ANFA
Australian Nuclear Free Alliance

Submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia

May, 2022

The Australian Nuclear Free Alliance welcomes this opportunity to contribute to this important review and supports good faith efforts to improve the recognition, rights and respect of First Nation's culture, Country and community.

Formed in 1997, the Australian Nuclear Free Alliance (formerly known as the Alliance Against Uranium) brings together Aboriginal people and relevant civil society groups concerned about existing or proposed nuclear developments in Australia, particularly on Aboriginal homelands.

The Alliance provides a forum for sharing of knowledge, skills and experience. It is an opportunity to come together and find strength through our shared aims to protect Country and culture from nuclear developments.

ANFA helped to build the successful campaign to stop the Jabiluka uranium mine in the Northern Territory and has supported community action against proposed national nuclear waste dumps at Muckaty in the NT, Brewarrina in NSW and in South Australia. Currently more Aboriginal communities are facing uranium mining and exploration, rehabilitation and remediation of former mine sites, several proposed new uranium mines, and a proposed national nuclear waste facility planned for Barngarla land near Kimba in regional South Australia.

The UNDRIP recognises historic injustices that have occurred for Indigenous Peoples resulting from "their colonization and dispossession of their lands, territories and resources," and the impact these have had on the development of the needs and interests of First Nations Peoples. Nuclear activities in Australia provide many examples of both historic injustices and current threats to the human rights and self-determination principles explicitly outlined in the UNDRIP.

ANFA members' lived experience has been characterised by limited or no inclusion in consultation and approval processes, highly constrained or non-existent project veto rights and systemic and profound imbalances in resources, capacity, institutional support and access to information and decision shapers and makers.

ANFA maintains that wide ranging reform is urgently needed in many areas of regulation to advance better compliance with international best practice and contemporary community expectation.

Uranium:

A 2003 Senate Inquiry raised wide-ranging concerns about the performance of the Australian uranium industry. These concerns, which remain unresolved, found the sector characterised by a pattern of underperformance and non-compliance, an absence of reliable data to measure the extent of contamination or its impact on the environment, an operational culture that gives greater weight to short term considerations than long term environmental protection and which concluded that changes were necessary in order to protect the environment and its inhabitants from 'serious or irreversible damage.'[1]

In ANFA's direct lived experience the uranium industry is unsustainable and provides no net benefit and remains controversial and contested. It is characterised by operational underperformance and regulatory non-compliance and is in urgent need of reform.

Mining agreements with Indigenous groups have been justifiably criticised for not operating on a level-playing field. Problems relating to financial and administrative resources, confidential and complex agreements, and inadequate representation show that the "Australian Government is unlikely ever to make *adequate* provision for the proper, professionally-supported preparation and execution of all significant future act negotiations."[2]

The cards are heavily stacked against concerned Aboriginal people who would prefer to see no uranium mining on their country. The inequity found in the relationship between mining companies and Indigenous communities is further compounded by the limited rights afforded to Aboriginal people in relation to developments on traditional lands and estate. According to prominent Aboriginal lawyer Noel Pearson:

> *The legal framework that applies to mining and native title legal framework that applies to mining and native title severely disadvantages indigenous landowners. Section 38 of the Native Title Act explicitly says that in arbitrating an application for mining, the National Native Title Tribunal "must not determine a condition ... that has*

[1]Senate ECITA Committee: Regulating the Ranger, Jabiluka, Beverley and Honeymoon uranium mines, October 2003, p. iv.

[2] Ciaran O'Faircheallaigh, 'Financial Models for Agreements Between Indigenous Peoples and Mining Companies', *Aboriginal Politics and Public Sector Management,* Research Paper No. 12, January 2003.

the effect that native title parties are to be entitled to payments worked out by reference to:

*(**a**) the amount of profits made; or*
*(**b**) any income derived; or*
*(**c**) any things produced."*

You might as well make clear in the law that the tribunal can only determine beads and mirrors as acceptable outcomes from arbitration, because that is in effect what it has been doing.
The mining lobby has been quiet on land rights for the past decade. Having secured an advantageous legal framework through the bitter conflicts over the Native Title Act in the '90s, they have learned that ideological opposition to land rights is unproductive for its members.
As long as member companies are winning hands-down through the so-called agreement-making process, they have had no interest in conflict.[3]

The Aboriginal Land Rights (Northern Territory) Act 1976 (Clth) provides Traditional Owners with some ability to veto mining proposals on their lands, however this is unnecessarily complicated and compromised by the conjunctive linkage between exploration approval and mining approval. This veto power would be far more meaningful if exploration and mining approvals were discrete and separate processes and the principles of Free Prior and Informed Consent (FPIC) were adhered to in every case.

Such an approach would appear beneficial for all parties by providing increased clarity and certainty for Aboriginal Traditional Owners (that saying yes to exploration did not preclude any ability to say no to future mining), for industry (as Traditional Owners would be arguably less likely to oppose exploration applications if they knew this would not constrain their options on future mining approvals) and for other stakeholders who would have more confidence that the process facilitated and reflected FPIC.

Aboriginal communities on Native Title land have extremely limited ability to say no to mining developments on their country.

In the experience of ANFA members, many Aboriginal communities are put in a position where they must choose between (i) non-cooperation and non-consent with a mining or development proposal, an option that often most clearly reflects opposition to the proposed development but is not of itself sufficient to halt the project and also precludes a place at the table should the project go ahead and (ii) forming an Agreement with the developer. This second pathway is invariably promoted by the project proponent as proof of community 'consent' and used to confine debate and any continuing concerns over the operation to in house forums. Often unreasonable time and financial pressures and expectations are placed on Aboriginal communities to fast-track mining agreement and approvals.

Aboriginal communities facing uranium developments on their traditional estate need a way to ensure that their key concerns and questions receive meaningful attention and that they retain a critical and empowered voice, both within and parallel to any Agreement process.

[3] Noel Pearson, 'Boom or dust lifestyle', *The Australian, 16* December 2008.

Most mining agreements fail to deliver benefits to Aboriginal landowners. According to the Native Title Working Group Report, obstacles frequently get in the way of successful agreements for Indigenous communities with mining companies.

> "There are *only a limited number of good agreements* to provide models…The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the *Native Title Act 1993* (NTA) is, in itself, deserving of inquiry."[4]

ANFA supports a dedicated Inquiry into the continuing failure of mining and resource agreements and operations to provide significant and ongoing benefit to Aboriginal communities, organisations and representative bodies.

ANFA notes that the 2011 Fukushima nuclear crisis was directly fueled by Australian uranium.

In October 201, Dr Robert Floyd, the head of the Australian Safeguards and Nuclear Safety Office stated, "we can confirm that Australian obligated nuclear material was at the Fukushima Daiichi site and in each of the reactors".

This has been a cause of great heartache to many Aboriginal people, especially the Mirarr people of Kakadu.

The Mirarr have said that they *"*want the world to understand the responsibility we feel for the impacts of uranium from our country, even though the mine was imposed upon us. Our long-held concern that mining on our country would cause harm overseas was tragically realised when the Fukushima disaster occurred in 2011".

In August 2011, the then UN Secretary General released the *United Nations system-wide study on the implications of the accident at the Fukushima Daiichi nuclear power plant* which recommended that nations involved in the nuclear trade undertake 'an in-depth assessment of the net cost impact of the impact…of mining fissionable material on local communities and eco-systems'.

At this time Mirarr Senior Traditional Owner Yvonne Margarula wrote to UN Secretary General Ban Ki Moon expressing her sadness at the devastation that uranium from her lands was causing in Japan, stating: "This is an industry we never supported in the past and want no part of in the future. We are all diminished by the events unfolding at Fukushima".

ANFA has urged that this review take place. This has not occurred, and it now needs to.

ANFA further supports a comprehensive and independent review of previous federal Parliament Inquiries into the uranium sector and a compliance and implementation audit of extant recommendations.

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4 Native Title Payments Working Group report, December 2008

As a primary and fundamental response ANFA strongly supports that Aboriginal people and affected communities have clear and legally recognized project veto rights**.**

Radioactive Waste:

ANFA members have had a long history with radioactive waste and have actively opposed multiple iterations of international and domestic moves to dump/store all levels of radioactive waste on traditional lands.

Australia continues to be perceived and promoted as a site to host high-level international radioactive waste. ANFA members were engaged in community advocacy and action around the earlier proposal advanced by the South Australian Royal Commission for a global high level waste dump in SA, including through participation in the Citizens' Jury process that emphatically rejected this plan.

ANFA members have played critical roles in successfully contesting earlier radioactive waste plans including with the Kupa Piti Kungka Tjuta in northern South Australia and at Muckaty in the Northern Territory.

Australia's current domestic waste approach lacks transparency and is deficient and inconsistent with international best practice. Instead of an evidence-based and integrated approach, the previous federal government advanced a sub-optimal and divisive pathway.

The current iteration of the planned National Radioactive Waste Management Facility (NRWMF) slated for Kimba on South Australia's Eyre Peninsula puts a disproportionate burden on regional and First Nations communities. ANFA hopes that this approach is not continued under the new federal government as it is unnecessary, divisive and deeply deficient.

Radioactive waste management is a complex policy arena. It involves long-lived wastes that pose a significant intergenerational legacy and burden. The material is hazardous with important safety, security and risk considerations and related technical, financial, regulatory and political complexities and costs. The difficulty of the issue is heightened by the long-term nature of the material and the fact that any decision may compromise other future management or development options.

In Article 29 the UN DRIP position is clear: **"*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".***

The Barngarla Native Title holders in the affected region oppose the NRWMF and the Barngarla Determination Aboriginal Corporation (BDAC) is taking legal action to challenge the siting decision. An earlier Federal Court action by BDAC contesting Barngarla's exclusion from the federal government's earlier tightly managed 'community ballot' process saw the Federal Court accept that the Barngarla people were neighbours at the Kimba site and were excluded from the ballot.

Whilst the approach to the vote under the SA Local Government Act was ultimately held to be non-discriminatory under national discrimination law, the Federal Court's judgment should not be taken as providing any comfort that the ballot, which excluded the Barngarla people, was a legitimate or appropriate way to "consult" with stakeholders or an endorsement that the vote means that consultation has occurred. The fact remains that the Barngarla people were substantially excluded from the vote and remain strongly opposed to the planned facility.

When given the opportunity to respond to a ballot the Barngarla community response was a unanimous rejection of the NRWMF proposal.

After being excluded from the Kimba Council ballot, the Barngarla Determination Aboriginal Corporation RNTBC ("BDAC") recently engaged Australian Election Company, an independent ballot agent, to conduct a confidential postal ballot of BDAC members regarding the National Radioactive Waste Management Facility ("NRWMF").

The ballot paper asked: *Do you support the proposed National Radioactive Waste Management Facility being located at one of the nominated sites in the community of Kimba?* Of 209 eligible Barngarla native title holders, 83 cast valid "No" votes while zero "Yes" votes were returned.

As stated, the Barngarla Determination Aboriginal Corporation is now taking legal action to challenge the siting decision, yet even this right of judicial review had to be hard won. The former portfolio Minister Keith Pitt actively sought to modify the enabling legislation for the planned facility to remove the Barngarla's right to a day in Court. This unreasonable and highly politicised approach was stalled in the Senate for over a year by the Labor Opposition, the Australian Greens and the crossbench until this fundamental right to democratic participation was restored.

This approach of denying the Traditional Owners the right to have a primary say and adding further insult by seeking to remove their right to make a legal challenge is in stark conflict with the DRIP's clear guidance that Indigenous free, prior and informed consent is an essential pre-condition for the siting of any such facility.

ANFA further notes that Kimba is an important grain producing region. The National Health and Medical Research Council 1992 Code of Practice for the near-surface disposal of radioactive waste in Australia lists the following criterion (inter alia) for near-surface disposal of radioactive waste as follows: "the site for the facility should be located in a region which has no known significant **natural resources, including potentially valuable mineral deposits, and which has little or no potential for agriculture or outdoor recreational use".** There has been sustained opposition of many Kimba grain growers to the selection of this site and the Kimba site is inconsistent with the NHMRC Code of Practice.

This shared concern is reflected in a June 2021 joint BDAC/ grain producer's statement:

The simple fact remains that even though the Barngarla hold native title land closer to the proposed facility than the town of Kimba, the First Peoples for the area were not allowed to

vote. They prevented Barngarla persons from voting, because native title land is not rateable. Further, they did not allow many farmers to vote, even though they were within 50km of the proposed facility, because they were not in the Council area.

They targeted us, because they knew that if they had a fair vote which included us, then the vote would return a "no" from the community. The process also ignores the fact that the Government never sought the views of the communities which will be affected by the transport of nuclear waste. Those communities, where the waste will be transported through, have had no right to have a say. South Australians more broadly have had any rights to have a say.

Mistakes have been made and the process needs to start again. Instead, the Government sought to change the law to remove our democratic right to judicial review of their actions so that no Court could ever assess what had been done. We find this staggering, as checks and balances are needed for a functioning democracy.

ANFA believes that the current federal approach to radioactive waste is unjustified and is in direct conflict with both the spirit and letter of the UN DRIP.

Nuclear weapons and nuclear testing:

Uranium is the source material required for both nuclear power and nuclear weapons.

October 2022 marks the 70th anniversary since the beginning of British nuclear weapons testing in Australia. The environmental, cultural and human impacts of these and subsequent nuclear tests continue.

Successive Australian governments have attempted to maintain a distinction between civil and military end uses of Australian uranium exports. However, no safeguards can absolutely guarantee Australian uranium is used solely for peaceful purposes.

Exporting uranium for use in nuclear power programs to nuclear weapons states means other uranium supplies are freed up to be used for nuclear weapons programs and the primary difference between a civilian and military nuclear program is one of intent.

The sorry story of nuclear weapons testing continues to directly impact many ANFA members and Aboriginal lands. Indigenous peoples were forcibly dispossessed from Country,[5] and many suffered direct or intergenerational health and psychological impacts as a result of the weapons testing and dispossession.[6] ANFA members have been actively

[5] UNDRIP Article 10 states, "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."
[6] UNDRIP Article 28.1 reads, "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

engaged in public commentary and advocacy around nuclear weapons and the need for redress and repair.

ANFA members have also strongly supported the development of the UN Treaty on the Prohibition of Nuclear Weapons (TPNW). This game-changing initiative was driven by Australian civil society group ICAN – the International Campaign to Abolish Nuclear Weapons. The Treaty comprehensively outlaws nuclear weapons and contains positive obligations that offer important pathways for affected communities and Country, recognising the "disproportionate impact of nuclear-weapon activities on Indigenous peoples." Articles Six and Seven of the TPNW relate to victim assistance and environmental remediation, including age and gender sensitive medical and psychological assistance, support for social and economic inclusion and necessary and appropriate environmental remediation measures.

ANFA strongly urges the Australian government to adopt a positive approach to this Treaty and to speedily advance signature and ratification. Such an approach would give practical and long overdue expression to the UN DRIP commitments, including those in Article 30[7] alongside the remediation clauses in Article 29.[8]

Key concerns and recommendations:

- The uranium sector remains controversial and contested. It is characterised by underperformance and non-compliance and is in urgent need of regulatory reform.
- Unresolved concerns over site-specific contamination, tailings management, radioactive waste and nuclear proliferation mean that the Australian uranium sector fails any measured sustainability assessment.
- Systemic Aboriginal disadvantage has not been addressed by mining operations and no mining agreements have delivered lasting benefits to Indigenous communities. A dedicated Inquiry should examine and address this failure.
- Indigenous people's ability to exercise full, free, prior and informed consent and effective input into the activities of mining operations on traditional lands is compromised by severe capacity and procedural constraints. The legal and approvals framework should be changed to address this power imbalance.
- Provide a veto right - the absence of a credible veto right for projects directly undermines Aboriginal agency and inclusion. ANFA strongly supports the legal

[7] UNDRIP Article 30.1 reads, "Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned."
[8] UNDRIP Article 29.3 reads, "3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented."

recognition of veto rights and maintains that a community that is unable to meaningfully say no cannot be claimed to have said yes.

- There is a history of sub-standard mine rehabilitation in the Australian uranium sector and an urgent need to address the long-term impacts of the Australian uranium sector in a way that does not allow cost shifting from mining companies to the public purse.

- Radioactive waste is a complex and inter-generational policy challenge. The historical approach of successive Australian national governments has been deeply flawed and unfairly and disproportionately targeted Aboriginal peoples and lands. ANFA supports a new approach based on transparency, inclusion, meaningful consultation and approval processes and a clear right of veto.

- Nuclear weapons remain a profound existential threat to all life on Earth. To reduce this risk and to actively acknowledge and address the continuing legacy of previous British nuclear tests in Australia ANFA strongly supports Australia signing and ratifying the UN Treaty on the Prohibition of Nuclear Weapons (TPNW).

- The harms caused by nuclear weapons testing and development on Australian territories require rigorous modern surveying, review, monitoring and, where possible, remediation or assistance to victims. ANFA calls for further scientific, social and medical studies, monitoring and other appropriate measures to address harms from nuclear weapons projects on Australian territories, and to seek international cooperation and assistance where needed.[9]

- That the legal exemptions provided to BHP Billiton in the South Australian Roxby Downs Indenture (Ratification) Act 1982 be reviewed to ensure that the federal -SA regulatory framework and bilateral agreements do not facilitate the mines legal privileges and better address Aboriginal concerns.

- Ensure that the operations and rehabilitation and closure plans of Australian or ASX listed corporations engaged in offshore uranium projects is consistent with best industry practice, contemporary community expectation and DRIP guidance.

- Initiate an in-depth assessment of the net cost impact of the impact of mining fissionable material on local communities and eco-systems as recommended by the UN post Fukushima – and recognise and amplify key Pacific community and regional concerns over the planned direct disposal of Fukushima wastewater in the Pacific.

[9] Articles Six and Seven of the Treaty on the Prohibition of Nuclear Weapons (TPNW) provides guidance on these measures.

- Conduct a comprehensive review of previous federal Parliament Inquiries into the uranium sector and a compliance status audit of extant recommendations.

Conclusion:

Thank you for your attention to this important set of issues. Improved transparency, inclusion and compliance with the UN DRIP would be an important and long-overdue response to the continuing issues of under-recognition and the lack of respect provided to First nation communities and lands.

ANFA representatives would be happy to provide the Committee with further detail or to speak directly to the issues raised in this submission before the Committee.

For any further clarification please contact via: anfacommittee@gmail.com