasses on a place after being warned to stay off under section 8, a member of the Police Force may warn that person of the consequences of not leaving the place forthwith and, if the person fails to leave forthwith:

(a) arrest the person without warrant to be further dealt with according to law; or

(b) without arrest but by force if necessary, remove the person and the person's property (if any) from that place.

11 Offences

(1) Offences under this Act are regulatory offences.

(2) Proceedings for offences under this Act shall be taken only on the complaint of an occupier of the place concerned or a member of the Police Force, and shall be disposed of summarily.

(3) Proceedings taken and a finding of guilt entered in respect of an offence committed under one provision of this Act shall not be a bar to proceedings being taken and a finding of guilt entered against the same defendant in respect of an offence committed under another provision of this Act in respect of a continuing course of events.

12 Evidence

In proceedings for an offence against this Act, an averment in a complaint or information that:

(a) the person is, or was at the relevant time, an occupier within the meaning of section 4 or a member of the Police Force; or

(b) a direction to leave or a warning to stay off was given in accordance with section 9,

is evidence of the fact so averred.

13 Defences

(1A) It is a defence to a charge of committing an offence against section 5 if the defendant proves that the trespass was a result of an honest and reasonable mistake of fact.

(1) It is a defence to a charge of committing an offence against section 6 if the defendant proves that:

(a) the defendant did not see and could not reasonably be assumed to have seen the notice posted on the land; or

(b) the trespass was not wilful and was done while hunting or in the pursuit of game.

(2) It is a defence to a charge of committing an offence against section 5 or 7 if the defendant proves that it was necessary to remain in or on the place concerned or to return to that place for the defendant's own protection or the protection of some other person, or because of some emergency involving the defendant's property or the property of some other person.

(3) It is a defence to a charge of committing an offence against section 8 if the defendant proves that:

(a) the person by whom or on whose behalf the warning concerned was given is no longer an occupier of the place concerned; or

(b) it was necessary for the defendant to commit the trespass for the defendant's own protection or for the protection of some other person, or because of some emergency involving the defendant's property or the property of some other person.

14 Relationships of Act to other laws and instruments

Nothing in this Act shall:

(a) derogate from anything that a person is authorized to do by or under any other Act or law in force in the Territory; or

(b) affect the provisions of:

(i) the *Business Tenancies (Fair Dealings) Act* or the *Residential Tenancies Act*; or

(ii) an Act or instrument conferring a right of entry on land.

ENDNOTES

1 KEY

Key to abbreviations

amd = amended
app = appendix
bl = by-law
ch = Chapter
cl = clause
div = Division
exp = expires/expired
f = forms
Gaz* = *Gazette
hdg = heading
ins = inserted
lt = long title
nc = not commenced
od = order
om = omitted
pt = Part
r = regulation/rule
rem = remainder
renum = renumbered
rep = repealed
s = section
sch = Schedule
sdiv = Subdivision
SL = Subordinate Legislation
sub = substituted

2 LIST OF LEGISLATION

***Trespass Act 1987* (Act No. 7, 1987)**

Assent date	27 May 1987
Commenced	1 July 1987 (*Gaz* G24, 17 June 1987, p 4)

***Sentencing (Consequential Amendments) Act 1996* (Act No. 17, 1996)**

Assent date	19 April 1996
Commenced	s 7: 19 April 1996; rem: 1 July 1996 (s 2, s 2 *Sentencing Act 1995* (Act No. 39, 1995) and *Gaz* S15, 13 June 1996)

***Residential Tenancies (Consequential Amendments) Act 1999* (Act No. 46, 1999)**

Assent date	10 November 1999
Commenced	1 March 2000 (s 2, s 2 *Residential Tenancies Act 1999* (Act No. 45, 1999) and *Gaz* G8, 1 March 2000, p 2)

***Trespass Amendment Act 2000* (Act No. 51, 2000)**

Assent date	14 November 2000
Commenced	6 December 2000 (*Gaz* G48, 6 December 2000, p 3)

***Statute Law Revision Act 2004* (Act No. 18, 2004)**

Assent date	15 March 2004
Commenced	1 July 2004 (s 2(2), s 2 *Business Tenancies (Fair Dealings) Act 2003* (Act No. 55, 2003) and *Gaz* G9, 3 March 2004, p 5)

***Justice Legislation Amendment (Penalties) Act 2010* (Act No. 12, 2010)**

Assent date	20 May 2010
Commenced	1 July 2010 (*Gaz* G24, 16 June 2010, p 2)

3 LIST OF AMENDMENTS

s 4	amd No. 51, 2000, s 4
ss 5 – 7	amd No. 51, 2000, s 7; No. 12, 2010, s 3
s 8	amd No. 17, 1996, s 6; No. 51, 2000, s 7; No. 12, 2010, s 3
s 10	amd No. 51, 2000, s 7
s 11	amd No. 17, 1996, s 6
s 12	amd No. 51, 2000, s 5
s 13	amd No. 51, 2000, s 6
s 14	amd No. 46, 1999, s 7; No. 18, 2004, s 3

STATUTORY TRESPASS OFFENCES IN OTHER AUSTRALIAN JURISDICTIONS

A. Commonwealth

CRIMES ACT 1914 - SECT 89

Trespassing on Commonwealth land

(1) A person who, without lawful excuse (proof whereof shall lie upon him or her), trespasses or goes upon any prohibited Commonwealth land shall be guilty of an offence.
Penalty: 10 penalty units.

(2) Where a person is found upon prohibited Commonwealth land, a constable, a protective service officer or an authorized Commonwealth officer may request the person to furnish his or her name and address to the constable or officer and, if the person fails to comply with the request, he or she shall be guilty of an offence.
Penalty: 10 penalty units.

(3) Where a person is found upon prohibited Commonwealth land and a constable or authorized Commonwealth officer has reasonable grounds to believe that that person has gone upon the land in circumstances that amount to an offence against subsection (1), the constable or officer may apprehend that person and that person may be detained in proper custody to be dealt with according to law.

(4) An authorized Commonwealth officer shall not, under this section, request a person to furnish his or her name or address, or apprehend a person, unless he or she first produces to the person the instrument by virtue of which he or she is an authorized Commonwealth officer.

(5) In this section:
"authorized Commonwealth officer" means a Commonwealth officer declared by a Minister, by instrument in writing, to be an authorized Commonwealth officer for the purposes of this section.
"prohibited Commonwealth land" means 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 upon the land is prohibited.
"protective service officer" has the same meaning as in the *Australian Federal Police Act 1979* .

PUBLIC ORDER (PROTECTION OF PERSONS AND PROPERTY) ACT 1971 - SECT 11

Additional offences on premises in a Territory

(1) A person who trespasses on premises in a Territory is guilty of an offence, punishable on conviction by a fine of not more than 10 penalty units.

(2) A person who:

(a) engages in unreasonable obstruction in relation to the passage of persons or vehicles into, out of, or on premises in a Territory, or otherwise in relation to the use of premises in a Territory;

(b) while trespassing on premises in a Territory, behaves in an offensive or disorderly manner; or

(c) being in or on premises in a Territory, refuses or neglects to leave those premises on being directed to do so by the occupier or a person acting with the authority of the occupier;

is guilty of an offence, punishable on conviction by a fine of not more than 20 penalty units.

(2A) For the purposes of an offence against subsection (1) or (2), absolute liability applies to the physical element of circumstance of the offence, that the premises are in a Territory.

Note: For ***absolute liability*** , see section 6.2 of the *Criminal Code* .

(2B) Subsection (1) and paragraph (2)(c) do not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2B) (see subsection 13.3(3) of the *Criminal Code*).

(3) Notwithstanding section 23, the consent of the Director of Public Prosecutions, or of a person, or of a person included in a class of persons, authorized by the Director of Public Prosecutions for the purposes of subsection (2) of that section, is not required for the institution of proceedings for the prosecution of an offence against this section.

(3A) This section is not intended to exclude or limit the concurrent operation of any law of the Australian Capital Territory.

(4) In this section, ***premises*** does not include Commonwealth premises.

PUBLIC ORDER (PROTECTION OF PERSONS AND PROPERTY) ACT 1971 - SECT 12

Additional offences on Commonwealth premises

(1) A person who trespasses on Commonwealth premises is guilty of an offence, punishable on conviction by a fine of not more than 10 penalty units.

(2) A person who:

(a) engages in unreasonable obstruction in relation to the passage of persons or vehicles into, out of, or on Commonwealth premises, or otherwise in relation to the use of Commonwealth premises;

(b) being in or on Commonwealth premises, behaves in an offensive or disorderly manner; or

(c) being in or on Commonwealth premises, refuses or neglects to leave those premises on being directed to do so by a constable, by a protective service officer, or by a person authorized in writing by a Minister or the public authority under the Commonwealth occupying the premises to give directions for the purposes of this section;

is guilty of an offence, punishable on conviction by a fine of not more than 20 penalty units.

(3) For the purposes of an offence against subsection (1) or (2), absolute liability applies to the physical element of circumstance of the offence, that the premises are Commonwealth premises.

Note: For ***absolute liability*** , see section 6.2 of the *Criminal Code* .

(4) For the purposes of an offence against paragraph (2)(c), strict liability applies to the physical element of circumstance of the offence, that the direction had been given by:

(a) a constable; or

(b) a protective service officer; or

(c) a person authorised in writing by a Minister or the public authority under the Commonwealth occupying the premises to give directions for the purposes of this section.

Note: For ***strict liability*** , see section 6.1 of the *Criminal Code* .

(5) Subsection (1) and paragraph (2)(c) do not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

PUBLIC ORDER (PROTECTION OF PERSONS AND PROPERTY) ACT 1971 - SECT 20

Additional offences in relation to protected premises

(1) A person who trespasses on protected premises is guilty of an offence, punishable on conviction by a fine of not more than 10 penalty units.

(2) A person who:

(a) engages in unreasonable obstruction in relation to the passage of persons or vehicles into, out of or on protected premises, or otherwise in relation to the use of protected premises;

(b) while trespassing on protected premises, behaves in an offensive or disorderly manner; or

(c) being in or on protected premises, refuses or neglects to leave those premises on being directed to do so by a constable, by a protective service officer, by a protected person residing or performing duties on the premises, or by a person acting in accordance with authority conferred on him or her by such a protected person;

is guilty of an offence, punishable on conviction by a fine of not more than 20 penalty units.

(3) Subsection (1) and paragraph (2)(c) do not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

(4) For the purposes of an offence against subsection (1) or (2), absolute liability applies to the physical element of circumstance of the offence, that the relevant premises are protected premises.

Note: For ***absolute liability*** , see section 6.2 of the *Criminal Code* .

(5) For the purposes of an offence against paragraph (2)(c), strict liability applies to the physical element of circumstance of the offence, that the direction had been given by:

(a) a constable; or

(b) a protective service officer; or

(c) a protected person residing or performing duties on the premises; or

(d) a person acting in accordance with authority conferred on him or her by such a protected person.

Note: For ***strict liability*** , see section 6.1 of the *Criminal Code* .

B. Australian Capital Territory

ENCLOSED LANDS PROTECTION ACT 1943 - SECT 4

Penalty for unlawful entry on enclosed lands

(1) Any person who, without lawful excuse (proof of which shall lie on the person), enters into the enclosed land of any other person, without the consent of the owner or occupier or the person in charge of those lands, commits an offence.
Maximum penalty: 5 penalty units.

(2) Without limiting the expression ***lawful excuse*** in subsection (1), a drover or person in charge of stock being driven on a road lawfully enclosed with the lands of any person is taken to have lawful excuse for entering those lands for the purpose of preventing the stock from straying or of regaining control of stock that have strayed from that road.

(3) If a road is lawfully enclosed with the lands of any person and the road is not clearly defined and—
(a) if there is a reasonably defined track commonly used by people passing through those lands—the centre of the track is taken, for this Act, to be the centre of the road; or
(b) if there is no reasonably defined track through the lands—a person passing through the lands does not commit an offence against this section unless it is shown that the route taken by the person in so passing was, having regard to the circumstances, unreasonable.

TRESPASS ON TERRITORY LAND ACT 1932 - SECT 4

Trespass on Territory land

(1) The Minister may cause to be placed on unleased Territory land or land occupied by the Territory a notice prohibiting trespass on the land.

(2) A person who, without reasonable excuse, trespasses or enters—
(a) unleased Territory land or land occupied by the Territory—
(i) about which any notice is posted on it prohibiting trespass; or
(ii) that is in the city area and is delineated on any of the subdivisional plans held by the Territory, and has on it a dwelling house; or
(b) any garden, plantation or afforestation area on unleased Territory land or land occupied by the Territory;
commits an offence.

Maximum penalty: 5 penalty units.

C. New South Wales

INCLOSED LANDS PROTECTION ACT 1901 - SECT 4

Unlawful entry on inclosed lands

(1) Any person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands without the consent of the owner, occupier or person apparently in charge of those lands, or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands, is liable to a penalty not exceeding:
(a) 10 penalty units in the case of prescribed premises, or
(b) 5 penalty units in any other case.

(1A) A drover or person in charge of stock being driven on a road lawfully inclosed within the lands of any person has a lawful excuse for entering those lands for the purpose of preventing the stock from straying, or regaining control of stock that have strayed, from that road.

(2) Where a road is lawfully inclosed with the lands of any person, and such road is not clearly defined but there is a reasonably defined track commonly used by persons passing through such lands, the centre of such track shall, for the purposes of this Act, be deemed to be the centre of the road.

(3) Where a road is lawfully inclosed with the lands of any person and such road is not clearly defined and there is no reasonably defined track through such lands a person passing through such inclosed lands shall not be guilty of an offence unless it is shown that the route taken by such person in so passing was, having regard to the circumstances, unreasonable.

(4) In this section, "stock" includes horses, cattle, sheep, goats, pigs and camels.

D. Queensland

SUMMARY OFFENCES ACT 2005 - SECT 11

11 Trespass

(1) A person must not unlawfully enter, or remain in, a dwelling or the yard for a dwelling.
Maximum penalty—20 penalty units or 1 year's imprisonment.

(2) A person must not unlawfully enter, or remain in, a place used as a yard for, or a place used for, a business purpose.
Maximum penalty—20 penalty units or 1 year's imprisonment.

Note—

See the Police Powers and Responsibilities Act 2000, section 634 for safeguards applying to starting proceedings for particular offences in this division.

(3) This section does not prevent an authorised industrial officer entering a workplace in accordance with the terms of the person's appointment as an authorised industrial officer.

E. South Australia

SUMMARY OFFENCES ACT 1953 - SECT 17

17—Being on premises for an unlawful purpose

(1) A person who has entered, or is present on, premises for an unlawful purpose or without lawful excuse is guilty of an offence.
Maximum penalty:
Where the unlawful purpose is the commission of an offence punishable by a maximum term of imprisonment of 2 years or more—imprisonment for 2 years.
In any other case—$2 500 or imprisonment for 6 months.

(1a) Despite section 5, the onus of proving absence of lawful excuse in proceedings for an offence against this section lies upon the prosecution.

(2) Where a police officer believes on reasonable grounds that a person has entered, or is present on, premises for the purpose of committing an offence, the officer may order the person to leave the premises.

(3) A person who fails to comply with an order under subsection (2) is guilty of an offence.
Maximum penalty: $2 500 or imprisonment for 6 months.

(4) In this section—
"premises" means—
(a) any land; or
(b) any building or structure; or
(c) any aircraft, vehicle, ship or boat.

SUMMARY OFFENCES ACT 1953 - SECT 17A

17A—Trespassers on premises

(1) Where—
(a) a person trespasses on premises; and

(b) the nature of the trespass is such as to interfere with the enjoyment of the premises by the occupier; and

(c) the trespasser is asked by an authorised person to leave the premises,

the trespasser is, if he or she fails to leave the premises forthwith or again trespasses on the premises within 24 hours of being asked to leave, guilty of an offence.

Maximum penalty: $2 500 or imprisonment for 6 months.

(2) A person who, while trespassing on premises, uses offensive language or behaves in an offensive manner is guilty of an offence.

Maximum penalty: $1 250.

(2a) A person who trespasses on premises must, if asked to do so by an authorised person, give his or her name and address to the authorised person.

Maximum penalty: $1 250.

(3) In this section—

"authorised person", in relation to premises, means—

(a) the occupier, or a person acting on the authority of the occupier;

(b) where the premises are the premises of a school or other educational institution or belong to the Crown or an instrumentality of the Crown, the person who has the administration, control or management of the premises, or a person acting on the authority of such a person;

"occupier", in relation to premises, means the person in possession, or entitled to immediate possession, of the premises;

"offensive" includes threatening, abusive or insulting;

"premises" means—

(a) any land; or

(b) any building or structure; or

(c) any aircraft, vehicle, ship or boat.

(4) In proceedings for an offence against this section, an allegation in the complaint that a person named in the complaint was on a specified date an authorised person in relation to specified premises will be accepted as proved in the absence of proof to the contrary.

F. Tasmania

POLICE OFFENCES ACT 1935 - SECT 14B

14B. Unlawful entry on land

(1) A person, without reasonable or lawful excuse (proof of which lies on the person), must not enter into, or remain on, any land, building, structure, premises, aircraft, vehicle or vessel without the consent of the owner,

occupier or person in charge of the land, building, structure, premises, aircraft, vehicle or vessel.

(2) A person who is convicted of an offence under this section is liable to a penalty of–
(a) a fine not exceeding 10 penalty units or imprisonment for a term not exceeding 12 months, in respect of entering or remaining in a dwelling-house; or
(b) 5 penalty units or imprisonment for a term not exceeding 6 months, in respect of entering into, or remaining on, any other land, building, structure, premises, aircraft, vehicle or vessel.

(2A) However, if the court that convicts a person of an offence under this section is satisfied that the person –
(a) was in possession of a firearm during the actual commission of the offence; or
(b) made any use of an aircraft, vehicle or vessel during the actual commission of the offence –
the person is liable to a penalty not exceeding twice that provided for by subsection (2).

(2B) If subsection (2A)(a) applies to the convicted person, the court may, in addition to any other penalty it may impose, do either or both of the following:
(a) order that the firearm is forfeited to the Crown;
(b) cancel all or any of the licences or permits that the convicted person may hold under the Firearms Act 1996.

(2C) A firearm forfeited to the Crown pursuant to subsection (2B) is to be disposed of as the Minister determines.

(3) Where a person is convicted of an offence under this section in respect of entering or remaining in the dwelling-house of another person, the court or one of the justices may issue a warrant addressed to all police officers commanding them to enter the premises and give the possession thereof to the complainant.

(4) For the purpose of executing a warrant under subsection (3), every police officer may, if necessary, break and enter the premises to which the warrant relates and eject the person convicted and any other person therefrom.

(5) A police officer who reasonably suspects that a person in possession of a firearm is committing an offence under this section may seize that firearm.

(6) Section 68 applies if a firearm is seized under subsection (5).

POLICE OFFENCES ACT 1935 - SECT 19A

19A. Sports grounds

(1) A person shall not –
(a) enter the reserved area of a sports ground without lawful excuse; or
(b) remain on the reserved area of a sports ground after having been requested to leave that area by a police officer or some person having authority to require him to leave that area.

(1AA) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months.

(1A) Subject to subsection (1B), a police officer may arrest without warrant any person who fails to leave the reserved area of a sports ground –
(a) where a sport is being played or a game is being conducted;
(b) where a sport is to be played or a game is to be conducted; or
(c) where a sport has been played or a game has been conducted –
when requested to do so by that police officer.

(1B) A police officer shall not exercise the power of arrest referred to in subsection (1) unless he reasonably believes –
(a) that the sport being played, or the game being conducted, on the reserved area of the sports ground is or will be interrupted or the use of that area by persons participating or having participated in the sport or game is or will be interfered with or affected; or
(b) that the commencement of the sport to be played, or the game to be conducted, on that area will be delayed.

(2) In this section –
reserved area means so much of a sports ground as is set apart or reserved for the playing of a game or the conducting of a sport;
sports ground means a public place, not wholly contained within a building, to which the public are admitted, whether on payment or otherwise, to view a game or sport played or conducted on the reserved area of that sports ground.

G. Victoria

SUMMARY OFFENCES ACT 1966 - SECT 9

9. Wilful destruction, damage etc. of property

(1) Any person who-

(a) destroys damages pollutes or obstructs any aqueduct dam sluice pipe pump waterway pond pool or fountain;

(b) being an artificer workman journeyman or apprentice wilfully damages spoils or destroys any goods wares work or material committed to his care or charge;

(c) wilfully injures or damages any property (whether private or public) the injury done being under the value of $5000; or

(d) wilfully trespasses in any public place other than a Scheduled public place and neglects or refuses to leave that place after being warned to do so by the owner occupier or a person authorized by or on behalf of the owner or occupier; or

(e) without express or implied authority given by the owner or occupier or given on behalf of the owner or occupier by a person authorised to give it or without any other lawful excuse, wilfully enters any private place or Scheduled public place, unless for a legitimate purpose; or

(f) neglects or refuses to leave a private place or Scheduled public place after being warned to do so by the owner or occupier or a person authorised to give that warning on behalf of the owner or occupier, unless the person has a lawful excuse; or

(g) without lawful excuse, enters any place (whether private or public) in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace-

shall be guilty of an offence. Penalty: 25 penalty units or imprisonment for six months.

(1A) In any proceedings for an offence against subsection (1) the statement on
oath of any person that he is or was at any stated time the owner or occupier of any place or a person authorized by or on behalf of the owner or occupier thereof shall be evidence until the contrary is proved by or on behalf of the accused that such person is or was the owner or occupier of that place or a person authorized by or on behalf of the owner or occupier thereof (as the case requires).

(1B) A person may commit an offence against paragraph (d), (e), (f) or (g) of subsection (1) even though he or she did not intend to take possession of the place.

(1C) Without limiting paragraph (e) of subsection (1), examples of circumstances in which a person does not have express or implied authority to
enter a place are-

(a) the person enters that place after having been previously warned not to enter by the owner or occupier or a person authorised to give such a warning on behalf of the owner or occupier; or

(b) the person enters that place despite being then warned not to enter by the owner or occupier or a person authorised to give such a warning on behalf of the owner or occupier; or

(c) the person enters that place in breach of a prominently displayed sign erected at that place by the owner or occupier or a person authorised to erect such a sign on behalf of the owner or occupier stating that-

(i) the person concerned, or a class of persons of which the person concerned is a member, is prohibited from entering that place; or

(ii) persons engaging in that place in the type of activity in which the person concerned is proposing to engage in that place are prohibited from entering that place- and the person has no other lawful excuse for entering that place.

(1D) A warning may be given to a person under subsection (1)(f) or subsection
(1C)(a) or (b)-

(a) orally; or

(b) by delivering written notice of it personally to the person; or

(c) except in the case of a warning under subsection (1)(f), by sending written notice of it by certified mail addressed to the person at his or her usual or last known place of residence.

(1E) A person may commit an offence against paragraph (g) of subsection (1) even though he or she had a right to enter that place in a manner other than that described in that paragraph.

(2) For the purposes of section 86 of the Sentencing Act 1991 the cost of repairing or making good anything spoiled or damaged in contravention of this section shall be deemed to be loss or damage suffered in relation thereto.

(3) Nothing contained in this section shall extend to any case where the person offending acted under a fair and reasonable supposition that he had a right to do the act complained of or to any trespass (not being wilful and malicious) committed in hunting or the pursuit of game.

H. Western Australia

CRIMINAL CODE (WA), s 70A

70A. Trespass

(1) In this section —

person in authority, in relation to a place, means —
(a) in the case of a place owned by the Crown, or an agency or instrumentality of the Crown — the occupier or person having control or management of the place or a police officer; or
(b) in any other case —
(i) the owner, occupier or person having control or management of the place; or
(ii) a police officer acting on a request by a person referred to in subparagraph (i);

trespass on a place, means —
(a) to enter or be in the place without the consent or licence of the owner, occupier or person having control or management of the place; or
(b) to remain in the place after being requested by a person in authority to leave the place; or
(c) to remain in a part of the place after being requested by a person in authority to leave that part of the place.

(2) A person who, without lawful excuse, trespasses on a place is guilty of an offence and is liable to imprisonment for 12 months and a fine of $12 000.

(3) In a prosecution for an offence under subsection (2), the accused has the onus of proving that the accused had a lawful excuse.

———————————————————

AUTHORITIES FROM THE SUPREME COURT OF THE NORTHERN TERRITORY CONSIDERING THE OPERATION OF THE *TRESPASS ACT*

A. *O'Rourke v Hales* [1999] NTSC 47

Appeal against sentence on conviction of a charge of trespassing on the Jabiluka Mineral Lease contrary to s 7 of the *Trespass Act*. The case contains no relevant discussion of the operation of the legislation.

B. *Cintana v Burgoyne* [2003] NTSC 106

[8] Counsel for the respondent, Mr Geary, submitted that the police were authorised by s 26 of the Code because the appellant, once she had been asked to leave the premises and did not do so, became a trespasser, and the police were empowered to remove her by **s 10 of the *Trespass Act*** which provides as follows:

> "Where a person fails or refuses to leave a place after having been directed to do so under **section 7** ..., a member of the Police Force may warn that person of the consequences of not leaving the place forthwith and the person fails to leave forthwith -
>
> (a) arrest the person without warrant to be further dealt with according to law; or
>
> (b) without arrest but by force if necessary, remove the person and the person's property (if any) from that place."

[9] There was no finding by the learned magistrate that the police warned the appellant of the consequences of not leaving the place forthwith, and there was no evidence that any such warning was given. Counsel for the appellant submitted that the exercise of the power depended upon the warning having been given, and as no warning had been given, the respondent could not rely on **s 10**. Counsel for the respondent submitted that, because the section uses the word "may", it was not necessary for such a warning to be given. No authorities were cited directly in point by either party, and according to my own researches, the point has not previously been considered by this Court.

[10] I am of the opinion that Mr Goldflam is plainly correct. The word "may", in this context, confers a power: see the well-known dictum of Earl Cairns LC in *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 222-223. The power to either arrest or remove a person under s 10 depends, inter

alia, upon the relevant warning having been given. As this did not occur, the removal of the appellant was not authorised by **s 10 of the *Trespass Act.***

[11] Alternatively, Mr Geary submitted that the police had the power to remove the appellant at common law because the appellant was causing a breach of the peace. In *Gardiner v Marinov and Northern Territory of Australia* (1998) 7 NTLR 181 at 190, B F Martin CJ held that the powers at common law included those "necessarily incident to the discharge of a constable's functions as a peace officer or conservator of the peace." Mr Goldflam submitted that the powers were limited to restraining or preventing injury to persons or damage to property: *Panos v Hayes* (1987) 44 SASR 148 at 155 per Legoe J. Further, it was submitted that there was no evidence of a breach of the peace at the relevant time because there was no harm actually done, or likely to be done, to any person or to the property of any person; nor was any person put in fear of being harmed by an assault, an affray, a riot, an unlawful assembly or by any other disturbance: see Watkins LJ in *R v Howell* [1982] 1 QB 416.

[17] There are a number of difficulties with the respondent's argument. First, in view **of s 10 of the *Trespass Act***, it may be said that the position is governed by that section rather than the powers of a constable to prevent a breach of the peace. It is not necessary to reach a conclusion about this because, secondly, there is no evidence that a breach of the peace was imminent. So far as the power of self-help is concerned, ss 29(2)(a)(r) and (vi) of the Code apply where a trespasser enters on or remains on land with intent to commit an offence, or in circumstances where the entry on to or the remaining on the land constitutes an offence: see s 29(4). There was no finding that the appellant had committed an offence (although one might have thought that, having been told to leave the premises by a staff member of the shop, an offence against **s 5 of the *Trespass Act*** had been committed). On the contrary, there was a finding that no offence had been committed by the appellant. Regardless of this, there is simply no evidence, and there were no findings that the owners or occupants of the store were about to use self-help or were imminently likely to use self-help, so that a breach of the peace was imminent.

C. *R v Jesson* [2009] NTSC 13

[50] There is however no equivalent provision relating to the search of premises. As there was no warrant in force which enabled the police to search cabin 131, the first question is whether the search was unlawful. Counsel for the accused submitted that the search constituted a trespass. It was not suggested that the search exposed the police to prosecution for an offence against Northern Territory criminal law. Presumably this is because counsel for the accused acknowledged that the police would have a defence under **s 13(1A) of the *Trespass Act***.

D. *Kenwright v Hales* [2000] NTSC 6

[10] Coming to the events in question, the appellant had phoned the complainant's phone number on a number of occasions on Friday, 12 February 1999 and early on the morning of Saturday, 13 February. The last of those calls was at 12:35 am, after which the appellant went to the complainant's premises. The complainant's evidence was that there was a knock on her door to which she replied "Come in", after which the appellant entered the premises. The learned Magistrate was clearly of the view that the appellant had the complainant's permission to enter the premises; however, he did not consider that this permission could constitute "authorisation" for the purposes of the ***Trespass Act***.

[11] Section 213(1) of the *Criminal Code* provides that "any person who unlawfully enters a building with intent to commit any offence therein is guilty of an offence". It is clear from this provision that the intent to commit the offence must be held at the time the person unlawfully enters the building. The only offence it was alleged that the appellant intended to commit was that of trespass, as provided for in the ***Trespass Act***.

[12] Although the form of trespass was not particularised, it seems clear, as the learned Magistrate concluded, that the form of trespass in question was that of trespass on enclosed premises: see ***Trespass Act,* s5**. The appellant commits that offence only where his trespass is "unlawful" under the *Trespass Act;* that is, "without authorisation, justification or excuse" **(s4(1))**. If at the time of the appellant's entry to the building, his action was authorised within the meaning of this provision, that action was not unlawful within the meaning of the *Trespass Act*. However, the learned Magistrate concluded that the appellant had no "authorization" within the meaning of that term in the *Trespass Act.* He concluded that the complainant had no power to grant such permission, as it would be inconsistent with the terms of the Domestic Violence Order.

[17] However, there is a further difficulty which causes me to hesitate before allowing the appeal solely on this ground. **Section 5 of the *Trespass Act*** provides:

> A person who trespasses unlawfully on enclosed premises commits an offence.

The word "unlawfully" is defined by **s4(1) of the *Trespass Act*** to mean, in relation to trespass, "without authorization, justification or excuse". *Prima facie* this would appear to require that Part II of the *Criminal Code* applies to offences against s5. Yet **s 11(1)** provides that offences against the Act are only regulatory offences. Consequently, Part II of the *Criminal Code* does not apply (with some minor exceptions): see *Criminal Code,* s22. It is difficult to reconcile these provisions, and I respectfully suggest that this apparent conflict needs the attention of the legislature. No argument was addressed to me on this question, it being assumed by both sides that as **s5** was a regulatory offence, s31 of the Code did not

apply. I am by no means sure that this is correct. However, it is not necessary for me to resolve this conundrum because I am satisfied that if s31 does apply to the offence of trespass upon enclosed land, the learned Magistrate did not find that the appellant had any such intent and I am not prepared to infer that the existence of such an intent was inherent in his Worship's findings as suggested by Mr Tiffin. One of the defences raised by the appellant to the charge covering the breach of the Domestic Violence Order was that the appellant believed that the order had lapsed. His Worship held that as that offence was a regulatory offence, the defence of honest and reasonable mistake under s32 of the *Criminal Code* did not apply. His Worship therefore did not rule that the appellant entered the land knowing that the order was in force and in deliberate violation of it; he seemed to accept the possibility that the appellant may have been mistaken. If this be so, it is difficult to see how in the circumstances of this case, his Worship could have found that the appellant deliberately entered the premises knowing that he was a trespasser. I would therefore allow the appeal against conviction in relation to the unlawful entry charge.

E. *Meyerhoff v Darwin City Council* [2005] NTCA 8 *Highway, Meyerhoff & Inder-Smith v Thomas* (unreported, Court of Appeal of the Northern Territory, 21/5/2004 AP 25 of 2003)

[18] In the case of *Highway, Meyerhoff & Inder-Smith v Thomas* (unreported, Court of Appeal of the Northern Territory, 21/5/2004 AP 25 of 2003) this Court heard an appeal from Bailey J in circumstances where the appellants have each been found guilty of trespass, contrary to **s 5 of the *Trespass Act***, the particulars of trespass being that the appellants, together with others, trespassed on the premises of the Office of the Chief Health Officer, 4th Floor, Health House, 87 Mitchell Street, Darwin.

Note: *Highway, Meyerhoff & Inder-Smith v Thomas* was an *ex tempore* decision. Following a hearing in the Court of Summary Jurisdiction, the appellants were found guilty of trespassing on premises, namely, the private office of the Chief Health Officer, 4th Floor, Health House, Mitchell Street in Darwin. The appellants were self-represented at the hearing. But It was not in dispute that each of the appellants entered and stayed in the office of the Chief Health Officer for some 15 minutes or so and that during this time they barricaded themselves inside the office and ignored requests to vacate the office.

The appellants subsequently appealed to the Supreme Court against the findings of guilt on the grounds that –

• A political protest in the form of a peaceful occupation is not trespassing.

• T on he magistrate erred by ignoring the defendants' claims of an implied invitation.

• The offence of trespass is invalid as it breaches the implied right to freedom of speech and political communication in the Australian Constitution.

The Supreme Court dismissed each of the appeals holding that –

• As trespass was a regulatory offence, intention or motive was irrelevant except to the extent that it may found one of the statutory defences set out in the Trespass Act. In this respect the appellants had failed to discharge the onus which the Trespass Act placed upon them.

• There was ample unchallenged evidence for the magistrate to find that it was fanciful for the appellants to assume that they had a right to enter individual private offices.

• The right of free speech is not an unlimited freedom.

The unsuccessful appellants then appealed the decision of the Supreme Court to the Court of Appeal. The grounds of appeal were the same as those in the Supreme Court. The Court of Appeal unanimously dismissed the appeals. In doing so, the Court agreed with the reasons given by the Supreme Court, and noted further that the Northern Territory law of trespass does not effectively burden freedom of communication about government or political matters, either in its terms, operation or effect and in any event, to any extent that it does, the trespass law is reasonably appropriate and adapted to serve a legitimate end compatible with representative or responsible government, namely, proprietary rights and the right to personal liberty and privacy.

F. ***Stewart Barry Dureau and Andrew Edward Dureau v Robin Laurence Trenerry*** **(unreported)**

After some discussion of clause 1(a), (as to which his Worship made no finding one way or the other), his Worship turned to consider 1(c). His Worship held that "lawfully" had its general and ordinary meaning, as something that was according to law or permitted by and therefore not contrary to law. His Worship concluded that, on the facts, there was no offence committed in violation of the *Trespass Act*, and he said that no other offence had been suggested to him by counsel. Nevertheless he considered that the appellants had breached s46A of the *Summary Offences Act*, *viz*:

> A person who in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace enters whether or not he is so entitled to enter land which is in the actual and peaceful possession of another is guilty of an offence. Penalty: imprisonment for 12 months.

Alternatively, Mr Carey submitted that the appellants were not lawfully in the premises as they had committed an offence against the *Trespass Act*, but he eventually was forced to concede, and rightly so, that no offence

was committed against that Act, because the land was not "enclosed premises" **(s5)** as it was partly unfenced, the land was not prohibited land **(s6)**, and no warning off had been given **(s8(4)**).

G. *Step v Crown Land Manager* [2011] NTSC 55

[1] The appellant has appealed against his conviction by the Court of Summary Jurisdiction of the offence of trespass after a direction to leave contrary to **s 7(1) of the *Trespass Act*.** No penalty was imposed on the appellant following his conviction. However, the trial Magistrate gave the appellant a warning to stay off the land under **s 8(3) of the *Trespass Act*.**

[2] The grounds of appeal are that the trial Magistrate erred in law when he:

(1) held that s 198 of the *Lands Title Act* totally abrogates common law possessory titles; and

(2) ordered the appellant to leave the property under s **8(3) of the *Trespass Act*.**

Section 7(1) of the Trespass Act

[3] **Section 7(1) of the *Trespass Act*** states:

> A person who trespasses on any place and, after being directed to leave that place by an occupier or member of the police force acting at the request of the occupier, fails or refuses to do so forthwith or returns within 24 hours to that place, commits an offence.

[4] Under **s 4 of the *Trespass Act***, "Crown land" means all Crown land, including reserved or dedicated land, other than Crown land which has been leased or is occupied under a licence or agreement. "Occupier" in relation to a place, means, where the place is Crown land, a person in charge of the land and includes an employee or other person acting under the authority of the person in charge.

[5] **Section 9 of the *Trespass Act*** states that a direction to leave under **s 7** of the Act shall be given to the individual person concerned either orally or by notice in writing delivered to that person or sent to that person by post. **Section 12 of the *Trespass Act*** states that in proceedings for an offence against the Act, an averment in a complaint that:

(a) the person is, or was at the relevant time the occupier within the meaning of **s 4** or a member of the Police Force; or

(b) a direction to leave or a warning to stay off was given in accordance with **s 9** of the Act, is evidence of the fact averred.

[6] Subsection **11(2) of the Trespass Act** states that proceedings for offences under this Act shall be taken only on the complaint of an occupier of the place concerned or a member of the Police Force, and shall be disposed of summarily.

….

[13] On 7 May 2010 a further letter was sent to the appellant by Ms Stanger. The letter stated that the appellant had challenged the direction given to him to leave Section 1660. It also stated that further investigation by the Department showed that he had belongings located on the adjoining section of land, Section 1659 Hundred of Ayres. The letter gave the appellant the following direction:

> Pursuant to **s 7(1) *Trespass Act***, I, as a person acting under the authority of the "occupier", being the Northern Territory now direct you to cease trespassing upon Sections 1659 and 1660, Hundred of Ayres and to leave Sections 1659 and 1660 Hundred of Ayres and to remove your personal property and effects from both parcels of land.
>
> You are further required to comply with this direction within 30 days from 12 May 2010 being the date this letter was served.
>
> Should you fail or refuse to comply with this direction by the above date prosecution proceedings will be instituted under the *Trespass Act.*

….

[15] The complaint was signed by Ms Hinton. The complaint charged the appellant with being a trespasser on Sections 1659 and 1660 Hundred of Ayres, being Crown Land, who had been directed by the occupier on 12 May 2010 to leave that place by 10 June 2010 and who had failed and refused to do so contrary to **s 7(1) of the *Trespass Act***. The complaint also pleads the following averments:

(1) At all material times Ms Stanger was a person acting under the authority of the Northern Territory of Australia who was the occupier.

(2) The direction to leave the premises was given by a letter dated 7 May 2010 which was served on the appellant on 12 May 2010 in accordance with **s 9 of the *Trespass Act***. Ms Hinton made the complaint under **s 11(2) of the *Trespass Act*** and s 50 of the *Justices Act.*

….

[18] The appellant maintained that s 198 of the *Land Title Act* did not abrogate his possessory rights. Section 198 of the *Land Title Act* only applied to land under that Act and by implication he must be taken to have argued that the two parcels of unalienated Crown land was not land under that Act. The appellant also sought to rely on the defence of emergency under **s 13(2) of the *Trespass Act***. He stated that an emergency existed because he had nowhere else to live if he was removed from Section 1660 Hundred of Ayers.

[19] Counsel for the complainant argued that by virtue of s 198 of the *Land Title Act* there was no adverse possession against the Crown in the Northern Territory. The appellant was a trespasser and the Crown, as the true owner of the land, had re-entered and reasserted its possession of the parcels of land and under **s 7 of the *Trespass Act*** had given the appellant a lawful direction to leave the land and the appellant had refused to do so. Further, there was no emergency.

….

[21] After the trial Magistrate made the above remarks there was the following exchange.

HIS HONOUR: I now have to warn you that you have *to leave that property* [emphasis added]. So I am giving you an official warning to satisfy section …

THE APPELLANT: Under what section, your Honour?

HIS HONOUR: I think it is s 8, isn't it?

MR JOBSON: Yes, your Honour, **s 8(3).**

THE APPELLANT: Stay off from where?

HIS HONOUR: Stay off 1659 and 1660.

THE APPELLANT: When does it take effect?

HIS HONOUR: The warning takes effect immediately. I dare say you will take about as much notice as you did the last one but it will trigger **s 10 [of the *Trespass Act*]** which means that the Crown's people can go in there and remove you and your belongings.

….

[23] His Honour had earlier stated that the appellant did not have a defence under the emergency provisions of **s 13 of the *Trespass Act*** because the emergencies contemplated by those provisions were emergencies relating to the appellant's property or someone else's property. They were not emergencies relating to whether or not the appellant had somewhere else to live.

Ground 1

[24] The appellant's primary submission about the first ground of appeal may be summarised as follows. An element of the offence created by **s 7(1) of the *Trespass Act*** is that the offender must be a trespasser. That is, in order for the appellant to be found guilty of an offence contrary to **s 7(1) of the *Trespass Act*,** the complainant must prove that on 12 May 2010, when the appellant was directed to leave the two parcels of unalienated Crown land, he was a trespasser on that

land. The appellant submits that he was not a trespasser because he had peacefully and openly acquired and maintained independent exclusive possession of the two parcels of land for more than nine years and in that time no action had been taken by the Crown to recover the land. Consequently, he had acquired a de facto and inchoate possessory interest in the land. As he was in actual possession of the land, the Crown had ceased to be in possession of the land and he had ceased to be a trespasser. Although the Crown could bring appropriate proceedings to eject him, and despite the fact that his possession of the land did not impinge upon or affect the Crown's rights over the land, he was not a trespasser. In support of this submission the appellant relied upon a number of cases in which various courts have ascribed legal significance to mere adverse possession of land for less than the limitation period prescribed by the relevant statute of limitations. He placed particular reliance on the judgments of Dixon J in *Wheeler v Baldwin*, Slattery J in *Spark v Whale Three Minute Car Wash,* and McHugh JA in *Newington v Windeyer*.

….

[35] As to the second ground of appeal, the appellant also submitted that the trial Magistrate warned him to leave the land rather than warn him to stay off the land. Such an order was beyond the power granted to the trial Magistrate under **s 8(3) of the *Trespass Act***. This submission cannot be sustained either. Although it is true that prior to giving the appellant a warning pursuant to **s 8(3) of the Act**, the trial Magistrate did say "I now have to warn you that you have to leave that property", he then went on to give the appellant a formal warning in accordance with **s 8(3) of the Act**. The appellant was referred to **s 8(3) of the Act** and the trial Magistrate in substance gave him an "official warning" under **s 8(3) of the Act** to stay off Sections 1659 and 1660 Hundred of Ayers.

Orders

[36] Notwithstanding that the trial Magistrate erred in law in his reliance of s 198 of the *Land Title Act,* no substantial miscarriage of justice has actually occurred and the appeal should be dismissed. The appeal is dismissed and I affirm the warning under **s 8(3) of the *Trespass Act*** that the appellant is to stay off Sections 1659 and 1660 Hundred of Ayres.

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