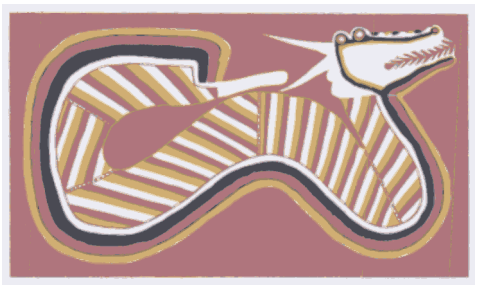

Parliament of Australia

Senate

Community Affairs Committee

Inquiry into the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008

Northern Land Council Submission

30 April 2008

NORTHERN LAND COUNCIL POSITION PAPER

30 APRIL 2008

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (EMERGENCY RESPONSE CONSOLIDATION) BILL 2008

The Northern Land Council (NLC) welcomes the opportunity to provide a submission to the Senate Community Affairs Committee regarding its enquiry into the provisions of the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008*.

The NLC refers to its submission dated 10 August 2007 and supplementary submission dated 13 August 2007 to the Senate Legal and Constitutional Affairs Committee regarding the original legislation.

The NLC generally supports the written submission dated 14 April 2008 made by the Central Land Council to the Community Affairs Committee regarding this Bill, and anticipates making a comprehensive submission to the Minister regarding the intervention legislation at the time of the proposed review later this year.

The NLC considers that it is necessary that that review comprehensively consider concerns which have been expressed by the Human Rights and Equal Opportunity Commission, the Law Council of Australia, the NLC and others that aspects of the intervention are discriminatory.

In this submission to the NLC wishes to briefly comment in relation to the permit system. The attachment to this submission contains background regarding the operation of the permit system since 1978 under the *Aboriginal Land Act* (NT), the permit system which operated under welfare laws between 1918 and 1977, the position on Norfolk Island, and the enquiries conducted by John Reeves QC and the 1998 Joint House of Representatives/Senate Committee Inquiry.

In 2006 and 2007 the NLC conducted comprehensive consultations with all communities in its region regarding proposals for reform identified by the former Indigenous Affairs Minister, Mal Brough. Traditional owners, and Aboriginal people in communities, universally opposed removal of the permit system, as does the NLC.

The NLC welcomes the Commonwealth Government's implementation of its election commitment that the former permit system will be restored although subject to an alternative mechanism whereby legal access for journalists will be provided by the Commonwealth Minister by means of a written authorisation (proposed s 70(2BB)).

The Minister's power is unfettered, and applies not only in relation to journalists but to any specified person or class of persons.

This bestowal of unfettered power on the Minister far exceeds the Government's election commitment, and cannot be justified. The unfettered power also goes far beyond the purpose of the provision as explained in the second reading speech:

> "Separately, by means of a ministerial determination, the government will ensure that journalists can access communities for the purpose of reporting on events in communities."

The unfettered power means that a future Commonwealth Minister may, at any time and without further reference to the Parliament, abolish the legislative policy since 1976 that traditional owners and land councils may regulate the entry of persons to Aboriginal land.

It is submitted that the Minister's power should be constrained by reference to its purpose, namely to enable access by bone fide journalists to communities for the purpose of reporting on events in communities.

Restrictions, such as suggested by the Central Land Council in its submission, are also appropriate in relation to ensuring that cultural events and ceremonial or funereal matters are not recorded without consent, vehicular access to communities be by main roads, and that large projects such as documentaries which require staying on Aboriginal land for extended periods not be facilitated by the Ministerial authorisation process (but instead be facilitated by means of a permit granted by traditional owners or land councils).

ATTACHMENT

1. The permit system under the Aboriginal Land Act (NT)

The permit system has operated in relation to Aboriginal land under the *Aboriginal Land Act* (NT) since 1978, and has legal and policy purposes.

Legally, the scheduling of Aboriginal reserves (which were crown land) as freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) bestowed a right in the owner (ie a Land Trust) to exclude any person for any reason (other than Aboriginal people with traditional rights of access).

This right was recognised by Woodward J in his 1974 report as being integral to the concept of Aboriginal ownership of land.[1] Justice Woodward recorded that it was strongly supported at the time by the Northern and Central Land Councils on behalf of their Aboriginal constituents, and the right as regulated by the permit system continues to be strongly supported by them.

Justice Woodward recognised that, in contrast to ordinary grants of freehold, a regulatory scheme was required since it was necessary that persons with a legitimate or justifiable purpose be able to access Aboriginal land (especially communities, but also regarding road maintenance, public works, or mining and other development) and that such persons should not be subject to arbitrary or capricious exclusion.

That the scheme is regulatory is made clear by s 73(1)(b) of the *Land Rights Act*, which authorises the NT Legislative Assembly to make "laws regulating or authorising the entry of persons on Aboriginal land". The *Aboriginal Land Act* (NT) is made pursuant to that power.

The statutory scheme in the *Aboriginal Land Act* (NT) thus regulates the right to exclude ordinarily encompassed by an estate in freehold by ensuring that certain persons have a right of access (eg members of Parliament), and other persons have a right to apply for access and have it properly considered by the Minister or a Land Council in accordance with law.

To ensure flexibility traditional Aboriginal owners may also grant a permit regarding their country (s 5(2)), and Land Councils may delegate their power (s 5(4)). (In practice, although they have no statutory role, Aboriginal communities or community councils facilitate permits in conjunction with traditional owners.)

From a policy perspective the scheme is intended to ensure that Aboriginal communities and people are not subject to breaches of privacy, or inappropriate or culturally insensitive actions by unauthorised persons on Aboriginal land, as well as ensuring that persons with a legitimate or justifiable interest may enter Aboriginal land.

Such inappropriate actions are not uncommon, and (in a non-court context) have included inappropriate presence or reporting regarding culturally sensitive matters such as funerals or ceremonies, unauthorised photography, and indefensible misrepresentation regarding important issues.

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[1] Woodward J *Aboriginal Land Rights Commission* Second Report April 1974 para 109 p 18.

Prosecution for breach is the responsibility of the police (with whom Land Councils work closely),[2] and ordinarily concern the removal of non-Aboriginal persons regarded by the police as causing difficulty in a community or in relation to unauthorised commercial activity (eg use of a land base for mud crabbing).

The number of permits issued by Land Councils and the Northern Territory Government during the 2005/06 financial year is detailed in the table below.

Northern Land Council	22,260
Central Land Council (approximate)	4,000
Tiwi Land Council (approximate)	4,000
Anindilyakwa Land Council (approximate)	1,000
Northern Territory Government	750

In addition, although figures are not available, it is known that traditional owners with the assistance of community councils issue a large number of permits. It is estimated that, in the NLC's region, the total number of permits issued by the NLC and traditional owners is up to 30,000.

Over 80% of NLC permits were issued within 48 hours. No fees were charged.

A total of 56 permit applications were received from the media, with 54 being granted. Two of these applications were to attend a Magistrates' Court hearing in Wadeye. Both were granted at short notice. Two of the media applications were refused after advice that the relevant community had chosen to be extensively interviewed by an alternative media organisation.

The relatively high number of permits issued in the Tiwi Land Council region reflects the high number of tourists who visit the island. By contrast, in the Central Land Council region, most tourists visit national parks and other areas which (even if Aboriginal land) do not require a permit, such as Uluru and Kings Canyon.

2. Permit system under welfare laws prior to the Land Rights Act: 1918 to 1977

A permit system also operated in relation to Aboriginal reserves in the Northern Territory prior to their scheduling as Aboriginal land in 1977 (see *Aboriginals Ordinance 1918* and the *Welfare Ordinance 1953*). This system was in a different form both legally and from a policy perspective.

Legally the system did not regulate the right to exclude inherent in freehold (since the land was crown land), but rather prohibited entry to land in the context of a scheme which reflected welfare purposes. Decisions regarding access were made by welfare officials rather than by Aboriginal people themselves (or by statutory Aboriginal organisations).

3. Permit system on Norfolk Island

The permit system regarding courts operating on Aboriginal land is not unique and is analogous in principle to the position on Norfolk Island, a community of about 1,800 persons. Courts operate on Norfolk Island, however Australians other than island residents cannot access the island to attend a court or for any other purpose without first obtaining an entry permit under the *Immigration Act 1980* as enacted by the Legislative Assembly of Norfolk Island under the *Norfolk Island Act 1979* (Cth) (which bestowed a form of self government).

[2] It is noted that the consent of the relevant Land Council is required before a prosecution may be pursued: s 21 of the *Aboriginal Land Act* (NT).

The preamble to the latter statute records that the Commonwealth Parliament "recognises the special relationship of the said descendants [of Pitcairn Island settlers] with Norfolk Island and their desire to preserve their traditions and culture" (Norfolk Island having been established as "a distinct and separate Settlement" in 1856 by an Order in Council made by Queen Victoria).

Norfolk Island formed part of NSW until 1844, and then part of Tasmania from 1844 to 1856. In 1856 Queen Victoria agreed to relocate the 193 descendants of the Bounty mutineers from Pitcairn Island to Norfolk Island. Norfolk Island was severed from Tasmania and established as a separate and distinct settlement.

Descendants of the original Pitcairn Islanders make up about 48% of the permanent resident population of Norfolk Island, with the remainder being Australians and New Zealanders. Only residents, or incoming residents, may purchase land on the Island.

There are no fees for a visitors permit, but a departure fee of $30 is payable on departure from Norfolk Island. Tourism is the most important industry on Norfolk Island, ensuring almost full employment, with an average 35,000 visitors per year.

There are two important differences between Norfolk Island and Aboriginal land:

(i) Most of Norfolk Island is crown land in contrast to Aboriginal land which is freehold. The public may enter vacant crown land, but have no right to enter freehold.

(ii) Norfolk Island has self government including in relation to immigration, and the permit requirements are made under the immigration power. Permits in relation to Aboriginal land derive from property law, namely that freehold owners may exclude trespassers.

4. 1998 Reeves Report and 1999 Joint Representatives/Senate Committee Inquiry

In 1998 John Reeves QC recommended that the permit system be abolished, and replaced by use of the *Trespass Act* (NT). The *Trespass Act* only applies where a person ignores a notice warning that trespassers will be prosecuted. John Reeves considered that the permit system was "costly, ineffective, confusing, divisive and burdensome", that it was "a racially discriminatory measure", and that it was "not widely supported by Aboriginals" (p 308 Reeves report).

In 1998 a Joint Representatives/Senate Committee inquired regarding the Reeves Report, and rejected its findings and recommendations. The Committee conducted 31 meetings, mostly public and in communities, during 1999 and received written submissions. The Committee found that Aboriginal people "[o]verwhelmingly" (para 7.17) supported the permit system (para 7.26):

> "Indeed, the vast majority of Aboriginal people told the Committee that they wanted the permit system to remain. It provides them with [a] mechanism to control entry onto their land and it respects Aboriginal tradition to some extent by requiring that permission to visit Aboriginal land is obtained from the relevant traditional owners."

Submissions from non-Aboriginal organisations, particularly mining companies, also supported the permit system (para 7.23).

5. Concerns raised by journalists to NT Attorney-General regarding access to courts on Aboriginal land

In an e-mail letter to the Attorney-General dated 12 October 2005 some journalists raised concerns regarding access to Aboriginal land by the media or the public to attend court sittings. The letter was copied to the Chief Justice, Chief Magistrate and the Commonwealth Minister and Attorney-General, and was provided to Land Councils by the Department of Justice in a letter dated 23 December 2005.

It was claimed that journalists had been restricted from accessing courts sitting on Aboriginal land, and said that this was inconsistent with the principle of open justice whereby the public has access to courts. The journalists referred to the Yarralin Supreme Court hearing as an example of access being denied due to the permit system.

In fact Land Councils, at that time, had never received any application from a journalist (or a member of the public) to attend a court sitting on Aboriginal land. The NLC however had declared open access to the public regarding two court cases of significant public interest, being the Croker Island native title hearing in 1997 and the Blue Mud Bay case in 2005. Subsequently, during 2006, the NLC received an application from ABC radio and NT News journalists to attend the Magistrates' Court sitting at Wadeye in relation to riot charges. Permits were granted. In 2007 the NLC declared open access in relation to an inquest being conducted at Wadeye.

Further, Yarralin is a community living area under NT legislation and is NT freehold, not Aboriginal land. Accordingly the permit system does not apply in relation to Yarralin.

At the time the NLC provided a comprehensive response to the NT Attorney-General to the journalists' letter (copied to the Commonwealth Minister for Indigenous Affairs and Attorney-General). NLC officers also met with the Chief Justice, Chief Magistrate, and departmental representatives. The NLC emphasised that under the Act, unless compelling reasons existed, permits would be granted to journalists to attend courts sitting on Aboriginal land and that open access would be declared for significant cases, and that this meant the principle of open justice was not interfered with. The letter also explained that applications to attend courts had never been refused, and that Yarralin is not Aboriginal land.

On 24 October 2006 it was reported on ABC radio that the NT Attorney-General had advised journalists that the permit system would not be altered in relation to access to courts sitting on Aboriginal land, bearing in mind assurances from Land Councils that permits would be granted unless compelling reasons existed.