



**CLC Submission to the  
Senate Legal and Constitutional Affairs Committee Inquiry  
into the  
*National Radioactive Waste Management Bill 2010***

**March 2010**

**Introduction**

The Central Land Council (CLC) welcomes this opportunity to provide a submission to the inquiry into the *National Radioactive Waste Management Bill 2010*. The CLC is a statutory authority established under the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act). The CLC is also a Native Title Representative Body under the *Native Title Act 1993*. The CLC represents approximately 24,000 Aboriginal people in the southern half of the Northern Territory.

The CLC notes that the committee has asked that this inquiry focus on legal and constitutional matters arising from the 2010 Bill, including issues relating to procedural fairness and the Bill's impact on, and interaction with, state and Territory legislation. The CLC's submission is therefore focused on those matters and does not consider the broader issues relating to radioactive waste management.

## Summary and Recommendations

The *National Radioactive Waste Management Bill 2010* (the Bill) is a deeply flawed piece of legislation that allows the Commonwealth government to continue to override many important considerations in the selection of a site for a radioactive waste facility. It is utterly disingenuous of the Australian Government to claim that this Bill honours the ALPs election commitment to repeal the *Commonwealth Radioactive Waste Management Act 2005* (the current Act). This Bill retains the processes and in many cases the actual provisions of the current Act. It largely mirrors the approach taken by the previous government – an approach characterised by the desire to find a politically expedient solution, contempt for state and Territory laws, and disregard for decision-making processes enshrined in the Land Rights Act – although it does provide for limited access to procedural fairness and administrative review.

The CLC does welcome the commitment in this Bill to dispose of the three sites listed in Schedule 1 of the current Act. The CLC represents the traditional landowners of two of the sites intended to be removed from further consideration. These sites are Harts Range and Mount Everard. Traditional landowners of these two sites have been vigorously opposed to a radioactive waste repository on their country, and the ‘selection’ of those sites did not meet any of the best practice requirements of site selection.

The CLC has also had representations from traditional owners and affected Aboriginal people living in the Tennant Creek region within the boundary of the CLC area, regarding their opposition to the proposed site at Muckaty Station and their dissatisfaction with consultation processes undertaken under the current Act. The CLC is disappointed that this Bill validates the Muckaty nomination without acknowledging the dissent and conflict amongst the broader traditional owner group about the process and the agreement. It is not acceptable that access to procedural fairness continues to be excluded in relation to its existing nomination or approval. This confirms the CLC’s view, put clearly in our submission to the senate inquiry into the current Act (2005) that better protection would be afforded to traditional landowners who chose to nominate a site in accordance with the operations of the Land Rights Act. The CLC believes that the processes for obtaining a nomination from a Land Council under the current Act are so flawed that the existing Muckaty station nomination and approval should be not be preserved in the Bill.

The CLC’s concerns with this Bill can be summarised as:

- Like the current Act, the Bill is clearly designed to facilitate the repository being sited on Aboriginal land in the NT;
- Like the current Act, the Bill fails to provide for a site selection process based on best practice and scientific assessment, instead relying on voluntary nominations and an unspecified and non-transparent agreement-making process;
- Like the current Act, the Bill sets aside established laws and processes for the acquisition of land and land-use decision-making and management;
- Like the current Act, the Bill subverts the processes under the Land Rights Act which offer greater protection to traditional landowners and affected communities;
- Like the current Act, state and Territory laws are overridden in so far as they ‘regulate, hinder or prevent’ the facility’s development and operation;
- Like the current Act, the Commonwealth’s heritage and environmental laws are overridden at the site selection stage;
- Muckaty station is entrenched as an approved site and there is no procedural fairness requirement in relation to its existing nomination or approval, despite the fact that there is considerable evidence that there is dissent amongst the broader group of traditional owners and affected Aboriginal people in the region<sup>1</sup>;
- Procedural fairness provisions (s.9) do not apply at the nomination stage; and
- The procedural fairness requirements in the Bill (s.9) are very limited: only persons with a right or interest in the land are invited to comment on a proposed approval, and the Minister is only required to take any relevant comments into account in deciding whether to approve land. Other parties who may be affected by the declaration have no rights at all; there is no public hearing, and no rights to relevant information. These considerations also apply in relation to s.17.

### **Recommendation 1.**

The Central Land Council recommends that the Senate reject the *National Radioactive Waste Management Bill 2010* in its entirety.

<sup>1</sup> See for example the submission on behalf of Muckaty elders to the 2008 Senate Inquiry into the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*

## **Recommendation 2.**

That the Australian Government develop an alternative Bill which:

- \* repeals the current Act in its entirety;
- \* establishes a transparent, rigorous and scientific process for determining a site for a national radioactive waste repository;
- \* reinstates the present Land Rights Act consultative and decision-making processes in respect of any decisions to allocate Aboriginal land to the Commonwealth for the purposes of a radioactive waste repository; and
- \* reinstates established laws and processes for the acquisition of land and land-use decision-making and management (including environmental assessment and protection, heritage protection and recognition of native title rights).

## **Site nomination**

Like the current Act, the nomination process lies at the heart of the problem with this Bill. The CLC has specific concerns (detailed below) about the process of a Land Council making a nomination, but also suggests that a process that involves landowners - whether Aboriginal or non-Aboriginal - nominating parcels of land as possible sites for a radioactive waste facility is not a scientifically rigorous process and can in no way be understood as a serious or best-practice approach to the siting of a radioactive waste facility in Australia.

### ***Reliance on voluntary nominations***

Choosing a waste site from one that is simply nominated by a landowner is a fundamentally flawed approach to the siting of a long term facility which houses significant amounts of short lived and long lived radioactive waste. Originally, two separate facilities were identified for storing low-level and intermediate level waste. The site selection process for the low level waste facility occurred over a 10 year period commencing in 1992, and involved public comment at three stages. Siting criteria were established by the National Health and Medical Research Council (NHMRC) in its 1992 *Code of practice for the near-surface disposal of radioactive waste in Australia*. Eight regions across Australia were identified for further assessment and Woomera finally chosen as the preferred site.

The National Store Project, designed to store intermediate level waste, commenced in 2001 and according to Senator Minchin was “intended to be a transparent, nation-wide search for a suitable site [for long lived intermediate level waste] based on scientific and environmental criteria”. Senator Minchin ruled out co-location of low level and long lived intermediate level waste. It is not clear what happened to the National Store Project process. A *Code of practice for the pre-disposal management of radioactive waste* remains in draft and is unavailable.

The report of the National Store Advisory Committee was never widely released. However, a short-list of 22 Defence properties across Australia suitable for intermediate level store was produced.

It is simply not credible to pretend that a voluntary nomination process, presumably with considerable financial enticements, can replace a process that actually evaluates regions based on accepted scientific criteria.

### ***Nomination by a Land Council***

With respect of site nomination by a Land Council the CLC has three significant concerns:

- the fact that a nomination pursuant to this Bill provides substantially less protection for traditional landowners than a nomination pursuant to the Land Rights Act;
- the focus on obtaining a site on Aboriginal land in the NT before other nominations can be called for; and
- the fact that the procedural fairness provisions (s.9) do not apply at the nomination stage.

### ***Land Council nomination process unworkable***

The CLC submits that it is virtually impossible for a Land Council to comply with the requirements for nomination set out in section 4 because subsection 4(2)(e) requires that a nomination must contain evidence that:

...if there is a sacred site within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* on or near the land – contain evidence that the persons for whom the site is sacred or is otherwise of significance are satisfied that there is no substantial risk of damage to or interference with the sacred site as a result of the nomination or subsequent action under this Act.

Further, under sub-section 4(2)(f)(ii) a nomination by a Land Council is required to contain evidence that:

the traditional Aboriginal owners 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.

The main problem arises from the statement “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”. Sub-section 10(2) of the Bill empowers the Commonwealth, a Commonwealth entity or a contractor to do anything necessary for or incidental to the purposes of selecting a site. Similarly, sub-section 10 (3) lists some of the things which might be done “whether or not on a site”. The list includes a number of activities which could desecrate a sacred site, such as drilling, constructing bores, road construction to access the nominated land and clearing vegetation. There may be other activities which could be conducted under the general power. Therefore, it is not possible for either a Land Council or the traditional Aboriginal owners of an area to know specifically **what** may be done pursuant to clause 10 if a nomination is accepted, and it is not possible for them to know **where** the activities may be carried out, because they could be carried out at considerable distance from the nominated area.

Until an area is nominated not even the Commonwealth will know what needs to be done for the purpose of selecting a site, in relation to that specific area. It may not even know what needs to be done until some time after it accepts a nomination. Yet the traditional landowners are required to know all of that before they make the nomination. The ultimate consequence of a successful nomination could be the loss of all of their interests in the land and in any all weather access required, upon a declaration pursuant to section 13. Thus it follows that it is virtually impossible for a Land Council to meet the requirements for nomination of an area of Aboriginal land, both as to the sacred site requirement and the informed consent requirement.

To summarise: the informed consent requirement requires evidence of understanding of what might be done to the nominated area, and other areas. This will be impossible to satisfy when much of the activity will not be known until a future date, post-nomination.

### ***Greater protection offered by the Land Rights Act***

It is important to understand that even if the current Act, or this Bill, were never introduced a Land Council could still have nominated a site to the Commonwealth for the purposes contemplated by the Bill under the Land Rights Act.

A Land Council could only nominate a site on the instructions of the traditional landowners obtained in compliance with sub-section 23(3) of the Land Rights Act. What would happen

thereafter would be a matter for agreement between the Land Council and the Commonwealth. Any agreement would need to record particulars of all that might be done by or on behalf of the Commonwealth in respect of the nominated site, or outside the site and in respect of any all-weather access to the site.

Should the nominated site prove suitable, the agreement would encompass the terms of the Commonwealth's acquisition of all necessary interests, and the circumstances of its final selection as a site. This would provide much greater protection to the rights of the traditional landowners than the Bill.

For the reasons detailed above the CLC believes that the Land Council nomination process provided for in the Bill remains unworkable and that better protection would be afforded to traditional landowners who may choose to nominate a site in accordance with the operations of the Land Rights Act.

### ***Prioritising Aboriginal land***

The CLC is concerned that this entire Bill is clearly designed to facilitate a site on Aboriginal land in the NT, whether at Muckaty or another nominated site. Despite a contingent capacity to call for general nominations from elsewhere in Australia, it is obvious that the political and constitutional convenience of locating a radioactive waste repository in the NT, specifically on Aboriginal land, is the main motivating factor in this Bill. The presumption is difficult to avoid that impoverished Aboriginal landowners have been made the primary focus of the Bill because, with few other resources, they may more easily be persuaded by financial inducements.

In deciding whether to make a declaration allowing for general nominations the Minister must 'have regard to whether it is unlikely that a facility will be able to be constructed and operated on Aboriginal land that has been nominated as a potential site under section 4' [s.5(2)]. It appears the case that general nominations will not be called for until all attempts to attract a suitable nomination from Aboriginal land in the NT have been exhausted.

### **Procedural fairness provisions and the limited opportunity for judicial review**

The Minister's power under the current Act is absolute and there is no right of review or procedural fairness accorded to anyone. This Bill restores some level of procedural fairness and administrative review but does not go nearly far enough. The procedural fairness provisions (s.9 and s.17) ensure that the Minister must invite comments from each nominator, and, via public

notices in the Gazette and newspapers, from persons with a right or interest in the relevant land. Comments from these persons must only be ‘taken into account’ by the Minister in deciding whether to approve a nomination (s.9(5)(e)) or declare a site (s13).

In addition, the procedural fairness provisions apply only to those with a ‘right or interest in the land’, meaning that neighbours, those living in a community nearby, or the relevant State or Territory government do not have an opportunity to comment. This is contrary to best practice land-use and land planning community consultation processes, and contrary to the Australian Government’s ‘*Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia*’ which recommend a process of establishing ‘public consent’.

Sub-section 9(7) of the Bill provides that the procedural fairness requirements set out in s.9 are ‘taken to be an exhaustive statement of the natural justice hearing rule’, limiting the scope for review of the Minister’s decision at general law or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This is problematic because the process which the Minister must observe in making a decision consists mainly of notice requirements, or merely taking the views of those with an interest ‘into account.’ The bar is set so low that it would be surprising if the Minister ever failed to comply. It is also interesting to note that at no stage of the decision making process is the Minister called upon to take into consideration some objective criteria, such as whether the nominated land is scientifically or geographical appropriate.

Further, there are insufficient procedural fairness protections at the nomination stage. While sub-section 4(2) sets out the consultation requirements which must be complied with before a nomination of a site can be made under proposed s 4 of the Bill, sub-section 4(4) of the Bill specifically provides that ‘failure to comply with subsection (2) does not invalidate a nomination’. This effectively prohibits review of the nomination once made and limits relief which can be granted in an application for judicial review on the grounds of failure to comply with the consultation requirements to the obtaining of an injunction prior to the making of the nomination under proposed s 4 (see *Kerinaia v Tiwi Land Council and Anor* [2007] NTSC 40 at [51] per Southwood J), which would give persons affected only a limited period of time to seek relief.

While provisions of the Land Rights Act (see sub-sections 19(6) and 19A(3)) are similar in terms to sub-section 4(4) of the Bill, there are additional protections which apply to the Land Rights Act and do not apply to this Bill. As discussed in detail above, the agreement making processes under the Land Rights Act are more transparent and thorough. Further, there is no equivalent to sub-section 9(7) of the Bill in the Land Rights Act which would preclude review on natural justice grounds of the final decision. For the above reasons, the inclusion of sub-section 4(4) providing



that failure to comply with sub-section 4(2) does not invalidate a nomination is deeply cynical and very disturbing.

It is also unclear whether a nomination made under s 4 of the Bill is a reviewable decision under the ADJR Act, which would provide persons with standing under the ADJR Act with a right to reasons (s.13). The ADJR Act only applies to “a decision of an administrative character made...under an enactment” (s.3), or to conduct deemed to be decisions (which includes a statutory requirement for a recommendation as a condition precedent to the making of a decision under that enactment) (s.3(3)). It is not certain whether a nomination under s 4 of the Bill falls into either of those categories.

The CLC contends that the nomination process is the key part of this Bill, and those with a right or interest in land should be provided with procedural fairness at the nomination stage, as well as those who are affected by the nomination. Once a nomination is made the succeeding decisions are all at the discretion of the Minister (not withstanding the procedural fairness provisions at the approval and declarations stage). If those with rights and interests to the land do not support the proposal to nominate land, or were not consulted with respect of the nomination, it is critical that they be given the earliest possible opportunity to seek redress.

## **Site selection**

Section 11 of the Bill effectively excludes State and Territory laws from operating where they would ‘regulate, hinder or prevent the doing of a thing authorised by section 10.’ Under this section, the Commonwealth has complete discretion to exclude all or parts of State and Territory laws, or limit such exclusions. In addition, like the current Act, the Bill overrides the application of the Commonwealth’s *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999* as far as they apply to the site selection process (s.6). Other Commonwealth laws can be excluded by regulation [s.10(2)]. While the Commonwealth may have the constitutional power to override Territory laws, such as those designed to protect sacred sites or protect the environment, it is completely unacceptable for the Commonwealth to also exclude application of relevant Commonwealth laws at the site selection stage.

The CLC is extremely concerned that a project of such national significance would not be subject to an environmental assessment process at the site selection stage. This would provide publicly

available data on the assessment process and environmental studies, and allow members of the public, indigenous and non-indigenous, to have input.

Legislation such as the Commonwealth's *Native Title Act 1993* (NTA) and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Northern Territory Aboriginal Sacred Sites Act*, have been enacted by parliaments to address disadvantage Aboriginal people face in maintaining their culture in contemporary society. Over-riding the established processes for land acquisition and land use is unnecessary and improper. Setting aside so many enactments that are intended to provide for well considered, scientifically sustainable and community accepted decisions, further illustrates the very poor decision making process on such a nationally important matter, that will be enshrined in this legislation.

### **Acquisition or extinguishment of rights and interests**

The Bill continues the depressing trend of the Commonwealth to override or avoid the provisions of beneficial legislation in favour of expediency. A declaration under s.13(2) that would extinguish native title rights is to have effect despite the NTA [s.19(2)(c)]. This would enable the avoidance of the right to negotiate provisions of the NTA.

If the Government proposed to acquire native title rights under the NTA, native title holders would have the benefit of the 'right to negotiate' process: they would have the opportunity to provide a written submission to the Government and the Government would be required to negotiate in good faith [see section 31(1) NTA]. Further, if native title holders requested land or other non-monetary compensation, the Government would be required to consider this request in good faith [see section 24MD(2)(d) NTA].

The CLC strongly believes that a declaration should not be capable of having effect despite the provisions of the Native Title Act 1993 and there is no justification in limiting or avoiding this legislation.

Although the definition of a 'future act' in the NTA excludes any act affecting Aboriginal/Torres Strait Islander land [s.233(3)(b) NTA], it is noted that common law native title rights are capable of co-existing with Aboriginal land but can be extinguished when a declaration under ss13(2) is made. Whilst the Bill provides for the granting of rights and interest in land to the original owners when a facility is no longer required (Part 6) it is noted that these provisions only apply to freehold interests and that the underlying common law native title rights are extinguished for all time at the time a declaration under ss13(2) is made. There is no reversion of native title rights.

### ***Declaration of a site***

Subject only to the limited procedural fairness requirements at s.17, the Minister has absolute discretion to declare that a nominated and approved site is to be the selected site for the facility (s.13(2)). The Bills fails to set out any criteria that must be followed by the Minister.

### **Schedule 1.**

Part 1. The CLC supports repeal of the current Act in its entirety.

Part 2. The CLC supports the repeal of paragraph (ZC) of schedule 1 of the ADJR Act.

### **Schedule 2.**

The current Act prevents application of the ADJR Act in respect of site nominations, approval of nominations and selection of preferred site. This Bill preserves the legal status of the 2007 Muckaty station nomination, without allowing those traditional owners and others affected by the decision any legal recourse, unless the site reaches the s.13 declaration stage.

The CLC is disappointed that the existing Muckaty nomination and approval have been retained without establishing a process that would include the broader group of traditional owners and affected area people. Ignoring the obviously high level of dissent over the Muckaty nomination will only serve to entrench conflict between individuals and family groups in the Tennant Creek region.

The CLC again reiterates that the processes of the Land Rights Act would have afforded better protection to traditional owners, and ensured that those with an interest in the area had an opportunity to put their views forward.

The CLC believes that the processes for obtaining a nomination from a Land Council under the current Act are so flawed that the existing Muckaty station nomination and approval should be not be preserved in the Bill.