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ENVIRONMENTAL DEFENDERS OFFICE NT – Submission into Inquiry into National Radioactive Waste Management Bill 2010

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Submitted to:

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NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

Contents

1. INTRODUCTION

The scope of this submission addresses two fundamental legal, constitutional and procedural fairness aspects of the *National Radioactive Waste Management Bill 2010* (**2010 Bill**):

a. Environmental Management & Regulation of Radioactive Waste Management Activities

The ability of the *Australian Radiation Protection and Nuclear Safety Act* (**ARPNS Act**) and *Environmental Protection and Biodiversity Conservation Act* (**EPBC Act**) to regulate and manage the types of risks and impacts caused by a radioactive waste facility without State and Territory legislation and institutional capacity. And the exclusion of the rights to "procedural fairness" provided by State and Territory laws to the communities who will be affected by radioactive waste management.

b. Aboriginal People's Consent

The issue regarding voluntary informed consent of the Aboriginal owners of land for which a nomination for a facility may be made and the application of the *Aboriginal Land Rights (Northern Territory) Act* (**ALR Act**), particularly the existing nomination for Muckaty which has been continued under the 2010 Bill in the Schedule of the Bill (See **Attachment A**).

2. BRIEF HISTORY OF THE 2010 BILL

The original *Commonwealth Radioactive Waste Management Bill 2005* (**2005 Bill**) was only designed with 3 existing Commonwealth defence sites in mind. There are some ambiguities as to the extent to which Territory laws can regulate Commonwealth actions, so the 2005 Bill was to make it clear that Territory environmental and planning laws would not apply on Commonwealth Defence Sites.

On 21 October 2005 the NLC called for an amendment to the 2005 Bill to allow it to nominate land at the same time as promoting an "open debate on uranium issues" (aka uranium mining). On 1 November 2005, NT members of the CLP picked up this call from the NLC and proposed amendments to allow for this to occur. They also purported to place some limits on the type of waste that could be accepted by such a facility. The *Commonwealth Radioactive Waste Management Act 2005* (**2005 Act**), as amended, was assented to on 14 December 2005.

With some quick, and ill conceived amendments, the scope and power of the Bill changed profoundly and now provided a means of taking Aboriginal Land by the Commonwealth indefinitely though a "voluntary" process to site the facility.

Under the new 2005 Act process, a Land Council was allowed to nominate land within its region, allowing in theory any of the 3 Land Councils (Northern, Central and Tiwi Land Councils) to nominate a site.

But instead of stating that the normal Land Council process applied under the ALR Act (which provided a mechanism for voluntary informed consent), or putting in place a better alternative scheme for voluntary informed consent, the 2005 Act set about ensuring that such consent was not required for a nomination through the following series of intentional legislative designs:

- The 2005 Act ensured that compliance with the ALR Act was not a pre-requisite to the right of the Land Council to make a nomination;

- The 2005 Act ensured that a decision by the Minister to approve a nomination or declare a facility did not require a finding that voluntary informed consent under the ALR Act was provided, that there were no rights to be heard on this issue by affected parties, and that such a decision was not reviewable by the Courts on this basis.

- In 2006, at the time when opposition by local Traditional Owners to the impending Muckaty nomination was becoming obvious, further amendments were passed to ensure that the act of nomination itself, in addition to the Minister's decisions about such nominations, could not be subject to procedural fairness or legal challenge on the basis of absence of voluntary informed consent.

The 2010 Bill retains all of the intentional design features the 2005 Act which exclude the need for voluntary informed consent, except for the following:

- It removes the exclusion of procedural fairness and judicial review for the nomination, and approval of the nomination, for any new nominations apart from the existing Muckaty nomination.

- Instead of letting the common law apply normal principles of fairness to the decisions being made under the Bill, it states that the right of a aboriginal persons who's land is being taken without their consent to make a written submission is all that is required for a "fair" hearing of their concerns.

- It places rights to make a submission for all nominations, including the Muckaty nomination, on the decision to declare a facility. However, this decision does not concern the issue of voluntary informed consent.

Such changes have little effect on the objective of ensuring that voluntary informed consent is irrelevant to the process:

- The 2010 Bill does not re-instate procedural fairness, or judicial review, for the Muckaty nomination except for a declaration about that nomination.

- The 2010 Bill still does not say for other nominations that compliance with the ALR Act is a condition of validity, either for the nomination itself or the Minister's decision to approve it or declare a facility with respect to it.

- The claim that "procedural fairness" is re-instated by the other changes is an intentional nonsense, as:

    - There are no rights whatsoever for persons other than those "with an interest in the land" to make a submission;

    - It is likely that people will miss notification of the submission right given there is no requirement for any details to be provided in the notification that would identify what it is actually about in plain language;

    - Providing rights to be heard in the written form is extremely prejudicial to Aboriginal people;

    - There are no objectives or criteria in the Act, or on the Minister's decision, so it is impossible for a person to know what to make a submission about;

    - There is no right for a person to see information on which the Minister will base his decision (eg Anthropological Reports and Evidence from Land Councils as to compliance with ALR Act), in particular there is no right to see information adverse to a particular person's interest; and

    - The Minister is free to be quite biased, and literally make a decision on the flip of a coin.

- Equally the claim that "judicial review" is re-instated is misleading, as the Bill continues the intentional design feature of the 2005 Act in ensuring there are no grounds on which a judicial review can be based, and no access to information on which to base a review.

3. ENVIRONMENTAL MANAGEMENT AND REGULATION OF RADIOACTIVE WASTE MANAGEMENT ACTIVITIES

The key tenant of the 2005 Act, to exclude all State and Territory environmental, natural resource and planning laws, has remained in the 2010 Bill.

The argument for this appears to be 2 fold:

- The exclusion of NT & State laws are required in order to ensure a facility is not prohibited based on "political" grounds; and

- The EPBC Act and APRANS Act alone are adequate to regulate all the risks and impacts of a radioactive management facility, and "replicate" State or Territory laws.

We agree that it is disingenuous for States and Territories to agree to a need for radioactive management facility then pass laws which prohibit them.

However this argument is clearly not a reason to exclude all laws which merely *regulate* or *inhibit* a radioactive waste facility, as opposed to *prohibiting* one. The 2010 Bill could easily be changed to ensure the NT & State laws apply so as to assist to manage the environmental impacts and risks as thoroughly as possible subject to a clause that they may not actually prohibit the facility or activities essential to a facility.

The remaining argument is simply wrong and arrogant. We note the following in particular:

- The exclusions of State and Territory laws are extremely broad, apply off-site, and the effect of the Commonwealth's Constitutional immunities and land acquisition mean that they are not limited to the purported limits on the type or source of radioactive waste in the 2010 Bill's definition of "facility".

- In terms of best-practice management of the particular risks posed by a radioactive material facility, the Commonwealths laws are flawed. Both in regulatory and institutional sense the Commonwealth's EPBC Act and ARPNS Act frameworks have not been designed to address the types of environmental, economic and social risks posed by a radioactive waste facility and associated activities it entails;

- The exclusion of State and Territory laws also excludes the procedural fairness accorded to the community in these laws which is not replicated at Commonwealth level or the 2010 Bill.[1]

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[1] This Inquiry professes to be addressing "procedural fairness". This concept refers to the ability of parties and stakeholders that will be affected by a decision to be involved in the process of making that submission. It has been recognised for decades that the common law notion of procedural fairness is completely inept at addressing land-use and environmental decisions – because the parties and people seriously affected by the decision do not hold property rights (eg radioactive material seeping into groundwater or surface water and affecting downstream users of water and communities off the site of the facility).

The ability of regulatory environmental management framework to keep the facility safe and secure was something which clearly informed the Lauder family's consent. We are therefore deeply concerned that their information on this issue from the NLC was that the 2 Commonwealth laws were adequate. We note in particular that the 2005 Act (and 2010 Bill) allowed for the ALR Act to be excluded by the Commonwealth for all its activities off site.

3.1. The Scope of Activities Exempt from State and Territory Laws

The exemption of State and Territory laws under the 2010 Bill is not just for the construction, operation and decommissioning of the radioactive disposal or storage facility, and secure access and transportation of radioactive material to and from it.

The exemption is for almost any land use or activity so long as they relate to:

- *management* of radioactive material;
- radioactive material other then high level radioactive material or spent nuclear fuel; and
- radioactive material "generated, possessed or controlled" by the Commonwealth.

Management is extremely broad. It can relate to the disposal of radioactive material permanently or temporarily, storage, or re-cycling and re-processing for re-use. There looks to be no exclusion on intermediate long-lived waste if it is not spent nuclear fuel. The Commonwealth can clearly *possess* or *control* radioactive materials generated or supplied from other nations, corporations or from the States and Territories if it wants.

There are expressly no limits to the geographical location of the activities at all, so long as they are somehow related to the facility on the selected site. This means that highly intrusive activities (quarries, river diversions and groundwater alteration) could be carried out throughout the entire Muckaty Land Trust and beyond if required to construct, protect, maintain or decommission the facility.

Anything regulating the transport of radioactive waste is also excluded. Would the *Sea Dumping Act (Commonwealth)* and *Marine Pollution Act* (NT) be excluded because they "regulate" pollution from the transport of ships containing radioactive waste into Darwin Harbour in NT and Commonwealth waters?

Indeed the Act is drafted so broadly that the facility itself could arguably be constructed to extend outside the nominated site if it had to, or other subsidiary facilities could be constructed along transport routes (ie interim storage at Darwin Port and Stuart and Barkley Highways).

The critical point though, is that such restrictions are not tied to the acquisition of the land by the Commonwealth itself or its continued ownership – and do not constrain the Commonwealth's Constitutional immunities.

Once the Commonwealth acquires the land it can propose whatever it likes on the land now that it owns it and attracts Constitutional immunities from State and Territory laws, including storage of high level radioactive waste and spent nuclear fuel from other Countries. Although the exemption under the 2010 Bill from State and Territory laws would not apply to the storage of high level radioactive waste and spent nuclear fuel, this does not mean that States and Territories could apply their laws to the land held by the Commonwealth or Commonwealth operations. The Constitutional legal position is already that State and Territory laws may not apply to Commonwealth Land or Commonwealth operations and activities depending on the circumstances[2].

As stated by Department of Resources, Energy and Transport (**DRET**):

> It is the Department's view that, if the Australian Radiation Protection and Nuclear Safety Agency has issued a license in respect of a facility, any State law purporting to prohibit the actions authorised by that license would be inconsistent with the APRANS Act. Accordingly the state law would be invalid by operation of s109 of the Constitution.
>
> The Department is also of the view that s52(i) of the Constitution would be relevant to a facility constructed on land acquired from a State.[3]

This would mean supposed restrictions in the 2010 Bill originally placed by the CLP in the 2005 Act are completely useless, indeed they are a rouse. The Commonwealth Government could store high level radioactive material and spent nuclear fuel, including material from overseas or States and Territories, with only the EPBC Act and APRANS Act applying. We are not aware of either of these 2 Acts placing any prohibitions on such activities.[4]

Indeed nuclear fuel storage plant and facility for production of radioisotopes, particle accelerator, irradiator and facility used for the production, processing, use, storage, management or disposal of unsealed and sealed sources could be constructed subject to license under the ARPNS Act on the nominated land.

All this could be done notwithstanding the fact that the site was not nominated for any of these purposes by the Traditional Aboriginal Owners of the land.[5] The ALR Act would no longer apply to require further consent because the site is not Aboriginal Land.

We also note that it is very possible that an Australian Government's position may change over the next decade on nuclear power and re-processing in Australia due to the urgent need for alternative sources of energy being driven by the threat of Climate Change and energy security concerns. In this case we would consider it

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2 Section 122 of the Constitution (Territories), Commonwealth Places immunity, Inconsistency of laws doctrine, Doctrine of Intergovernmental Immunity etc

3 Letter dated 15December 2008 from DRET to Senate Committee

4 There are current prohibitions on nuclear fuel fabrication plant, nuclear power plant, an enrichment plant and a reprocessing facility under section 10 of the APRANS Act. This may restrict the types of nuclear waste from Australian sources.

5 See definition of nuclear installation in section 13 of ARPNS Act

likely that there would be overwhelming political expediency to store, dispose or re-process high level radioactive waste generated from such activities (located most probably elsewhere in Australia) in the only spot already designed for radioactive waste in the country which is owned by the Commonwealth in a remote area.

Would any Government seriously set about finding a new site for high level radioactive waste management (ie spent reactor fuel rods) if it did not have to?

3.2 Best Practice Management of a Radioactive Waste Facility

There is no disputing that radioactive waste is extremely dangerous without rigorous active management and procedures of containment. If such containment is successful, there are largely no significant immediate and certain environmental impacts that can be identified in the short term. Radioactive waste management can claim under such a theoretical case to be "safe", with no immediate identifiable and unavoidable impacts on the environment. But this should not be confused with an activity which has no inherent ability to cause serious harm. In the case of radioactive waste management, if you take away the constant required rigorous procedures for containment - the inherent impacts of radiation are undeniably certain, widespread and dangerous to humans and the env**ironment.**

Accordingly, the critical characteristic of a regulatory framework is that is focuses on constant management and procedures to ensure that things go according to plan, and if they do not, accident and clean-up mechanisms are in placed to immediately work.

As the Montara Oil Spill demonstrates, regulatory regimes which concentrate on identifiable impacts at the time of approval are inept at dealing with these types of risks. It matters little how rigorous an initial assessment and approval process is. What matters for these types of activities is the constant ongoing regulatory framework that ensures over 100s of years that the "plans and procedures" are actually followed and do not slip as to release what is being contained.

In order to achieve this, our view is that a regulatory framework must do the following:

- Strategically locate a site based on best science and risk-management, but also impacts on economic and social issues;

- Apply strict criteria, standards and policies designed to deal with all environmental risks of the facility, and which have the input and are acceptable to the community (not just determined by Government);

- Provide a framework concerned with constant vigilance, community oversight, risk removal, and prevention of pollution or contamination rather than just "project assessment, approval and condition";

- Provide a framework which deals with residual risks, emergencies and contaminated land if things go wrong.

The EPBC Act

The primary purpose of the EPBC Act is to assess and approve predictable and certain impacts of an activity on discrete matters of national environmental significance (threatened species & communities, migratory species, RAMSAR wetlands, World Heritage places etc).

The EPBC Act does not address holistic environmental, social and economic issues raised by radioactive waste management. As stated in the recent Hawke Review of the EPBC Act:

> The current system operates on the basis that local environmental impacts are assessed by State and Territory governments.
> ...
> In a Federal system, environmental protections are provided by a combination of Commonwealth, State, Territory and Local government regulation.[6]

The only time the EPBC regulates impacts on the environment *in general* is in relation to nuclear actions, Commonwealth actions and Commonwealth Land. It is probable that the proposed facility will be captured by one of these triggers which allow assessment in relation to the general environment. Although, there are numerous provisions which allow an environmental impact assessment to be by-passed in the EPBC Act, and for an approval not to be required.[7] We would be very concerned if any of these were used in this case.

Apart from this we consider that the EPBC Act has little value in regulating radioactive waste management because:

- The Department has very little history, compared to State and Territory agencies, in assessing, approving, regulating and ensuring compliance by proposals with regard to their general impact on the environment. Indeed it always relies upon State and Territory institutional capacities and expertise in assessing environment impacts through Bilateral Agreements. The removal of the Bilateral by the 2010 Bill will mean that the Commonwealth agencies will have to start from scratch regarding institutional knowledge about the Territory environment and capacity to undertake environmental assessment.

- The Act only relates to "likely significant impacts on the environment" on a national scale, making it unconcerned about local or regional impacts, economic and social impacts, and only concerned with identifiable likely impacts at time of conceptual design, not ongoing risk or compliance management.

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6 Page 157, Chapter 7 on Report of the Independent Review of the EPBC Act 1999

7 Decision on assessment level, approval of a bioregional plan or conservation agreement etc

- That Act is hardly enforced. The findings of the 2007 Audit are damming and create a disturbing reality of how a radioactive waste facility will be managed under the EPBC Act:

> Implementation of the compliance and enforcement strategy has been generally slow – particularly in regard to managing compliance with conditions on approval. The department did not have sufficient information to know whether conditions on the decision are generally met or not. There has been insufficient follow up on compliance by the department for those individual or organisations subject to the Act and little effective management of the information that has been provided.
>
> Consequently, the department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective. This is not consistent with good practice an does not encourage adherence to condition set by the Minister. While voluntary auditing has been carried out for a small number of decisions, auditing and reporting on compliance with the statutory decisions is not yet well developed. From a small sample for eight decisions, departmental audits found that only 58 percent of total conditions were fully complied with.[8]

As stated in recent EPBC Review:

> As highlighted by the Australian National audit Office (ANAO), there are significant shortfalls in the enforcement of the Act in its early years of operation. When ANAO conducted its first audit of the Act in 2002, there had been no prosecutions under the Act. When the ANAO conducted its second audit in 2006, there had only been one successful prosecution.[9]

We are also concerned as the extent to which the Commonwealth Government is going to regulate itself, and a facility which is literally as far away as possible from regulatory agencies.

The ARPNS Act

The ARPNS Act is more tuned to addressing ongoing risk management of radiation then the EPBC Act. It requires a facility license to be obtained by Commonwealth entities for construction, operation and decommissioning, and a source license to be obtained for transportation and other handling activities.

However the ARPNS Act itself is still based upon a site selection process, the existence of complementing State and Territory regulation, and it is not able to address issues not directly related to radioactivity. The reality is that Australia has never operated a proper radioactive waste facility at all (and many countries have not), and it is very likely that this will be a "learning by doing" process for which we cannot predict the alternations and changes that will be required over the years.

For example, the principle control it adopts for Waste Management Facilities is the *Code of Practice for the Near-surface disposal of radioactive waters in Australia (1992)* (**Disposal Code)** which in turn is actually based upon complying with State and Territory laws and the ability to conduct a alternative site selection process. It is hypocritical to say that the ARPNS Act will rigorously regulate the facility, when the

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8 Paragraphs 48 and 49 at page 25 of ANAO Audit Rpeort No. 31 2006- 2007

9 Section 16.5, Chapter 16 of Report of the Independent Review of the EPBC Act 1999

selection of the Muckaty facility already means that the following sections of the Code cannot be complied with:

- Section 2.4.2(d) – a site should be located way from any known or anticipated seismic activity. Tennant Creek is known to have significant seismic activity.

- Section 2.4.2(f) – that groundwater in the region of the site should not be suitable for human consumption, pastoral or agricultural use. The Groundwater is well suited, and currently used, for consumption by pastoral uses and outstations etc.

- Section 2.4.2(j) – in known habitat of rare fauna or flora. The site is known habitat for threatened species such as the Greater bilby, and possibly Australian Bustard.

- Section 2.4.2 (k) – the site should not be located in an area which is of special cultural or historical significance. There is a range of sacred sites right next to the facility as identified in the Land Commissioner Report.

- Section 2.4.3 – Site selection shall include a suitable consultative process to establish public consent to the location of a disposal facility at the particular site. Clearly the 2010 Bill does not do this.

- Entire sections 3.3. and 3.4 are undermined by the ability to return the land to Aboriginal people so long as the facility has been "abandoned". The ARPNS Act does not even adopt the NEPM for contaminated land as far as we can tell.

Most importantly, the code discusses the need to control many issues which may operate to create risks for radioactive storage or disposal (hydrology, excavations, land-uses, population, traffic movements etc) which cannot be assessed or done without proper application of State, Territory and Local Government laws.

We are also concerned that the Code is some 18 years old and is extremely generic. It applies equally to uranium mining activities and is heavily outdated. The Code is limited in that it addresses nothing about the integrated waste disposal system (waste collection and preparation at source, transportation, off-loading and further treatment etc). We are not aware of any specific Australian codes or guidelines at all under the Act for Long-lived intermediate level waste or high level waste.

Apart from this code, we are concerned that the ARPNS Act regulation is principally concerned with the impacts on human health of people working at the facility or handling radioactive materials, and as a secondary issue the human health impacts outside the facility. It appears to make the assumption that human health protection will also protect the environment.

> The International radiation protection standards are primarily designed to protect human health. Until recently it has been assumed that these standards would incidentally protect flora and fauna as well. However, it is now agreed that additional standards and measures are required to protect other species, and a

> number of international organisations including the International Commission on Radiological Protection and the IAEA have established new work programs to this end.[10]

This is acknowledged by ARPNS Act in their *Regulatory Guidance for Radioactive Waste Management Facilities; Near Surface Disposal Facilities; and Storage Facilities* December 2006:

> With respect to any anticipated, significant discharges to the environment from the operation of a radioactive waste store, pending further developments in international guidance in this area, the applicant should undertake a screening assessment of doses to non-human biota in the vicinity of the store using one of the internationally currently accepted screening tools.[11]

The ARPNS Act provides for extremely limited guarantee of public rights to be involved in the process, except for a submission on a facility license, and is highly discretionary.[12]

One striking example is the ability of the CEO of ARPNSA to issue a complete exemption from any or all requirements of the Act and Regulations if satisfied the action will not pose an unacceptable potential hazard. There are no rights of the public to have a say in such a decision, no reasons required to be given outside the ADJRA Act, and no express review and appeal rights to ensure the decision was made logically and according to law.[13] There are no prescriptive constraints or test of this discretion, such as that it cannot be made where radioactive material it to be released into the environment.

There is also a right to exclude the Act completely if it concerns "national security".[14]

Even where the Act applies to require a Source or Facility License, we are very concerned that the requirement under the Act is only to "take into account" whether the information provided in a license application establishes that the proposed conduct can be carried out without undue risk to the health and safety of people, and to the environment.[15] Surely it must be a test which "must be met" rather than "must be considered". What circumstances could ever justify granting a license which has an undue impact on health and safety of people and the environment for a radioactive waste facility? Again it is unacceptable that there are no prescriptive constraints on this discretion, such as that a license cannot be issued if there is a risk of release of radioactive material into the environment.

We note there is no right to the community to be involved in source license decisions at all (ie how and who can transport & handle radioactive waste).

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10 Section 7.4.2 at page 101 of 2006 publication Australian Government - "Uranium Mining, Processing and Nuclear Energy – Opportunities for Australia"

11 Page 23, section 3.1 of the Guidelines

12 Regulation 40 only requires publication of a notice about an application for a facility license to be put into a paper. There are no guaranteed rights to get information concerning the application or be heard on the application above making a written submission.

13 Section 30(1)(g) and Regulation 37

14 Section 8 of the ARPNS Act

15 Regulation 41(3) of the Regulations.

There is often pressure over time to relax standards due to perceived "safety history" after a few years of operation. We are very concerned there is no test in the legislation that any amendment must not create a greater risk or impact on human health or the environment.[16] We are particularly concerned at the inability of the community to be involved, or know anything, about the ongoing management of the facility and transport to and from it. There are no rights to merits review of license decisions, or of any subsequent decisions regarding the ongoing operation of the facility. There are no community rights to seek injunctions or enforcement orders when there is a breach of the law and Commonwealth Government is unwilling to punish itself.

One key factors driving compliance in many States and Territories is the *threat* itself of communities taking actions in Court if a operation is not complying with its conditions of approval or causing environmental harm. Even the mere publication of compliance issues, audits, and reporting obligations assist in ensuring that attention remains on compliance and developing risks. Although a Radiation Incident Register exists and ARPNSA publishes Reasons for Decisions and other avenues of public input, we are not aware of it being guaranteed in legislation outside the ADJRA. They can be altered or taken away at a whim. We are concerned that "security concerns" will be used to legally block any attempt by the community to seek information about the ongoing management of the facility under Freedom of Information laws.

In contrast, under the NT WMPC Act there are open public registers, including license, conditions, compliance actions, subsidiary management plans, incidents and audits.[17]

We are also not aware of any general obligation under ARPNSA on the public or other entities other then the license holder to notify environmental incidents involving the facility or transport as would occur under Northern Territory *Waste Management and Pollution Control Act* (**WMPC Act**), this is a critical failure for emergency response.

We note that site may contain a range of dangerous materials besides radioactive material, or material which is both radioactive and contains other dangerous characteristics (ie clinical waste, mercury, petroleum stored on site for truck re-fuel, material and chemicals used in treating and disposing, construction or decommissioning). We are concerned as to the ability of the ARPNS Act to deal with these issues. Again the scope of the NT WMPC Act is to address all pollutants, not just radiation issues.

Finally, unlike the WMPC Act there are no basic offences under the ARPNS Act for the release of radioactive material (ie pollution) into the environment which provides the absolute starting point of all pollution and contamination laws. The regulatory affect of this is that, to the extent that an activity or incident is not prohibited or controlled expressly in a license issued under that Act, it is allowed to occur.

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16 Section 36 of the Act

17 Section 9 of the WMPC Act

No Strategic Planning & Alternative Site Selection

Most States and Territories laws contain strategic instruments which can locate different land-uses between a range of potential options based on assessment of environmental impacts, amenity, cultural and economic issues and community desires. These include basic zoning provisions, strategic environmental assessments (**SEAs**) and also control of land tenure. These help place land-uses and activities where they are best suited regarding their environmental risks and social and economic impacts, rather than just placed based on individual landowner's desires.

In this case the key siting criteria include seismic activity, hydrology of surface and ground-water, geological structure, conflict with traffic flows, conflict with other economic resources, and biodiversity values.

There are no such valid processes under the Commonwealth's EPBC Act and ARPNS Act. SEAs under the EPBC Act have shown not to work and are useless without land-tenure options.

In particular, it is hypocritical to say that the ARPNS Act is rigorous regime, when the core requirements of the ARPNS Act contained in the Code for Waste Disposal are for a site to be strategically selected from a range of options based on science – which has been effectively prevented by the 2010 Bill. This makes one of the main strengths of the ARPNS Act framework completely defunct.

No Community Rights in Standard or Policy Setting

The ARPNS Act gives no right to the community to have a say in what levels of radioactive dose, or requirements, they want to be applied as criteria to a facility.

For example, under the NT WMPC Act, Environmental Protection Objectives are instruments which form the criteria for approving waste disposal sites or regulating a particular contaminant like radioactive materials can be set. There are extensive rights of the community to be involved in this process.[18]

No Pollution and Waste Management Control

As discussed above, the starting point is that neither the EPBC Act nor the ARPNS Act constitutes a comprehensive regime for pollution control.

The issue of pollution management by the Commonwealth has been repeatedly acknowledged as inept. It has a very poor history for example of contaminated land management on Defence Land.

As found by the Australian National Audit Office (ANAO):

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[18] Part 4 of the Waste Management and Pollution Control Act. No EPOs currently exists, but the intention is to develop them for contaminated land and other pollutants etc.

> There is no specific Commonwealth legislation or formal policy to guide Commonwealth land management entities in tackling environmental matters such as pollution prevention and site contamination.[19]

Progress has never been made on rectifying this situation by creating a specific Commonwealth regulatory framework.

The absence of such framework is worrying. The combination of the Waste Management and Pollution Control and Water Act in the NT create a starting point that pollution, waste or a contaminant cannot be released to the air, ground or water.[20]

Poor coverage on many environmental, economic and social factors

The focus of the EPBC Act is on discrete national values of the biophysical environment (ie natural values). On the other hand the APRANS Act is focussed on concerns about radiation on humans, which though important, is certainly not comprehensive.

The overriding of State and Territory local and regional planning laws would be particularly negligent if the Muckaty nomination was not pursued, and a site was pursued closer to urban environment or region centre. Local planning framework addresses critical health and safety issues that would be raised by a radioactive management facility, including"

- Traffic safety issues caused by the movement of heavy vehicles into and out of the facility containing dangerous goods.
- Amenity issues of noise, light and dust by the operation of the facility.
- Access issues caused by the facilities need for high-level of security
- The mere stress of knowing a facility containing dangerous goods is next door.
- The interaction of other land-uses with the facility to prevent conflicts.
- Economic impacts caused by the facility, such has been voiced by Pastoralists and other members of Barkley community about impact on business.

Poor Regional Integrated Land Use Control

19
Audit Report No. 31 1995-96

Summary 24 June 1996

[20] Section 83(7) of the WMPC Act and section 16(2F) of the Water Act.

We are concerned as to the ability of surrounding land-uses to be adequately controlled to prevent issues developing at the radioactive facility. Ordinarily a large degree of coordination and integration occurs at State and Territory level, so that impacts from highly intrusive uses, which can drive significant changes in the environment downstream, such as mining and quarries can be assessed against existing uses.

As one example, a new or expanding mine sites near to the site may alter hydrology and run-off patters which cause flooding and other issues at the radioactive facility. Other issues concern control of haulage routes by cattle and mining with regard to reducing potential conflict and safety issues with Arriving and Departing loads of radioactive waste.

We note in particular the issue with conflict between 24 Haulage Trucks from Bootu Creek Mine and incoming and outgoing transport of radioactive Waste.[21] Over the next few hundred years it is likely that many new mines will be proposed in the region, as well as pastoral properties and other land-uses. How are the significant risks of traffic generated by these new land-uses going to be managed under the EPBC Act and APRANS Act?

There are no existing laws under either the EPBC Act or APRANS Act which require integration of these issues, or even notification of events to relevant agencies (such as the time when radioactive waste will be entering and leaving the facility).

Inability to regulate significant associated activities

We are deeply concerned at to the scope for the Commonwealth to do whatever it likes with regard to a facility on or off the nominated site.[22]

For instance, a circumstance could arise where the hydrology of the local region surrounding the site is a risk to seepage of water into the containment facility for radioactive waste, and therefore a direct risk of causing harm to the environment and humans. Indeed this is likely to be a positive legal obligation on the operator to comply with APRANSA License conditions.[23]

Such changes could have drastic impacts on important sacred sites which are often do to with hydrology (ie waterholes etc), as well as ecology of the area. For example Lungkarta and murlunpanta very close to the site.

In these circumstances, the Act would expressly authorise the Commonwealth to access land upstream and divert an entire watercourse through major earth-works, or

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21 Parkons Brinkerhoof Report – Proposed Commonwealth Radioactive Waste Management Faciltity, Transport Assessment Report T3.5

22 Sections 22(4), 22(2), 22(3), 10(3).

23 See for example section 3.1(g) of *Code of Practice for the near-surface disposal for radioactive waste in Australian (1992)* - which becomes a mandatory condition by virtue of Regulation 48(3)(b) of the ARPNS Regulations:

> A surface water management system shall be incorporated to control water erosion of the cover and to divert water away from any partially filled disposal structure, but shall not allow water to drain off-site.

de-water an underground aquifer, to ensure the facility itself is "safe" and "maintained".

The APRANS Act has no ability to regulate these issues at all as they do not directly concern a nuclear installation or radioactive material[24]. The EPBC may not apply because:

- the activities are not on Commonwealth land (being outside the area acquired by nomination);[25]
- the activities are not a nuclear action;[26] and
- the activities, if undertaken by a Commonwealth contractor, are not a Commonwealth agency under the EPBC Act.[27]

Poor Regulation of Legacy Issues and Contaminated Land

Our most serious concern is that complete ineptitude of Commonwealth regulation to address contamination and legacy issues with regard to environmental effects, human heath and safety.

Again whilst the ARPNS Codes raise these issues, the regulatory regime has no means of actually addressing contaminated land and clean up like the NT WMPC Act and other State contaminated land laws.

The APRNS Act contains no provisions of obtaining financial sureties, nor of setting out closure criteria up front before obligations under a license can be surrendered, cancelled or suspended requiring contaminate land and environmental audits before obligations can be released. We note that the 2010 Bill does not restrict the handing back of a site which is contaminated to Aboriginal people. It only requires a site to have been "abandoned" for a facility before land is handed back, which would not even require compliance with a facility license for decommissioning. This is completely unacceptable.

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24 Section 13 of the ARPNS Act

25 Section 525 – ***Commonwealth area***

26 Section 22 - Definition of ***Nuclear Action*** is extremely narrow. Does not include activities associated with the management of a nuclear installation.

27 Section 528 – ***Commonwealth agency*** does not expressly include ANSTO nor a Commonwealth contractor. In particular if associated works and activities were to be done by the Muckaty Aboriginal Corporation or the Northern Land Council they would be expressly excluded from the definition.

4. TRADITIONAL LANDOWNER VOLUNTARY INFORMED CONSENT

The EDO NT acknowledges that some process of ensuring community consent to a radioactive waste facility is required. Community consent cannot be forced by choosing a site "on the science" and pretending there is any other choice to the designate community but to accept it (ie Woomera selection). However, nor can a single site be selected without any scientific selection process, with no information about the proposed facility, and with only asking the landowners what they think rather than the broader affected community (ie Muckaty selection). Both approaches are equally extreme and irrational. The later is what is entailed in the 2010 Bill.

However, in contradiction to the claims that this is intended to be a "voluntary" agreement to acquisition and use of a site on Aboriginal Land we note:

- The land can be acquired even if there was no voluntary agreement to its nomination by the Traditional Aboriginal Owners of the land.

- Once the land is acquired, the Commonwealth is free to do what is likes even though the nomination of the site was based on it being used for a "facility".

- The Commonwealth can acquire land for all weather road access from a site (possibly a number of times in different locations) which has not been voluntarily nominated at all.

- The Commonwealth has powers to do almost anything on land which has not been nominated surrounding the nominated site at the exclusion of both environmental management requirements under State and Territory laws and property rights of a landowner, including Aboriginal people under the ALR Act.

- The environmental impacts and risks of the project beyond the site have not been voluntarily assumed by the community who will be subject to them (including future generations).

Making of a Nomination by a Land Council

The first problem with the regime is it appears to believe that a Land Council owns Aboriginal Land, and therefore gives them the right to make a nomination of Aboriginal Land for it to be acquired by the Commonwealth and used to manage radioactive waste.

The Regime does not say at all that the ALR Act compliance is a condition of validity for a nomination to be made. Whilst it requires *evidence* as to consultations under the ALR Act to be provided with a nomination, it appears from the provisions of the Regime that this does not mean that compliance with the ALR Act is necessary.

Whilst a nomination attracts the obligations under the ALR Act, irrespective of what the 2010 Bill says, the key point is that the effect of the Bill is that non-compliance with the ALR Act can simply not be enforced.

The EDONT submits that a "legal obligation" which cannot be enforced is not a legal obligation at all; it is nothing more than a voluntary obligation which can be disregarded at will.

Our principle concerns with the 2010 Bill are:

- The 2005 Act (and 2010 Bill) made the ALR Act unenforceable:
- The ALR Act framework is itself arguably illegitimate for achieving voluntary informed consent in many respects; and
- The 2005 Act and 2010 Bill are intentionally designed so that no information is available for TOs to make their decision.

a. The ALR Act Decision-Maker and Process

Notwithstanding that the ALR Act framework was not enforceable, it still applied as a voluntary obligation and has been used by the Land Council to say that proper voluntary informed consent was obtained due to compliance with its processes.

However, the ALR Framework it itself flawed, and these flaws have been intentionally utilised by the successive governments to achieve the objectives of the 2005 Act.

We question the fairness of putting Land Councils in charge of making decisions about Aboriginal Owners of land when it is clearly going to have a range of agendas relevant to its functions under the Act which put it in direct conflict.

This is particularly illegitimate where there are no merits appeal rights from these decisions and where there is no legal assistance to Aboriginal people in the Northern Territory to seek review by the Courts when they do not agree that the Land Council has accorded with the law (most would not even know they had the right to). We note that Aboriginal Legal Aid is under funding restrictions from the Commonwealth AG not to assist aboriginal people with "land use" decisions. This basically means that Aboriginal people who do not agree with a Land Council decision have no chance whatsoever to try to review it, even if there are legal avenues.

Why is the same decision about Aboriginal Traditional Owners made through a transparent, logical and independent process at the time of granting Aboriginal Land, but subsequent decisions are placed in a secretive, inquisitorial process operated by a non-independent body?

b. Informed Consent

The 2010 Bill (and previous 2005 Act) is not designed to give information to traditional landowners about what the land would be used for, as it does not generate any information about a Project.

The regime is not a "land use approval" regime and is not tied to one. It does not require details of a proposed land use to be proposed for consideration, and approval of that land use constrained to the scope of the proposal. Rather, it is just a regime for excluding State and Territory laws and for acquiring property rights. Therefore landowners have

- No concrete details of what is proposed;
- No ability to constrain their approval to details which are given and on which they base their decision;
- No critical information about the proposal;

For example this is different to mining proposals under the ALR Act, where the miner is under obligations to provide a high standard of information going to specific details of the site proposal and environmental impacts.[28] In addition, the proponent is tied to this statement, as if they do not accord with it, their Mining title may be cancelled.[29] The voluntary informed consent process is also married to the Mining Act and Environmental Assessment approval process to help generate objective and tested critical information.

There was no requirement under the 2010 Bill for the EPBC Act or ARPNS Act to have been undertaken in order to produce reliable and independent information to the TOs to inform their decision to nominate. Indeed they are expressly excluded at the time of nomination.

It is also important to realise that whilst TOs are being asked to consider the making a nomination in relation to a "facility" on the "nominated site" (which can not include high level waste or spent nuclear fuel):

- the Commonwealth's acquisition and ownership of the nominated land is not itself constrained by the term "facility" in any way; and
- the nomination allows the Commonwealth to do many things outside the nominate site which directly affect other Traditional Owners land.

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28 Section 46 of the ALR Act (particularly 46(1)(a)(viii))

29 Section 47 of the ALR Act

c. ***Compliance with the Declaration of Indigenous Rights***

As is evident, none of the provisions of the 2010 Bill and ALR Act accord with the *Declaration of Indigenous Rights* adopted by the Australia Government, particularly Articles 10, 29 and 32.

> Article 10
>
> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
>
> Article 29
>
> States shall 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.
>
> Article 32:
>
> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources."
>
> States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

As evidenced by the Muckaty Nomination discussed in **Appendix A**, Aboriginal people (who are not from Lauder family) are being forcibly removed from the nominated site without their prior informed consent, and there has been no "effective mechanisms for just and fair redress" due to exclusion of judicial and merits review, and the Commonwealth has used inducements of cash for essential services to undermine the freedom of decisions by Aboriginal people.

Given that the Government is now proposing a new Act in relation to this issue after adopting the declaration, it is clearly under an obligation to ensure that the process accords with the Declaration:

d. ***The Muckaty Nomination***

With respect to the Muckaty nomination, we **attach** at **Appendix A** an analysis of the whether this nomination accorded with the ALR Act. This is provided based on existing public information, without knowledge of information kept under confidentiality arrangements, does not cover many other legal issues with the nomination, and is not on behalf of traditional owners.

Based on existing public information, there is a real possibility that the actual owners of the nominated site never agreed to its nomination in accordance with the ALR Act.

The Senate Committee is not in a position to determine this dispute, and we do not seek for it to do so. Indeed, the Land Council will no doubt have reasonable and rationale arguments supported by evidence of their own.

The point is for the Committee and the Commonwealth Government & Opposition to accept that:

a. There is clearly a reasonable dispute about whether voluntary informed consent was obtained in compliance with the ALR Act, and therefore a real possibility that the owners of the land never agreed to it being acquired by the Commonwealth.

b. There was never a legitimate process in place to resolve this dispute, such as review by a Tribunal or the Courts. The determination of the Northern Land Council and the Minister cannot be seen a legitimate process to resolve a contested issue in these circumstances.

c. There is no overriding legal obligation based on the Nomination Agreement to pursue the Muckaty nomination.

d. The Senate & Government is under a duty if it is serious about this process being with "voluntary consent", to provide an avenue for resolution of this dispute.

Recommendations

1. ***All Northern Territory & State laws should apply, subject to exclusion of any laws which "prohibit" the nuclear waste facility directly or indirectly. Laws which merely "regulate", and in doing so "inhibit" should not be excluded.***

2. ***Commonwealth Government undertake a strategic assessment and site selection, which includes use of strategic frameworks of States and***

Territories, to identify general regions or a range of sites where a radioactive waste facility could be best located regarding environmental, social, economic and institutional risks.

3. ***Within identified sites or areas, thorough community consultations and negotiations are undertaken in which communities may voluntarily agree to a possible site.***

4. ***The agreement is able to constrain the activities which can occur on the possible site into the future even once it becomes Commonwealth Land.***

5. ***The current Muckaty Nomination is dropped.***

6. ***For all new nominations on Aboriginal Land, an independent review is undertaken transparently to ensure the nomination is legitimate in compliance with the ALR Act before being accepted by the Minister. This could include referral to Aboriginal Land Commissioner under section 50(d) of the ALR Act to decide question of Traditional Aboriginal Owners etc.***

7. ***Serious changes are made to APRANS Act to improve transparency and community involvement.***

Yours sincerely
Environmental Defender's Office (NT) Ltd

APPENDIX A – FAILURE TO PROVIDE PRIOR VOLUNTARY INFORMED CONSENT FOR THE MUCKATY NOMINATION THROUGH THE ALR ACT

1. COMPLIANCE WITH ALR ACT

The ALR Act requires the Land Council "shall not take any action in connexion with land" without doing the following:

(a) Having regard to the interest of, and shall consulted with, the traditional Aboriginal owners of the land and any other Aboriginals interested in the land

(b) Ensuring that the traditional Aboriginal owners (if any) of that land understand the nature and purposes of the proposed action and, as a group, consent to it; and

(c) Ensuring that the Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its views to the Land Council.[30]

In undertaking these consultations and processes of gaining consent, and in making its decisions consequent to those actions, the Land Council is under a procedural fairness duty at law to:

e. Give Aboriginal people who's rights, interests or legitimate expectations are affected an opportunity to be heard; and

f. Be free from bias.[31]

These requirements are usually enforceable under the ALR Act to stop the Land Council doing something in breach of them, except where the action has <u>already</u> resulted in Aboriginal Land already being transferred to another party without that party procuring it with fraud.

Procedural fairness is not a "nicety", it is vital to ensuring the right decision or outcome is actually reached, in this case that the right aboriginal people consented to the nomination.

For example, under the duty of procedural fairness it has been found that the NLC must ensure that Aboriginal people are provided with enough financial, legal and anthropological assistance to be able to put their case that they are "Traditional Aboriginal Owners" (**TOs**) of an area of land.[32] It has been recognised in Federal Court cases that the failure to do so could mean that the wrong outcome was reached, namely that the NLC declares the wrong people to be the Traditional Aboriginal Owners of an area of land.

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30 Section 23(3) of the ALR Act, replicated in 19(5).
31 *Kioa v West* applied to ALR Act decisions in *Daisy Majar v NLC*
32 *Daisy Majar v NLC*

> The NLC was under a statutory obligation to assist the applicants in pursuing their claim to be recognised as the traditional Aboriginal owners of the land in question, and in particular, it was obliged to arrange for legal assistance for them at the expense of the land council.[33]
>
> ...
>
> The capacity of the applicants to look after themselves was seriously eroded by their lack of legal and anthropological assistance. The issues were matters of the gravest concern to the parties involved. They involved questions going to the spiritual responsibly of the competing claimants. And they are questions which arose in the framework of a unique piece of legislation. The issues of fact and law were extremely complex.[34]

The duty of procedural fairness is thus critical to ensuring consent is actually given to an acquisition of land. Normally this is a legally enforceable legal obligation until the point at which land is transferred without fraud; by virtue of the 2005 Act and 2010 Bill this was unenforceable at all times prior to land being transferred to the Commonwealth, particularly after a nomination was made.

2. AMENDMENTS TO THE ACT IN 2005 BY NLC

The changes to the 2005 Bill instigated by the NLC allowed Aboriginal Land to be nominated so that the Commonwealth could essentially acquire Aboriginal Land. The nomination also meant that normally enforceable obligations under the ALR Act to obtain voluntary informed consent became unenforceable with respect to a subsequent nomination. In this way the action both allowed for a nomination of land, and directly changed the legal consent-making process under the ALR Act for any such nomination of land (ie by making it non-applicable).

It is therefore clear that the action taken by NLC at its meeting in Crab Claw Island on 20 October 2005 after meeting with ANSTO to pass a resolution calling for amendments to the 2005 Bill was "an action in connexion with land" held by Aboriginal people for which the mandatory obligations of obtaining prior voluntary informed consent attached.

It is undisputable that the NLC neither consulted, nor obtained the voluntary informed consent of Traditional Owners across its jurisdiction affected by such an amendment to the bill prior to its action on 20 October 2005.[35]

It is interesting that the NLC at the time also called for a "full and transparent debate on uranium related issues" on 24 October 2005, but never did so itself with aboriginal people before unilaterally calling for an amendment to the 2005 Bill under its direct legal obligations.[36]

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33 Paragraph 62 of Re: Daisy Majar on behalf of herself and on behalf of others of the Werat clan and Margaret Daiyi on behalf of herself and on behalf of others of the Maranunggu Clan v the Northern Land Council [1991] FCA 209

34 Paragraph 69 of Daisy Majar v NLC – The Statutory obligation arose from both express provisions in the ALR Act, and common law notion of procedural fairness.

35 See NLC Senate Submission Supplementary 2008

36 NLC Media Release "NLC Calls for a full and transparent debate over uranium" dated 24 October 2005

The NLC's action was arguably illegal, void and without any prior voluntary informed consent.

To the extent that the NLC did the same thing for 2006 amendments, which further affected Traditional Owners rights in nominating land, such action was also arguably illegal, void and without any prior voluntary informed consent.

3. NLC LEGAL OBLIGATIONS FOR THE MUCKATY NOMINATION

The legal obligations for the actual nomination can be broken down as follows:

(a) To consult with any Aboriginal people (including TOs and non TOs);

(b) To ascertain who are the "Traditional Aboriginal Owners" of the site to be nominated, and;

   a. ensure that these "TOs" understand the nature and purpose of the nomination; and

   b. ensure that these "TOs" consent to it, as a group

(c) To provide other Aboriginal groups (who are not TOs) adequate opportunity to express views to Land Council; and

(d) To consider, based on the views of the TOs and other Aboriginal groups, whether to make a nomination.

With respect to the last point, the veto of TOs for an action by the NLC is negative, not positive. A Land Council cannot make the Muckaty nomination without TO consent, but it can clearly refuse to make the Muckaty nomination even if TOs have given consent because of the impact on other Aboriginal groups.

This is necessary to ensure that Aboriginal Land is used by the Land Trust in accordance with its obligation under the ALR to:

> Hold title in the Northern Territory for the **benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned**, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission[37]

This means that the intention is to make decisions about land with both the interest of TOs and other Aboriginal people in mind, as recognised by the Federal Court:

> So it may be said that the purpose of the legislation is to permit the grant of land following upon a recommendation to that effect by a Land Commissioner in order that the use and occupation of

[37] Section 4(1) – the original section used an even broader phrase that the Land Trust was to hold land "for the benefit of groups of Aboriginals"

traditional Aboriginal land (being un-alienated Crown land) may be secured to those who are the traditional Aboriginal owners and who have a spiritual affinity to it **as well as to other Aboriginal people having rights to enter or use it, but no primary responsibility for it**.[38]

Because the land is granted to, and held for the benefit of, both groups the High Court has stated that decisions about Aboriginal Land by the Land Council must only be made with approval of the traditional Aboriginal owners and consideration of the view of any Aboriginal community or group that might be affected.[39] This is quite clearly the situation established by sections 19 and 23(3) in the Act.

3.1 Consent of Traditional Aboriginal Owners

3.1.1 The Importance and Effect of the Decision

The determination of who are the TOs it extremely critical decision. Subject to other considerations noted above, such status gives a range of property interests greater than other Aboriginal person under the ALR Act, including:

- They can use the land exclusively and exclude other people from it[40] ;
- They have greater say in deciding what happens to the land so that they have a vehicle to operate their own autonomy;
- They can benefit financially from the use of the land, either by using it themselves, or by allowing other people to use it; and
- They can be compensated for the acquisition of the land (as had occurred here).

A determination also gives recognition that an Aboriginal person is the traditional owner of a particular area of land, which is of great significance to their sense of identity, self-respect and culture apart from the "property" benefits brought by land ownership listed above.

The decision in this instance is also being made to effectively allow that land to be acquired by the Commonwealth indefinitely under the 2005 Act (continued under the 2010 Bill) – without any guarantee of its return. Effectively removing any of the property rights of Aboriginal person once the land is acquired.

This confounds the seriousness of such a decision even further. The power of the NLC is therefore simply immense - to give, or take away, significant freehold-like property rights as between different Aboriginal people.

3.1.2 The Nature of the Decision

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38 Paragraph 34 of Northern Land Council v Olney 1992 FCA 69

39 Paragraph 10 of *R v Toohey*; *Exparte Meneling Statation Pty Ltd* [1982] HCA 69 per Brennan J

40 *Northern Territory v Arnhem land Aboriginal Land Trust* [2008] HCA 29

The core problem for such a grave decision is that the term "Traditional Aboriginal Owner" (**TO**) is highly subjective, artificial & legalistic in nature. It means a "local decent group" having common spiritual affiliation in the sense of primary spiritual affiliation, and the rights to forage, for the land in question.[41]

It is not something capable of objective determination by Anthropologist or any other social sciences.[42] Nor is it reflective of Aboriginal people's own concept of land ownership.

As stated in *Griffiths v Northern Territory of Australia* [2006] FCA 903 (17 July 2006) at 72:

> The key term, "traditional Aboriginal owners" is not a term of art. It is rather a creature of statute.

And more specifically in *NLC v Olney* [1992] FCA 69:

> The concept of traditional Aboriginal ownership of land, as defined in the Land Rights Act, is particularly complex.
>
> ...
>
> An initial reaction to the phrase is that it must be a technical expression having an accepted meaning to anthropologists. If this were so, evidence could be called both to assist the conclusion that the expression is used in a technical sense and to elucidate that technical meaning if differing form its ordinary meaning
>
> ...
>
> No such evidence was called before the Commissioner and indeed it seems to have been accepted by all parties that the expression "local descent group" has **no special, generally accepted meaning in the discipline of anthropology at all**[43]

Justice Maurice referred to evidence of Anthropologists alone in determining the question would "tend to clothe with authority valueless and irrelevant conclusions" because:

> The Act contains no mandate to apply conventional (nor indeed, unconventional) anthropological principles in the quest to determine traditional owners. In fact... the Commissioner is directed to have regard to matters quite alien to any theoretical descent model...[44]

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41 See definition of "Traditional Aboriginal Owners" under ALR Act

42 See Anmatjirra and Alyawarra Land Claim to Utopia Pastorl Lease (1980) paras 89, 105-108; Lander Warlpiri Anmatijirra Land Claim to WIllowra Pastoral Easee (1980) paras 87-91, Griffiths v Northern Territory [2006] FCA 903, NLV v Olney [1992] FCA 69, Daisy Majar v NLC, Kidman Springs Land Claim, Uluru (Ayers Rock) National Park and Lake Amadeus / Luritja Land Claim, Kidman Springs Land Claim and McClaren Creek Land Claim

43 Paragraph 37 of Re *NLC v Justice Olney* [1992] FCA 69

44 Section 5.11 of Kidman Springs Land Claim

Nor does the term have any easily defined & static legal meaning. Not surprisingly for such a subjective and ambiguous term which such power over people's lives, the NLC and other Land Councils have taken advantage of its access to Judicial Review under the ALR Act to successfully challenge many decisions by the Aboriginal Land Commissioners regarding their interpretation of this critical term in the process of adjudicating Land Claims.[45]

For example, in 1992 the Northern Land Council brought a judicial review in the federal court against a determination by an Aboriginal Land Commissioner regarding the Kenbi Land Claim. The Federal court found that Justice Olney had erred in determining that "Traditional Aboriginal Owners" were to be determined with regards to patrilineal heritage and the strength of attachment to land by the Aboriginal owners claiming ownership.[46] As stated by the Federal Court – "the errors noted are such that they might have influenced the outcome" with regard to which aboriginal people are determined to be Traditional Aboriginal Owners for the Kenbi Land area.

We note ironically that the NLC was only able to ensure that the right decision was made by the Aboriginal Land Commissioner because of access to judicial review (both legally, and because of resources available to the NLC), and also because of the transparent and public process by which the Land Commissioner was required to make his decisions meant his errors could be ascertained (eg, the basis of his decisions was explained in public documents, which referenced how he applied the evidence to the ALR Act terms and made a final decision).

It is therefore clear that not only is the term incredibly powerful and grave instrument on Aboriginal people, but the term itself cannot be determined by any objective legal or scientific process. This means in every case, its determination must be by competing evidence and argument to produce the most rationale decision possible in the circumstances.

To make such a process non-transparent, secretive, biased and arbitrary is simply unacceptable, particularly when such a different approach is taken when non-aboriginal parties are affected by the power at the time that Aboriginal Land is granted.

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45 See Re: Northern Land Council v Aboriginal Land Commissioner [1992] FCA 69, Lansen v Olney [1999] FCA 1745 (17 December 1999), Re George Brown Jungarrayi; Geoffrey Taylor Japangardi; Tasman Casson Japanangka and Dick Riley Japanangka v the Hon Howard William Olney, Aboriginal Land Commissioner and the Attorney-General of the Northern Territory of Australia [1992] FCA 68 (27 February 1992); Re George Brown Jungarrayi ; Geoffrey Taylor Japangardi; Tasman Casson Japanangka and Dick Riley Japanangka v the Hon Howard William Olney, Aboriginal Land Commissioner and the Attorney-General of the Northern Territory of Australia [1992] FCA 68 (27 February 1992)

46 See Northern Land Council v Olney [1992] FCA 69

3.1.3 Pre-existing determination of Traditional Aboriginal Owners for the nominated site

In addition to the importance of such a power, in the case of Muckaty there was already a rigorous, legitimate and authoritative determination as to who were the Traditional Aboriginal Owners of the nominated site by the Aboriginal Land Commissioner when granting the Land Claim in 1997.

There are 5 to 7 Traditional Owner groups that make up the Land Trust, and 1 of those groups (the Ngapa) is made up of 3 family groups (the Lauder family, the Foster family and the Anderson family). The Foster family had some 20 members, and the Anderson Family branch some 26 members.[47]

After 4 years of inquiry, hearing detailed evidence from all sides through an objective and transparent process, the Aboriginal Land Commissioner constituted by a learned Justice Gray found the closest sacred sites to the nominated site were actually of Traditional owner groups <u>other</u> than the Ngapa.

a. Site 66 (Murunju-Mantangi) – Yapayapa site[48]
b. Site 51 (karakara) – Yapayapa site [49]
c. Site 50 (Lungkarta) – Ngarrka site (shared with Ngapa)[50]
d. Site 74 (Karntawarralki) – Milwayi site[51]
e. Site 109 (unnamed) – Ngarrka site[52]

It is clear that the Ngarrka and Yapayapa and Milwayi were found to be Traditional Aboriginal Owners of the area covered by the nomination.

None of these sites are discussed at all by the aboriginal land commissioner when he identifies the elements making up the term "Traditional Aboriginal Owner" regarding the Ngapa group. It is only in sections discussing elements of "Traditional Aboriginal Owner" for the Yapayapa (site 66) and the Ngarrka (site 50) that passing reference is made to some subsidiary association by Ngapa with these sites. In relation to the closest site (51) to the nominated site the Report reads:

> The Yapayapa group takes its name from the Walmanpa word for a dreaming which is known as Jupurla-japurla in teh Warlpiri landguage.
> ...
>
> The Japurla-japurla dreaming travelled through the centre of the claim area to [ ], at which one of the boys was swallowed by a lizard, (Karkara (site 51), where the dreaming left a spring and a water hole before leaving the claim area towards the south.[53]

In relation to the overlapping spiritual affiliations by different groups to these sites, and the question of whether there was a "primary spiritual affiliation" amongst these, the ALC made the following critical finding:

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47 Pages 24, 25 and 26 of the Land Commissioners Report dated 19 March 1997.
48 18 march 1997 Land Commissioners Report at page 43
49 18 March 1997 Land Commissioners Reports at page 43
50 18 March 1997 Land Commissioners Report at page 41
51 18 march 1997 Land Commissioners Report at page 40
52 18 March 1997 Land Commissioner Report at page 41
53 Page 43 – Section 4.10.3 of Land Commissioners Report

4.12 Primary spiritual responsibility

...

4.12.3 Another issue as to the primacy of responsibility arises because of the overlapping of dreaming tracks. This has resulted in a considerable number of shared sites and areas of land, to be found elsewhere in this chapter. Occurrences of this kind are common in semi-arid country in central Australia. Different groups with different dreaming will often share site because spiritual focus often coincides with the existence of the necessities of life, especially water. In the case of shared site and land, no single group seeks to assert its pre-eminence over another. **When witnesses were asked about who should speak for a particular sites which are shared by more than one group, they would invariably respond by naming the senior people from each of the groups involved. As a result, it is possible to say that the members of each of the groups related to a shared site exercise primary spiritual responsibility for that site, with none attempting to exclude any other.**[54]

Even when discussing sites relevant to only the Ngapa, the Aboriginal Land Commissioner found that all 3 Ngapa families were Traditional aboriginal owners of their sites and areas <u>on the claim land</u> as they all shared responsibility and <u>all had primary spiritual responsibility</u>.

The major dreaming involved in the present claim are travelling dreaming, some of which travel over quite long distances.

Different parts of the tracks followed by dreaming belong to different groups of people. A group will have responsibility for a defined part of a dreaming track. The sites along that part of hte track and the country surrounding them will belong to that group. It is common for people to say that they take a dreaming from another (often named) group at a particular site and carry it through their country to hand it on to another group at another named site. The handover points, in a sense, will mark the boundary of the estate of a particular group.

...

The three family branches of the Ngapa group *share responsibility* [emphasis added] for the portion of the Ngapa dreaming track on the claimed land, even though the responsibilities of those families are not coextensive in respect of portions of the dreaming track which do not lie on the land claimed.

...

As in teh case with Aborigininal land tenure systems in semi-arid areas, there tends to be a focus on sites of significance, which are often sites associated with the practicalities of survival in a dry environment. Sharpy defined boundaries between estates of different groups are unusual in such circumstances. There is a tendency for different groups to share some ties, with a consequent overlap between the areas claimed by those groups. There is also a tendency for land between sites to be the subject of overlapping claims, or for it to be ucnlea into the estate of which group it falls.[55]

...

The Ngapa group has three branches; each focused on a different part of the Ngapa dreaming track, **but has overlapping responsibilities in relation to the part of that track on the land claimed.**[56]

We point out that the submission by the NLC and the Department of Resources, Energy and Tourism to the 2008 Senate Inquiry quoted the last paragraph above,

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54 Page 44 and 45 of Land Commissioner Report (4.12.3 paragraph)

55 Section 4.1 at page 38 of Land Commissioners Report by Justice Gray dated 19 March 1997.

56 Section 3.7.1 at page 22 of Report by Justice Gray dated 19 March 1997.

but left out the rest of the sentence.[57] It made no reference to the third paragraph quote above, nor critically section 4.12 which put the issue beyond doubt.

At time, neither the NLC nor the Ngapa lauder family group contested the findings of the Aboriginal Land Commissioner. Indeed the NLC welcomed and endorsed the findings of the Land Commissioner in a media release at the time the land was handed back by the Minister.[58]

We note that previous exercises by the NLC in relation to the Amedous Gas Pipeline and Railway are nowhere near the nominated sites, being far off to the west, and have no relevance.

3.1.4 The Unlawful Decision by NLC

It is clear that despite all of the above, the NLC found that only 1 single family in the Lauder family (out of 3) out of 1 group (out of 5) were the Traditional Aboriginal Owners of the nominated site, and this was the basis on which the nomination was made and accepted by the Minister in 2007.

Accordingly it is arguable that the NLC has not accorded with the law in failing to obtain consent of all Muckaty TOs for the Land Trust in 2 respects:

- At least 3 or 4 Muckaty Groups were the Traditional Aboriginal Owners of the nominated site and did not give their consent; and

- All Traditional Owners groups in Muckaty Land Trust would have their land outside the nominated site affected by the nomination, so their consent was also required.

Wrong determination of TOs

Whilst new determinations may be required to identify the exact individuals who are members of a local decent groups area of ownership, this does not legitimise new determinations which completely overturn the actual responsibility for areas of land of each local decent group.

The Aboriginal Land Commissioner clearly found that 4 groups (Ngarrka, Yapayap, Milayi and Ngapa) had spiritual affiliations to the nominated site, and that each affiliation was a non exclusive primary spiritual affiliation.

It is clear that the NLC accept that all Muckaty Land Trust groups have spiritual affiliations and right to use areas within the nominated site.

The distinction which appears to have been made by the NLC was that the responsibilities and affiliations of the single Lauder family Ngapa group ruled out

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57 Letter to Senate Committee dated 15 December 2008

58 Media Release of NLC dated 18 February 1999 "Outback Station returned to traditional Aboriginal owners"

the responsibilities and affiliations of the other 2 Ngapa groups and all 3 other aboriginal groups within the term of "Traditional Aboriginal Owner", because only the Lauder family had "primary spiritual responsibility" for the site. This was also clearly the reasoning on which the Minister approved the nomination of the Muckaty site.[59]

This decision directly conflicts with the ALC Report (particularly section 4.12), but also such a narrow finding conflicts with the following Federal Court decisions regarding the criteria for being a "TO" within the legal definition:

a. The Act should be given broad beneficial construction to benefit aboriginal people, [60] which suggests that an interpretation be given in favour of granting property rights to more rather than less aboriginal people; and

b. A group of aboriginal can be the "Traditional Owners" of an area of land irrespective of that fact that:

    a. They also have spiritual affiliations with sites on other lands besides the one in question[61];

    b. There are other groups which are also Traditional Aboriginal Owners of the same site[62];

    c. More than one group has responsibilities or primary spiritual affiliations for the site[63];

    d. Finding more than 1 owner group of a single site might make it harder to get consent as required under the Act.

Wrong basis of selecting TOs

We also note that the NLC is required to obtain consent for any action it takes in any matter in connexion with land, by the TOs of "that land".

The effect of the nomination of the site does not mean the NLC is only taking an action in relation to that nominated land. It is also taking an action in relation to other land by nominating the site. It is a clear and immediate affect from the nomination, well known to the NLC, under the 2005 Act that upon approving the nomination:

- The Commonwealth can acquire an all weather access road across adjacent land outside the nominated site without further consent from TOs of that other land. In particular we note that the Commonwealth may be free to make any number of declarations over time under section 13(4) for the approved nominated site, altering the access road in

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59 Senate Inquiry Transcript 28 November 2008 page 41 (Mr Davoren)

60 Re Kearney; Ex parte Jurlama (1984) 52 ALR 24 per Gibbs C.J. at p 28; Re Kearney; Ex parte **Northern Land Council** (1984) 52 ALR 1 at 7 and Re Toohey; Ex parte Meneling Station Pty. Ltd. (1982) 44 ALR 63 at 77.

61 Paragraph 90 of Re NLC v Justice Olney [1991] FCA 69

62 Pargraph 81 of Myoung v NLC [2006] FCA 1130

63 Page 19 of Myoung v NLC [2006] FCA 1130

response to changing circumstances (ie conflict and safety issues with Bootu Mine Haulage Trucks, flooding, security concerns etc)

- The Commonwealth can undertake any associated activity or land-use, and enter and remain on any land in doing so, outside of the nominated site without further consent of TOs of that other land.[64]

This would mean direct diminishment of all property rights held in the area surrounding the nominated site if the Commonwealth wanted to use the land. For example the Commonwealth would not be subject to prohibition regarding sacred sites in section 69 of the ALR Act. This would directly affect the land of the Ngarra, Yapayap and Milayi at least.

2. No "Informed" Consent or "consultations"

It is surprising that the NLC believe that Traditional Owners would be able to understand the full nature of the nomination and potential implications of it based on the single view-point by the proponents of the radioactive waste facility which was based on an abstract concept of a facility for Defence land[65][66]:

> Consultations conducted by the NLC, together with Commonwealth representatives, meant that this requirement was satisfied...
>
> The consultations conducted by NLC and Commonwealth representatives enabled Aboriginal people to assess competing viewpoints and the accuracy of information, and thus to make their own decision regarding the repository (including, in some cases, by altering previously expressed positions).[67]

The only information about the site itself contained in the Parkens Brinkerhoff Report was only commissioned and available after the nomination was made and consultations finished.

NLC is in effect submitting that repeated presentations about an abstract conceptual project by the proponents of a development are enough information for Traditional Owners to "understand the nature and effect of the proposed nomination and the things that might be done on or in relation to the land under this Act if the Minister approves the nomination".

Neither ANSTO nor Commonwealth DRET are objectives parties. At the time of presenting and meeting with the NLC and TOs, ANSTO was desperate to show APRANSA in 2006 and 2007 that there was significant progress in finding a site to locate radioactive waste from decommissioning of the HIFAR reactor, and to store

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64 See section 24 allowing the ALR Act to be excluded.

65 Page 19 Monday 17 November 2008

66 Page 15 of senate Inquiry 17 November 2008

67 Page 8 of Senate Supp Submission.

waste produced into the future for the new OPAL reactor, so it could obtain required licenses for both from ARPNSA. Indeed this formed a key basis on which licenses were issued by APRANSA in July 2006 and September 2008.[68]

The Commonwealth DRET needs to build a waste dump because of its contractual obligations to take re-possession of reprocessed nuclear fuel rods coming back from France in 2013 to 2015.

Not only do the NLC believe that they only need information to be provided from the proponents of a facility, they also believe it is there role in providing information is to attack people who do not share the view of those proponents. From the very beginning on 21 October 2005 the NLC attacked any view opposite to the one adopted by themselves, before even consulting Traditional Owners, that a facility was completely safe and should be put on Aboriginal Land:

> ...
>
> "The storage of radioactive waste from medical treatment is clearly a matter of national importance.
>
> "The Chief Minister knows full well that a waste facility may be safely built in some parts of the Northern Territory - but carefully says nothing about this issue," Mr Daly said.
>
> "Low and intermediate radioactive waste facilities already exist in many locations throughout the world - including Western Australia. "The Chief Minister also knows full well that 400,000 Australians receive radioactive medical treatment every year, and the small amount of waste generated should be stored safely in a secure national repository - not in hospital basements or shipping containers in over 100 different locations in Australia," Mr Daly said.
>
> "The Chief Minister's position is irresponsible, irrelevant, and an abject failure of leadership."
>
> ...

The NLC, not happy with just attacking any opposite views from the NT Government also attacked any opposite views from Muckaty traditional owners, calling them "dissidents". On 22 February 2007 **whilst undertaking consultations for the nomination**, the NLC released the following media release:

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68 See reasons for decision by CEO of ARPNSA for both license decisions.

> Northern Land Council (NLC) Chief Executive, Norman Fry, today stated that the NLC was required by law to conduct consultations regarding the nomination of land for a radioactive waste facility, notwithstanding that some Aboriginal persons may be opposed.
>
> "There is widespread interest from Aboriginal groups throughout the NLC's region, including Muckaty Station, as to whether a radioactive waste facility may be safely located on their traditional country," Mr Fry said.
>
> "Those groups are entitled to participate in consultations, notwithstanding that a few individual members may disagree - or that other groups in a region may be opposed.
>
> "**These groups are also entitled to make their own decision regarding their country, without their rights being subverted by opposition from other groups or from dissident individuals within a group,"** Mr Fry said.
>
> "The NLC will ensure, as required by law, that comprehensive consultations are confidentially conducted, and that land is only nominated for a waste facility with the consent of traditional owners.
>
> "The NLC looks forward to continuing to properly conduct consultations within its region regarding this important national interest facility," Mr Fry said.

It is extraordinary that the NLC sees fit to directly attack anyone who is objecting to the waste facility.[69]

Surely the whole point of consultations is to hear people's objections, as well as support for the proposed action? For the NLC to take such an arguably biased action is clear evidence they did not accord with procedural fairness in their consultations by directly attacking groups of TOs.

In addition there is also evidence of:

a. Attempts to restrict opponents from meetings.[70]

b. Direct threats of legal action by NLC lawyers against Muckaty Traditional Owners for merely participating in the consultation process.[71]

c. Meetings being carried out without any microphones so nobody was receiving any information at all.[72]

d. Meetings carried out without translators.

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69 Media Release of NLC dated 22 February 2007
70 Page 2 of Senate Transcript 17 November 2008 paragraph 4 (Ms Marlene Bennett)
71 Page 2 of Senate Transcript (18 November 2008) (Ms Jackson)
72 Page 2 of Senate Transcript 17 November 2008 paragraph 1 (Ms Marleen Bennett)

e. That aboriginal people had no idea what meetings were for, and just turned up to sign paper for money.[73]

f. Numerous requests for minutes and Anthropological Reports being denied.

g. Notification of meetings occurred with only 1 days notice.

h. Letters written to the NLC were not tabled by its director, and even ripped up in front of Full Council.[74]

i. That nobody understood what a Uranium dump was, as no translation into local languages – people thought it was a normal rubbish dump.[75]

Not only did the NLC promote 1 view, openly attack any other, but it also actively sought consultations and information on financial benefits to be obtained from nomination which was not a requirement of the 2005 Act. It arranged no less than 4 presentations by the Commonwealth on how much money would be received if consent was given. We question what possible justification there is for paying money for the nomination of a site prior to a declaration being made which acquires the property interests in the sites apart from a tool to undermine voluntary informed consent?[76]

3.2 Views of other Aboriginal Groups

It is critical to recognise that "other Aboriginal Groups" may have very significant property and traditional interest in the nominated site even though they are not "TOs" within the definition. For example, Aboriginal people clearly still have common spiritual affiliations and the right to forage on the land and the right to access it and occupy is pursuant to section 71.The High Court has found rights just under section 71 to be property.[77]

The ALR Act grants express obligation on the NLC to consult with these groups and give them an "adequate opportunity to express their views to the Land Council".

The intention of this obligation is clear, from the NLC to decide how to act based on the views of Aboriginal people who are not TOs.

NLC clearly failed in applying the law in two respects:

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73 Paragraph 1 page 2 of Senate Transcript 17 November 2008 (ms Marlene Bennett)

74 Page 3 of Senate Committee Transcript 18 November 2008 (Ms Jackson)

75 Paragraph 2, of page 26 of Senate Transcript (17 November 2008) (Mitch)

76 11 April 2006, 8 February 2007, 9 March 2007, 9 May 2007 as stated by NLC in supplementary submission to Senate Inquiry 2008

77 Wurridjal v The Commonwealth of Australia [2009] HCA 2

1. It took the view that the consent of the TOs was determinative; and

2. It did not consult with all the Aboriginal Groups *affected* by the decision to nominate the land.

3.2.1 Determinative force of Lauder Family Consent

If the NLC believed that the Lauder family consent was directive, then clearly it was never going to listen to what other Aboriginal groups had to say no matter how many consultations were undertaken, as it would have no purpose whatsoever.

The NLC clearly operated on the belief that the consent of the Lauder family vetoed any views of other aboriginal groups:

> Our view in 2007 was that under Aboriginal tradition, the group with ultimate authority regarding that land overwhelmingly supported the nomination and that remains our view. I never had to give legal advice to the full council about this issue. They were quite satisfied about that and about that advice that was received. **But, if I had been asked to give advice as to whether, in those circumstances, the full council could refuse pursuant to its functions to make the nomination; my advice would have been that it could not**.
> ...
>
> The authority to ultimately make the decision is with that group but consultations must be broader and they must be real consultations, which they were. That occurred. When it came time to make the decision, we knew that there were individuals, including some people here today and some who are not, within other groups who were opposed, but it was not their country.
> ...
> **The ultimate authority was within the Ngapa group and they overwhelmingly supported it. Accordingly, the NLC made the nomination. As I have said, there was never any doubt that the NLC full council would do that. If I had been asked, and I was not, to give legal advice about it, my legal advice would have been that the full council must make such a nomination**.[78]

3.2.2 Aboriginal Groups *affected* by the nomination

Clearly all TOs within the Muckaty Land Trust have some spiritual affiliation or property rights in the nominated sites, or to areas which can be used by the Commonwealth due to the nomination.

The nomination of the site would have direct affects on their visions for their own future:

> All of the sites are extremely close to communities and community-controlled business ventures. There are tourism businesses, cattle business, and there are a lot of ideas that people have as to how they want to live on country, not just for themselves but also for the next few generations. Obviously none of these things will be able to go ahead if there is a dump in the middle of their country.[79]

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78 Page 14 to 15 of Senate Transcript 17 November 2008 –NLC Solicitor

79 Page 20 of the Senate Committee Hansard Monday 17th November 2008 in Alice Springs

Despite this, we note that the NLCs own statement is that they determine that "other Aboriginal communities affected by the nomination" only constituted:

- The Lauder family living with 6 km of the site; and
- 1 other outstation within 16 kilometres of the site.[80]

Even taking a very narrow view of where people *currently live*, we note that the Parkens Brinkerhoff Report found at least 6 active outstations to be relevant assessment of impacts of the proposed facility (Muckaty, Namerinni, Kumunu, Kalumpurla, Blue Bush & Pingala).[81] It does not matter that some of these communities are outside the NLCs jurisdictional area.

3.2.3 Duty to Afford Procedural Fairness in the Decision to Nominate Land

The need to accord procedural fairness is obvious in such a situation as this, where:

- The decision to be made is so important, with such dramatic effects on Aboriginal people;
- The nature of the term "TO" is complex, legalistic and highly subjective such as the outcome cannot be produced by objective Anthropologic Report.
- There is a pre-existing determination as to who the TOs are, and therefore legitimate expectation by TOs.

Even with regard to the limited role of Anthropological investigations, they depend like anything, on evidence being put as to who has decision-making power or the right to speak for an area of land. If one group claiming that right has evidence in support (because of resources and support), and another group also claiming that right has no evidence (because of lack of resources and support), than the only conclusion which can be found *based on the evidence* is that the previous group are the owners. Thus the critical point is whether each clan had adequate legal, anthropological, financial and other assistance to be afforded a proper opportunity to put their claim

As stated by the Federal Court, failures to accord procedural fairness in these circumstances have serious consequences for the substantive outcomes of the decision so to make them invalid:

> The capacity of the applicants to look after themselves was seriously eroded by their lack of legal and anthropological assistance. The issues were matters of the gravest concern to the parties involved. They involved questions going to the spiritual responsibly of the competing claimants. And they are questions

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80 Page 8 of NLC Supplementary Submission to Senate Inquiry dated 4 December 2008

81 Some of these are off the Muckaty Land Trust but this does not make any difference to the obligation to consult them as communities or groups affected.

which arose in the framework of a unique piece of legislation. The issues of fact and law were extremely complex.[82]

Again with regard to the conduct of the consultations and decisions by the NLC there is clear evidence of:

a. Attempts to restrict opponents from meetings.[83]

b. Direct threats of legal action by NLC lawyers against Muckaty Traditional Owners for merely participating in the consultation process[84]

c. Meetings being carried out without any microphones so nobody was receiving any information at all[85]

d. Meetings were carried out without translators

e. That aboriginal people had no idea what meetings were for, and just turned up to sign paper for money.[86]

f. Numerous requests for minutes were denied

g. Notification of meetings occurred with only 1 days notice

h. That letters written to the NLC were torn up by its director[87]

i. That nobody understood what a Uranium dump was, as no translation into local languages – people thought it was a normal rubbish dump.[88]

It is quite clear that the NLC failed to accord TOs a right to be heard on this issue, and operated from a biased position – in arguably direct breach of their obligations under the ALR Act.

a. It provided no opportunity for groups to put their case, did not listen to their case, and did not provide anthropological or legal assistance to different groups to put their case;

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82 Paragraph 69 of Daisy Majar v NLC
83 Page 2 of Senate Transcript 17 November 2008 paragraph 4 (Ms Marlene Bennett)
84 Page 2 of Senate Transcript (18 November 2008) (Ms Jackson)
85 Page 2 of Senate Transcript 17 November 2008 paragraph 1 (Ms Marleen Bennett)
86 Paragraph 1 page 2 of Senate Transcript 17 November 2008 (ms Marlene Bennett)
87 Page 3 of Senate Committee Transcript 18 November 2008 (Ms Jackson)
88 Paragraph 2, of page 26 of Senate Transcript (17 November 2008) (Mitch)

a. Did not disclose adverse findings in Anthropological reports to different groups nor the basis of their decision or reasoning – and continue to deny disclosure;

b. Did not give any groups a chance to address a finding different from that of the Aboriginal Land Commissioner which such groups would have been reasonably relying upon; and

c. Directly favoured one group over another, by attacking some aboriginal groups through media releases. They also pre-determined many critical questions.

We note in particular that the NLC and Commonwealth DRET appear to acknowledge they did not accord procedural fairness, but claim nobody raised a dispute about the issue. This is simply untrue & is irrelevant in any respects as the NLC is under a duty to accord procedural fairness even if TOs did not adequately express their concerns.[89]

The NLC was well aware of these objections to the nomination and consultation process whilst performing its duties under the ALR Act when they were raised verbally on numerous occasions, and it was notified formally in writing directly on **1 December 2006** (some 7 months before the nomination was made), **21 February 2007** and later on **1 March 2007** (some 3 or 4 months before the nomination):

> We are all members of local descent groups recognised by the Aboriginal Land Commissioner as traditional Aboriginal owners of area on NT portion 1629 held by the Muckaty Aboriginal Land Trust. We have signed this letter under the headings for our respective traditional owner groups, but we all have traditional interest in the land in the area of Muckaty where we understand potential sites for nomination have been identified
>
> ...
>
> We are strongly opposed to the nomination of any site on Mucaty, including any site anywhere near the Bootu Creek access road.
>
> ...
>
> We are not aware of any direct consultation that has taken place with our respective local descent groups about a proposal that the Muckaty Aboriginal Corporation should be the forum through which consent to land use proposals rot he purposes of section 77A of the Aboriginal Land Rights (NT)Act will be determined. We have not ourselves been consulted in relation to such a proposal and would strongly disagree with it to the extent that it would apply to consultations in respect ofa nomination of a site on Muckaty for the purposes of the Commonwealth Radioactive Waste Management Act.[90]

As argued by NLC itself in cases before the Federal Court, there can be no significance put to the fact that aboriginal people may at times not use the term "Traditional Aboriginal Owner" when claiming they are required to consent to any use of that land, as the concept is a white legal fiction – and most aboriginal people just refer to themselves no matter what context as "Traditional Owners" or "TOs"[91]

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89 See *Teoh v West*

90 Letter to John Daly NLC – dated 1 December 2006

91 Paragraph 85. And 86. Of NLC v Land Commissioner [1992] FCA 69

The TOs repeated their claims of unfair and illegal treatment with letters to all relevant Ministers over a long period, media interviews and statements prior and after the nomination.

The same claims were continued at the 2008 Senate Inquiry, where they were repeated again:

> **Senator Pratt** – Can you tell us a little bit about the site itself that has been chosen? You have told the committee that that has been proposed. I think what you have told the committee is that you have all got links with that country that strcetch across it to the other side and around it. Is that what you are telling us?
>
> **Ms Stokes** – Yes, we have. We have got the snake, that is Milqayi, and Yapakurla, the little short man – that is mine – and we have Ngarrka. Ngarrka is a bit on the western side, but we are all surrounding it, and Ngapa are not the people who say yes. It is not their Dreaming that is in that site; it is these old people here.
>
> **Senator Pratt** – So ngapa is simply one of the closes communities to that site? Is that why it is purported that they have a right to speak for it?
>
> **Ms Stokes** – And Milwayi. They are the closest
>
> **Scenator Pratt** – So Milwayi is close as well
>
> **Ms Stokes –** Yes
>
> **Senator Pratt** – and they have not consented to or participated in the nomination either
>
> **Ms Stokes** – No.[92]
>
> ...
>
> **Ms Stokes** – We want to see people come face to face with the traditional owners, with the Wannapa group, not just one individual group, the Ngapa clan. We want all the traditional owners to be there to say yes or no and to hear what is going on.

We note that the Land Council is also under a legal obligation to attempt conciliation of disputes where is informed of a dispute with respect to Aboriginal Land.[93] Clearly this occurred during the process leading up to nomination, especially where the Land Council took the approach of actively supporting one side.

No Avenues of Review

The problem was not just the determination by the NLC, but the lack of avenue to anyone to review such a determination independently.

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92 Page 5 and 6 Senate Transcript 17 November 2008 (Ms Stokes)

93 Section 25 of the ALR Act

Even if Traditional Owners could have sought judicial review of the NLC decision, such review could never have stopped it making a nomination – so such was useless. The 2005 Act does not say that a Land Council can only make a nomination in accordance with the ALR Act, and once a nomination is made the 2005 expressly prevents it being challenged on the basis that procedural fairness was not accorded.

In practice, whatever the legal avenues available, Aboriginal people in the Northern Territory have minimal access to justice on these issues unless they can afford a private lawyer in Darwin or interstate. Aboriginal Legal Aid is under a funding condition not to assist Aboriginal people with land-use disputes, so Aboriginal people who do not agree with conduct by a Land Council are left completely out to dry in terms of seeking judicial review.

Of course the use of highly legalistic white language, lack of access to lawyers, and the hiding of all relevant information has made it virtually impossible for Traditional owners to pin-point their claims with regard to the exact terminology to be argued under white law. As stated in submissions to the Senate Inquiry:

> No clear number was given, and that people who opposed it have never been able to access minutes from meetings or see the signatures of who has actually said yes to nominating Muckaty, or any of the paperwork that would be normal process for affected people to have an understanding of what is happening on their country and in their land trust really indicates that a bit of paper shuffling is being done by teh NLC in particular

As the current 2010 Bill seeks to keep the Muckaty nomination, and continue the exclusion from procedural fairness and judicial review for the existing decisions – there is no avenue for review once it is enacted on the question of compliance with the ALR Act informed consent provisions.

Whilst the 2010 Bill "re-instates" procedural fairness and judicial review obligations for the "declaration decision", the issue of informed consent is not relevant to this decision and it follows that such a decision expressly cannot be challenged on the basis of failure to accord with the ALR Act informed consent provisions.

No overriding Obligation to Pursue Muckaty Nomination Agreement

The basis of the power of the Muckaty Land Trust to enter into an agreement is the ALR Act has been complied with. If it has not, then the Agreement is void.

We note that the 2005 Act contained no provisions requiring an Agreement between groups nominating a site, which placed any obligations on the Minister as to how he will deal with a nomination under his powers under the 2005 Act to consider approving it, and to make a declaration of a facility in relation to it. The only Agreement which is required is for just compensation at the time of the actual acquisition of the land, which has yet to be decided to occur as a declaration has not been made.

To the extent that the previous Government entered into an agreement at the time of nomination which pre-disposed its decisions on approval or declaration, it was a unjustified pre-emption of the discretion of the Minister and invalid. We note in

particular that the Ministers decision was completely discretionary, and he expressly did not have to consider a nomination.

We find it ironic that the Land Council is happy for Aboriginal people not to be accorded procedural fairness, but call for such from the Minister in considering whether to drop the Muckaty nomination under the Agreement. In any event, the only obligation of procedural fairness is to hear the views of the NLC, there is no obligation to continue the Agreement and Mucakty nomination.

Accordingly it cannot be said that there is any overriding legal requirement for the Minister to maintain the Agreement. There may be a contractual obligation, but like any contract it can be ended. As already stated in evidence to the Senate Committee, the Agreement only creates obligations once certain milestones have been reached. It would have been specifically designed end in any event if a declaration was not made about the approved Muckaty nomination.