

APPENDIX 3

**RESPONSE FROM THE NORTHERN LAND COUNCIL
DATED 6 JULY 2011**



Parliament of Australia

Senate

Legal and Constitutional Affairs Committee

National Radioactive Waste Management Bill 2010

Northern Land Council

Response to supplementary question on notice

6 July 2011

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010
RESPONSE TO SUPPLEMENTARY QUESTION ON NOTICE

Introduction

In a letter dated 20 May 2011 the Chair of the Committee sought from the Northern Land Council (NLC) “clarification of the evidence” it provided during the 2010 inquiry into the *National Radioactive Waste Management Bill 2010*. The letter states that documents held by the National Archives of Australia:

... appear to confirm that all Ngapa land on Muckaty station was held in common by three Ngapa family groups, and that no Ngapa land on Muckaty station was owned exclusively by any of the three family groups.

This is the same language that is used in a press release issued by Maurice Blackburn on 9 May 2011 titled “Fresh Evidence Boosts Traditional Owners Legal Challenge to Muckaty Station Nuclear Waste Dump.” Maurice Blackburn asserts that documents obtained from National Archives include:

A report by three senior anthropologists commissioned by the NLC for the Muckaty land claim which confirmed that all Ngapa land on Muckaty station was held in common by the three Ngapa family groups and that no Ngapa land on Muckaty station was owned exclusively by any of the three family groups.

Federal Court proceeding

The Committee may be aware that Maurice Blackburn acts for the Applicant in Federal Court proceedings in which a challenge is made to the nomination of the site on Muckaty station.

The Maurice Blackburn press release asserts that the report and other documents were “unearthed” by the Applicant’s legal team and provide “compelling new evidence” of alleged error in the nomination. As detailed below, there is nothing new in these documents. They have been available to the public for many years and they were examined by the NLC in the course of the nomination.

It is regrettable that claims of this kind are being made about a matter that is before the Federal Court. The convention of the Senate is to refrain from inquiring into matters before the courts should that carry the risk that the Senate might be seen as involved in a pre-judgment of the issues. The Committee appeared to acknowledge that in its May 2010 report when legal proceedings were being threatened (pars 3.118-3.119).

It is also regrettable that claims of this kind are being made when the parties to the Federal Court proceeding are engaged in mediation under Court order. That process involves the exchange of information between the parties in a confidential setting.

Nevertheless, in view of the statements made by some Senators (referred to further below), and the circumstance that the anthropology report is a public document, and has been available to the public for many years, the NLC is pleased to elaborate upon the evidence given to the committee in the 2010 inquiry. In doing so, however, it needs to be made clear that the NLC refrains from making any comment about the merits of the parties' respective positions in the Federal Court proceeding.

Summary of points

In summary, the material referred to in the Chair's letter and the press release from Maurice Blackburn:

- (i) was considered by the NLC in the course of the nomination, along with other material, and had been referred to in earlier submissions by the NLC to Senate Committees;
- (ii) has been available to the public for many years; it is a mistake to think that it contains new or fresh evidence about traditional Aboriginal ownership of the nominated site, and as with the earlier land claim inquiry itself, it does not deal with that question directly;
- (iii) does not support the proposition that one Ngapa local descent group cannot be the traditional Aboriginal owners of an area of land on Muckaty Station (or elsewhere) associated with Ngapa Dreaming.

Earlier Senate submissions

As the Chair's letter of 20 May 2011 mentions, on 30 March 2010 the NLC provided the Committee with a written submission. At page 2 of that submission, the NLC referred to and quoted an earlier written submission dated 4 November 2008 provided to the Senate Environment, Communications and the Arts committee in its inquiry on the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*. In that inquiry, the NLC provided a supplementary written submission dated 4 December 2008.

Part 2.3 of the 4 December 2008 submission is headed "Anthropological advice" and deals with the findings, and evidence before, the Aboriginal Land Commissioner in the earlier land claim inquiry, the *Warlmanpa (Muckaty Pastoral Lease) Land Claim* upon which the Commissioner reported in March 1997.

The material referred to in the 4 December 2008 submission includes the report mentioned in the Maurice Blackburn press release. The 4 December 2008 submission notes that the report gives an account of the Ngapa (rain) dreaming. The submission goes on to note that the relationship between three Ngapa groups may give rise to what the Commissioner termed as "overlapping responsibilities", but that each group constitutes a separate group of traditional Aboriginal owners in relation to that part of the Ngapa Dreaming track and associated land for which they have primary spiritual responsibility.

The earlier land claim

The report mentioned in the Maurice Blackburn press release was prepared in May 1993 and presented to the Commissioner in the *Warlmanpa (Muckaty Pastoral Lease) Land Claim* in advance of the hearing of evidence by Aboriginal witnesses.

A report of this kind is commonly called a “claim book” because it sets out the claim and any views expressed by an anthropologist must be supported by evidence given by the Aboriginal witnesses about their traditions. After evidence from Aboriginal witnesses is given, the authors of the claim book will then give evidence commenting upon the Aboriginal evidence and will, if appropriate, make adjustments to what is in the claim book.

The claim book was prepared and presented to the Commissioner before the Aboriginal claimants gave evidence. Their evidence included evidence on different aspects of Ngapa Dreaming, and on hand over points from one Ngapa group (or branch) to another, which signify the existence of separate Dreaming and land interests among the groups and their members.

After that evidence was heard, one of the authors of the claim book gave oral evidence. The author commented that the Aboriginal evidence revealed that the Ngapa Dreaming had various transformations, such that different aspects of the Dreaming, involving different characters and stories, were associated with different Ngapa groups. He also gave evidence that information provided on sites, including sites associated with Ngapa Dreaming, required correction in the light of the evidence from the Aboriginal witnesses. The author emphasised that the systems of the Aboriginal claimant groupings involved were more subtle and complex, and that not all members of a grouping have all of the same dreamings and therefore do not have a direct interest in particular land.

The term “traditional Aboriginal owners” is defined by *the Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in the following way:

traditional Aboriginal owners, in relation to land, means a local descent group of Aboriginals who:

- (a) *have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land;*
- (b) *are entitled by Aboriginal tradition to forage as of right over that land.*

Although, the three Ngapa groups are in a company relationship, and they share ceremonial responsibilities, that does not mean that all three groups together satisfy the statutory description in relation to any particular area of land. They are separate local descent groups with different primary responsibilities for different areas of country. The company relationship does not mean that one Ngapa group cannot be the traditional Aboriginal owners of an area of land on Muckaty Station (or elsewhere) associated with aspects of Ngapa Dreaming.

Consideration of the earlier material

The land under claim in the earlier inquiry was an area of about 221,704 hectares. The nominated site is about 225 hectares in size. The claim was made by seven claimant groupings, Ngapa, Yapayapa, Milwayi, Ngarrka, Wirtku, Kurakuraya and Walanypirri.

The land claim inquiry was not directed to the question of who are the traditional Aboriginal owners of any particular part of Muckaty Station. The evidence, and findings of the Commissioner, concerned whether the members of the various claimant groupings fell within the definition of traditional Aboriginal owners for any part of the whole of the land claimed.

The findings by the Commissioner, and the evidence before the Commissioner, including the claim book and the oral evidence, were considered by the NLC during the course of the nomination. That material was examined by anthropologists engaged by the NLC to investigate traditional Aboriginal affiliations with the country in which the nominated site is located. In addition to examining the findings of the Commissioner and the evidence before the Commissioner in the earlier land claim, including the 1993 claim book, they considered other material on Aboriginal interests in the area and conducted field research among Aboriginal groups and communities in relation to Muckaty Station and interviewed members of those groups and communities.

The other material included information obtained since the earlier land claim inquiry in the course of consultations on various projects on Muckaty Station where it became necessary, in administering the Land Trust, to ascertain traditional Aboriginal affiliations with particular parts of Muckaty Station. That included transactions in the vicinity of the nominated site and haulage road.

These considerations and processes were detailed in the earlier 4 December 2008 Senate Committee submission.

On the information available to the NLC, including the findings by the Commissioner, the evidence before the Commissioner, and information obtained since then, the NLC was satisfied that the right people had been consulted for the country concerned.

Other matters

A number of different and conflicting claims have been made in the Senate about who are the traditional owners of the nominated site. They are referred to in the attachment. On the NLC's reckoning, nine different positions have been put to the Senate.

With respect to those making these (contradictory) claims, the question of who are the traditional Aboriginal owners of any particular area is a complex one that requires consideration of a range of material. To fasten upon any particular piece of evidence in isolation, like a sentence in the 1993 claim book, is apt to mislead.

The NLC notes that on enactment of the new legislation, before the Minister can select a site for the facility, the Minister must invite and consider comments. Those who suggest that one or more of the different alternative positions, or some variations on those positions, more accurately reflects who are the traditional Aboriginal owners of the nominated site can put that to the Minister at that point.

Conclusion

The NLC trusts that this clarifies the matter. The documents in the National Archives, being the material before the Aboriginal Land Commissioner in the earlier land claim inquiry, were considered in the course of the nomination process, and the 1993 claim book was dealt with in earlier submissions to the Senate.

ATTACHMENT

VARIOUS CLAIMS TO SENATE ON TRADITIONAL ABORIGINAL OWNERSHIP OF NOMINATED SITE

The query in the letter dated 20 May 2011 from the Chair of the Committee that “documents sourced from the National Archives of Australia appear to confirm that all Ngapa land on Muckaty Station was held in common by three Ngapa family groups, and that no Ngapa land on Muckaty Station was owned exclusively by any of the three family groups” is similar to what was raised on 3 June 2011 by Senator Scott Ludlam at Senate Estimates,¹ and by Senator Ludlam and Senator Nick Xenophon in the Senate on 14 June 2011.²

In addition to claiming that the land nominated for consideration as the Commonwealth Radioactive Waste Management Facility is traditionally owned by three Ngapa groups in common, Senators Ludlam and Xenophon also claimed that a sacred site which is proximate to, but not within, the nominated land, is Yapayapa country - the apparent inference being that the nominated land is Yapayapa country.³

Senator Ludlam's claim was made despite evidence from Dianne Stokes to the Committee in Darwin on 12 April 2010 that her Yapayapa country “ends at the railway” being more than 50 km to the west of the nominated land,⁴ advice which accords with the Aboriginal Land Commissioner's findings in the 1997 Warlmanpa (Muckaty Pastoral Lease) Land Claim.⁵

Senator Ludlam's claim was also made despite his tabling of a letter dated 21 March 2010 from Dianne Stokes and Mark Chungaloo on behalf of the Warramungu/Warlmanpa people which claimed that the nominated land is Milway[i] Country”, this being something which “Warlmanpa Elders always said”. Senator Ludlam tabled the letter in the Senate on 14 June 2011.⁶

Senator Ludlam tabled Ms Stokes and Mr Chungaloo's letter despite a letter to the Resources Minister in March 2011 from Mark Lane, the applicant in the Federal Court proceedings referred to above, which said that the sacred site which is proximate to the nominated site “is not Milwayi country.” Senator Rachel Siewert quoted from Mr Lane's letter in the Senate on 14 June 2011.⁷

Senator Siewert quoted from this letter despite also claiming that the Commissioner's “report clearly indicated that the nominated site was jointly owned by at least three to five groups”,⁸ as did Senator Xenophon (referring to the “Ngapa, Milwayi, Wirntiku, Ngarrka and Yapa Yapa” groups).⁹

¹ Senate Community Affairs Legislation Committee.

² Senate Hansard 14 June 2011 pp 13 and 15.

³ Senate Community Affairs Legislation Committee 3 June 2011 p 28, Senator Ludlam. Senate Hansard 14 June 2011 p 15, Senator Xenophon.

⁴ Senate Legal and Constitutional Affairs Committee, Darwin, 12 April 2010. Ms Stokes objects to the nomination.

⁵ Muckaty Land Claim Report par 4.5.1. The Commissioner found that the site Taaru (20 kms to the north-west of the nominated site) “represents an approximate boundary” between the Ngapa and Yapayapa groups.

⁶ Senate Hansard 14 June 2011 p 18.

⁷ Senate Hansard 14 June 2011 p 9.

⁸ Senate Hansard 14 June 2011 p 9.

This “five group” claim was also made in 2008 to the Senate Environment, Communications and the Arts Committee on behalf of objectors by Stephen Leonard of McCluskys Lawyers,¹⁰ and Natalie Wasley of the Arid Lands Environment Centre/Beyond Nuclear Initiative.¹¹ Mr Leonard also filed a “List of Ngapa Sacred Sites” from the Muckaty Land Claim which listed a site said to be proximate to the nominated land as Ngapa,¹² referred to the Commissioner's 1997 report as finding that that site “is shared between Ngapa and Yapayapa”,¹³ and referred to the Commissioner's 1997 report as finding that that sacred site is Yapayapa.¹⁴

This “five group” claim was made despite the Commissioner in fact finding that the traditional Aboriginal owners of Muckaty Station are comprised by seven groups (the aforementioned five, plus Kurrakurraja and Walanypirri), each group being “connected to part of the land claimed”.¹⁵

In total, since the nomination in 2007 nine different positions have been put by or on behalf of objectors as to the traditional ownership of the nominated site or proximate land. Four of these have been reiterated in the last month by Senators Ludlam, Siewert and Xenophon.

⁹ Senate Hansard 14 June 2011 p 14. Senator Xenophon referred only to a five group claim, not three groups.

¹⁰ Senate Committee on Environment, Communications and the Arts Inquiry into the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008* submission 95 (p 1), and attachment 13 (letter McCluskys Lawyers to NLC dated 3 September 2008). Mr Leonard claimed that “[d]ecisions which concern this single land trust, must be made in full consultation with traditional owners of the land within the Muckaty Land Trust and with the Muckaty Aboriginal Corporation”, being the Ngapa, Milwayi, Wirntiku, Ngarrka and Yapayapa groups. The suggestion that persons or groups which are not traditional Aboriginal owners have decision making capacity in relation to the nominated site - or that all traditional owning groups encapsulated within the cadastral boundary of Muckaty Station, by some undisclosed process, must jointly make decisions for all land given it is a “shared single land trust”, has no legal or anthropological basis.

¹¹ Hansard Senate Committee on Environment, Communications and the Arts, 17 November 2008, p 25. Ms Wasley said “that a decision made about the Muckaty Land Trust needs to be done with all five family groups.”

¹² Senate Committee on Environment Communications and the Arts Inquiry into the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008* submission 95 attachment 4.

¹³ Senate Committee on Environment, Communications and the Arts Inquiry into the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008* submission 95 attachment 13.

¹⁴ Senate Committee on Environment, Communications and the Arts Inquiry into the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008* submission 95A.

¹⁵ *Warlmanpa (Muckaty Pastoral Lease) Land Claim Report* pars 4.1, 4.12.

