SUBMISSION TO THE SENATE INQUIRY INTO THE NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

ON BEHALF OF MUCKATY TRADITIONAL OWNERS OPPOSED TO THE NOMINATION OF THE RADIOACTIVE WASTE FACILITY WITHIN THE MUCKATY LAND TRUST[1]

APRIL 2010

No Consent to the Muckaty Nomination - Australia's Radioactive Waste Management Legislation

Many Traditional Aboriginal Owners and other Aboriginal people with legal and other interests in the nominated site on Muckaty are strongly opposed to the acquisition of their land without their consent for a proposed Commonwealth radioactive waste facility ("the proposed facility").

These include senior elders representing the views of all 5 of the main groups in the Muckaty Land Trust, the Milwayi, Ngapa, Ngarrka, Yapayapa and Wirntiku for whom we act.

To be clear once again, the traditional owners of the site that we have taken evidence from, have never given their consent to it. They have continuously denied that the Lauder family has exclusive rights to say yes or no to the nomination of the site.

This position is supported by the determination of the 1997 Land Commissioner's Report prepared for the original hand back of the Muckaty Land, as well as previous anthropological reports and of course their own detailed knowledge passed down to them by their ancestors. The senior men and women who object to the proposal continue to undertake traditional ceremony to uphold their law and dreaming with respect to the area of the nominated site.

In 1997, after hearing years of tested evidence in a transparent and objective tribunal framework, the Aboriginal Land Commissioner[2] found that there was clearly joint and interconnected "ownership" between the 5 main groups in the Muckaty Land Trust where dreaming overlapped. This was a core reason why a single Land Trust was granted[3]. Furthermore the Report clearly indicated that the nominated site was jointly "owned" by at least 3 to 5 groups, the Milwayi, Yapayapa, Ngarrka, and perhaps the Winrtiku and Ngapa.

Despite this, the Northern Land Council ("NLC") has claimed that they only required consent from the Lauder family for the nomination. The other 2 family groups of the Ngapa, and all the groups of the Milwayi, Yapayapa, Wirntiku and Ngarrka have never given their consent to the nominated site.

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[1] The list of Muckaty Traditional Owners on whose behalf this Submission is made can be found at **Schedule 1** herewith. Those persons listed at Schedule 1 also represent other Traditional Owners;

[2] Report and Recommendation of the Aboriginal Land Commissioner RE: Warlmanpa (Muckaty Pastoral Lease) Land Claim No 135 dated 18 March 1997 ("18 March 1997 Land Commissioners report");

[3] 18 March 1997 Land Commissioners Report at page 68;

Furthermore such a drastic change in position was only supported by a secret anthropological report. They have been denied natural justice by the manner in which these reports were undertaken. They were not involved in any new anthropological investigations undertaken for the nomination, or given a real chance to prepare a case for these investigations or decisions. They have been denied copies of the reports prepared from these investigations which purportedly support the Muckaty nomination, and have been denied all other relevant information despite formal written requests (such as minutes and Nomination Agreement). All the while they have had no real access to financial or legal assistance (at least for 3 years) to protect their hard earned rights. They have found themselves in a completely powerless situation in which all but a few have felt too intimidated to speak out until now.

Accordingly, we re-iterate that the Muckaty nomination has not been made with voluntary informed consent or fair process under the *Aboriginal Land Rights (Northern Territory) Act* or otherwise.

Hence the current Nomination by the NLC dated 18 June 2007 has been the subject of complaint for several years by Traditional Aboriginal Owners both before and after the nomination was made. These complaints were that:

1. the "Traditional Aboriginal Owners" did not consent in accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* ("the ALRA"), for which evidence of such was required by section 3B(1)(g)(iii) of the *Commonwealth Radioactive Waste Management Act 2005* (CRWMA).

2. the "Traditional Aboriginal Owners" did not have real information from the NLC in accordance with the ALRA as to the nature and effect of the action that was being taken to inform the decision on consent, for which evidence of such was required by section 3B(1)(g)(ii) of the CRWMA;

3. the NLC failed to consult with the Traditional Owners in accordance with the ALRA, for which evidence was required by section 3B(1)(g)(i) of the CRWMA;

4. the NLC failed to give Aboriginal groups which would be affected by the nomination an adequate opportunity to be heard in accordance with the ALRA, for which evidence was required by section 3B(1)(g)(iv) of the CRWMA.

It is important to look at these obligations with respect to the nature of the action which is being undertaken by the Land Council in making the Muckaty nomination. In this case, the subject matter is extremely serious. Firstly it involves an acquisition of Aboriginal Land (or at least significant rights and interest in Aboriginal Land), which is completely against the fundamental operating principles of the ALRA in granting inalienable freehold title. Secondly, the land is being acquired to site a radioactive waste facility that will create risks of contamination for hundreds to thousands of years – affecting future generations of Aboriginal people without their consent. Thirdly, once the site is acquired by the Commonwealth it and the areas around it could be used for almost anything relating to radioactive material.

This is a unique circumstance. There is one proposed radioactive waste facility for the entire Nation and any consultation, whether in an Aboriginal or non Aboriginal community must be wide and should be consistent with best international practices. The use of this site as a radioactive waste facility is not comparable with a mining lease or other commercial use of Aboriginal land.

When one takes the time to compare international best practice with the procedures undertaken thus far by the NLC in terms of consultation, the result is dismal.

A comparison between the Muckaty process and the recommendations made by the United Kingdom's independent Committee on Radioactive Waste Management (accepted by the UK Government) indicates that when compared with the UK:

1. There has not been continuing public and stakeholder engagement. Many Traditional Owners opposed to the site have requested meetings with and documents from the NLC however such requests have not been met despite the obligation on the NLC to represent and provide assistance, financial or otherwise to these Traditional Owners. This lack of engagement appears to have resulted in a break down in trust and confidence in the process surrounding the siting of this facility;

2. There has not been community involvement based on the principle of volunteerism and an expressed willingness to participate. In this circumstance, Traditional Owners wishing to participate are being shut out of the process and denied important rights, which are very meaningful to the people in the community;

3. There have not been adequate community packages provided to facilitate participation in the short- term and it is clear that the proposed facility is not acceptable to many of the people in the proposed host community in the long-term. The well being of this community is not being enhanced and significant negative social impact has already been caused as a result of the poor process allowed to be undertaken under the current legislation.

Functions of the Northern Land Council

It is worthwhile setting out the relevant positive functions that the NLC has in relation to its representation of Aboriginal persons living in the area of the Land Council pursuant to section 23 of the ALRA:

> ***Functions of Land Council***
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> *(1) The functions of a Land Council are:*
>
> *(a) to ascertain and express the wishes and the opinion of Aboriginals living in the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land; and*
>
> *(b) to protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council; and*
>
> *(ba) to assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council; and*
>
> *(c) to consult with traditional Aboriginal owners of, and other*

Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land

……

(3) In carrying out its functions [referring to the above] with respect to any Aboriginal land in its area, a Land council shall have regard to the interest of, and shall consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginal interests in the land

The Traditional Owners of Muckaty urge the Committee to read these sections carefully. On analysis, the conclusion can be drawn in our opinion that:

1. In breach of section 1(a):

    a. the NLC is not ascertaining and expressing the wishes and opinions of the Traditional Owners who are opposed to the Muckaty site. It is ignoring the wishes and opinions of many Traditional Owners opposed to the proposed facility. It is the opinion of many that by ignoring legitimate objections, concerns and rights, that this representative body appears to preferring the interests of one group over others;

    b. We are not aware of any comprehensive consultations, let alone processes to obtain Traditional Owner consent, which have been undertaken by the NLC more broadly to grant it legal authority to make representations to the Senate to support legislation which allows a radioactive waste facility to be placed on Aboriginal Land in the form of either the 2005 Bill, 2006 amendments or this 2010 Bill (ie excluding rights normally held under the ALRA to decisions made about Aboriginal land, such as judicial review, procedural fairness and pre-requisite of informed consent).

2. In breach of section 1(b) the NLC is not protecting the interests of the Muckaty people opposed to the waste facility. The interests of the Traditional Owners are not being protected, in fact they are being eroded through a private and alleged confidential anthropological report. The Milwayi , Ngarrka and Yapayapa groups also have a strong spiritual affiliation to the nominated site and the NLC appear to have disregarded the findings of the Land Commissioner in 1997 which does not recognise any Ngapa sacred sites in proximity to the proposed facility. Instead, the NLC relies on a report that has not been seen by the majority of Traditional Owners and seeks to argue that none of these groups have the right to speak for this country. In addition to the failure to provide all or part of the anthropological report, the NLC have not seen fit to have any of the anthropologists provide evidence to the Senate Committee and it is submitted that the Committee ought draw adverse inferences in this circumstance. In this context, the submitters are unaware as to which (if any) senior Ngapa and Milwayi men were consulted by the anthropologists concerning their connections with the important men's site at Karakara[4] during this process;

[4] It is important that the Committee note that Karakara, the sacred site situated just north of the nominated area boundary, is an important and highly spiritual secret mans place;

3. In breach of section 1(ba) the NLC has not properly consulted with people in relation to the use of the land. It is agreed that some meetings have been held at different locations and people have discussed the matter and been present at some of these meetings, however the Committee is aware of the criticisms of these processes and it is widely felt within the community that the process was not genuine and was inadequate;

No Access to Justice

Despite this clear, continuous and legitimate objection, there has been no real & fair recourse to prevent or quash the Muckaty nomination due to its failure to comply with the ALRA or CRWMA. This is due to the intentional design elements of the 2005 Act continued in the 2010 Bill and the lack of support available to Aboriginal people to seek to uphold their legal rights on land use issues. For example the 2005 Act does not expressly state that compliance with the ALRA is a pre-requisite to a nomination, nor a criterion (even a discretionary one) for the Minister's decision to approve a nomination or declare a facility. There were no rights to make a submission or be heard on this issue due to the exclusion of procedural fairness. Even though evidence of compliance with the ALRA is required, section 3B(2A) of the CRWMA provides:

> "*Failure to comply with subsection (1) [referring to provision of such evidence]does not affect the validity of a nomination*"

To cap it all off the ADJRA was excluded, so that only the Judiciary Act and Constitution applied. These are useless residual review rights given the arbitrary nature of the 2005 Act, which did not expressly require voluntary informed consent to have been obtained before nomination could be made or approved. It is clear that the 2005 Act (continued by the 2010 Bill for the Muckaty nomination) was intentionally designed to prevent review by the Courts to the maximum extent possible under the Australian Constitution.

2010 Bill

The Milwayi, Ngapa, Yapayapa, Ngarrka and Wintirku people opposing the proposed facility submit that the 2010 Bill does nothing to improve on the 2005 Act that has left them in this situation. The Bill continues the following key tenants of the 2005 Act

1. It targets Aboriginal people and aboriginal land in a manner so as to cause division in Aboriginal communities;

2. It continues the intentional design that voluntary informed consent is not a pre-requisite to the process of declaring a facility on Aboriginal Land (and acquiring it), provides no checks or balances against the decisions of the Land Council, and is intentionally designed to prevent review by the Courts to a great extent.

3. It carries across the current disputed "voluntary" Nomination concerning the proposed site at Muckaty and continues the 2005 Act's exemptions from procedural fairness and judicial review for this nomination. **The current standing Nomination must be revoked when the old legislation is repealed and the process should start over and be undertaken properly.**

Perhaps the worst element of the 2010 Bill is its intentional deceit. It refers to "procedural fairness" and "judicial review" at the same time as making such "rights" hollow, and not applicable at all for the existing Muckaty nomination. For example the content of procedural

fairness in the Bill is expressly limited, and is next to nothing compared to what the Common law concept of procedural fairness would usually impose on decisions of the nature being made under the Bill. Hence the right to make a written submission on the declaration of the Muckaty nomination is useless.

The new legislation is as discriminatory, unfair and inappropriate, not to mention contrary to the spirit of reconciliation, as the old legislation.

In this context, it was found by the 2008 Senate Committee that:

1. The current legislation is unfair and discriminatory;

2. It is vital that consultations and decision making processes reflect the interests that ALL clan groups have in the immediate area;

3. The legislation is deeply flawed and is not a suitable foundation on which to build Australia's nuclear waste policy; and

4. The current legislation should be repealed.

Response to Matters Raised in the Senate Hearing on 30 March 2010.

Many people in the community have expressed a deep concern about comments that were made by the NLC at the Senate Hearing on 30 March 2010, in particular comments concerning:

1. a senior man who has now passed on and the alleged consent of this well respected individual; and

2. an assertion that no person has ever disputed the claim that the Ngapa (Lauder family) can exclusively speak for this site.

Many family members of this well respected person are significantly upset and offended by the NLC's attempt to attribute a position on this issue that is completely opposite to the position which this man continually expressed privately and publicity to his family members and the media. Particularly when no incontrovertible evidence has ever been produced supporting the NLC's claims.

This person has now passed on and has no opportunity to respond. In these circumstances we believe that the attempt to attribute this position to him by the NLC without producing clear evidence is, in practice (not law), damaging to this respected man's legacy amongst his people.

As to whether no person has ever disputed the claim that the Ngapa clan can speak for this site, this is clearly incorrect as evidenced by constant letters, media statements and interviews in which Traditional Owners have stated that their consent was also required. In this regard, we refer to and rely on the content of the Submission to the Senate Inquiry into the Commonwealth Radioactive Waste Management (repeal and Consequential Amendment) Bill 2008 on behalf of Muckaty Elders and Traditional Owners dated October 2008.

Further, as the 2008 Senate Committee confirmed, no Ngapa sacred sites or dreaming tracks are recognised in the 1997 Land Commissioners Report as being in the immediate proximity to the site location. Whilst Traditional Owners may accept that there may be some rights and

responsibilities accruing to some of the Ngapa families in the vicinity of the site (including sacred sites), they certainly reject any claim that this is held by the Lauder family or any other Ngapa group exclusively.

Request for Senate Hearing at Tennant Creek

The Muckaty Traditional Owners who are entitled to speak for this Country and who are opposed to this facility welcome this Senate Inquiry and this opportunity to convey how deeply unhappy many people are with this process and with the proposed radioactive waste facility. They continue to oppose this plan and will actively assert their rights to determine land use decisions on their traditional land.

Unfortunately however, funding resources prevent many people from being able to attend at the Senate Hearing in Darwin. The Submitters hereby request that the Senate Committee attend Tennant Creek and provide the local community with the opportunity to be heard on this unique and extremely important issue. Again, the submitters assert that this is not a usual and normal circumstance and additional measures should be taken to ensure that the proper processes are in place.

Request for All Representations and Submission of Northern Land Council to be Excluded from Senate Deliberations and Recommendations

We understand, there has never been any real consultation between the NLC and the Aboriginals living in the area of the Land Council regarding their position in respect of the proposed legislation as required by section 23(1)(a) and 23(3) of the ALRA which clearly effects the subject land and other parts of the NLC region.

Based on our understanding, the NLC is acting in breach of the ALRA and its actions are quite simply *ultra vires* as they do not have the legal power or authority to make such submissions or representations to this inquiry or any previous inquiry.

The Senate must disregard any submission or representations of the NLC as a result.

Stephen Leonard
Lawyer
For and on behalf of Muckaty
Traditional Owners

SCHEDULE 1

LIST OF NAMES OF TRADITIONAL OWNERS

Mark Lane (Ngapa)
May Foster (Wirntiku)
Mary Rankin (Ngapa)
Dianne Stokes (Yapayapa)
Bunny Naburula (Milwayi)
Susan Nelson (Ngarrka)

On behalf of other members of the Ngapa, Wirntiku, Yapayapa, Ngarrka and Milwayi.