Chapter 2

Opposition, Australian Democrats and Greens Report

2.1 Senators in these non-government parties oppose the Commonwealth Radioactive Waste Management Amendment Bill 2006 (CRWM Amendment Bill). Their principal objection is to the purpose of the bill, which is to remove the rights of traditional owners to appeal against the arbitrary decisions of land councils and the Minister in regard to the use of land for the storage of nuclear waste. The bill amends current provisions in the act which make it mandatory for land councils to consult and receive consent from traditional owners about the intended uses of their land. This is justified on the grounds that consultation processes, and any subsequent appeals, would result in delay to site declaration. According to the bill, appeals that are 'politically motivated', are undeserving of the usual right to judicial review.

2.2 Opposition and Democrats and Greens Party senators also object to the haste with which this legislation has been brought before the Parliament, and the inadequate time given to the committee to conduct its inquiry. The Opposition members of the committee made similar objections a year ago when it dealt in haste with the original bill. On neither occasion has the committee had the opportunity to visit the Northern Territory to gauge local opinion or to inform itself about the complex issues beneath the government's policy gloss.

2.3 This haste would be less of a problem if the government was prepared to be more transparent in its consultation and policy-making processes. The very opposite approach has been evident from the paucity of information offered by the Science Group in the Department of Education, Science and Training (DEST). It was capricious of the government to first refer the bill to the committee, and thereafter deny its members the opportunity of exploring the policy origins and ramifications of the bill. It was disingenuous of the Science Group officials who fronted the committee to maintain that details of their meetings with land councils and traditional owners could not be disclosed on the grounds that they were 'commercial-in-confidence'. The committee was given no reason for how this could be so. It presumably relates to a financial transaction of some kind but there is no provision for this in the bill and officers denied that they were empowered to discuss financial considerations for site nominations.

Background to the amendment

2.4 As the Opposition noted in its previous report on the 2005 bill, the Government abandoned its previously bipartisan approach to selecting a site for a nuclear waste dump. The pursuit of scientific rigour gave way to political expediency. The difficulty of negotiating a suitable site in South Australia led to what was clearly an easier option, constitutionally, of selecting three former defence sites in the Northern Territory.

2.5 Amendments to the bill made after the committee reported allowed land councils and the Chief Minister of the Northern Territory to nominate sites for assessment as a radioactive waste dump on land which they controlled.. It is noteworthy that the Commonwealth Radioactive Waste Management Act, as amended during its passage, restored the statutory right provisions similar to those applying under the Lands Rights Act.

2.6 It is widely believed that Muckaty station is the site most likely to be nominated by the Northern Land Council. Muckaty station is north of Tennant Creek and within the NLC boundary. A Muckaty nomination is considered likely because it is more suitable as a waste site than the former defence sites in that it is close to the railway line, with a spur constructed for use by a local mine and it is a more stable area geologically, being distant from surface or underground water.

2.7 The committee was assured that no nomination had yet been made and DEST would not confirm reported sightings of DEST officers and anthropologists at Muckaty Station.

2.8 Labor and other Senators were concerned that DEST was unwilling to provide advice as to the speculation about Muckaty Station having been assessed, citing an agreement with the NLC. A DEST official advised the committee:

> Yes, we agreed to keep confidential any correspondence and discussions with the Northern Land Council prior to any nomination coming forward.[1]

2.9 The response of traditional owners and others associated with Muckaty presented the government with a challenge under the original legislation. Section 3B1 of the Act provides that for land to be nominated for assessment by a land council, there must be demonstrated evidence of consultation with traditional owners; evidence that the traditional owners understand the nomination, and that they have consented as a group; and, that any community or group that may be affected has been consulted and had adequate opportunity to express its view. Failure to follow these procedures would render the nomination void.

2.10 It appears likely that these legislative amendments which the Government says are urgently required, are to overcome the opposition to this nomination by traditional owners of the Mukaty Station site who reside within the adjacent Central Land Council's jurisdiction. It may also be relevant that the DEST contract awarded to Parsons Brinckerhoff to survey nominated sites and to advise on which was most suitable will shortly expire.

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1 Ms Jessie Borthwick, *Committee Hansard,* 27 November 2006, p. 22. A copy of the letter from the NLC to DEST requesting this confidentiality was later made available to the committee.

The Government's 'remedy'

2.11 New sub-clause 3B(2A) says *Failure to comply with subsection (1) does not affect the validity of a nomination*, thus removing the following conditions in the Act for a nomination to be valid:

- consult the traditional owners
- have regard to the interests of traditional owners
- not take action without the consent of traditional owners
- ensure that traditional owners understand any proposal
- ensure any affected Aboriginal community has expressed its views, and
- comply with traditional decision making processes. (Central Land Council submission)

2.12 The committee is advised that such a drafting device is uncommon and normally used in cases where there are exceptions to the rule. Used here it is an invitation to ignore the provisions of the original Act, weakening Indigenous land rights, as the Central Land Council stated in its submission:

> Removing the need to comply with the procedures for consultation laid down in Waste Law 1 is the most problematic for traditional owners because it is these procedures for consultation which allow them to have their say. Not having to comply with them would necessarily *repeal* the consultation provisions under sections 23 and 77A of the Land Rights Act and sections 203BC and 251B of the Native Title Act to the extent they apply to site nomination.[2]

2.13 Opposition and other senators deplore both the substance of the amendment and its clumsy drafting. The committee received no satisfactory explanation from DEST officials about why this drafting convention was used rather than the repeal of clearly superseded paragraphs.

2.14 Senators opposed to the legislation note the strong support given to the legislation by the Northern Land Council, and its submission in favour of new provisions in clause 5 in respect to the non-binding rules of nominations. This stance conflicts with a resolution passed in October 2005 by the full council of the NLC. It approved the NLC's continued discussions with the government on a possible nomination, provided that traditional owners of the site agreed, and that the nominations did not interfere with heritage and sacred sites, environmental protection, or lead to the extinguishment of native title without consent of traditional owners. (we

2 Central Land Council, *Submission 56*, p. 2

need to reference this) The NLC's submission is a repudiation of its full council's resolutions of a year ago.

2.15 In her second reading speech, the Minister asks the Parliament to be reassured saying:

> Current provision of the Act set down a number of criteria that should be met if a land council decided to make a nomination. Importantly, these criteria include that the owners of the land in question have understood the proposal and have consented to the nomination, and that other Aboriginal communities with an interest in the land have also been consulted….I can assure the House that, should a nomination be made, I will only accept it if satisfied that these criteria have been met.[3]

2.16 Opposition and other senators consider that the Minister's intent should be reflected in the legislation and not rely on assurances in the second reading speech.

Consultation over Muckaty

2.17 The committee was assured that the Muckaty Station site had not been nominated, and that no consultation has been conducted. The Chairman of the NLC did however report that the NLC had conducted an educational program of visits to Lucas Heights for Traditional Owners. Evidence was also given to the committee of widespread opposition to a site at Muckaty and of letters to the NLC expressing this opposition. [4]

2.18 The committee heard that invitations from traditional owners to the NLC leaders to talk to them about the Muckaty speculation received no response.[5] Opposition and other senators presume that the reason for this bill lies in the extent of this opposition, and the likely determination of a large proportion of traditional owners to take advantage of the due processes of review that the current act provides.

Removal of judicial review

2.19 In the second significant amendment - the removal of judicial review - Opposition and other senators deplore the erosion of administrative and judicial safeguards against the arbitrary powers of governments. The current Act removed procedural fairness, giving the minister unfettered discretion over decisions. This bill extends this to exclude the entitlement to the right to judicial review under the *Administrative Decisions (Judicial Review) Act 1989* in relation to site nominations.

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3 The Hon. Julie Bishop MP, Minister for Science, *House of Representatives Hansard*, 2 November 2006, p. 1

4 Mr Elliot McAdam, *Committee Hansard*, 27 November 2006, p. 7

5 ibid. p. 9

2.20 The Minister explained in her second reading speech that this was intended to prevent 'politically motivated' challenges to land council nominations. As the Minister told the House of Representatives, the government will not accept what she describes as 'speculative' legal challenges intended to delay the establishment of waste facilities.[6]

2.21 Officers of DEST were unable to provide the committee with definitions of 'politically motivated' challenges. Further reference is made to this at para.2.25.

2.22 Mr David Ross, Director, Central Land Council said:

> ….it also talks very clearly about the ability of the Commonwealth to do what it wants to do in regard to – I think I mentioned it earlier – what it considers to be politically motivated challenges. I think the real issue here is that Aboriginal people are not interested in the politically motivated challenges; they are interested in their rights and in being consulted about what is to take place or what is not to take place on their land. That is what interests Aboriginal people more than anything else.

2.23 The Human Rights and Equal Opportunities Commission has pointed out that the effects go further than this.

> They prevent legitimate challenges to a nomination based on grounds such as a denial of procedural fairness or other grounds of judicial review such as bias, bad faith, fraud or lack of evidence.[7]

Return of land

2.24 The Government has declared that it will not be returning a dirty or polluted site to a land trust, and so the bill provides that the return will not be made unless the independent regulator has approved the site as safe. As this is not likely to occur for a century or longer, this reassurance is easy to give now. The bill does not make it mandatory for a government to hand back the land, and there is some doubt as to whether these provisions are legally necessary because the land could be handed back under provisions of the Land Rights Act. Opposition and other senators speculate that these provisions may be inserted to protect the Northern Land Council from criticism that it is conceding hard-won rights of traditional ownership.

A note on the evidence of officials

2.25 Opposition, Democrat and Green senators take strong exception to the use by the government of the term 'politically motivated' as a pejorative description of what is a normal exercise of democratic rights through review processes. For this reason they

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6 The Hon. Julie Bishop MP, Minister for Science, *House of Representatives Hansard*, 2 November 2006, p. 1

7 Human Rights and Equal Opportunities Commission, *Submission 63*, p. 9

sought advice from officials on the meaning of this term in the context of the bill. Senators were not impressed by the failure of Science Group officials to explain what the government might mean in its use of this term. If this terminology indicates an important policy motivation, then it ought to be capable of explanation by those officials whose task it is to administer policy. The committee is always careful to avoid putting officials in the position of commenting on policy, but they are expected to be able to explain it. On this matter, and on the matter referred to earlier of the peculiar drafting of sub-clause 3B(2A), which required no more than an explanation of drafting conventions and the citing of precedents, the answers given by officials were evasive and unsatisfactory. Despite the presence of four officials at the table, the quality of information offered was below that which would normally be expected of departmental officials appearing before the committee.

A connection with the impending nuclear energy debate

2.26 This bill raises issues which may well affect people in the major population centres within a few years. Nuclear waste is currently regarded as a remote issue, both in time and distance. But the issues of consultation, judicial review and ministerial discretion will be fought out on a much more crowded centre stage in any forthcoming push for nuclear energy generation. Future governments will have pause to ponder the question of rights of people affected by nearby power plants, and in this case it is unlikely that there will be an opportunity to exploit a convenient political division in order to secure approval for a nuclear building program. Opposition, Democrat and Green senators suggest that mishandling of sensitive issues, as we have seen in this bill, gives little encouragement that anything better could be expected of any future conservative government in developing a nuclear energy program.

Recommendation

Opposition, Australian Democrat and Greens senators recommend that this bill not proceed.

Senator Gavin Marshall **Senator Lyn Allison** **Senator Christine Milne**

Deputy Chair