Chapter 2

Radioactive waste: issues with the existing legislation

2.1 The evidence received by the committee overwhelmingly favoured repeal of the *Commonwealth Radioactive Waste Management Act 2005*. Even some submitters who supported the creation of a national waste facility did not specifically support existing proposed sites, and believed the current Act should be repealed in favour of more suitable replacement legislation.[1]

2.2 Most submissions suggested the existing legislation was unjust[2] and 'contrary to the principles of good governance'.[3] Several submitters also argued that the current legislation supports the wrong policy approach to managing radioactive waste. They suggested that the focus should be on waste minimisation and storage rather than on disposal.[4]

2.3 All submitters believed there should be a national approach to managing Australia's radioactive waste. There was no support for the previous government's stance, underpinning the existing legislation, that every jurisdiction should create its own waste management facilities.

2.4 As well as these general issues, the committee heard of three main specific concerns regarding the content of the existing Act:

- The violation by the Commonwealth legislation of Northern Territory autonomy and policy decisions;
- The procedural unfairness of the current law and the poor consultation processes associated with both the formulation of the legislation and the selection of a site; and
- Particular concerns about the proposed Muckaty Pastoral Lease site nomination.

2.5 This chapter looks at the issues raised during this inquiry regarding the existing waste management approach, before turning to the question of what should be the preferred way forward. Because the bill currently before the committee repeals

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1 Australian Uranium Association, *Submission* 2; FASTS, *Submission* 73, p. 1.

2 See, eg, Judy Blyth, *Submission* 1.

3 NT Government, *Submission* 81, p. 3.

4 See, eg, Julie Matheson, *Submission* 7; Medical Association for the Prevention of War, *Submission* 38; Public Health Association Australia, *Submission* 100.

existing law, most submitters addressed what they perceived as the shortcomings of the current policy framework and law.

Problems with the existing legislation and site selection process

2.6 The existing legislation is based on the previous government's desire to

> put beyond doubt the Commonwealth's power to make arrangements for the safe and secure management of the small quantity of radioactive waste produced by Commonwealth agencies from the use of nuclear materials in medicine, research and industry.[5]

2.7 The effects of the legislation were summarised at that time:

> It explicitly overrides the operation of both Territory and State laws that 'regulate, hinder or prevent' the facility's development and operation, although the Bill retains the flexibility to permit the operation of any Territory or State laws if the Commonwealth considers this appropriate. The Bill also overrides the application of various Commonwealth laws that might present some procedural delays in progressing the facility. The construction and operation of the facility would however still be subject to the usual approval and licensing provisions of the *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Environment Protection and Biodiversity Conservation Act 1999*.
>
> The Bill makes it clear that the Governments decision on the preferred site is not disallowable by Parliament, is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, and the Government owes no legal obligation of procedural fairness towards anybody affected by the decision.[6]

2.8 The existing facility design concept is for co-locating a store for long-lived intermediate level waste and a disposal facility for low level and short-lived intermediate waste. The goal has been to identify a single site, and to do so in a time frame that would facilitate final storage of long-lived intermediate level reprocessed reactor fuel. This reprocessed fuel is due to be returned to Australia from both France (Cogema) and the UK (Dounreay) by 2015.[7] The current Commonwealth proposal does not provide for accepting waste from the states.

2.9 The committee heard extensive criticism of the basis of the current Australian approach. FASTS argued that there should be a national facility that would accept

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5 The Hon. Dr Brendan Nelson, *House of Representatives Debates*, 13 October 2005, p. 1.

6 Angus Martyn, *Commonwealth Radioactive Waste Management Bill 2005 Bills Digest*, Bills Digest no. 59, 2005–06.

7 ANSTO, *Annual Report 1998–99*, p. 42; Senate Education, Science and Training Legislation Committee, *Supplementary Budget Estimates 2006–07*, Answer to Question on Notice DEST Question No. E548_07; Dr Cameron, Dr Ron Cameron, Acting Chief Executive Officer, ANSTO, Senate Standing Committee on Economics, *Estimates Hansard*, 3 June 2008, p. 100.

waste from all states and territories, not just from Commonwealth bodies. They suggested:

> It is internationally recognised that dispersed storage of radioactive waste is not a viable long-term strategy and is potentially hazardous, inefficient and impossible to completely secure.[8]

2.10 Others were critical of the centralised facility, not because it would accept only Commonwealth waste, but because neither centralisation nor disposal were necessarily to be preferred. They argued that alternative approaches should be explored through public inquiry, and placed an emphasis on storage of waste and waste minimisation.[9]

2.11 Some groups argued that choosing a remote location for a facility increased the transportation risks without any clear public health benefit.[10] The Public Health Association argued that this approach taken to site selection was creating public health risks, particularly amongst central Australian Aboriginal people.[11]

2.12 Many stakeholders favoured an approach that involved waste minimisation and planned on-site storage.[12] They placed a strong emphasis on community engagement, contrasting this with what they argued was the removal of stakeholders from the process under the existing Act.

2.13 It was also pointed out that the current process is not relying on the scientific site assessment process that the Commonwealth had developed and used prior to 2004:

> The current identified potential dump sites in the NT were not chosen on the basis of any objective, scientific criteria. None of the sites under consideration were short-listed by the earlier Federal Bureau of Resource Sciences' National Repository Project in the 1990s which assessed alternative sites around Australia for a repository for low-level and short-lived intermediate-level waste.[13]

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8 FASTS, *Submission* 73, p. 2.

9 Friends of the Earth Australia, *Submission* 74; Australian Conservation Foundation, *Submission* 85; Public Health Association Australia, *Submission* 100.

10 See, eg, Public Health Association Australia, *Submission* 100.

11 Public Health Association Australia, *Submission* 100.

12 See, eg, Friends of the Earth, *Submission* 74; No Waste Alliance, *Submission* 83; Anti-Nuclear Alliance of Western Australia, *Submission* 90; Public Health Association Australia, *Submission* 100.

13 Australian Conservation Foundation, *Submission* 85, p. 2.

2.14 The committee acknowledges this point. The initial process, commenced in 1992, assessed eight regions around Australia,[14] and found that all eight regions contained potentially suitable sites, with some having more potentially suitable areas than others.[15] None of the four sites currently under consideration falls within any of the regions originally examined.

2.15 The role of political factors, rather than scientific and technical ones, was effectively confirmed by ANSTO, whose officers remarked:

> Mr McIntosh—… the requirements for … low level waste, they are not that difficult. There is a range of suitable geologies. In France they are put in clay, I believe. In Germany they are in salt. In other places they are in hard rock…
>
> But there is a range of geologies which have to be suitable, and as long as you can find one of those geologies, that is all right. There is a rainfall issue. A repository in the United Kingdom or France certainly has rainfall challenges which would not exist in most of Australia. But you can deal with that with a bit of engineering, and that is been done successfully in those countries.
>
> CHAIR—So then why does Australia mainly look at remote sites?
>
> Mr McIntosh—I believe it is for political reasons, Senator.[16]

2.16 Mr McIntosh subsequently drew attention to the role of the NHMRC's *Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia* (a code now administered by the Australian Radiation Protection and Nuclear Safety Agency, ARPANSA). The code sets out a number of site selection criteria for a waste facility, including that it should be in an area of low population density.[17] The Code's principal criteria are:

> a. the facility site should be located in an area of low rainfall, should be free from flooding and have good surface drainage features, and generally be stable with respect to its geomorphology;
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> b. the water table in the area should be at a sufficient depth below the planned disposal structures to ensure that groundwater is Code of practice for the near-surface disposal of radioactive waste in Australia (1992)

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14 Bureau of Resource Sciences, *A Radioactive Waste Repository for Australia: Site Selection Study Phase 2 – Discussion Paper*, Bureau of Resource Sciences, Canberra, 1994, http://www.ret.gov.au/resources/Documents/radioactive_waste/public_discussion_paper_phase_2.pdf.

15 Bureau of Resource Sciences, *A radioactive waste repository for Australia: Site selection study Phase 3: Regional assessment: A public discussion paper*. Bureau of Resource Sciences, Canberra, 1997, http://www.ret.gov.au/resources/Documents/radioactive_waste/public_discussion_paper_phase_3.pdf.

16 Mr Steven McIntosh, ANSTO, *Proof Committee Hansard*, 28 November 2008, p. 10.

17 Mr Steven McIntosh, ANSTO, correspondence to the committee, 9 December 2008.

> unlikely to rise to within five metres of the waste, and the hydrogeological setting should be such that large fluctuations in the water table are unlikely;
>
> c. the geological structure and hydrogeological conditions should permit modelling of groundwater gradients and movement, and enable prediction of radionuclide migration times and patterns;
>
> d. the disposal site should be located away from any known or anticipated seismic, tectonic or volcanic activity which could compromise the stability of the disposal structures and the integrity of the waste;
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> e. the site should be in an area of low population density and in which the projected population growth or the prospects for future development are also very low;
>
> f. the groundwater in the region of the site which may be affected by the presence of a facility should ideally not be suitable for human consumption, pastoral or agricultural use; and
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> g. the site should have suitable geochemical and geotechnical properties to inhibit migration of radionuclides and to facilitate repository operations.[18]

2.17 The code also states that 'Site selection shall include a suitable consultative process to establish public consent to the location of a disposal facility at the particular site'.[19]

2.18 Mr McIntosh noted that the *Code of Practice* has been central to the site selection process since 1992.[20] This is reflected in the regulatory regime administered by ARPANSA. Its 2006 guidance [title] states in part:

> The ARPANS Regulations also require that disposal activities are in accordance with the National Health and Medical Research Council *Code of Practice for the Near Surface Disposal of Radioactive Waste*.[21]

2.19 The Australian Radiation Protection and Nuclear Safety Regulations 1999 state:

> The holder of a source licence or a facility licence must also ensure that dealings with the disposal of controlled material and controlled apparatus are in accordance with the following Codes of Practice

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18 NHMRC's *Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia*, Radiation Health Series No. 35, 1992, ARPANSA, pp 12–13, http://www.arpansa.gov.au/pubs/rhs/rhs35.pdf (accessed 10 December 2008).

19 NHMRC's *Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia*, Radiation Health Series No. 35, 1992, ARPANSA, p. 14, http://www.arpansa.gov.au/pubs/rhs/rhs35.pdf (accessed 10 December 2008).

20 Mr McIntosh, ANSTO, correspondence to the committee, 9 December 2008.

21 ARPANSA, Regulatory Guidance for Radioactive Waste Management Facilities: Near Surface Disposal Facilities; and Storage Facilities, ARPANSA, December 2006, pp 14–15, http://www.arpansa.gov.au/pubs/waste/rwmfacilities_reg_guid.pdf (accessed 10 December 2008).

> …
>
> the *Code of Practice for the Near‐Surface Disposal of Radioactive Waste in Australia*[22]

2.20 The committee notes that this appears to indicate that a process that did not 'include a suitable consultative process to establish public consent to the location of a disposal facility at the particular site' would be inconsistent with the Code and therefore with the ARPANS Regulations.

Pressure on affected communities

2.21 The committee was made aware of the stresses already experienced by Indigenous communities affected by processes underway, or contemplated under, the current Act. The Central Land Council was asked about their role in proposing sites for a waste facility. They responded:

> … we are not about to undertake that work. We have enough things coming at us now… We have the intervention, shires and whatever else and we are now about to get hit by people wanting to talk about departing from outstations. We have enough to do on a day-to-day basis.[23]

2.22 The Public Health Association of Australia raised concerns about the health effects of the stresses arising from the existing arrangements.

> The process that has ensued from the enactment of the Commonwealth Radioactive Waste Management Act 2005 and subsequent amendments has resulted in disempowerment of, and distress for, local Aboriginal people. Central Australian Aboriginal people suffer the highest rates of chronic disease in the world. The effects of chronic stress / distress caused by such events in turn negatively impact on increased rates of chronic disease. Therefore actions such as imposing the Commonwealth Radioactive Waste Management Act 2005 and amendments undermines government Aboriginal health policy, such as the commitment to closing the gap in Aboriginal health indices and addressing health disparities.[24]

2.23 As well as these broader concerns with existing Commonwealth radioactive waste policy, submitters were critical of several specific features of the current legislation.

The Commonwealth overrules the Northern Territory

2.24 The committee heard numerous objections to the existing legislation based on the fact that it singled out the Northern Territory for special treatment, setting up site

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22 Australian Radiation Protection and Nuclear Safety Regulations 1999, Reg. 48(3).

23 Mr David Ross, Director, Central Land Council, *Proof Committee Hansard*, 17 November 2008, p. 11.

24 Health Association of Australia, *Submission* 100.

nomination processes that could only be applied in the Territory and not in other jurisdictions.

2.25 The existing law contains a number of provisions that specifically target the Northern Territory. These include:

- Nominations of sites can only come from the Northern Territory (s. 3A)
- The Commonwealth is empowered to take steps to assess the suitability of sites, including over-riding existing rights or laws, only within the Northern Territory (s. 4(2))
- The extinction of various rights and interests association with the selected site, which will only be within the Northern territory; and
- The schedule of proposed sites is confined to lands within the Northern Territory (Schedule 1).

2.26 The committee notes that not even other Commonwealth territories were placed on an even footing with the Northern Territory, let alone states. The committee was not made aware of any sound justification for the targeting of the Northern Territory to the exclusion of all other jurisdictions.

2.27 The Northern Territory government strongly objected to the existing legislation, saying:

> The Northern Territory Government contends that the provisions in the *Commonwealth Radioactive Waste management Act 2005* (the CRWM Act) that override existing laws made by the democratically elected Legislative Assembly of the Northern Territory prohibiting the transport and storage of radioactive waste (refer *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2004)*:
>
> - Are a serious erosion of the democratic rights of Territorians, and are contrary to the concept of self government;
> - Create legal uncertainty in regard to the application of Northern Territory laws; and
> - Are contrary to the principles of good governance.[25]

2.28 Numerous other submitters drew attention to the over-riding of Northern Territory laws, objecting both to the discrimination involved, as well as the fact that one of those laws in particular – the *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2004* – is intended to prevent precisely the activities envisaged under the Commonwealth's legislation.[26]

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25 NT Government, *Submission* 81, p. 3.

26 See, eg, Arid Lands Environment Centre, *Submission* 35; Environment Centre NT, *Submission* 36.

2.29 The committee believes that the targeting of one jurisdiction is inequitable. In targeting the Northern Territory the current Act is directed toward ensuring that the waste is located in the jurisdiction that has the least legal power to act in response to any concerns it has with the process. The committee understands that it is also the jurisdiction that makes the least use of one of radiation's key benefits: nuclear medicine. The committee was told that the Northern Territory has the fewest nuclear medicine procedures of any Australian jurisdiction, not only in absolute terms but on a per capita basis.[27] It also guarantees that radioactive waste will have to be transported large distances, particularly from New South Wales and South Australia, regardless of the relative merits of safety cases that might be made for sites in different jurisdictions.

2.30 One of the most disturbing features of the current legislation is that it severely curtails the role of sound science in the process of choosing a site. It abandons the Commonwealth's commitment to basing the process on the best science, in favour of basing it on choosing a location with the least legal capacity to dispute the outcome.

The existing law is procedurally unfair

2.31 The existing legislation shows complete disregard for effective policy processes and effective consultation. Amongst the most egregious examples, the current legislation:

- With regard to voluntary nominations (the Act, ss. 3A to 3D), allows the minister 'absolute discretion' to decide whether to approve nominated land as a site, but also says the minister can ignore a nomination if he or she wishes;[28]
- States that no person is entitled to procedural fairness in respect of declarations that a site is to be selected for a facility, or any extinguishment of rights associated with that declaration;[29]
- Suspends rights of review under the *Administrative Decision (Judicial Review) Act 1977*;[30]
- Prevents interested parties from exercising rights they would normally have had under the *Lands Acquisition Act 1989* and the *Native Title Act 1993*.[31]

27 Friends of the Earth Australia, *Submission* 74.

28 The Act, 3C(2).

29 The Act, ss. 3D and 8.

30 The *Commonwealth Radioactive Waste Management Legislation Amendment Act 2006*, Schedule 1, item 1.

31 The Act, s. 10(2).

2.32 Most submitters commented on these provisions, particularly those that stripped rights from Indigenous traditional owners. The ACF was typical of critics of the legislation in this regard:

> The Commonwealth Radioactive Waste Management Act 2005 (CRWMA) undermines environmental, public safety and Aboriginal heritage protections. It prevents the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 from having effect during site investigation and excludes the operation of the Native Title Act 1993.
>
> The CRWMA is in stark contrast to the accepted international (International Atomic Energy Agency, UK Commission on Radioactive Waste Management et al) acknowledgment of the profound importance of community consultation, consent and confidence in successful decision making regarding radioactive waste management.
>
> In November 2006 the Federal Government moved to further remove Indigenous community rights with a series of amendments to the CRWMA that removed the need for community consultation, informed traditional owner consent, procedural fairness and administrative review from any potential dump site that might be nominated by a NT Land Council, particularly the Northern Land Council. These amendments directly undermined the far more robust and inclusive consultation and consent provisions of the long standing Aboriginal Land Rights Act.[32]

2.33 The committee agrees that the undermining of legal rights by the current legislation is unfair and discriminatory, and should not form the foundation for any issue, including radioactive waste management.

2.34 Some submitters also suggested that the Act does not require a Land Council to conduct consultations prior to making a nomination under section 3A of the Act. They argued this because section 3A(2A) states that the validity of a nomination is not affected by whether all procedures under section 3A (including consultation processes) have been followed.[33]

2.35 The committee understands that, while the removal of procedural rights created by section 3A(2A) is to be deplored, it does not exempt Land Councils from a legal requirement to consult.[34] Nevertheless, by preventing any problems with that consultation from affecting the validity of the nomination, the Act reduces the confidence of affected parties in the process, as well as taking away rights to use legal means to ensure proper process is adhered to.

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32 ACF, *Submission* 85, p. 2.

33 See, eg, Arid Lands Environment Centre - Beyond Nuclear Initiative, *Submission* 94, p. 5; Muckaty Traditional owners opposed to the proposed radioactive waste facility, *Submission* 95, p. 4.

34 Mr Ron Levy, NLC, *Proof Committee Hansard*, 17 November 2008, p. 13.

The Muckaty Pastoral Lease site nomination

2.36 In May 2007, the Northern Land Council (NLC) facilitated a nomination of a site under sections 3A and 3B of the Act. That nomination was supported by some Ngapa traditional owners of land that is managed through the Muckaty Land Trust. At the time, traditional owner Amy Lauder explained why she put forward the nomination:

> First, we want to create a future for our children with education, jobs and funds for our outstation at Muckaty Station and transport.
>
> Secondly, we have been to Lucas Heights and accept that the waste facility will be safe for the environment.
>
> Thirdly, our decision will help all people in Australia – because all Australians benefit from nuclear medicine which saves lives.[35]

2.37 The nomination was approved by a meeting of the Northern Land Council in May 2007, and was accepted by the Minister for Education, Science and Training in September 2007.[36] The nomination was supported by a confidential anthropological report, prepared by three anthropological consultants to the NLC. This report was important to the debate amongst submitters and is discussed below.

2.38 In June 2007 a site nomination deed was signed between the Commonwealth, the NLC and the Muckaty Land Trust,[37] agreeing to a process for the site nomination and a schedule of payments, totalling $11 million in a charitable trust plus $1 million in education scholarships.[38] The first payments have been made under this contract. The site remains under consideration by the government, which is currently engaged in a process of assessing the nominated site, along with three others listed in the schedule to the Act.

Muckaty Land Trust traditional owners have differing views

2.39 The NLC was concerned to ensure, should the existing legislation be repealed, that the nomination of the Muckaty site would stand:

> The NLC would only support repeal of the Act if it is replaced by appropriate laws which both preserve the Ngapa clan's rights regarding its existing nomination under the Act, and which enable traditional owners of other land to facilitate development of their country for a radioactive waste

35 Cited in NLC, *Submission* 96, p. 4.

36 The Hon Julie Bishop MP, 'Approval of radioactive waste facility nomination', *Media Release*, 27 September 2007.

37 Mr Patrick Davoren, DRET, *Proof Committee Hansard*, 28 November 2008, p. 38.

38 NLC, *Submission* 96, p. 4; Mr Patrick Davoren, DRET, *Proof Committee Hansard*, 28 November 2008, p. 44.

> facility if they wish - provided that the environment and sacred sites are protected.[39]

2.40 The committee received evidence from many groups, including some of the traditional owners of land at Muckaty, critical of the nomination and of the process that led to it. Ms Stokes, one of the traditional owners at Muckaty, said:

> I would like to talk about the waste dump and my people, the traditional elders I have brought from Tennant Creek. We have come because we have said no to the waste dump. We are the main Warlmanpa tribe. I have brought some Ngapa people also who are against the waste dump. I talk to my people about the waste dump all the time, and every time I do they say that it is not good to have a waste dump on our land. We are finding it hard. We want some people to listen to us. Some of the traditional owners, the elders of the Warlmanpa tribe, which is the main tribe in that country, are sick and very worried because they just want to say no to the waste dump.[40]

2.41 The criticisms of the Muckaty site nomination put to the committee were based on two related points. The first was that the nomination was not legitimate because most Indigenous traditional owners of the Muckaty Pastoral Lease were opposed to having a radioactive waste facility in the region. The second, related, criticism disputed the adequacy of consultation processes surrounding the nomination. There were, for example, claims that people had not been notified of, or were not able to participate in, discussions leading up to a nomination; and that documents were unavailable for examination.

2.42 The committee tested these issues in questions to the Northern Land Council and other parties during hearings, as well as receiving supplementary submissions on this subject.

The nomination: who speaks for the country?

2.43 The nomination of the Muckaty site was made by the Northern Land Council on behalf of one group of traditional owners of the Muckaty lands, the Ngapa clan. Some evidence to the committee implied that this nomination process was open to question, suggesting that there are doubts about whether the waste facility proposal has support from all the relevant traditional owners.

2.44 This issue goes to the question of who speaks for the country on which it is proposed to site the facility. This is a matter of Indigenous rights and traditional law. The Committee is not competent to deal with the anthropology that goes to the question of who has decision-making responsibility for particular areas of country within the area held by the Muckaty Land Trust. The committee does however make the following observations.

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39 NLC, *Submission* 96, p. 2.

40 Ms Dianne Stokes, Muckaty traditional owner, *Proof Committee Hansard*, 17 November 2008, p. 1.

2.45 The recognition of Indigenous land rights over the Muckaty Pastoral Lease was founded on the 1997 report of the Aboriginal Land Commissioner, a copy of which was provided to the committee. This report identified Aboriginal clans with responsibility for the lands covered by the Lease, and delineates some of the traditional law and dreamings that links those clans to sites in the region.

2.46 The committee was provided with a map showing the location of the proposed waste facility in relation to sites mentioned in the Land Commissioner's Report. As the traditional owners opposed to the facility pointed out, some of these sites close to the proposed facility are not Ngapa sites:

> Murunju-Mantangi (66) is recognised as a Yapayapa site;
>
> Karakara (51) is recognised as a Yapayapa site;
>
> Lungkarta (50) is recognised as a Ngarrka site;
>
> Karntawarralki (74) is recognised as a Milwayi site; and
>
> The unnamed site (109) is recognised as a Ngarrka site.[41]

2.47 The traditional owners opposed to the facility suggested the Land Commissioner's 1997 report implies doubt over whether the facility is located on Ngapa land. The Muckaty Land Trust traditional owners who are opposed to the waste facility argued:

> The anthropological report referred to provides an inconsistent view to that as set out and found after extensive hearings of the 1997 Land Commissioners Report… No evidence has been provided to the committee concerning this purported anthropological study to date. No anthropologists have made submissions on behalf of the Northern Land Council at any of the hearings and to date no such report has been viewed by the Committee. In the event that such evidence is provided however, it ought have little to no weight as it has not been tested nor has any party had an opportunity to respond to the matters raised therein. In any event, the comprehensive findings concerning sacred sites at Muckaty within the 1997 Land Commissioners Report following extensive hearings must be considered as the best evidence and authority on this issue. The 1997 Land Commissioners report must prevail.[42]

2.48 This argument relies on the suggestion that, because some sacred sites in the vicinity of the proposed waste facility are associated with other clan groups, this calls into question the identification of the traditional owners of the land. However, the committee notes that the Land Commissioner's report set out the distinctive nature of Ngapa responsibilities in the area, including the overlapping nature of sites and

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41 Muckaty Traditional owners opposed to the proposed radioactive waste facility, *Submission* 95A.

42 Muckaty Traditional owners opposed to the proposed radioactive waste facility, *Submission* 95A.

responsibilities for country. The Land Commissioner's report described the system of affiliations and responsibility in general terms:

> The areas on which the separate groups focus are not necessarily completely separate. As is the case with Aboriginal 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. Sharply defined boundaries between the estates of different groups are unusual in such circumstances. There is a tendency for different groups to share some sites, with a consequential 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 unclear into the estate of which group it falls…
>
> The major dreamings involved in the present claim are travelling dreamings, some of which travel over quite long distances. Different parts of the tracks followed by dreamings belong to different people. A group will have responsibility for a defined part of dreaming track. The sites along that part of the track and the country surrounding them will belong to that group…[43]

2.49 The Commissioner then turned to the nature of the Ngapa claim:

> The principal dreaming of the Ngapa group is the Ngapa, or rain, dreaming. In this case, the dreaming travels from its originating site at Kuntalymiri, well off the claim area to the south, to Purnarrapan (site 48), at Renner Springs [well north of the Muckaty station and proposed waste facility area]. In doing so it crosses the claimed land in a broad swath. It extends as far west as Minji (site 28), just south of the southern border of the claim area, Julypungali (site 19), which it shares with other dreamings, notably Japurla-japurla… and Puyarrinyku (site 43). Its eastern sites within the claim area are intermingled and sometimes shared with Milwayi. Its southernmost site on the claim area, Murlurrparta (site 46), is shared with Ngarrka and Japurla-japurla.[44]

2.50 The committee cannot comment on the specific anthropological evidence in relation to country within the bounds of the proposed facility: none of the specific sites discussed by the Land Commissioner in 1997 lie within the proposed facility's boundaries. However, the Commissioner's description of the relationship of clans to country in this region generally, and of the Ngapa's relationship to their country in particular, indicates that the Ngapa have wide ranging responsibilities for country across the Muckaty Pastoral Lease, including in the area where the facility is proposed to be located. It does not seem reasonable to use the Land Commissioner's report to suggest that Ngapa clan members might *not* be responsible for the area under present discussion.

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43 Land Commissioner's Report 1997, p. 38.

44 Land Commissioner's Report 1997, p. 40.

2.51 The committee now turns to other evidence received during the inquiry. Committee members put this issue of who speaks for the country to the NLC's representatives. Mr Levy from the NLC responded:

> Senator LUDLAM—Mr Levy, I would just put to you that the support is greatly less than overwhelming in terms of the evidence that has already been put to us just so far this morning.
>
> Mr Levy—I observed the evidence and that evidence does not change my view at all. The question is always a case of anthropological advice. We had advice from three very experienced anthropologists: the NLC's then anthropology branch manager, Kim Barber, the NLC's current anthropology branch manager, Robert Graham, and Dr Brendan Corrigan. Their advice was in relation to the relevant land and the identity of the traditional Aboriginal owners, and more importantly as to the identity of how that group, within the context of a larger group of groups, makes a decision about that country. Further, the advice was in relation to the decision in relation to that country under Aboriginal tradition when there are individuals in other groups, some of whom are consenting and some of whom are not, and whether the position of individuals in other groups affects the decision of the group with ultimate authority regarding that land under Aboriginal tradition. The NLC's anthropological advice was and remains that there was overwhelming support from the group with ultimate authority under Aboriginal tradition to make decisions regarding that land.
>
> CHAIR—Mr Levy, can you just clarify if that is still the view of the Northern Land Council, that there is still majority support for your proposed site?
>
> Mr Levy—Not majority; overwhelming.[45]

2.52 Committee members sought more detail on the role of the full council of the NLC:

> Senator BIRMINGHAM—… the full council has to respect the rights of those traditional owners who have particular authority over a particular piece of land; is that correct?
>
> Mr Levy—That is right, and that is always the way full council approaches things.
>
> Senator BIRMINGHAM—The anthropological advice to which you referred in response to questioning from Senator Ludlam, was that provided verbally or in writing?
>
> Mr Levy—No, it was provided in the form of a comprehensive anthropological report required by the legislation which, under that legislation, has to be submitted to the minister in relation to the then minister's decision as to whether or not to accept the nomination.
>
> Senator BIRMINGHAM—Is that a public document?

45 *Proof Committee Hansard*, 17 November 2008, p. 14.

Mr Levy—No, it is a private document.[46]

2.53 The committee also acknowledges the supplementary submission provided by the NLC, in response to the committee's request for more detailed information, which stated:

> The NLC's anthropological advice was (and remains) that members of the Ngapa branch or group associated with the Lauder families are the traditional Aboriginal owners of the nominated site. The group is comprised by approximately 40 persons. Members of other Ngapa groups are the traditional Aboriginal owners for other land. This advice was consistent with previous consultations regarding other developments such as the Amadeus to Darwin gas pipeline in 1996, the Alice Springs to Darwin railway in 1998, and the haulage road on Muckaty Station for the Bootu Creek manganese mine in 2004 - all of which traverse the length or breadth of the station and cross the country of different traditional owning groups from whom separate consent (relating only to their respective country) was required under the Land Rights Act. This advice was also iterated during consultations with senior (and other) representatives of other Ngapa groups (and of other neighbouring groups), who confirmed that they did not have primary spiritual responsibility for the nominated site.[47]

2.54 The NLC and the Department both indicated that they were aware of the range of views of traditional owners of Muckaty. They argued, however, that the traditional owners for the specific site involved supported the facility. They also stated that, having listened to the evidence given to the committee, they were of the view that no one was contesting the right of certain Ngapa people to speak for the land on which it is proposed to place the waste facility.[48]

2.55 The committee noted the evidence of some traditional owners opposed to the radioactive waste facility. While in general, this evidence was about consultation processes, at least one traditional owner did at one point appear to question whether all relevant decision-makers had played their appropriate roles. Ms Bennett at one point said:

> The way we found out about the consultation process was wrong. If everything was open, honest and above board, why did the NLC not come down and consult with the traditional owners on their country openly and honestly? They should not have gone on to any further stage until everyone had a clear understanding of what was going on. It appears to me that two individuals, or possibly three, took it upon themselves to speak for the rest of the tribe and clans. They had no right to do that, and I will say that straight out. When the land claim was on, all the extended families that have links and connections to Muckaty were together as one. My

46 *Proof Committee Hansard*, 17 November 2008, pp 14–15.

47 NLC, *Submission* 96A, p. 6.

48 See Mr Ron Levy, NLC, *Proof Committee Hansard*, 17 November 2008, p. 14; Mr Patrick Davoren, DRET, *Proof Committee Hansard*, 28 November 2008, pp 40–41.

> grandmother walked that country the same as the rest, yet those two individuals, my cousins, chose not to involve the senior traditional owners in any discussions, and that is just down and out wrong.[49]

2.56 This statement by Ms Bennett appears to suggest the decision-making was also problematic. It certainly was suggesting that the consultation processes were deficient.

The Muckaty nomination: consultation processes

2.57 As the Land Commissioner's report showed, it is clear that clans other than the Ngapa do have responsibilities for sites and dreaming tracks close to the proposed facility site. Some members of these clans, opposed to the facility, argued they had a right to be consulted, and that the consultations that did occur were not adequate:

> Ms Bennett—I am also very disappointed in the NLC consultation process. The NLC is the Aboriginal people's voice, and they failed to represent them… I think the consultation process was very flawed and that the time for trying to pull the wool over people's eyes is past. Open and honest discussion should be happening involving all the right people, not just with certain elements of the people.[50]

2.58 The NLC insisted such consultations had taken place:

> The land council followed its usual procedures in relation to consultations. In particular when dealing with a major matter, whether it be a matter like this, a major mine or anything which has either an actual or potential physical effect regarding other people or where people are just interested in it because it is controversial, the land council always comprehensively consults. In relation to this matter, the land council did just that. Many of the people here today are people who the land council consulted with and/or was always aware of what their position was at various times. There is a range of other people who are not here that the land council consulted with. In that respect I am talking about people other than the traditional Aboriginal owners of the land. We obviously also consulted with them.
>
> The Land Rights Act and the radioactive waste act require comprehensive consultations… We consulted in relation to other land which was not Ngapa land and we were not satisfied in relation to that land that the relevant traditional owners were consenting or were likely to consent. In relation to those sorts of matters, we obviously did not pursue them. But, in relation to this particular land, we were satisfied there was overwhelming support for a nomination after doing the comprehensive consultations.[51]

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49 Ms Marlene Bennett, Muckaty traditional owner, *Proof Committee Hansard*, 17 November 2008, p. 2.

50 Ms Marlene Bennett, Muckaty traditional owner, *Proof Committee Hansard*, 17 November 2008, p. 3.

51 Mr Ron Levy, Northern Land Council, *Proof Committee Hansard*, 17 November 2008, p. 14.

2.59 Following the hearings held by the committee, the NLC responded on this issue in more detail. The NLC outlined the history of the Muckaty nomination, the meetings it held with various groups of traditional owners, and visits involving the Commonwealth, both of traditional owners to the Lucas Heights reactor facility, and of Commonwealth officers to the Muckaty Pastoral Lease.[52]

The committee's view

2.60 The committee is aware from its evidence, both in written submissions and at hearings, that there is division amongst the Indigenous owners of the Muckaty Land Trust. In these circumstances the absence of rights to procedural fairness is of particular concern. The committee believes it is vital that consultations and decision-making processes reflect the interests that all clan groups have in the immediate area.

2.61 The committee understands the need to maintain the confidential status of anthropological information in certain circumstances. It appreciated the cooperation of the NLC and the Department in ensuring that information was provided to the committee in relation to that report, while protecting sensitive information not needed by the committee. It notes claims made by some affected parties that they should have had the opportunity to test claims made in the anthropological report, but that such an opportunity had not been made available to them.

2.62 The committee believes that the controversy surrounding the current Muckaty nomination, including the process of gathering and providing anthropological information, underlines the fundamentally flawed nature of the existing legislation. The subsequent lack of appeal rights available to those aggrieved by the nomination also demonstrates why the legislation is deficient.

2.63 The fact that the Muckaty nomination remains current is in itself a cause of community concern which overlays discussion about the future appropriate management of Australia's radioactive waste.

2.64 The committee also recognises there are contractual arrangements existing between the Commonwealth, the Northern Land Council and the Muckaty Land Trust that have been respected.

Recommendation 1

2.65 Noting there is a current nomination put forward by some Ngapa traditional owners seeking to have a facility sited on their country, the committee recommends that with regard to this nomination the process from this point forward should comply with the *Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia*. The process should:

- **Not rely on the suspension by the current Act of any of the procedural rights of other interested parties; and**

52 NLC, *Submission* 96A, pp 67.

- **Not proceed any further until those pieces of Commonwealth legislation suspended from operation by the Commonwealth Radioactive Waste Management Act again apply.**

Waste minimisation and the Lucas Heights reactor

2.66 In the course of this inquiry, some witnesses argued that Australia does not need a research reactor in order to supply medical isotopes. This was generally made as part of a case for waste minimisation. Waste minimisation is a strategy which the committee generally supports.

2.67 The Medical Association for the Prevention of War (MAPW) released a study in 2004, arguing against continuing to operate a research reactor in Australia for the purposes of nuclear medicine.[53] MAPW argued that Australia should import medical radioisotopes, support innovation in medical technologies such as expansion of positron emission tomography, and support research into non-reactor production of the most important radioisotope in this field, Technetium 99m.

2.68 Without wishing to get into the detail of this debate, the committee does note that there are some issues with the approach of ceasing to operate a research reactor as a source of medical radioisotopes. First, while there may be many nuclear reactors around the world, the IAEA has pointed out that there are very few that produce the material used in most nuclear medicine, technetium 99m:

> Just five research reactors produce most of worldwide demand for molybdenum 99, from which technetium 99m is fabricated. These are the High Flux Reactor in Petten, the Netherlands; BR2 at Mol in Belgium; Osiris at Saclay, France; NRU at Chalk River, Canada; and the Safari-1 at Pelindaba, South Africa. These facilities range in age from 42 to 51 years. A sixth reactor, Australia's recently constructed OPAL at Lucas Heights, is expected to commence molybdenum 99 production soon. Two research reactors in Canada – each dedicated to isotope production and expected to produce enough molybdenum to account for the bulk of global supply – were recently cancelled due to technical challenges.[54]

2.69 This was underlined during hearings, with ANSTO representatives commenting about how Australia managed for isotopes during a reactor shutdown:

> Mr McIntosh—We were able to rely upon a good relationship with the South Africans, but the South African Safari reactor is around 45 years old. Clearly being able to rely on the South Africans for much longer is not a tenable state of affairs. We have been lucky.[55]

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53 MAPW, *A New Clear Direction: Securing Nuclear Medicine for the Next Generation*, 2004, tabled by ACF, Canberra public hearing, 28 November 2008.

54 IAEA, Addressing the Global Shortage of Beneficial Radiation Sources, 4 November 2008, http://www.iaea.org/NewsCenter/News/2008/resreactors.html (accessed 25 November 2008).

55 Mr Steven McIntosh, ANSTO, *Proof Committee Hansard*, 28 November 2008, p. 17.

2.70 MAPW conceded that importation of radioisotopes would be necessary were Australia not to operate a research reactor.[56] However, as Mr Gerry Wood MLA argued, stopping Australian isotope production does not solve the nuclear waste problem, it just moves it to another country.[57] If we import our radioisotopes, we are leaving another country with the nuclear waste associated with Australia's nuclear medicine. International cooperation to minimise the number of operating research reactors may be sensible; as a policy principle for deciding whether Australia should be one of the countries that hosts such a reactor, this is not a helpful argument.

56 MAPW, *A New Clear Direction: Securing Nuclear Medicine for the Next Generation*, 2004, p. 11.

57 Mr Gerry Wood MLA, *Proof Committee Hansard*, 18 November 2008, p. 17.