Dissenting Report by Australian Greens

Introduction

1.1 This deeply flawed Bill has been strongly criticised throughout this inquiry by the majority of submitters, and has no place on the Australian statute books. It is the view of the Australian Greens that it should not proceed.

1.2 Much of the evidence and the majority of submissions made to this inquiry registered deep disappointment that Resources Minister Martin Ferguson has reversed ALP policy and broken an explicit 2007 election promise on the most appropriate way to handle Australia's nuclear waste.

1.3 The Australian Greens share this disappointment because on nuclear waste policy our parties shared some common ground on the objective of: 'establish[ing] a consensual process of site selection, which looks to agreed scientific grounds for determining suitability and the centrality of community consultation and support.'[1]

1.4 The government has not delivered on the spirit or letter of this promise through this legislation. Instead it has set itself up for a divisive and entirely avoidable confrontation with a community unwilling to host the nation's radioactive waste. The government should take time to seriously consider the criticism and amendments offered by other parties, as well as senior members of its own party.

1.5 The legislation should be rejected on four grounds:

a) **An inadequate framework**, for managing radioactive waste, most notably the lack of procedural fairness or avenues for judicial review.

b) **Wholesale overriding of State and Territory laws**, suspension of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, exclusion of the Native Title Act 1993 and suspension of the Judicial Review Act is alarming and heavy handed.

c) **Failure to uphold international best practice** particularly in relation to securing social licence and community acceptance of a radioactive waste facility.

d) **Excessive discretionary power given to a Minister operating with an absolute minimum of transparency**, and the withholding of key documents.

1.6 After some introductory comments on the Committee's report, followed by a recent history of this legislation, this dissenting report will provide detail on these four grounds for rejecting the National Radioactive Waste Management Bill 2010.

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1 Statement by Shadow Science Minister, Senator Kim Carr, 27 September 2007.

The Committee's Report

1.7 Senate Committee process for reviewing legislation is a very important mechanism in the creation of Australian law because it provides an opportunity for experts and public opinion to register concern. Very often, Senate Committee processes are opportunities for legislation to be improved, particularly when the government actually wants legislation to be improved.

1.8 This Senate Committee report is imbalanced. Significant effort and investment was made in generating draft language suggestions and argumentation for the Committee to consider in order to address this imbalance. All but two typos and the deletion of 6 words were rejected with no explanation or opportunity for discussion, which is why I am appending my detailed contribution to this report.

The road to Muckaty

1.9 The government's handling of this legislation has been characterised by two years of delay, followed by extreme haste.

1.10 The ALP expressed outrage when Prime Minister John Howard rammed the much criticised Commonwealth Radioactive Waste Management Act (CRWMA) through the Senate in a matter of hours. At that time, the ALP called Howard's legislation 'extreme, arrogant, heavy-handed, draconian, sorry, sordid, extraordinary and profoundly shameful,' and promised to repeal it.

1.11 The ALP also opposed the Howard Government's 2006 amendments to the CRWMA which made it possible for a land council to nominate a site for a radioactive waste dump, which led directly to the nomination of a site on Muckaty Station, 120km north of Tennant Creek.

1.12 The CRWMA is now cited in legal textbooks as a case study of defective legislation.[2]

1.13 After winning Government, Prime Minister Kevin Rudd took the regrettable decision to transfer responsibility for radioactive waste management out of the science portfolio and into the resources portfolio, held by Minister Martin Ferguson. In the absence of the necessary background, expertise or willingness to follow through with the ALP's election commitments, the matter lapsed for several months.

1.14 In 2008, a government-dominated Senate Environment, Communications and the Arts Committee reported on an Australian Greens bill to repeal the CRWMA. It found that the CRWMA legislation was unfair and discriminatory, that consultations and decision making processes should reflect the interests of all clan groups in the

2 Australian Policy Handbook, cited in Mr. Dave Sweeney's evidence provided to the Committee hearing held 30 March 2010, p. 41.

immediate area, that a new foundation for building Australia's nuclear waste policy was needed, and that the legislation should be repealed.

1.15 The Senate Committee stated, '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.'

1.16 After two years of stubborn silence and repeated calls on the government to uphold its election promise to repeal it, Minister Martin Ferguson eventually introduced virtual duplicate legislation which preserves the Muckaty nomination and introduces total Ministerial discretion over site selection.

1.17 This Bill was tabled in late February 2010, with the government proposing 11 working days in which to conduct an inquiry which would limit itself to legal and constitutional issues only.

1.18 After a demand from the Australian Greens for a credible deadline the Committee was eventually given more time to conduct this inquiry and issue this report.

1.19 It is extremely regrettable that the Committee refused to visit the proposed dump site, Tennant Creek or the Barkly region, despite the specific targeting of this area in the legislation.

The Muckaty Nomination

1.20 While its advocates frequently use the phrase 'international best practice', the government's approach fails many of these principles and basic standards, and ignores strong cautions arising from overseas experience.

1.21 One example is the UK Committee on Radioactive Waste Management's statement that, 'There is a growing recognition that it is not ethically acceptable for a society to impose a radioactive waste facility on an unwilling community.'

1.22 Instead, our government seeks to pass legislation that will allow precisely this to occur, to the people of the Barkly region north of Tennant Creek.

1.23 Muckaty Station exists on a floodplain and is an area of high seismic activity and great natural beauty. The ALP Member for Barkley, Gerry McCarthy offered to show the Committee:

> ...some of the best cattle country in the world, lands that are traversed by Indigenous and non-Indigenous people regularly, a site that has great water potential from aquifer sources, a site that has excellent grassland, a site that has an annual fire history and a site that, from 1998, has had a significant seismological history. It is a very habitable place. It is a very beautiful place.

1.24 When in Opposition, NT Senator Crossin stated that these lands in the Northern Territory are 'connected to indigenous people through their spirituality, so it's not exactly our land, I don't believe, to play around with.' She was right. The proposed dump site near Tennant Creek in the Northern Territory, the only option currently under consideration, is immediately adjacent to a sacred Milwayi men's site known as at Karakara.[3]

1.25 Senator Crossin also observed that the Howard government gave itself powers to, 'pretty much do what it wants and it seems like the interests of Aboriginal people here again are going to be denied.' Again, she was right.

1.26 A significant number of Aboriginal people with traditional obligations to the lands in question do not believe their views are being accurately represented by the statutory authority that has governance over their lands, the Northern Land Council. Their repeated and eloquent invitations for Minister Ferguson to visit their land have been ignored, over a period of several years. In one letter to the Minister which was subsequently tabled in Parliament, they state:

> …we want to see each other face to face where we can have a few questions to ask why you are not listening to the biggest forum of people… We want you to know that Traditional Owners are waiting to show you that the country means something to them. That is why we want you to come along and to see because we don't want that rubbish dump to be here in Muckaty area.

1.27 The people who signed this letter are from families listed in the 1997 Land Commissioners report that established the Muckaty Land Trust.

1.28 The 2008 Senate Inquiry into this matter elaborated at length on the importance of the Land Commissioners report because it granted title to five groups jointly, due the clearly interconnected ownership of the land and the overlapping dreaming shared by the Milwayi, Yapayapa, Ngarrka, Winrtiku and Ngapa people.

1.29 Stephen Leonard who made a submission for and on behalf of the Muckaty Traditional Owners emphasised the importance of this document:

> In 1997, after hearing years of tested evidence in a transparent and objective tribunal framework, the Aboriginal Land Commission found that there was clearly joint and interconnected 'ownership' between the five main groups in the Muckaty Land Trust where dreaming overlapped. This was a core reason why a single Land Trust was granted. Furthermore the Report clearly indicated that the nominated site was jointly 'owned' by at least 3 to 5 groups, the Milwayi, Yapayapa, Ngarrka and perhaps the Winrtiku and Ngapa.

1.30 The basis upon which the Muckaty Land Trust was established clearly recognised overlapping and group responsibilities for this country.

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3 Submission from Stephen Leonard, lawyer representing Muckaty Traditional Owners.

1.31 The current process isolates a number of people as the exclusive 'owners' in the white sense of having a title deed, imposing a framework which is convenient from a 'divide and rule' perspective but at odds with the way Aboriginal people approached land ownership under traditional law. In evidence to the committee, the Australian Public Health Association pointed out the health implications of this kind of divisive strategy.[4]

1.32 Consultants engaged by the NLC have produced a confidential anthropological report. The government refuses to table this document in the Senate, and is currently resisting producing it pursuant to my request under Freedom of Information laws. The Northern Land Council rests its entire case on this document but refuses to reveal it, even to other members of the Muckaty Land Trust whose country it concerns and whose family names are likely cited.

1.33 The Australian Greens do not support continued consideration of the Muckaty nomination, and believed it should be immediately withdrawn from the site selection process.

a) An inadequate framework

1.34 Considering this bill establishes the framework for the management of Australia's most dangerous industrial wastes for the next three hundred years, it is a breathtakingly flawed piece of legislation. The ANU's James Prest summarised the legislation accurately in his submission to the committee:

> …the re-instatement of procedural fairness and judicial review rights proposed by the Bill is so very tightly constrained and limited by other provisions to the extent that the re-instatement exercises threatens to become largely symbolic and illusory, if not misleading and deceptive.

1.35 **The Bill currently lacks an objects clause**, commonly included in legislation 'to guide decision makers in the event of statutory ambiguity and secondly, assisting courts and tribunals in the same situation if there is a problem with statutory ambiguity,' according to the evidence provided by ANU Lecturer Dr. James Prest. The Greens welcome the Committee has called for an objects clause to be inserted

1.36 **The Bill currently lacks detail about how this project will be financed over a period of several hundred year**s. The Bill as is, 'does not set out a framework for the future financial implications of running this facility, other than to essentially rely upon the Commonwealth to underwrite and provide appropriations.'[5]

1.37 **The Bill in no way restores procedural fairness to the process of selecting the Muckaty site**. Legal experts who provided evidence to the committee characterised this Bill as one that 'shifted the goalposts to essentially move the normal

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4 http://www.aph.gov.au/hansard/senate/commttee/S12917.pdf

5 Dr. Prest evidence given 30 March 2010, p 35.

apparatus of environmental law to one side and impose a special legislative regime for the approval of a particular project.' Such laws necessarily reduce or remove the common law concept that accords procedural fairness where an administrative decision affects rights, interests and legitimate expectations of affected persons.

1.38 Despite the words 'procedural fairness' being used repeatedly, the Bill does not reinstate procedural fairness, and the Muckaty nomination is insulated from it. As lawyers from the Northern Territory EDO stated:

> The claim that procedural fairness is reinstated is an intentional nonsense…

1.39 In the context of this uniquely defective piece of legislation, the term 'procedural fairness' is interpreted to mean the ability to make a submission to the Minister which he is then free to ignore, as the following exchange during the committee's hearings on 30 April established:

> **Senator TROOD**—So, if a decision were made to proceed with the Muckaty Station site, does this bill provide any more procedural fairness in relation to that site than was in the previous bill?
>
> **Mr Davoren**—I think it does in that the minister is obliged to accept submissions on decisions relating to that site. There was no such opportunity under the previous act.
>
> **Senator TROOD**—But he is not obliged to do anything other than receive those submissions, is he?
>
> **Mr Davoren**—And consider them.
>
> **Senator TROOD**—But that could be a two-minute exercise. He is not required to take evidence about them; he is not required to explore them. As your answers to Senator Ludlam made clear, he is not required to assess those submissions in relation to any particular criteria that this bill now provides that were not in the previous bill, is he?
>
> **Mr Davoren**—No, he is not.
>
> **Senator TROOD**—So the essence of the case for procedural fairness in relation to what is the preferred site is that the minister is required to receive submissions. Is that it?
>
> **Mr Davoren**—That is what I understand.

1.40 There are no rights for persons other than those 'with an interest in the land' to make a submission. It is likely that people will miss notification of the submission , given there is no requirement for any details to be provided in the notification that would identify what it is actually about in plain language. Forcing submissions to be made in writing is extremely prejudicial to Aboriginal people, and since there are no objectives or criteria in the Act, and nothing to guide the Minister's decision, it is impossible for a person to know what to make a submission about.

1.41 There is no right for a person to see information on which the Minister will base his decision (eg anthropological reports and evidence from Land Councils as to

compliance with the Aboriginal Land Rights Act), and in particular there is no right to see information adverse to a particular person's interests.

1.42 The Minister is free to literally make the decision on the flip of a coin if he chooses: nothing in this bill is designed to prevent the kind of entirely arbitrary decision making that seems to be Minister Ferguson's preferred mode of operation.

Judicial review

1.43 The claim that 'judicial review' is reinstated is misleading, as the Bill continues the intentional design feature of the 2005 Act in ensuring there are no grounds on which a judicial review can be based, and no access to information on which to base a review.

1.44 Access to judicial review depends in part on criteria against which to judge whether the Minister has upheld his or her obligations. As the committee established during the hearing on March 30:

> **Senator LUDLAM**—...My understanding of administrative law is that the minister's decision-making will be benchmarked against the criteria that are set, but you have just acknowledged that there are no criteria, so what form of review will be possible in that instance? On what grounds could you bring a claim that the minister did not do what he was supposed to do?
>
> **Mr Davoren**—There is the opportunity for people to give their views on the adequacy of the site.
>
> **Senator LUDLAM**—You cannot go into court with a view. If it is a judicial review you are seeking, you
>
> need to say the minister did not do what he should have done, but you have just said that there are not any criteria to guide him.
>
> **Mr Davoren**—No. The minister has to make a decision about whether to select the site and then proceed with its assessment.
>
> **Senator LUDLAM**—There is not really any process at all, is there, of actual site selection.

Recommendation 1

Procedural fairness and judicial review must be restored to the Muckaty Land Trust nomination.

b) Overriding State and Territory Laws

1.45 Legal experts have cautioned against the Commonwealth arbitrarily stripping powers from the States and Territories by suspending the application of all state and territory laws, environment protection and regulations, Aboriginal heritage laws, as well as health and safety standards. The Northern Territory Chief Minister and his government are firmly opposed, noting the obvious flaws in the Commonwealth's

strategy of suspending the operation of laws designed to safeguard public health, heritage and the environment.

1.46 Given there will be insufficient Commonwealth controls, personnel or infrastructure in any remote area dump, suspending the body of law designed to safeguard the public and the environment is simply dangerous and jettisons long established regulatory frameworks and standards for the protection of public health, the labour force, the environment, heritage, the receiving community and people along the transport corridor. It fails to take into consideration the fact that State or Territory emergency service personnel and infrastructure will be needed should an accident or incident arise, and that nuclear waste will be transported past the doors of many Australian homes, often on roads prone to accidents and extreme weather conditions, particularly flooding.

1.47 In their submission, lawyers from the Northern Territory EDO cautioned against excluding all laws which merely regulate or inhibit a radioactive waste dump, arguing that the Bill should be changed to ensure that State and Territory laws apply so as to assist to manage the environmental impacts and risks as thoroughly as possible. The EDO stressed the absurdity of suspending particularly any regulation of the transport of radioactive waste.

1.48 The EDO also pointed out the inadequacy of the Commonwealth laws that are being left in operation under this legislation – in particular the EPBC Act and the ARPANS Acts are frameworks that have *not* been designed to address the types of environmental, economic and social risks posed by a radioactive waste facility and associated activities it entails. The operation of the EPBC is flawed according to the Australian National Audit Office and the Hawke Review. It only relates to 'likely significant impacts on the environment' on a national scale, implying a reduced concern about local or regional impacts, economic of social impacts.

1.49 The ARPANS Act is based on the existence of complementary State and Territory regulation, and is not able to address issues not directly related to radioactivity. As the NT EDO stated:

> It is hypocritical to say that the ARPNS Act is a rigorous regime, when the core requirements of the ARPNS Act contained in the Code for Waste Disposal are for the site to be strategically selected from a range of options based on science – which has been effectively prevented by the 2010 Bill. This makes one of the main strengths of the ARPNS Act framework completely defunct.

1.50 The EDO noted the effect of the Commonwealths constitutional immunities and land acquisition to not limit the purported limits on the type or source of radioactive waste in the 2010 Bill's definition of facility'.

Recommendation 2

The Bill should be amended to ensure that State and Territory laws apply so as to assist to manage the environmental impacts and risks as thoroughly as possible.

c) International Best Practice

1.51 The Committee was provided a briefing in answer to questions on notice posed by Senator Feeney which described the international frameworks, best practice standards and details about the UK, Swedish and Hungarian case studies.

1.52 It is very difficult to miss the emphasis placed by the IAEA, by the OECD Nuclear Energy Agency, International Commission on Radiological Protection, EU, the UK and the Japanese on winning public confidence and obtaining social licence and community consent for the siting of radioactive waste facilities.

1.53 Australia is either a member of these institutions and treaties, or we have strong relationships with these countries considered to be like-minded on many fronts, which it makes it all the more regrettable that Australia is lagging behind on this aspect of international best practice.

1.54 The phrase 'international best practices' is used frequently by supporters of this legislation, but it appears to be very little understood. Certainly it was difficult to find an agency prepared to speak about the Australian government's understanding of internationally regarded principles on transparency, community participation, and stakeholder involvement in the decision making around nuclear waste.

1.55 ANSTO claimed, 'we are not experts on those matters…in the areas of public consultation on the matters that relate to this.' That is, despite ANSTO's CEO being ' charged with responsibility to take into account best international practice.'

1.56 **The UN Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Managem**ent – to which Australia is party – notes that 'public consultation on radioactive waste management strategies was not only a good practice to follow, but was also essential for the development of a successful and sustainable policy.'

1.57 **The IAEA** in 2007 noted examples of states which, having used undemocratic methods lacking public involvement and acceptance, have 'had to reconsider their programs'. One of the conclusions of the study was that 'reassessment can become necessary because past decisions were not reached through socially acceptable process.'[6]

6 IAEA, Factors Affecting Puablic and Political Acceptance for the Implementation of Geological Disposal (IAEA-TECDOC-1566) Vienna, October 2007.

1.58 According to the IAEA, there is a need for, 'a clear legal framework; a strong independent regulatory function; competent license or operators; clear lines of responsibility and accountability; public involvement in the decision making process; adequate financial provisions; clear, integrated, plans on how spent fuel and radioactive waste will be managed to ensure continued safety into the future, and as this could be for decades, to avoid creating a legacy situation that would impose undue burden on future generations…'[7]

1.59 **The OECD Nuclear Energy Agency** recognises that, 'the public, and especially the local public, are not willing to commit irreversibly to technical choices on which they have insufficient understanding and control'.

1.60 The Nuclear Energy Agency's report on the *Decommissioning and Dismantling of Nuclear Facilities, Status, Approaches, Challenges* stated, 'It is openly accepted that openness and transparency are essential for the winning of public approval…The local public is increasingly demanding to be involved in such planning and this may accelerate the introduction of concepts such as 'stepwise decision making'. The challenge for the future, therefore, will be satisfactory development of systems of consulting the public, and local communities in particular, and the creation of sources of information in which the public can have full confidence.'

1.61 **The European Union** requires member states to adhere to certain social principles in terms of site selection. The European Union *Inventory of Best Practice in the Decommissioning of Nuclear Installations*, 30 June 2006 concluded, 'Final waste repositories must be sited where local communities are willing to give their consent to these facilities for many generations. Experience has shown that, without this consent the project will sooner or later be cancelled, stopped or indefinitely delayed – one way or the other. Therefore siting must focus on three key issues: the safety of the repository system; the impact on local image and socio-economy, the importance of public acceptance and how it can be reached.'

1.62 **The UK Committee on Radioactive Waste Management** sets out a very detailed set of recommendations on how to proceed with the siting of a radioactive waste facility.

> *Recommendation 11:* Willingness to participate should be supported by the provision of community packages that are designed both to facilitate participation in the short term and to ensure that a radioactive waste facility is acceptable to the host community in the long term. Participation should be based on the expectation that the well-being of the community will be enhanced.

7 IAEA, The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management – Summary Report First Review Meeting of the Contracting Parties Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 24 December 1997.

> *Recommendation 12*: Experience from the UK and abroad clearly demonstrates the failure of earlier 'top down' mechanisms (often referred to as Decide-Announce-Defend) to implement long-term waste management facilities. It is generally considered that a voluntary process is essential to ensure equity, efficiency and the likelihood of successfully completing the process. There is a growing recognition that it is not ethically acceptable for a society to impose a radioactive waste facility on an unwilling community.'

Recommendation 3

Establishment of Commission with its first task to conduct an inventory of international best practices to be used in the Australian context.

d) Total ministerial discretion

1.63 It is difficult to recall a piece of legislation that vests so much control in the hands of a single Minister. To be specific:

- the decision as to whether the Muckaty nomination proceeds is entirely in the hands of the Minister and no rights of appeal apply.
- no written criteria exist against which the Minister is to judge the suitability of the Muckaty site.
- No timeline exists on which the Minister is required to consider evidence or make a decision.
- no statement of reasons for the decision is required by the Minister there is no obligation to publish a list or summary of submissions received.

1.64 Sections 8 (1) and 13 (2) confer absolute discretion upon the minister to make key approvals and declarations without being required to take any criteria or other matters into account in approving a state nomination or selecting a site.

Recommendation 4

That the legislation be amended to provide clear guidelines, timelines, consultation obligations and reporting obligations on the Minister before the process of site assessment proceeds any further.

Scope of this inquiry

1.65 This inquiry sought opinions only on matters of legal and constitutional significance, intentionally sidelining the wide community interest in environmental, social, technical and ethical dimensions of the Government's policy.

1.66 This intentional narrowing of the terms of reference of the inquiry means that this report is silent on the most obvious question of all: why the Australian Government is so determined to place radioactive waste at a central 'remote' site.

1.67 The answer was provided most accurately by former Science Minister Brendan Nelson, who in 2005 asked 'why on earth can't people in the middle of nowhere have low level and intermediate level waste?' His successor in the Science portfolio, Julie Bishop, noted that all the sites on the Government's shortlist were 'some distance from any form of civilisation.'

1.68 It has been a profound shock to many supporters of the Australian Labor Party that coercive attempts to dump radioactive waste out in 'terra nullius' did not end with the election of the Rudd Government, but have in fact picked up exactly where the former Government left off. This government opened his first term with an apology. If this legislation is allowed to proceed, it will close his first term owing another apology to Aboriginal Australians.

1.69 The report of this committee has ignored the findings of the previous ECA committee report into the repeal of the CRWMA, which did take the time to investigate issues beyond a narrow constitutional focus. In evidence given in 2008, both ANSTO and the scientific peak body FASTS acknowledged that politics, not science or some vague notion of international best practice was driving the Government to dump waste in regional communities:

> **Mr McIntosh**—We cannot really comment upon that policy process. We understand, and I know that you say to leave politics aside, but politics frankly was the determining factor.
>
> ...
>
> **CHAIR**—So then why does Australia mainly look at remote sites?
>
> **Mr McIntosh**—I believe it is for political reasons, Senator.[8]
>
> …
>
> **Mr Smith**—It would appear to be that politically the pragmatics seem to be that that is the only viable site at the moment that I am aware of for a Commonwealth facility.

1.70 When questioned on the feasibility of returning the reprocessed spent fuel to the Lucas Heights facility in Sydney, ANSTO acknowledged that there were no technical barriers to doing so.

> **Senator LUDLAM**—....Can you turn to the question of the spent fuel or the reprocessed material that is to be returned from overseas. What would be the constraints on ANSTO should that material be returned to Lucas Heights rather than to a remote dump? What would you need to provide on-site?
>
> **Mr McIntosh**—We would have to build a facility similar in nature to the proposed store for the Commonwealth facility.

8 McINTOSH, Mr Steven, Senior Adviser, Government Liaison, Australian Nuclear Science and Technology Organisation.

Senator LUDLAM—Is there anything technical preventing that from occurring, leaving politics to one side?

Mr McIntosh—No.

Senator LUDLAM—Has ANSTO or any other agency ever done a full assessment of what that would look like?

Mr McIntosh—No. There is been a full assessment done of what it would look like at the Commonwealth site, and presumably it would look the same, but we have not done any planning for such an action on-site because we have been told by government—and at the end of the day we are directed by government—that this waste will not be returning to our site. Why would we waste resources planning for something we have been told will not happen?[9]

1.71 In additional comments to the 2008 report, I wrote the following:

The Greens do not believe that the nuclear industry – in Australia and around the world – has ever demonstrated that remote dumps are the most appropriate solution for the disposal of radioactive waste. At some time in the future this may become the case – if the industry is able to demonstrate, for example, that the waste can be safely contained for the long time periods in question.

However, for as long as the industry is unable to demonstrate that it has found a safe way of guaranteeing safe isolation of radioactive waste for tens of thousands of years, the Greens believe the material should remain on-site, close to the point of production, where it can be monitored, re-packaged as necessary, and subjected to as little transport and movement as possible.

This option essentially allows for the greatest future flexibility, and does not foreclose potential future management options which may arise as waste management technologies evolve (for example through synroc, nanotechnology, transmutation or some other technique).

This is not necessarily an argument for the long-term 'disposal' of this waste at the Lucas Heights facility either; ANSTO has acknowledged that the feasibility of this option has never been evaluated.

The essential point is that whatever process arises from the current debate over the repeal of the CRWMA, it should not simply repeat the mistakes of the past in proceeding to the foregone conclusion that a remote community will one day host a radioactive waste dump, and that it's simply a question of whom. A much broader field of options must be assessed, leaving open the possibility that in the light of a properly constituted deliberative process, the decision may be taken to forestall final 'disposal' until such time as the industry can prove such a facility will be safe.

9 McINTOSH, Mr Steven, Senior Adviser, Government Liaison, Australian Nuclear Science and Technology Organisation.

Nothing has happened since that time to change this view, apart from an obvious entrenchment of the Rudd Government's determination to repeat the divisive and failure-prone strategies of the past.

It is not scientific or engineering best practice lining up Muckaty station and its custodians for radioactive waste, but a more predatory political calculation. It is a strategy that could not have been better calibrated to spark determined opposition from people with nowhere else to go, who were not asked and did not consent to hosting this toxic intergenerational memorial site. Behind them has arisen a much broader coalition of Australians with a more fair-minded idea of what constitutes regional economic development. The Rudd Government will stand condemned for attempting this strategy of overruling a community when the basic outlines of a workable approach were laid out in the findings of the 2008 Senate inquiry.

There is still time for the Rudd Government to reconsider whether it wants the Muckaty campaign to end up in textbooks as a bruising example of 'world's worst practice' in radioactive waste management.

Senator Scott Ludlam

Australian Greens

APPENDIX 1 - Australian Greens

Timeline

In December 2005 the Howard Government passed the *Commonwealth Radioactive Waste Management Act* (CRWMA) through the Senate, overriding relevant NT legislation prohibiting radioactive waste dumping and identifying three sites for a proposed national waste dump. The legislation prevented the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 from having effect during investigation of potential dump sites, and it excluded the Native Title Act 1993 from operating at all. Procedural fairness was also extremely curtailed through the suspension of the Judicial Review Act.

In 2006 amendments were made to allow the act to override the Aboriginal Land Rights Act procedures requiring informed consent from all affected people and groups. These changes explicitly stated that site nominations from Land Councils are valid even in the absence of consultation with and consent from traditional owners.

On 6 March 2007, a media statement from Kim Carr, Trish Crossin and Warren Snowdon committed Federal Labor to:

- Legislate to restore transparency, accountability and procedural fairness including the right of access to appeal mechanisms in any decisions in relation the sighting of any nuclear waste facilities;
- Ensure that any proposal for the siting of a nuclear waste facility on Aboriginal Land in the Northern Territory would adhere to the requirements that exist under the Aboriginal Land Rights, Northern Territory Act (ALRA);
- Restore the balance and, pending contractual obligation, will not proceed with the establishment of a nuclear waste facility on or off Aboriginal land until the rights removed by the Howard government are restored and a proper and agreed site selection process is carried out; and
- Not arbitrarily impose a nuclear waste facility without agreement on any community, anywhere in Australia.

At the 45th ALP National Conference held 31 July – 2 August 2007 the ALP policy platform was agreed in Chapter 5 to:

- Repeal the Commonwealth Radioactive Waste Management Act 2005;
- Establish a process for identifying suitable sites that is scientific, transparent, accountable, fair and allows access to appeal mechanisms;
- Ensure full community consultation in radioactive waste decision-making processes; and
- Commit to international best practice scientific processes to underpin Australia's radioactive waste management, including transportation and storage.

In September 2007, under the amended process, Muckaty, 120 km north of Tennant Creek, was nominated by the Northern Land Council. The site was added to the short-list of potential sites, when former Science Minister Julie Bishop accepted the contentious nomination.

On 27 September 2007 then Shadow Science Minister, Senator Kim Carr, stated**:** 'Labor is committed to repealing the Commonwealth Radioactive Waste Management Act and establishing a consensual process of site selection. Labor's process will look to agreed scientific grounds for determining suitability. Community consultation and support will be central to our approach.'

December 2007 Minister Ferguson given portfolio carriage of this issue – no reason was given to explain the first ever shift by any federal government of this portfolio area from Science to Resources

February 2008, Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

In September 2008, Senator Ludlam tabled the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008 which was referred to an Inquiry of the Environment, Communication and the Arts Committee that received 103 submissions and held hearings in Canberra and Alice Springs.

October 2008, Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

In December 2008 the government dominated Committee reported exposing the extraordinarily coercive nature of the legislation, its deficiencies and consequences, the Committee has recommended that this discriminatory and flawed legislation be repealed in the first few Parliamentary sitting weeks of 2009. The Committee has also outlined an entirely new approach to finding a solution to this complex and long standing problem, a process founded on rigorous consultation, voluntary consent, environmental credibility, and which utilises best practice models tested internationally.

17 February 2009 the government votes against a motion in the Senate calling for repeal of the commonwealth Radioactive Waste Management Act and for implementation of the Senate Committee's recommendations and ALP policy.

12 May 2009 the government votes against a motion in the Senate calling for repeal of the commonwealth Radioactive Waste Management Act and for implementation of ALP policy.

2 June 2009 Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

January 2010 – Greens initiate Freedom of Information request for the secret anthropology report, Parsons Brinkerhoff reports and all correspondence and evidence of consultation relating to the Muckaty nomination

Feb 2010 Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

25 February 2010 – Government introduces National Radioactive Waste Management Bill, referred to Committee for reporting 30 April.

3 March 2010 – Senator Ludlam addresses public meeting in Tennant Creek with TOs, local business people, ALP reps and pastoralists; strong community opposition registered.

15 March 2010 – Greens order for production of documents forces government to hand over the technical surveys conducted by Parsons Brinkerhoff, including the final report submitted to the department on 18 March 2009 and several peer reviewed reports.

Easter 2010 – Greens attend Easter gathering in Tennant Creek, 300 strong demonstration, support legal consultation and challenge work begins.

12 April large presence at Darwin Senate Inquiry Hearing

APPENDIX 2 – Australian Greens

Efforts to address this imbalanced report

Senate Committee processes provide an important opportunity for legislation to be improved, and in many cases improvement does occur as a result of input from stakeholders and experts.

This is not one of those occasions. This report presents an unbalanced and closed-minded justification for a foregone conclusion. Significant effort and investment was made in generating draft language suggestions and argumentation for the Committee to consider in order to address this imbalance.

All but two typos and the deletion of 6 words were rejected with no explanation or opportunity for discussion. For this reason I am appending my detailed contribution to this report.

Recommendations:

Recommendation 3: The committee recommendations that proposed sections 9 and 17 of the Bill be amended to require the Minister ~~to respond in writing to~~ take into accounts comments received in accordance with the Bill's procedural fairness requirements.

Recommendation 4: The committee recommends that the ~~Explanatory Memorandum~~ Bill be amended to include ~~a detailed rationale for, and explanation of,~~ a set of objectives and criteria to guide the Minister's ~~absolute~~ discretion in relation to decision making under this Bill.

This recommendation is so weak as to be redundant. Instead of a justification for absolute Ministerial discretion in the Explanatory Memorandum, which is of extremely limited value to anyone, the Committee should argue for a simple set of objectives and measurable requirements to guide the Minister. Given minimal standards in legislation around significantly less toxic or volatile materials routinely elaborates such guidance and standards of accountability, it's absurd for the Committee to arrive at

Chapter 1

- The initial section identified as 'Purpose of the Bill' also combines some aspects of what goes often into Committee reports as a 'Referral to the Committee' section.

- I see some utility in separating out these two aspects and request that a Referral to the Committee section come first, incorporating paragraphs 1.22, 1.23 and 1.24 followed by a 'Purpose of the Bill' section that starts with current para 1.3 and adds the following additional paragraph containing factual purpose elements, drawn from the Bills Digest description of the Purpose of the Bill.

New paragraph suggestion: The Bill provides legislative authority to undertake the various activities associated with the proposed facility and overrides or restricts the application of all State, Territory laws that might hinder the facility's development and operation. The Bill will restore some review rights and procedural fairness rights to the decision making process for future site selection, with these rights not applying to a pre-existing nomination. Unlike the current Act, the Bill also allows for a site to be selected outside the Northern Territory.

Para 1.23 A citation here should be to the ALP National Platform, and given that it is referred to various times in the report, the full policy should be provided to readers either in the text or a footnote.

Insert text suggestion: 'Labor is committed to a responsible, mature and international best practice approach to radioactive waste management in Australia. Accordingly, a Federal Labor Government will:

· not proceed with the development of any of the current sites identified by the Howard Government in the Northern Territory, if no contracts have been entered into for those sites.

· repeal the Commonwealth Radioactive Waste Management Act 2005.

· establish a process for identifying suitable sites that is scientific, transparent, accountable, fair and allows access to appeal mechanisms. …

· ensure full community consultation in radioactive waste decision-making processes.

· commit to international best practice scientific processes to underpin Australia's radioactive waste management, including transportation and storage.

(ALP National Platform 2007, Chapter 5)

- 1.25 This is simply an insufficient recounting of a robust Senate Inquiry process, especially when this Committee is making recommendations that run quite counter to its findings. There should be a paragraph addressing that. After this para I request that the four recommendations be duplicated in full (text provided below) or at least a summary of the findings should be cited, such as

- **Suggested summary paragraph**' The government led Senate Environment, Communications and the Arts Committee found that Howard's legislation was unfair and discriminatory, that consultations and decision making processes should reflect the interests of all clan groups in the immediate area, that a new foundation for building Australia's nuclear waste policy was needed, and that Howards legislation should be repealed. The Senate Committee stated, '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.'

- para 3.19 please provide a figure for the total amount of pro forma letters received

Chapter 2

- 2.4 – 2.5. These two paragraphs do not adequately cover the subject heading. A fuller explanation of the implications is needed. My suggestion is that we take what is currently in brackets in 2.4 and make it into a stand alone sentence with the implications spelled out.

- **Suggested text:** This site was nominated and approved under the current Act in 2007 which did prevent the act of nomination itself, in addition to the Minister's decisions about such nominations, being subject to procedural fairness or legal challenge on the basis of absence of voluntary informed consent.

- 2.9 A fuller explanation of the implications is needed.

Suggested additional sentence for end of paragraph 2.9: However, he is not required to assess those submissions in relation to any particular criteria. (Quote from Senator Trood, Hansard p. 10)

Chapter 3

- 3.8 A lengthy but selective quote is taken from the Land Commissioner's report, but not the key finding of the Land Commissioner that the Land Trust must be held in common by 5 groups due to interweaving and overlapping associations and responsibilities for the land. I propose we insert:

- 'Another issue as to the primacy of responsibility arises because of the overlapping of dreaming tracks. This has resulted in a considerable number of shared sites and areas of land, to be found elsewhere in this chapter. Occurrences of this kind are common in semi-arid country in Central Australia. Different groups with different dreaming will often share sites because spiritual focus often coincides with the existence of the necessities of life, especially water. In the case of shared sites of land, no single group seeks to assert its pre-eminence over another. When witnesses were asked about who should speak for particular sites which are shared by more than one group, they would invariably respond by naming the senior people from each of the groups involved. As a result, it is possible to say that the members of each of the groups related to a shared site exercise primary spiritual responsibility for that site, with none attempting to exclude any other.'

One submitter provided a description that could also suffice: 'In 1997, after hearing years of tested evidence in a transparent and objective tribunal framework, the Aboriginal Land Commission found that there was clearly joint and interconnected 'ownership' between the five main groups in the Muckaty Land Trust where dreaming overlapped. This was a core reason why a single Land Trust was granted. Furthermore the Report clearly indicated that the nominated site was jointly 'owned' by at least 3 to 5 groups, the Milwayi, Yapayapa, Ngarrka and perhaps the Winrtiku and Ngapa. ' Stephen Leonard's submission.

- 3.18 **Suggested additional sentence after Mr. Levy's quote:** Other reasons explained as contributing to this situation is that the NLC have withheld access to any anthropological or other evidence, the NLC has not provided any legal advice or support to project critics, the Muckaty site was at this stage one of four under consideration (not the sole site as it is now), and because it is very difficult to take legal action pertaining to a hypothetical scenario.

- 3.36 – **Suggested additional sentence after the quote from the Department**: Critics of the Bill asserted that retention of the contested Muckaty nomination undermines the value of the Departments emphasis on voluntarism, which is not defined in the Bill.

- 3.48 – **Suggested additional sentence after the quote from the Department**: Critics of the Bill described the Departments definition of consultation as deeply flawed, asserting that consultation should commence before site nomination, not in a partial and modular fashion after the site has been nominated.

  Significant input was provided to the Committee from environmental law experts on the weaknesses of the EPBC, and the ARPANS Act, which should be cited.

  Suggested new paragraphs after conclusion of 3.48:

  Submissions received by the Committee questioned the ability of the EPBC and the ARPANS Act to fulfil all of the functions assigned. It was noted that the principle code the ARPANS Act adopts is the *Code of Practice for the Near-surface disposal of radioactive waters in Australia (1992)* is 18 years old, with many sections not applying to the selection of Muckaty regarding seismology, water , flora or fauna, cultural or historical significance, or consultation processes. There are no basic offences under the ARPNS Act for the release of radioactive material (i.e. pollution) into the environment which provides the absolute starting point of all pollution and contamination laws. The regulatory affect of this is that, to the extent that an activity or incident is not prohibited or controlled expressly in a license issued under that Act, it is allowed to occur.

The EPBC Act was also seen by legal experts to have diminished value in regulating radioactive waste as the Act only relates to 'likely significant impacts on the environment' on a national scale, making it unconcerned about local or regional impacts, economic and social impacts, and only concerned with identifiable likely impacts at time of conceptual design, not ongoing risk or compliance management. As highlighted by the Australian National audit Office (ANAO), there are significant shortfalls in the enforcement of the Act in its early years of operation. When ANAO conducted its first audit of the Act in 2002, there had been no prosecutions under the Act. When the ANAO conducted its second audit in 2006, there had only been one successful prosecution.

Concern was also noted regarding the findings of the 2007 Audit that found, 'Implementation of the compliance and enforcement strategy has been generally slow – particularly in regard to managing compliance with conditions on approval. The department did not have sufficient information to know whether conditions on the decision are generally met or not. There has been insufficient follow up on compliance by the department for those individual or organisations subject to the Act and little effective management of the information that has been provided. Consequently, the department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective. This is not consistent with good practice and does not encourage adherence to condition set by the Minister.

- 3.50 **Suggested additional sentence:** Critics of the Bill observed that a consultative committee should acknowledge the national dimension of the issue and noted federal Labor's commitment to a national approach, which should also address the legitimate concerns of transport corridor communities.

- 3.59 **Suggested additional sentence:** Critics of this Bill and the NLC's approach to site selection argued that perpetuating the Muckaty nomination perpetuates the worst oversights in a site selection process that lacked fairness. They noted that strong community interest and the unique nature of the nations first purpose built radioactive waste facility should raise, not lower, the bar on getting the policy framework right guided by international best practice.

- 3.62 **Suggested additional sentence:** Critics of this Bill expressed concern that this requirement was far too constrained, calling for the legislation to include benchmarks and criteria against which the Minister would be required to assess submissions.

- 3.72 **Suggested additional sentence:** Critics of this Bill argued that triggering the ARPANS and EPBC Acts after site selection comes at a late stage when project momentum towards an approval is well underway. They also noted that involving ARPANSA in the site nomination process would adhere to international best practice standards.

- 3.77 **Suggested additional sentence:** Critics of the Bill, including the Central Land Council argued that that 'no invalidity' clauses put more weight on the need for industry certainty than Traditional Owner consent.

- 3.84. **Suggested additional sentence**. Critics of the Bill argued that the site nomination process continues to be at odds with international best industry practice and a range of other instruments including Article 29 of the UN Declaration on the Rights of Indigenous Peoples.

- 3.92 **Suggested additional sentence:** The ACF called for, 'a comprehensive and publicly available matrix of risks posed by the siting, construction and operation of the Facility (including the transportation of hazardous waste) and an analysis of how the laws that are saved by the Bill (including controlled facility licence conditions issued under the ARPANS Act) will address those risks in the absence of the displaced laws. Without this, affected communities cannot have confidence that the risks are adequately addressed.'

- 3.95 International best practice was discussed by many submitters, and was the subject of a paper provided to the committee in response to a question on notice. Given how much the phrase is used, I propose that the Committee's handling of international best practice be much more detailed.

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  Suggested text: The Committee was provided a briefing in answer to questions on notice posed by Senator Feeney which described the international frameworks, best practice standards and details about the UK, Swedish and Hungarian case studies.

  The UN Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management – to which Australia is party – notes that 'public consultation on radioactive waste management strategies was not only a good practice to follow, but was also an essential for the development of a successful and sustainable policy.'

  The IAEA in 2007 noted examples of states which, having used undemocratic methods lacking public involvement and acceptance, have 'had to reconsider their programs' one of the conclusions of the study was that 'reassessment can become necessary because past decisions were not reached through socially acceptable process'[10] According to the IAEA, there is a need for, 'a clear legal framework; a strong independent regulatory function; competent license or operators; clear lines of responsibility and accountability; public involvement in the decision making process; adequate financial provisions; clear, integrated, plans on how spent fuel and radioactive waste will be managed to ensure

10 IAEA, Factors Affecting Public and Political Acceptance for the Implementation of Geological Disposal (IAEA-TECDOC-1566) Vienna, October 2007.

continued safety into the future, and as this could be for decades, to avoid creating a legacy situation that would impose undue burden on future generations…'[11]

The OECD Nuclear Energy Agency recognises that, 'the public, and especially the local public, are not willing to commit irreversibly to technical choices on which they have insufficient understanding and control'. The Nuclear Energy Agency & OECD's report on the *Decommissioning and Dismantling of Nuclear Facilities, Status, Approaches, Challenges* stated, 'It is openly accepted that openness and transparency are essential for the winning of public approval…The local public is increasingly demanding to be involved in such planning and this may accelerate the introduction of concepts such as 'stepwise decision making'. The challenge for the future, therefore, will be satisfactory development of systems of consulting the public, and local communities in particular, and the creation of sources of information in which the public can have full confidence.'

The European Union requires member states to adhere to certain social principles in terms of site selection. The European Union *Inventory of Best Practice in the Decommissioning of Nuclear Installations*, 30 June 2006 concluded, 'Final waste repositories must be sited where local communities are willing to give their consent to these facilities for many generations. Experience has shown that, without this consent the project will sooner or later be cancelled, stopped or indefinitely delayed – one way or the other . Therefore siting must focus on three key issues: the safety of the repository system; the impact on local image and socio-economy, the importance of public acceptance and how it can be reached.'

The UK Committee on Radioactive Waste Management sets out a very detailed set of recommendations on how to proceed with the siting of a radioactive waste facility. Recommendation 11: Willingness to participate should be supported by the provision of community packages that are designed both to facilitate participation in the short term and to ensure that a radioactive waste facility is acceptable to the host community in the long term. Participation should be based on the expectation that the well-being of the community will be enhanced. Recommendation 12: Experience from the UK and abroad clearly demonstrates the failure of earlier 'top down' mechanisms (often referred to as Decide-Announce-Defend) to implement long-term waste management facilities. It is generally considered that a voluntary process is essential to ensure equity, efficiency and the likelihood of successfully completing the process. There is a growing recognition that it is not ethically

11 IAEA, The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management – Summary Report First Review Meeting of the Contracting Parties Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 24 December 1997.

acceptable for a society to impose a radioactive waste facility on an unwilling community.'

- 3.108 **Suggested additional sentence**: Critics of the Bill emphasised the extent to which the nomination of Muckaty fails to meet key benchmarks recognised as international best practice, and that evidence of contestation indicates that the Muckaty nomination has achieved an insufficient degree of volunteerism.

- 3.109 **Suggested additional sentence**: Critics of the Bill emphasised that science should drive the process of the best possible site selection and be given more weight than the convenience of nominations.

- 3.112 **Suggested additional sentence after the second sentence:** The committee notes criticism of the current approach particularly with regards to limited transparency and secret documents that impedes an increased understanding by key stakeholders.

  It is necessary in this paragraph to qualify the proportions of the waste arising from 'beneficial sources' such as industrial applications and nuclear medicine, and that half of the total Commonwealth proportion of waste is 2,000 cubic metres of contaminated soil from the CSIRO.

  Suggested additional sentence: The Committee notes that critics of the Bill expressed a view that there is time to improve the policy architecture given that 95% of Australia's radioactive waste is currently in secured storage at two Commonwealth sites and the portions of waste to be received from Europe (35 cubic metres) is a small amount compared to 530 cubic metres at Lucas Heights and the CSIRO's 2,000 cubic metres of contaminated soil.

- 3.113 **Suggested sentence after first sentence**: The Committee notes criticism that these standards were not upheld for the Muckaty nomination.

  Suggested sentence at the conclusion of the paragraph: The committee notes that with the exception of historic legacy wastes, all other sites currently using and storing waste will continue to do so past the development of any national facility as the sources will continue to emanate from those hospitals and labs.

- 3.114: I believe the language in this paragraph is too strong given the relative brevity of this inquiry, and the acknowledged restrictions placed by the Committee on its terms of referenced focused almost exclusively on the legal and constitutional aspects of this Bill . Given these restrictions, on what basis does the committee assert this omnibus statement?

- 3.116 There should be reference in this paragraph to the fact that this finding is contrary to the findings of the Senate Committee Environment Communications Committee.

Suggested text to be inserted after the first sentence 'While the Senate Committee Environment Communications Committee found that, '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', the Legal and Constitutional Committee notes that it's preservation was specifically requested…continue paragraph

- 3.117 Suggest striking much of the last sentence of this paragraph, The Committee acknowledges the importance of these questions. ~~and notes that the inquiry provided an opportunity for all stakeholders to put forward their views on these issues.~~

  While the Committee's process was longer than the government initially intended, the short time frame for submission was a limiting factor on all stakeholders putting forward their views. The Committee also had a restricted terms of reference to legal and constitutional issues, which was a limiting factor on all stakeholders putting forward their views. The Committee was repeatedly called to go to Tennant Creek and was unwilling to do so. Had it done so it would have helped to compensate for the fact that providing rights to Aboriginal people to be heard in written form only is prejudicial. The failure to visit Muckaty or hold a hearing in Tennant Creek reduces claims about the process engaging all stakeholders.

- 3.118 The committee notes that it did not have access to the deed of agreement relating to the Muckaty Station nomination, or to anthropological reports relating to the question of traditional ownership of that country.

- **Suggested additional sentence:** These documents have been requested through a Senate Order for the Production of Documents and an FOI request by a member of the Committee.

- Between 3.116 and 3.117 there is a leap of logic the Committee may wish to rectify in redrafting the logic of arguments presented. Given how key these documents are to establishing the extent to which the site nomination was genuinely voluntary, how then is it possible for the Committee to arrive at the conclusion expressed in 3.103 that this is a voluntary nomination? On what factual basis?

- 3.119 The committee should indicate that it intends to stand aside from these questions at an earlier stage of the report. It would be preferable and more honest for the content in 3.105 and 3.106 to appear in the 'Referral to the Committee' component of the report to flag the Committee approach is restricted to the legal components and that the Committee stands aside from making comment on Indigenous cultural practice and the adequacy consultation process.

- **If reference to legal challenge remains in this part of the report suggested additional sentence:** The committee notes that the lack of procedural fairness requirements for the existing Muckaty nomination makes any legal challenge difficult, compounded by the fact that any such challenge would be actively opposed rather than supported by the challenger's representative body, the NLC, whose strongly held position on the nomination of Muckaty makes any other 'competent' or meaningful resolution mechanism unlikely.

- 3.121. The Committee should reconsider the argumentation in defence of no invalidity clauses in this paragraph. The current language is patronising and fails to reflect the seriousness of this issue within the legal and constitutional terms of reference adopted by the Committee, or the procedural irregularities surrounding the Muckaty nomination, which amount to far more than ' a failure to adhere to mere formalities or minor aspects of process.'

- 3.128 **Suggested additional sentence:** The committee notes that recourse to an ADJR appeal after a siting decision has been made increases the burden on those opposed to the nomination than if they were able to challenge the site nomination itself.

- 3.132 **Suggested addition to second last sentence in the paragraph:** … The committee also received substantial evidence on the regulatory role and processes of ARPANSA in relation to the proposed facility, [add: although it notes objection to ARPANSA not being included at the site nomination stage].

Full text of the Recommendations of the 2008 Inquiry

Recommendation 1

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

Recommendation 2

The committee recommends that the Act be repealed and replaced with legislation founded on the principles outlined in Recommendation 3. The committee recommends that this legislation should be introduced into the Parliament in the Autumn 2009 sittings. A new policy on radioactive waste should provide a fair, transparent and

scientifically sound foundation on which Australia can conduct radioactive waste management. The committee believes that the evidence it has received, and international best practice, support several key features of this new policy approach.

Recommendation 3

The committee recommends that radioactive waste policy be placed on a new footing, relying on five key founding principles:

- It should be built on a foundation of trust through engagement with governments, stakeholders and communities;
- It should place an emphasis on voluntary engagement rather than coercion;
- It should be grounded in sound science and best technological and engineering practice;
- It should look to national solutions for national waste management challenges; and
- It should have a fair, equitable and transparent Commonwealth legislative foundation.

Recommendation 4

The committee recommends that legislation to replace the existing Act should have at least the following three key differences from the existing Act:

- It should not remove procedural rights and opportunities afforded to affected parties;
- It should not suspend the operation of relevant Commonwealth laws; and
- It should not discriminate against or target one jurisdiction over others.