Submission to the Senate Inquiry on the National Radioactive Waste Management Bill 2010

Submitted by:

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This submission focuses on:

- the power and processes necessary to *select a site* for the radioactive waste management facility;
- natural justice and the Minister's powers;
- application of State and Territory laws and Commonwealth laws

PART 1

Nomination of a site – by a Land Council - Section 4

The protections afforded in subsection 2 to indigenous traditional owners regarding nomination of their land as a radioactive waste site are legal obligations of the Federal Government post the amendment to s.52 of the Constitution in 1967, the implementation of the Racial Discrimination Act 1975 (Cth) and the Federal Government's ratification of the United Nations Convention on the Elimination of all forms of Discrimination (including the domestic implications of that executive action) (to name only a few of the legal obligations of the Federal Government in such a case).

Section 4(2) is the relevant subsection that provides for the process by which an Aboriginal land holding body can be nominated by the Land Council. This is supposed to be a process which ensures a dump is not forced upon a people and their land if they do not want it. Yet section 4(4) which states that 'Failure to comply with subsection (2) does not invalidate a nomination' is a clause that renders the protections in subsection (2) ***meaningless.***

Yet, even without the nullifying effect of subsection (4), the process afforded indigenous land holding bodies under subsection 2 ***does not ensure that their civil rights and human rights as indigenous peoples, nor their proprietary rights, are protected***.

The current situation of Martin Ferguson's plans to press ahead with the nomination of the Mackaty site despite clear evidence from Muckaty elders and traditional owners that there

has been no prior consent of their people represented by the Mackaty Land Trust (the land holding body – made up of five family groups with interests in the proposed dump site – see Submission 95 to the 2009 Inquiry) regarding the nomination of their land as a waste dump, is a prime example of the flawed process of negotiation in this area and is evidence of the need for meticulously drafted protections for indigenous traditional owners who, as a minority group with interests in land far away from the centres that make most impact in the nation's political decisions, must have their civil rights, group rights and human rights protected, not eroded, by legislation.

Nomination of a site – General Nominations - Section 5 and 6

What is the purpose behind the general nomination provisions set out in section 5? Why would it be necessary to ensure that an indigenous land holding group represented by a Land Council is to be barred from nominating their land once the Minister declares nominations can be made under section 6? (Although I find it hard to imagine a situation in which such a group would come to a unanimous decision, fully informed, with free and prior consent, to nominate their land for such purposes.)

Nomination of a site - Rules about nomination – Section 7

Section 7(1)(e) relies on the regulations and as drafted is ludicrously ambiguous and vague for legislation dealing with the level of radioactive waste that is considered by the bill, the highest level of toxicity of industrial waste this country produces.

Section 7 subsection 4 also ensures that any right to be heard as person whose interests may be effected by the location of the dump site is not protected.

PART 2

Natural Justice hearing rule – Section 9 subsection 7

Re: *Exhaustive statement*

(7) This section is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to:
   (a) the Minister's decision whether to make a declaration under section 5; and
   (b) the Minister's decision whether to approve land, or a specified part of land, under section 8.

I strongly object to a legislative statement of the intention of the legislature to restrict the court's ability to judge whether or not the provisions in the legislation have accorded natural justice. If the legislation is written with the honest intention to provide natural justice there is no need to include a provision that explicitly states that this is intended to be an 'exhaustive statement'. This section suggests that the Government, in passing this Bill, would be adhering to a process that ***seriously reduces the privileges of citizenship*** under the Constitution and inherent in the common law and is moving away from the traditions and values that underlie the rule of law in our parliamentary democracy.
The same analysis applies to the statement of legislative intention in the 'exhaustive statement' in section 17 subsection 5.

The Minister's Powers

The Bill places all discretion in the hands of the Minister. This is arbitrary decision making with no reference point for decisions of national importance and of long term consequence. It would be possible to make laws that require the Minister to take into consideration an Experts' report, perhaps prepared by a council made up of representatives of the relevant expert interest groups (land holding groups and experts in the nuclear waste and storage industry.) A process that has genuine community support, where communities are informed and agree to the location of the site in their region, is the ***only*** process that ensures the longevity and safety of the selected site, its inhabitants and the surrounding area.

PART 3

The application of State and Territory laws – Section 11

The removal of the application of State and Territory laws by Section 11 for the purposes of activities set out in Section 10 will, if the dump site is land nominated under section 4, prevent the protection of Aboriginal Sacred Sites. If by virtue of poor consultation practice regarding the nomination of a site on indigenous land (which is in itself can be clearly compromised by unequal power relations and/or political circumstances) relevant indigenous persons will not have recourse to legislation that has been put in place to protect their interests in the spirit, not of charity ***but of right*** as a result of the history of colonisation in this country and as is required by International law. If consent is in fact the fully informed prior consent of a group in a unanimous fashion then there is no need to rescind the operation of relevant state and territory laws.

The application of Commonwealth Laws – Section 12

The removal of the application of
(a) the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*; and
(b) the *Environment Protection and Biodiversity Conservation Act 1999*
for the purposes of activities carried out under section 10 is also an abrogation of the rights, privileges and protections that we as an Australian community and as individual Australian citizens, expect to be honoured by our Government in the 21st Century. The ends do not justify the means. There are other safer legislative means to ensure the proper balance is struck.

The current political context

Mackaty land has been nominated by the Northern Land Council as a potential dump site. There is ***significant*** discontent amongst many Ngapa Traditional Owners because of the nomination of this site. There are some members of the five family land holding group who have agreed to the nomination ***however*** there are many vocal traditional land owners who have ***not*** consented to the nomination of their land as a potential radioactive waste storage facility / dump site. I am aware that Martin Ferguson received a letter opposing the dump in May 2009 signed by 25 Ngapa Traditional Owners and 32 Traditional Owners from other Muckaty groups. I am, as a resident of Martin Ferguson's electorate and as an Australia citizen extraordinarily concerned about these developments. The Senate Committee MUST go to Tennant Creek to take evidence directly from those who are likely to be most affected by the passing of this Bill.

That the waste from the Lucas Heights reactor is due back here in 2014 is frightening but there are ways to deal with this matter ***without*** putting into place dishonest and coercive procedures that may force a highly toxic material to be placed on Aboriginal land without the proper consent of its owners. As David Ross has said, locating the waste dump on Mackaty land will cause ongoing disputation and social problems amongst the indigenous groups in the area (not unlike other highly invasive industrial/development projects that have gone ahead on indigenous land without the unanimous consent of all relevant indigenous traditional owners.) Must our governments continue to make the same mistakes as their predecessors?

The NT Labour Conference in April 2008 voted unanimously to exclude Muckaty on the basis that fully informed unanimous consent of the traditional owners was not obtained by the Land Council. Yet Martin Ferguson and the Labour Government have continued to pursue Muckaty as a radioactive waste dump site. This is dishonest politicking. And yet there is here, at this point in time, an opportunity to show historical leadership in Australia in this area.