



Australian
Human Rights
Commission

Inquiry into the site selection process for a national radioactive waste management facility

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**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION
TO THE SENATE ECONOMICS REFERENCES COMMITTEE**

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1 Introduction

- 1 The Australian Human Rights Commission (the Commission) makes this submission to the Senate Economics References Committee for inquiry into the site selection process for a national radioactive waste management facility (waste management).
- 2 The effective management and disposal of radioactive waste is a serious and growing issue nationally and internationally.¹ Agreement on selecting a site for a waste management facility has proven to be contentious in Australia. This is often due to the divergent positions of many groups, including Indigenous peoples.² To effectively manage this highly complex matter, the Commission commends the approach of the Australian Government to obtain agreement from communities affected throughout the site selection process.
- 3 It is international best practice to ensure that the process of nomination of a waste management site is a voluntary process. This is stipulated in the Australian National Radioactive Waste Management Act 2012 (Cth).³
- 4 The Commission further commends the Australian Government for recognising that the need for ongoing support of the affected community is essential:

At all stages of the project, agreement with the community on hosting the facility is essential. The Government will not impose a facility on an unwilling community, noting that no individual or group has an automatic right of veto.⁴
- 5 The Commission is of the view that the Australian Government's site selection process for a radioactive waste management facility must meet the highest standard of accountability and transparency. Past experiences of site selection and also for mining activity suggests that failure to do so can lead to protracted litigation and opposition extending over many years.
- 6 This submission provides comment to **paragraph (c) of the Terms of Reference**. The submission sets out the necessity for ongoing participation of Indigenous peoples affected by the site selection of the waste management facility. In this regard, attention is given to Article 29(2) of the United Nations Declaration on the Rights of Indigenous Peoples⁵ (UNDRIP), which states that **no storage of hazardous materials shall take place on Indigenous lands without their free, prior and informed consent**.
- 7 This submission breaks down the components of free, prior and informed consent to consider the unique rights and interests of Indigenous peoples affected during the phases of the site selection process.

2 Recommendations

Recommendation 1: That the Australian Government ensure:

- the free, prior and informed consent of Aboriginal communities is obtained at all stages of the site selection process

- that the process of engagement with Aboriginal communities is fully documented and recorded
- that necessary supports are provided to Aboriginal communities and their freely chosen representative institutions to ensure that they are able to engage meaningfully in the site selection process, including by ensuring that they have access to information in a culturally appropriate manner and access to expert advisory support to truly comprehend the longer term impacts of the waste management facility.

Recommendation 2: That ongoing technical and financial support is provided to affected Aboriginal communities if the waste management facility proceeds, to ensure that they can effectively participate in the management of activities on their traditional lands into the future.

Recommendation 3: That, as a matter of priority, the Australian Government address concerns about inadequate consultation with Indigenous groups including the Adnyamathana peoples in all phases of site selection and ongoing agreement making with the Australian Government and fully document the engagement process.

3 Relevant human rights standards

8 The Commission notes that Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) explicitly requires States to:

Take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent.⁶

9 While the UN Declaration itself is not binding, it sets out how binding human rights standards apply to the specific vulnerability and historical situation of Indigenous peoples.

10 For example, the standard of free, prior and informed consent is identified as part of Australia's binding human rights obligations under Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁷

11 General Recommendation 23 of the Committee on the Elimination of Racial Discrimination, for example, calls on parties to the Convention to:

Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.⁸

12 And further, to:

recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally

owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁹

- 13 A failure to adhere to the standard of free, prior and informed consent in relation to matters affecting the rights of Indigenous peoples over their traditional lands may therefore constitute a breach of the principles of non-discrimination (Article 2) and equality before the law (Article 5) in the ICERD.¹⁰ Like provisions can also be found in other treaties to which Australia is a party, such as Articles 2, 26 and 27 of the International Covenant on Civil and Political Rights (ICCPR).¹¹
- 14 It is therefore of paramount importance that, in the consideration of a site for waste management, Indigenous peoples are able to determine how best to protect and maintain access to their lands and sacred sites. If a waste site is agreed to on their lands then Indigenous peoples must be able to determine how a facility can safely co-exist with their rights and interests, and appropriate restitution is agreed to for the use of their lands and territories.¹²

4 Indigenous peoples' significant interests

- 15 The Wallerberdina Station site, selected for ongoing consideration for a waste management facility, is in close proximity to the Adnyamathana Native Title determined land.¹³ The determined area lies to the immediate north and west of the site under consideration at Wallerberdina Station. The Adnyamathana people have raised serious concerns about the possible impact of a waste management facility on their surrounding traditional lands, over the short and long-term. This includes concerns they have that a facility may affect their Indigenous Protected Area (IPA),¹⁴ located just east of the Station.¹⁵
- 16 It is clear that the Adnyamathana people have significant interests in the site selection process. The Commission is therefore concerned by reports that Indigenous groups and the Adnyamathana people consider that they have not been consulted effectively in the site selection process to date.¹⁶ The opposition of Indigenous groups, including the Adnyamathanha people, to advancing the site selection process is noted in the Government's 'phase 1 summary' report.¹⁷ This situation requires immediate attention if consideration of the site at Wallerberdina Station is to continue.
- 17 The Commission is of the view that the Australian Government should strive to meet the highest standard of transparency and accountability when engaging with the Adnyamathana traditional owners and Native Title holders of surrounding lands on a matter of such significance. As the experiences at Muckaty station, as well as the Jabiluka mine show,¹⁸ a failure to meet the standard of free, prior and informed consent in engaging with traditional owners who have significant interests in the matter can lead to opposition and uncertainty that lasts into the future.

5 The principle of free, prior and informed consent

18 Article 29 of the UN Declaration is underpinned by the principle of free, prior and informed consent.¹⁹

19 It is much stronger than an obligation simply to provide information or 'consult' with Indigenous peoples. Obtaining free, prior and informed consent entails a process of ongoing discussion and engagement with Indigenous peoples. Furthermore, processes of engagement must be able to accommodate the complexities and inter-relatedness of Indigenous societies and a wide range of issues and players.²⁰ The process must therefore be managed on a case-by-case basis and not through a 'one-size-fits-all' model of consultation.

(a) The components of free, prior and informed consent

20 The principle of free, prior and informed consent can be broken down into the following four components:

- i. *Free* means no force, coercion, intimidation, bullying and/or time pressure.
- ii. *Prior* means that Indigenous peoples have been consulted before the activity begins.
- iii. *Informed* means that Indigenous peoples are provided with all of the available information and are informed when either that information changes or when there is new information.
- iv. *Consent* requires that the people seeking consent allow Indigenous peoples to say 'yes' or 'no' to decisions affecting them according to the decision-making process of their choice.²¹

(b) Incorporating free, prior and informed consent into the implementation of the phases of site selection, and any advanced stages

21 It is the duty of the Australian Government in seeking the free, prior and informed consent of Indigenous peoples that they are fully informed in a manner where they can effectively participate in agreement making.

22 The Commission considers that elements that would indicate compliance with the standard of free, prior and informed consent include the following:

- communication of information in the relevant Indigenous language on the issue and possible impact(s) of the waste management facility.
- a process for Indigenous peoples to specify or nominate their own form of representative institutions to negotiate and ultimately express views on behalf of the affected peoples or communities
- resourcing support to ensure that the nominated representative institution/s have the capacity to be involved in informed discussions²²

- recording and documentation of discussions and negotiations involving consent processes, and for this to be accessible to Indigenous peoples unable to attend meetings
- adequate timeframes for Indigenous people to discuss and consider together, separate from government consultations, the locality of the proposed facility, the nature, size, pace, reversibility and scope of the establishment of a waste management facility on or near their lands
- a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle. This principle refers to a decision-making process which anticipates future risks based on uncertain evidence in the present. Such a process requires extensive risk-management to ensure the public are protected from any possible exposure to harm in the future
- ongoing engagement between Indigenous peoples and the personnel likely to be involved in the site selection and ongoing assessment for the waste management facility (including indigenous peoples, private sector staff, research institutions, government employees and others).²³

(c) *Community willingness for a waste management facility is the product of consensus*

- 23 The principle of free, prior and informed consent is not a right to veto, as the rights of Indigenous peoples exist in relation to the rights of other non-Indigenous peoples. The principle should also not be understood as requiring unanimity among Indigenous peoples. It does require the overwhelming and clearly expressed support of the affected Indigenous group.
- 24 The Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, noted this in her report following her visit to Australia in 2017, that the principle of free, prior and informed consent ‘does not require the consent of all’.²⁴
- 25 Instead, what is required is a process whereby governments or companies and Indigenous peoples can engage with each other on an equal footing.
- 26 Governments should not use coercion or manipulation to gain the consent of Indigenous peoples. For example, Indigenous peoples should not be influenced to consent to a decision on the grounds that they will gain improved or newly available essential services or core benefits. Access to essential services should not be contingent on providing free, prior and informed consent.
- 27 An important outcome of an effective consultation process is when Indigenous peoples and their representative institutions feel fully informed about the decision to be made, and any concerns expressed are responded to adequately.

28 If there remains distrust, dissent or objection to the decision-making process from some or all of the Indigenous peoples concerned, it questions the legitimacy of the site selection process for the waste management facility. This has the potential of isolating and causing fractures between Indigenous groups, which in turn can significantly undermine any advanced stages of the site selection process.

29 Conversely, implementing an ongoing process of engagement underpinned by informed consent can lead to broad consensus for why a decision has been made. This can lead to successful processes of engagement and minimises community opposition and the risk of community fragmentation when a decision is made.

6 The need for ongoing engagement and consent with Indigenous peoples

30 Ongoing engagement and a continued process of obtaining consent from the Indigenous peoples concerned is required for a long-term decision-making process such as site selection of a waste management facility. The phased process of site selection and possible advancement stages means that engagement with Indigenous peoples should be structured into each phase.

31 Furthermore, beyond the phases involved for site selection, a radioactive waste management facility will have a long-term impact on the surrounding community, potentially over generations, due to the long half-life of radioactive material. The social, environmental, economic and political context will change over this time which is likely to impact on the nature of Indigenous people's consent. As the site selection process and advanced stages progress, there is potential for Indigenous peoples consent to change during each phase.

32 It is therefore necessary that Indigenous peoples representative institutions are considered legitimate by the Australian Government and are resourced to participate effectively in a long-term engagement process to accommodate changes in context and consent. Resourcing requirements include the ability for Indigenous peoples to:

- have their legitimate representation and leadership attend consultations, and decision-making meetings
- take proposals back to their communities for further consideration
- access appropriate expert advice
- ensure that the process of obtaining consent is thoroughly documented.²⁵

33 Without this resourcing, Indigenous peoples cannot be expected to consent to or comment on any proposal, particularly not a long-term process, in a fully informed manner. In addition, without thorough and accessible records which document how, and from whom, consent has been obtained, Indigenous

peoples cannot be said to have consented. Free, prior and informed consent can only be obtained through the adequate resourcing of engagement processes which meet all the above requirements.

(d) *The case of Muckaty — gaining legitimate consent*

- 34 The example of Muckaty²⁶ highlights the complexity of gaining consent. A process which does not aim to obtain free, prior and informed consent from all Indigenous groups and peoples involved can mean that consent unravels over time, which in turn de-legitimises decision-making processes.
- 35 In 2007 the Commonwealth accepted a nomination to locate a waste management facility on Muckaty station in the Northern Territory. This decision was subsequently brought before the Federal Court with dissenting Indigenous clan groups, some of whom supported and others opposed the nomination. It was alleged that the Northern Land Council (NLC), which supported the nomination for the site, did not effectively represent all the Indigenous groups affected by the decision, and had engaged in a flawed consultation process.²⁷
- 36 The case divided Indigenous peoples, their families and clan groups at Muckaty. After seven years of ongoing disputes between Indigenous peoples and interest groups, the NLC decided to withdraw the nomination to locate the facility on Muckaty station. Due to the divisive and complex issues surrounding the legitimacy of consent between Indigenous groups, no further nominations were made.²⁸
- 37 The example of Muckaty highlights the complex and multi-layered nature of gaining legitimate consent²⁹ from Indigenous peoples to locate a waste facility on their traditional lands. Gaining consent from Indigenous peoples and their representative institutions demands a rigorous engagement approach which is consistent with Australia's international human rights obligations.

- ¹ Dave Sweeney, 'Plan to use Aboriginal land as a nuclear waste dump is flawed and misguided', *The Guardian* (online). 31 July 2013, At <https://www.theguardian.com/commentisfree/2013/jul/31/muckaty-aboriginal-land-nuclear-waste> (viewed 23 April 2018).
- ² Dave Sweeney, 'Plan to use Aboriginal land as a nuclear waste dump is flawed and misguided', *The Guardian* (online). 31 July 2013, At <https://www.theguardian.com/commentisfree/2013/jul/31/muckaty-aboriginal-land-nuclear-waste> (viewed 23 April 2018); Mines and Communities, Barndioota (SA), 'the only site to be assessed for national radioactive dump'. 30 April 2016 At <http://www.minesandcommunities.org/article.php?a=13360> (viewed 19 March 2018).
- ³ National Radioactive Waste Management Act 2012 (Cth)
- ⁴ Department of Industry, Innovation and Science, Australian Government, National Radioactive Waste Management Facility At <http://www.radioactivewaste.gov.au/site-selection-process> (viewed on 15 March 2018).
- ⁵ United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/Res/61/295 (13 September 2007), art 29.
- ⁶ United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/Res/61/295 (13 September 2007), art 29.
- ⁷ International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. A/6014 (1966).
- ⁸ Committee on the Elimination of Racial Discrimination, General Recommendation 23, General Comments, 1997, UN Doc A/52/38 para 4(d).
- ⁹ Committee on the Elimination of Racial Discrimination, General Recommendation 23, General Comments, 1997, UN Doc A/52/38 para 5.
- ¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. A/6014 (1966), art 2, art 5.
- ¹¹ International Covenant on Civil and Political Rights, GA Res 2200A, UN Doc. 23 March 1976. Art 2, art 26, art 27.
- ¹² Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, '*The United Nations Declaration on the Rights of Indigenous Peoples A Manual for National Human Rights Institutions*', UN Doc HR/PUB/13/2 (August 2013) p. 39.
- ¹³ *Adnyamathanha No. 1 Native Title Claim Group v The State of South Australia (No. 2)* [2009] FCA 003.
- ¹⁴ Australian Government, Department of the Prime Minister and Cabinet, '*Indigenous Protected Areas – IPAS*', January 2017, No. 62 Yappala At <https://www.pmc.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas> (viewed 29 March 2018).
- ¹⁵ Meredith Booth, 'Fears Nuclear Dump will end their story', *The Australian* (online). 23 May 2016 At <https://www.theaustralian.com.au/national-affairs/indigenous/fears-nuclear-dump-will-end-their-story/news-story/0bf29b3b919547bad0c797ac1b9a4631> (viewed 28 March 2018),
- ¹⁶ Michael Anderson and Vince Coulthard, Adnyamathanha Traditional Lands Association, Aboriginal Corporation RNTBC, 'Adnyamathanha Nation says no to waste dump', (Media Release, 29 April 2016).
- ¹⁷ Australian Government, Department of Industry Innovation and Science, National Radioactive Waste Management Facility (NRWMF), Phase 1 Summary Report, April 2016, p. 10.
- ¹⁸ Keri Phillips, 'The long and controversial history of uranium mining in Australia', *Radio National ABC* (online), Tuesday 14 July 2015. At <http://www.abc.net.au/radionational/programs/rearvision/history-of-uranium-mining-in-australia/6607212> (viewed 29 April 2018).

¹⁹ United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/Res/61/295 (13 September 2007), art 19, art 29.

²⁰ T Bauman, Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: research findings, recommendations and implementation (2006), Report No. 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, p.13.

²¹ Adapted from C Hill, S Lillywhite and M Simon, *Guide to Free, Prior and Informed Consent*, Oxfam Australia (2010), p 9. At http://www.culturalsurvival.org/files/guidetofreepriorinformedconsent_0.pdf (viewed 29 March 2018).

²² Mick Gooda, *Social Justice Report 2011*, Australian Human Rights Commission, p.73.

²³ M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp.72-74.

²⁴ Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, 8 August 2017 (A/HRC/36/46/Add.2), p.17.

²⁵ United Nations Permanent Forum on Indigenous Issues, 'A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples', International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements, UN Doc E/C.19/2009/CRP.7 (undated), p.21.

²⁶ Andre Dao, 'Nuclear Waste at Muckaty', *The Monthly* (online). June 2014. At <https://www.themonthly.com.au/issue/2014/june/1401544800/andr-dao/nuclear-waste-muckaty> (viewed 20 March 2018).

²⁷ Amos Aikman, 'Nuclear waste fight sparks \$17 million claim', *The Australian* (online), 26 July 2017. At <https://www.theaustralian.com.au/national-affairs/indigenous/nuclear-waste-fight-sparks-17m-claim/news-story/1fa95bb665d1dbdb653d0e2e8b7df0e9> (viewed 20 March 2018).

²⁸ Staff writers, 'NLC and Feds drop plan for a nuclear waste dump at Muckaty Station', *NT News* (online). 19 June 2014. At <http://www.ntnews.com.au/news/northern-territory/nlc-and-feds-drop-plan-for-nuclear-waste-dump-at-muckaty-station/news-story/028558c36372d72ea56b3a6427c7f21a> (viewed 20 March 2018).

²⁹ See for example the complexities of consultation, T Bauman, Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: research findings, recommendations and implementation (2006), Report No. 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, p.13.