The Central Land Council (CLC) is a Statutory Authority which operates under the Commonwealth Aboriginal Land Rights Act (NT) 1976 and the Native Title Act 1993. The CLC is located in the southern portion of the Northern Territory and covers an area of 775,963 square kilometres – 381,792 square kilometres is Aboriginal land. The CLC is directed by its Council, which consists of 90 Aboriginal people elected from communities. The CLC represents approximately 24,000 Aboriginal people resident in the southern half of the Northern Territory. Indigenous communities located within the CLC area are diverse and include small family outstations, large remote communities and town camps located within the larger regional service centres of Alice Springs and Tennant Creek.

Submission to Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008

October 2008

Summary

The *Commonwealth Radioactive Waste Management Act 2005* (**Waste Act**) provides a mechanism for establishing a waste management facility in the NT and seeks to protect that mechanism from legal challenge.

The CLC disagrees with the mechanism to establish a waste facility because it ignores best practice and ignores Aboriginal land interests in and around the nominated sites. Despite comprehensive consultations, including presentations by Commonwealth officials, traditional owners of Harts Range and Mt Everard remain steadfastly opposed to the siting of a waste facility on their country.

The CLC strongly disagrees with the need to remove normal legal checks and balances from the waste facility establishment mechanism. In particular, removing the need to comply with procedure necessarily repeals important protections contained in the *Aboriginal Land Rights (Northern Territory) Act 1976* (**Land Rights Act**). The result is that the Waste Act does not provide a mechanism for prior informed consent as does the Land Rights Act. The Waste Act protects the nomination process at the outset rather than the protecting the interest in land once consultations and negotiations have concluded.

Overall, the Waste Act is an abuse of proper process for such a serious proposal and diminishes the rights of traditional owners. The CLC supports the Bill to repeal it.

Introduction

The Waste Act does two things:

- provides a mechanism for establishing a waste management facility in the NT, and
- protects that mechanism from legal challenge.

The mechanism consists of a site nomination and selection process. The Waste Act nominates three sites on defence land: one at Fishers Ridge near Katherine, and two in the CLC region at Harts Range

(Alcoota) and Mt Everard. The Waste Act also provides for the NT Government or a land council to nominate further sites and the Northern Land Council has nominated Muckaty Station. The Minister has "absolute discretion" to select a site.

The mechanism for site nominations and selection is protected from legal challenge by:

- providing for "absolute discretion" by the Minister
- preventing application of the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**)
- removing any entitlement to procedural fairness, and
- removing the need to comply with procedure, and
- specifically preventing application of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Environment Protection and Biodiversity Conservation Act 1999, Native Title Act 1993*, *Lands Acquisition Act 1989* as relevant to the site nominations and selection mechanism.

Problems with Mechanism to Establish a Waste Facility

The CLC disagrees with the mechanism to establish a waste facility in the NT because it ignores best practice and ignores Aboriginal land interests in and around the nominated sites.

Best practice was laid out in the 1992 *Code of practice for the near-surface disposal of radioactive waste in Australia* by the National Health and Medical Research Council (**NHMRC**). In the scientifically rigorous process that followed over 10 years, the Harts Range and Mt Everard sites were not identified in the eight shortlisted regions, nor were they contained in a shortlist of 22 defence properties suitable for intermediate level waste.

The nomination of three sites in the original legislation ignored Aboriginal land interests in and around the nominated sites. The mechanism for site selection, apart from providing for a compensation mechanism for any legal interest holders, also has no requirement to take into account the social and cultural interests of Aboriginal people, contrary to the NHMRC Code of Practice which states that "the site should not be located in an area which is of special cultural or historical significance".

Traditional owners / native title holders assert they have native title rights in both the Harts Range and Mt Everard sites. In both cases the land was acquired by the Commonwealth in 1978, without consultation or any agreement, and native title holders assert native title was not acquired. On 8 November 2005 native title holders lodged native title applications over both sites to seek recognition of their native title rights.

Traditional owners also hold rights in the country around both sites. In respect of the Harts Range site, the Alcoota Pastoral Lease and the cattle operations on the lease are wholly owned by traditional owners and completely surround the Harts Range site. In respect of the Mt Everard site, two land trusts held under the Land Rights Act, Athenge Lhere and Werre Therre, are in close proximity to the site, and the site is otherwise surrounded by pastoral land where traditional owners / native title holders assert native title rights. The Waste Act offers no recognition of these rights nor

any interest in the site selection process, even though there is a real threat of diminished enjoyment of these rights.

Despite comprehensive consultations, including 14 CLC meetings involving representatives for the Harts Range and Mt Everard sites (two of which involved detailed presentations by Commonwealth officials), traditional owners of Harts Range and Mt Everard remain steadfastly opposed to the siting of a waste facility on their country.

Problems with Protection of Mechanism

The CLC disagrees with the need to remove normal legal protections from the waste facility establishment mechanism. Judicial review, procedural fairness and proper consultation provide appropriate checks and balances on all decision makers.

Providing for "absolute discretion" attempts to free the Minister from any fetter on his power. This alone does not take away proper avenues of redress, but it does serve to reinforce and emphasise the Minister's power.

Preventing application of the ADJR Act means that a nomination decision could not be challenged under that Act according to any of the administrative law grounds noted; for example breach of natural justice, improper exercise of power or fraud (see section 5). The ADJR Act is the main check and balance on government decision making and few laws are listed in the exemption schedule. No other planning laws are listed.

Removing entitlement to procedural fairness means any common law administrative challenge outside the ADJR Act could not rely on this ground. Other administrative law grounds do exist (as noted in the ADJR Act) but procedural fairness is the main ground any aggrieved person could use to seek redress in relation to a consultation process.

Removing the need to comply with the procedures for consultation is the most problematic because it is these procedures for consultation which allow Aboriginal landowners to have their say. Not having to comply with them would necessarily repeal the consultation provisions under sections 23 and 77A of the Land Rights Act and sections 203BC and 251B of the *Native Title Act 1993* to the extent they apply to site nomination.

Specifically, land councils are required to:

- consult with traditional owners
- have regard to the interests of traditional owners
- not take action without the consent of traditional owners
- ensure that traditional owners understand any proposal
- ensure any affected Aboriginal community has adequate opportunity to express its views, and
- comply with traditional decision making processes.

These are proper and serious protections that traditional Aboriginal owners are entitled to and expect by operation of the law. The CLC did not support the removal of these protections when the Waste Act was amended in 2006.

Is protection of the waste facility nomination mechanism appropriate?

In a submission to the inquiry into amendments to the Waste Act in 2006 it was asserted that the approach taken in the Waste Act to protect the nomination process from legal challenge is consistent with the scheme in the Land Rights Act and is appropriate. The CLC strongly disagrees with this assertion.

Under the Land Rights Act, leases are protected from legal challenge once all information has been provided, consultations have concluded and a lease is granted. This is a legitimate objective of the Land Rights Act to give certainty to interests in land and to the land tenure system, and is based upon the free, prior and informed consent of landowners.

Under the Waste Act, the waste facility establishment process is protected at the outset – at the nomination stage – before all information is received, before all consultations have concluded and before an interest in land is granted. Once a nomination is accepted by the Minister, there is simply no further redress or say for traditional owners even though they may find out a lot more about the waste facility, through scientific, regulatory or other processes, and even though it would still be their land until declared by the Minister at some later stage.

The Waste Act does not provide a mechanism for prior informed consent as does the Land Rights Act. The Waste Act protects the nomination process at the outset rather than the protecting the interest in land once consultations and negotiations have concluded. The Waste Act model is very different to the scheme in the Land Rights Act and inappropriately diminishes the rights of traditional owners.