Parliament of Australia

Senate

Legal and Constitutional Affairs Committee

National Radioactive Waste Management Bill 2010

Northern Land Council

Response to questions on notice

28 April 2010

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

RESPONSE TO QUESTIONS ON NOTICE

1. INTRODUCTORY COMMENT

Various submissions have been made to the Committee by or on behalf of persons or organisations who object to the Bill and to the NLC's 2007 nomination of land at Muckaty Station under the current legislation.

It is not possible to respond in detail to every aspect of these submissions other than to observe, generally, that they include significant misconceptions of both fact and law.

Similar submissions were made in 2008 to the Senate Environment, Communications and the Arts Committee regarding a Bill which proposed repeal of the current 2005 legislation.

In response the NLC filed a detailed supplementary submission to the 2008 Committee which rebutted these claims, including by detailing the comprehensive nature of the NLC's consultations and anthropological advice in relation to the nomination.[1]

The 2010 submissions by or on behalf of objectors do not alter the NLC's previously expressed position, namely that the traditional Aboriginal owners of the nominated land are the Ngapa (Lauder) group, and that that group overwhelmingly consents to and supports the nomination with substantial support by members of adjacent and proximate groups (only a few individuals expressed opposition to the nomination of a site on Ngapa country).

2. QUESTIONS ON NOTICE

3.1 Procedural fairness (Senator Barnett)

Senator Barnett asked the following question on notice:

> *I have a final question on the issue of procedural fairness, which has come up this morning. I do not know if you have had a chance to see the submission from Dr James Prest from the ANU. He is appearing later today. I do not know if Mr Levy has a view about the adequacy of the procedural fairness set out under the bill.*
>
> …
>
> *It is up to you, but if you would like to take it on notice and respond to it that would be of interest to the committee. If you do not wish to, that is also fine. It is obviously an area of concern for at least some members of the committee.*

[1] See: http://www.aph.gov.au/Senate/committee/eca_ctte/radioactive_waste/submissions/sub96A.pdf.

The Commonwealth has provided a detailed response, on notice, to Dr Prest's submission in relation to procedural fairness and other matters. The NLC agrees with that response, and further notes as follows.

The NLC's 2007 nomination was subject to a statutory requirement that there had been comprehensive consultations with the traditional Aboriginal owners and any Aboriginal community or group that may be affected, and that the traditional Aboriginal owners (as a group) had consented to the nomination.[2] This requirement duplicated the same requirement as contained in various provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976*.[3]

This requirement is directed at, and in substance delivers, procedural fairness in relation to Aboriginal persons, communities or groups who may possess rights or be affected by a nomination.[4]

No basis exists for retrospectively applying, three years after the nomination, unspecified additional requirements (for example, as to notification of non-Aboriginal third parties), whereby the nomination and completed consultations may be challenged by reference to obligations and requirements which did not then exist. Such retrospectivity would give rise to substantive unfairness, particularly to the Ngapa traditional Aboriginal owners and other Aboriginal persons and groups supportive of the nomination.

3.2 Disbursement of funds (Senator Ludlam)

Senator Ludlam asked the following question on notice:

> *Can the NLC identify in as much detail as possible, the breakdown of funds disbursement from the $200,000 payment from the Commonwealth on receipt of the Muckaty nomination, specifically:*
> - *Funds disbursed to the Northern Land Council (for administrative or other costs)*
> - *Funds disbursed to the Muckaty Land Trust PBC*
> - *Funds disbursed to individuals*
> - *Funds disbursed to any other party or organisation*
>
> *I also seek advice as to whether any negotiations have been entered into relating to future disbursements of funds, and if so whether a breakdown of funds for future payments to the parties listed above has been established.*
>
> *I am not requesting the NLC name specific individuals in either past or future cases.*

As explained in oral evidence before the Committee on 30 March 2010, the initial $200,000 payment received from the Commonwealth was distributed to 25 senior persons on behalf of their respective families and groups, including the Ngapa (Lauder) traditional Aboriginal owners of the nominated land, other Ngapa groups, and the Milwayi and Yapayapa group.

---

[2] Section 3B(g) of the *Commonwealth Radioactive Waste Management Act 2005*.
[3] For example, s 19(5) of the *Land Rights Act*.
[4] Accordingly it is not accurate to assert that "access to procedural fairness continues to be excluded in relation to [the] existing nomination or approval" at Muckaty Station (as stated in the Central Land Council submission dated March 2010, p 2).

Bearing in mind the requirements of the *Privacy Act 1988* (Cth) and the private nature of the requested information, and the focus of the Committee's inquiry - being "legal and constitutional matters, including issues relating to procedural fairness and the Bill's impacts on, and interaction with, state and territory legislation", the NLC respectfully considers that it is inappropriate to provide such information regarding the breakdown of the funds disbursement to those 25 senior persons.

No funds were retained, or used, by the NLC in relation to its administrative or other costs.

It is noted, in relation to this question, that when speaking at a rally held in Melbourne on 12 April 2010, Dr Jim Green of Friends of the Earth incorrectly claimed that the 2007 nomination was "governed by a conflict of interest whereby the Northern Land Council gets a cut of the money."[5] In its supplementary submission to the Senate Environment, Communications and the Arts Committee, the NLC detailed similar concerns as to incorrect, inadequate or misleading information being provided by environmental groups, including Dr Green, regarding the 2007 nomination and the proposed repository.[6]

The question in relation to the "Muckaty Land Trust PBC" discloses confusion in terminology. The Muckaty Aboriginal Land Trust is a body corporate established under the *Land Rights Act*. Its sole function is to hold title to Aboriginal land (s 5(1)(a)). It has no power to accept moneys or give valid discharge for moneys in relation to that land; instead such funds may be paid to the responsible land council (s 6). No funds were disbursed to the Land Trust.

A "PBC", or prescribed body corporate, is an Aboriginal corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) after a successful native title application. No native title applications have been lodged in relation to Muckaty Station (since it is Aboriginal land), and there is no prescribed body corporate. No funds were paid to any prescribed body corporate.

The question may concern the Muckaty Aboriginal Corporation, a corporation established in 1991 under Commonwealth legislation and now registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). No funds were disbursed to the Muckaty Aboriginal Corporation.

There have been no negotiations or consultations regarding future disbursements of funds. Under the site nomination deed, future payments will be by means of a charitable trust. That trust has not yet been established.

3.3 Disbursement of funds, site nomination deed, avenues of legal challenge (Senator Crossin)

Senator Crossin asked five questions on notice which, together with the NLC's responses, follow:

(i) In your evidence to the Committee on Tuesday the 30th of March in Canberra, you identified that following Ministerial approval of the nomination, payments were made to the Ngapa, Yapayapa and Millway groups. How would you respond to the claims made in evidence to the Committee in Darwin that those payments have not been received?

[5] A video of Dr Green's speech may be viewed at: http://www.engagemedia.org/Members/pc/videos/muckaty-nda-12april10_transcoded.avi/view.

[6] See: http://www.aph.gov.au/Senate/committee/eca_ctte/radioactive_waste/submissions/sub96A.pdf.

The NLC's evidence to the Committee on 30 March 2010 was that an initial payment of $200,000, triggered by the then Minister's approval of the 2007 nomination, was distributed in 2008 to 25 senior persons including members of the Ngapa (Lauder) group, other Ngapa groups, the Yapayapa group and the Milwayi group. This evidence did not imply that every individual member of those groups necessarily received a proportion of the initial payment.

To the extent that it was suggested by witnesses appearing before the Committee on 12 April 2010 that the NLC's evidence was incorrect,[7] those suggestions were misconceived and in error.

(ii) What is the total amount of funds that have been made payable to the NLC in relation to the nomination at Muckaty? To the extent possible, can the NLC provide a break down of the allocation of the funds? What amount if any is held in the Charitable Trust fund? How is the allocation of funds determined? Which individuals were a part of the decision making process which determined the allocations funds?

There are five components to this question. Each is answered separately below.

First, the total amount of funds paid to the NLC under the site nomination deed is $200,000, being the sum referred to above which was distributed in 2008. Further payments will only occur if the nominated site is both approved by the Environment Minister after a comprehensive environmental impact process, and is declared as the facility site by the Resources Minister. Those further payments, if they occur, will be to a charitable trust fund.

Secondly, bearing in mind the requirements of the *Privacy Act 1988* (Cth) and the private nature of the requested information, and the focus of the Committee's inquiry - being “legal and constitutional matters, including issues relating to procedural fairness and the Bill's impacts on, and interaction with, state and territory legislation”, the NLC respectfully considers that it is inappropriate to provide further information as to the breakdown of its distribution of funds.

Thirdly, the charitable trust fund has not yet been established. Accordingly no funds are, or presently can be, held by it.

Fourthly, in relation to the $200,000 payment, in accordance with the site nomination deed the NLC allocated the funds after consultations with the traditional Aboriginal owners and other interested or concerned Aboriginal persons. The process under the deed accords with that applicable under s 35(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in relation to the distribution of lease payments received by a land council.

Fifthly, as explained in the preceding paragraph, the decision as to allocation was made by the NLC after consultations with the traditional Aboriginal owners and other interested or concerned Aboriginal persons. It is inappropriate, if that be the intent of the question, to regard such consulted persons as being part of a decision making process with a determinative role. In any event, for the reasons explained above in relation to privacy and the focus of the Committee's enquiry, the NLC respectfully considers that it would be inappropriate to disclose the identity of those persons.

[7] Hansard Senate Legal and Constitutional Affairs Committee, 12 April 2010, pp 14 to 17. Evidence of Dianne Stokes, Mark Lane and Robert Sambo.

(iii) The Committee understands that a site nomination deed was signed in June 2007.

(a) Who were the parties to the deed?

The parties to the site nomination deed were the Commonwealth of Australia, the Muckaty Aboriginal Land Trust, and the NLC.

(b) Who signed the deed?

In relation to the Commonwealth, the deed was executed by a person duly authorised to sign on its behalf.

In relation to the Muckaty Aboriginal Land Trust, in accordance with s 4(5) of the *Land Rights Act*, the deed was executed with the written authority of the Chair and two other members of the Land Trust.

In relation to the NLC, the deed was executed by the Chair and two members of the Executive Council.

(c) If the NLC was a signatory, can you identify the persons who the NLC signed on behalf of?

The NLC executed the deed in accordance with its statutory functions, including that it was satisfied that the relevant traditional Aboriginal owners consented to the nomination after comprehensive consultations with them and other interested or affected Aboriginal persons or groups, and after consideration of other relevant matters such as the protection of sacred sites.[8]

(iv) The Committee understands that payments made to persons came out of a charitable trust fund.

(a) Is this understanding correct?

[8] The claim made at p 42 of the submission dated 26 March 2010 by the Environmental Defenders Office (NT) that the NLC incorrectly considers that it has no role other than to accept the position of traditional Aboriginal owners (as a group) regarding a proposed development is misconceived, and misrepresents the evidence given by the NLC's principal legal officer to the 2008 Senate Committee. As was explicitly stated that evidence was directed to the particular "circumstances" of the nomination, and was thus qualified in that respect. The point and emphasis of the evidence was that a Land Council cannot, in processing a development proposal (including that the terms and conditions are reasonable – see s 19(5)(c) of the *Land Rights Act*), simply substitute its own views for the informed position of traditional Aboriginal owners. A cogent basis, such as (but not only) damage to a sacred site in which other Aboriginal persons had an interest, would be required to justify rejection of a proposal favoured by traditional Aboriginal owners. A land council could not, for example, lawfully refuse to process uranium exploration or mining proposals - although approved by traditional Aboriginal owners (as a group) - merely on the basis of a policy of opposition to all uranium matters. This construction of the statute accords with the evidence (in context) given by the CLC Director to the Committee on 12 April 2010 (Hansard p 33): "I do not believe that the land council has a right to make a decision for or on behalf of anyone. The traditional owners have to make that decision."

As explained above, the initial payment of $200,000 was paid to the NLC and distributed in 2008. This payment did not derive from a charitable trust fund; such a fund has not yet been established. Further payments will only occur if the nominated site is both approved by the Environment Minister after a comprehensive environmental impact assessment under the *Environmental Protection and Biodiversity Conservation Act 1999*, and is declared as the facility site by the Resources Minister. Those further payments, if they occur, will be to a charitable trust fund.

(b) What are the terms and conditions of the charitable trust fund?

A charitable trust fund has not yet been established. However the site nomination deed provides that such a fund, if and when established, will be maintained for the purposes of relieving poverty, advancing health, education and welfare, improving and increasing economic opportunities, and other purposes beneficial to the relevant traditional Aboriginal owners and other interested or concerned Aboriginal persons.

(c) Has the trust fund been deemed as a charity for GST purposes?

A trust fund has not yet been established, however it is intended that the fund have charitable status for taxation purposes.

(d) How does the charitable trust fund operate?

A charitable trust fund has not yet been established. However the site nomination deed provides that such a fund, if and when established, will be administered by a trustee satisfactory to the parties to the deed.

(e) Who are the signatories to the fund?

A charitable trust fund has not yet been established. In the event that such a fund is established, its signatories will be identified at that time.

(v) In evidence to the committee you made the following statement:

"For those who say, that under the Howard act, there could not have been a legal challenge, that is not correct."

(a) Do you believe that the current legal framework provides sufficient avenues for a legal challenge to the nomination process, should the nomination be disputed?

Two matters arise. First, as the Administrative Review Council explained in its submission to the Senate Education, Employment and Workplace Relations Committee in 2005, the current legislation (and the Bill) does not, and cannot, exclude review under s 75(v) of the Constitution, and also does not exclude review under s 39B(1) of the *Judiciary Act 1903*.[9] These remedies concern where the exercise of a power is invalid due to a jurisdictional error, being where a decision maker has exceeded the authority or power conferred on them.

[9] http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/radioactive05/submissions/sub212.pdf.

In his written submission to this Committee Steven Leonard, solicitor, on behalf of Aboriginal objectors, described these important protections as "useless residual review rights".[10] However his colleague, George Newhouse, solicitor, also representing Aboriginal objectors, was reportedly "confident" that these protections would enable a successful challenge if what he has been told (as to the NLC's processes) is correct.[11]

The NLC is confident, should it occur, that any challenge to the 2007 nomination of land at Muckaty Station would fail, and that its comprehensive consultations and detailed anthropological research would be upheld as properly, carefully and lawfully conducted.

Secondly, the current legislation (and the Bill) ensures, consistent with the scheme of the *Land Rights Act* since its inception, that a Land Council's nomination of a site for a facility (and indirectly also the Minister's declaration) will be protected from challenge on certain procedural grounds.

The NLC provided detailed oral and written submissions regarding the purpose and underlying policy justifying this provision to the Senate Employment, Workplace Relations and Education Legislation Committee in 2006.[12] In summary, for over 30 years the *Land Rights Act* has provided that a lease of Aboriginal land or certain mining leases cannot be invalidated on the basis of lack of compliance by a Land Council with consultation requirements.[13]

The purpose of the provision and the scheme of the *Land Rights Act*, by analogy to the Torrens title system, is to provide certainty in land transactions and security in financing of developments, by ensuring that a lease of Aboriginal land cannot be invalidated years after the event due to an omission to comply with formal requirements. Relevantly, the statutory processes of the *Land Rights Act*, and of the current legislation (and the Bill), ensure a range of opportunities for objection and review prior to approval. These include the Full Council process, and the requirement that there be Ministerial consent.[14]

The Torrens title system, in relation to real property, has provided since the 19th century that, once registered, dealings in land cannot be invalidated on the basis of lack of compliance with formalities or defects in the chain of title. Objections must be considered during the registration process, for example by lodgement of a caveat. The Torrens system was a major beneficial reform which ensures certainty in land transactions and security in financing of developments, by way of contrast to the lack of certainty and lack of security which hitherto existed. In the Northern Territory the Torrens system is applied by NT legislation,[15] however

---

[10] Submission, Stephen Leonard, solicitor, April 2010, p 5.
[11] ABC Radio report, 7 April 2010: http://www.abc.net.au/news/stories/2010/04/07/2865948.htm.
[12] See, in particular, the NLC's written submission dated 27 November 2006: http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/radioactive06/submissions/sub57.pdf.
[13] Sections 11A(6), 19(6), 19A(3)), and 48D of the *Land Rights Act*.
[14] Leases of Aboriginal land which are longer than two years must be approved by the Full Council (or a Regional Council) of a Land Council. Approval cannot be delegated to a Land Council's CEO or director. Ministerial consent or approval is required regarding agreements involving payments of greater than $1 million, and leases with a term of greater than 40 years.
15 *Law of Property Act*.

the Federal Court has held that where inconsistency arises that legislation cannot override superior Commonwealth law such as the *Land Rights Act*.[16]

For that reason the validity provisions in the *Land Rights Act*, and regarding a nomination in the current legislation and in the Bill, are required to ensure certainty of title and security of financing. If those provisions were not included, the protection ordinarily applied by the Torrens system under NT law would have a restricted ambit which would inhibit development on Aboriginal land as compared to other land. Those objecting to the provision in relation to the Bill do not also object to those provisions in the *Land Rights Act*, and no basis has been provided to justify a differential approach in relation to a nomination under the current legislation or the Bill.

(b) What, if any, legal mechanisms are currently available to challenge the nomination process and site selection decision?

As explained above, in relation to the current legislation and the Bill, a nomination may be reviewed under s 75(v) of the Constitution and under s 39B(1) of the *Judiciary Act 1903*.

(c) Would those mechanisms be improved or otherwise affected by the proposed Bill?

The Bill does not affect the availability or operation of rights of review under s 75(v) of the Constitution or s 39B(1) of the *Judiciary Act 1903*.

16 *Attorney General for the Northern Territory v Hand* (1989) 25 FCR 345, 370-371 (Lockhart J) and 402-403 (von Doussa J).