

REPORT TO THE SENATE

Evidence received from the Northern Land Council in relation to the inquiry into the provisions of the National Radioactive Waste Management Bill 2010

Background

1.1 On 25 February 2010, the Senate referred the provisions of the National Radioactive Waste Management Bill 2010 (Bill) to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 15 March 2010. This reporting date was later extended to 30 April 2010.¹ On 30 April 2010, the committee tabled an interim report which noted that the committee intended to table its final report on 7 May 2010.² On 7 May 2010, the committee tabled its final report in relation to the Bill.³

1.2 As part of the inquiry, the committee received evidence from the Northern Land Council (NLC) about consultations with relevant Indigenous traditional landowners regarding land at Muckaty Station in the Northern Territory, in relation to the nomination of that land as a potential site for the Commonwealth's proposed radioactive waste facility. The NLC provided evidence (in both its submission and during the public hearing on 30 March 2010) which indicated that only one family group had rights over the land nominated for the site.⁴

1.3 The evidence received by the committee concerning the Muckaty Station site nomination reflected evidence provided by the NLC in 2008 to the (then) Senate Environment, Communications and the Arts Committee's inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008.⁵

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- 1 *Senate Hansard*, 25 February 2010, p. 1277. This extension followed a motion by Senator Scott Ludlam for a simultaneous referral of the Bill to the Senate Environment, Communications and the Arts Committee with a reporting date of 24 June 2010, *Senate Hansard*, 25 February 2010, p. 1243.
 - 2 Senate Legal and Constitutional Affairs Legislation Committee, *Interim Report: National Radioactive Waste Management Bill 2010 [Provisions]*, April 2010, available at http://www.aph.gov.au/Senate/committee/legcon_ctte/radioactivewaste/index.htm, (accessed 1 November 2011).
 - 3 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, available at http://www.aph.gov.au/Senate/committee/legcon_ctte/radioactivewaste/index.htm, (accessed 1 November 2011).
 - 4 *Submission 230*, p. 4; Mr Ron Levy, NLC, *Committee Hansard*, 30 March 2010, p. 17.
 - 5 Senate Environment, Communications and the Arts Committee, *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, December 2008, available at http://www.aph.gov.au/Senate/committee/eca_ctte/radioactive_waste/index.htm, (accessed 27 September 2011).

1.4 On 10 May 2011, Senator Scott Ludlam (Australian Greens, Western Australia) raised his concerns with the committee in relation to certain documents, sourced from the National Archives of Australia, which in his view 'revealed substantial inconsistencies' in the submission and evidence provided to the committee by the NLC in 2010.⁶ Senator Ludlam was concerned that these inconsistencies were 'so great as to potentially constitute misleading the committee'. Accordingly, Senator Ludlam requested that the committee investigate:

- a) whether the committee was misled, to the extent that the NLC's submissions are contradicted by the evidence attached;
- b) whether the NLC *knowingly* misled the Committee;
- c) if so, whether a possible contempt has been committed in that regard; and
- d) whether the matter should therefore be raised with the President as a Matter of Privilege under standing order 81.⁷

1.5 The committee considered the matter on 12 May 2011, and resolved to write to the NLC to seek clarification regarding the evidence provided to the committee during its 2010 inquiry.⁸ The NLC responded to the committee's request for clarification on 6 July 2011.⁹ The committee considered the matter again on 15 September 2011 and resolved to prepare a report for the Senate in response to Senator Ludlam's concerns.

Issues

1.6 The process of identifying an appropriate site for the disposal and storage of low and intermediate-level radioactive waste in Australia dates back to 1980.¹⁰ On 7 December 2005, the Australian Government passed the *Commonwealth Radioactive Waste Management Act 2005*, to facilitate the establishment of a low-level radioactive waste facility in the Northern Territory. This legislation was later revised to allow

6 Correspondence received from Senator Scott Ludlam dated 10 May 2011, attached at Appendix 1. The documents sourced from the National Archives of Australia are: Aboriginal Land Commissioner (ALC), *Re: Muckaty Pastoral Lease, Land Claim Number 135*, Transcript of Proceedings, 27 July 1993, p. 285; ALC, *Re: Muckaty Pastoral Lease, Land Claim Number 135*, Transcript of Proceedings, 28 July 1993, pp 325-327 and pp 332-339; ALC, *Muckaty Pastoral Lease Claim, Submissions on Behalf of the Claimants, Part 1 – Traditional Ownership and Traditional Attachment*, Northern Land Council, 1994, pp 35-36; Northern Land Council, *Anthropologist's report by Dr P. Sutton, Dr D. Nash and P. Morel*, Darwin, May 1994, pp 51-52.

7 Correspondence received from Senator Scott Ludlam dated 10 May 2011.

8 The committee's letter is attached at Appendix 2.

9 The NLC's response is attached at Appendix 3.

10 Matthew James and Ann Rann, 'Radioactive waste and spent nuclear fuel management in Australia', *Background paper*, 21 July 2011, p. 2, available at <http://www.aph.gov.au/Library/pubs/BN/sci/RadioActiveWaste.pdf>, (accessed 15 August 2011).

Indigenous Land Councils to nominate potential sites for a facility. In May 2007, the NLC, on behalf of Ngapa clan traditional owners, nominated an area 120 kilometres north of Tennant Creek on Muckaty Station in the Northern Territory. On 27 September 2007, the then Minister for Education, Science and Technology, the Hon Julie Bishop MP, accepted the nomination.

1.7 The provisions of the Bill¹¹ include the repeal and replacement of the *Commonwealth Radioactive Waste Management Act 2005*, and the restoration of some review and procedural fairness rights in the process of selecting a site for the proposed radioactive waste management facility. However, Schedule 2 of the Bill also includes a saving provision which means that, despite the repeal of the earlier legislation, the site at Muckaty Station will remain an approved site for a radioactive waste management facility.¹²

1.8 The question of whether all relevant traditional owners of Muckaty Station had been consulted about, and given their approval to, the Muckaty Station site nomination was 'a highly contested feature of submissions to the [committee's] inquiry' into the Bill.¹³ In its submission to the inquiry, the NLC noted that it had 'supported the position of Ngapa traditional owners who overwhelmingly support the nomination of their country at Muckaty Station for the Commonwealth's radioactive waste facility'. On the issue of traditional ownership of the Muckaty Station site, the NLC commented:

Although objectors claim that the nomination is highly "contested", in fact it has not been disputed that the relevant Ngapa group (associated with the Lauder families) are the traditional Aboriginal owners of the nominated land.

As explained in the NLC's supplementary submission [to the Senate Environment, Communications and the Arts Committee inquiry in 2008] but ignored by objectors, there are other Ngapa groups which are responsible for other land. Under both Aboriginal tradition and the *Aboriginal Land Rights (Northern Territory) Act 1976* (and the current legislation) those Ngapa groups, although consulted, may only make decisions regarding their country.¹⁴

11 The Bill lapsed at the end of the 42nd Parliament and was reintroduced on 21 October 2010 in the House of Representatives by the Minister for Resources, Energy and Tourism, the Hon Martin Ferguson MP. The reintroduced version of the Bill incorporates amendments recommended in the committee's majority report. This version of the Bill was passed by the House of Representatives on 22 February 2011 and is currently before the Senate.

12 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, p. 9.

13 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, p. 15.

14 *Submission 230*, pp 4-5.

1.9 At the public hearing on 30 March 2010, the issue of traditional ownership of the Muckaty Station site was also raised with the NLC. A NLC member and Ngapa traditional owner, told the committee:

I am a Ngapa traditional owner of Muckaty Station and I represent them today; I have got other traditional owners behind me. We have got custodians: our children, their children and their grandchildren and so on. We nominated our land in 2007. There are other groups in the land. We have five clan groups on Muckaty land itself, but at this time as Ngapa traditional owners we are just concentrating on our Ngapa site on Muckaty. Yes, the other clan groups have got rights to make a proposal, but it is our decision; it is our land. Ngapa is the main dreaming site on Muckaty itself. It is our decision and it is our land, so we nominated our land for the government's consideration.¹⁵

1.10 However, other perspectives on the issue of 'ownership' of the Muckaty Station site were also received in evidence and the disputed nature of this issue was reflected in the committee's conclusions:

A major area of contention in the present inquiry, and in the inquiry by the ECA committee [the Senate Environment, Communications and the Arts Committee] in 2008, is the extent to which all relevant traditional owners have been consulted over the nomination of Muckaty Station as a potential site for the waste facility. This issue also goes to the question of whether the consent to the Muckaty Station nomination was granted by traditional owners with the relevant authority to make decisions affecting, or to 'speak for', the land in question. 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.

Despite this, the evidence received by the inquiry was not sufficient to allow the committee to reach a conclusion on these matters, which, fundamentally, must be determined by information which the committee does not have access to or is not competent to assess. In particular, the committee 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.

Further, the committee does not consider that it is its role to determine whether the consultative processes around the Muckaty Station nomination were adequate or whether the approval of traditional land owners has been adequately sought according to legal and traditional requirements. These disputes revolve around issues to do with Indigenous cultural practice and its interaction with the *Aboriginal Land Rights (Northern Territory) Act 1976*. The committee believes that ultimately these matters must be resolved in a legal forum or through a mechanism that is competent to resolve such disputes between groups of traditional owners.

15 *Committee Hansard*, 30 March 2010, p. 15.

The committee notes that affected parties will have access to procedural fairness processes and to judicial review under the Bill, and there is provision for the establishment of regional consultative committees.¹⁶

1.11 On 9 May 2011, Maurice Blackburn Lawyers distributed a press release titled 'Fresh evidence boosts traditional owners legal challenge to Muckaty Station nuclear waste dump'.¹⁷ The press release referred to National Archives of Australia documents 'unearthed' by Maurice Blackburn Lawyers which provided 'compelling new evidence that the Northern Land Council (NLC) did not correctly identify and obtain consent from the traditional owners of the land before the [Muckaty Station] site was nominated'. The press release quoted Maurice Blackburn Lawyers senior associate, Mr Martin Hyde:

The Muckaty Land Claim documents obtained from the National Archives show two things: first, that the nominated site is not exclusively owned by the Lauder family, as is claimed by the NLC and, secondly, that according to the NLC's own expert anthropological evidence tendered in the Muckaty Land Claim, all Ngapa land on Muckaty Station is owned in common by three Ngapa family subgroups and that no Ngapa land on Muckaty Station is owned by one family group. There are serious questions to be answered by the NLC in light of the information contained in these documents.¹⁸

1.12 In its response to the committee's request for clarification, the NLC commented:

In summary, the material referred to in the Chair's letter and the press release from Maurice Blackburn:

- (i) was considered by the NLC in the course of the nomination, along with other material, and had been referred to in earlier submissions by the NLC to Senate Committees;
- (ii) has been available to the public for many years; it is a mistake to think that it contains new or fresh evidence about traditional Aboriginal ownership of the nominated site, and as with the earlier land claim inquiry itself, it does not deal with that question directly;

16 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, pp 39-40.

17 Maurice Blackburn Lawyers, 'Fresh evidence boosts traditional owners legal challenge to Muckaty Station nuclear waste dump', *Press Release*, 9 May 2011, available at <http://www.mauriceblackburn.com.au/news/press-releases--announcements/2011/fresh-evidence-boosts-traditional-owners-legal-challenge-to-muckaty-station-nuclear-waste-dump.aspx>, (accessed 15 August 2011).

18 Maurice Blackburn Lawyers, 'Fresh evidence boosts traditional owners legal challenge to Muckaty Station nuclear waste dump', *Press Release*, 9 May 2011, available at <http://www.mauriceblackburn.com.au/news/press-releases--announcements/2011/fresh-evidence-boosts-traditional-owners-legal-challenge-to-muckaty-station-nuclear-waste-dump.aspx>, (accessed 15 August 2011).

- (iii) does not support the proposition that one Ngapa local descent group cannot be the traditional Aboriginal owners of an area of land on Muckaty Station (or elsewhere) associated with Ngapa Dreaming.¹⁹

1.13 Further, the NLC noted that a number of different and conflicting claims have been made in the Senate about the identity of the traditional owners of the nominated site:

With respect to those making these (contradictory) claims, the question of who are the traditional Aboriginal owners of any particular area is a complex one that requires consideration of a range of material. To fasten upon any particular piece of evidence in isolation, like a sentence in the 1993 claim book, is apt to mislead.²⁰

Conclusion

1.14 The committee recognises that this matter is currently the subject of legal proceedings before the Federal Court of Australia. This was also referred to in the NLC's response, which noted in that context that '[t]he convention of the Senate is to refrain from inquiring into matters currently before the courts'.²¹ In the view of the committee, however, the current circumstances do *not* restrain the committee from examining and considering the issues raised by Senator Ludlam with respect to the NLC's evidence to the 2010 inquiry. The Senate's *sub judice* convention is a restriction which the Senate imposes on itself, and its committees, whereby debate on matters is avoided if it could involve a substantial danger of prejudice to proceedings before a court, unless there is a overriding requirement for the Senate to discuss matters of public interest.²² The purpose of the convention is to prevent prejudice to proceedings before a court, and it does not necessarily prevent matters before a court being simultaneously considered by a Senate committee.

1.15 In any event, Senate committees have a general and ongoing role to protect the integrity of their processes. Under the Senate's resolutions, witnesses appearing before Senate committees must not give any evidence which they know to be false or misleading in a material particular, or which they do not believe on reasonable grounds to be true or substantially true in every material particular.²³ In some circumstances, an omission by a witness to provide relevant information to a Senate committee could raise questions about whether a committee has been misled or false evidence has been received. In the view of the committee, however, it is difficult to reach a definitive conclusion that that has occurred in this particular case.

19 Northern Land Council, *Response to supplementary question on notice*, 6 July 2011, p. 3.

20 Northern Land Council, *Response to supplementary question on notice*, 6 July 2011, p. 5.

21 Northern Land Council, *Response to supplementary question on notice*, 6 July 2011, p. 1.

22 Harry Evans (ed), *Odgers' Australian Senate Practice*, 12th edition, 2008, p. 199.

23 Privilege Resolution 6(12)(c).

1.16 Importantly, the question of traditional ownership of the Muckaty Station site was not a focal point of the committee's inquiry into the Bill – in particular, the committee did not consider that it was its role to determine 'whether the approval of traditional land owners has been adequately sought according to legal and traditional requirements'.²⁴ The committee noted in its report that this issue 'must be determined by information which the committee does not have access to or is not competent to assess'.²⁵ While the committee's report acknowledged that it did not have access to 'anthropological reports relating to the question of traditional ownership',²⁶ the committee did not pursue those anthropological reports as part of the inquiry.

1.17 The documents referred to by Senator Ludlam may provide information relevant to the question of the identity of the traditional owners with the relevant authority to make decisions affecting, or to 'speak for', the land at the Muckaty Station site. However, these documents do not alter the committee's view, as expressed in its 2010 report, that conflicting views clearly exist regarding this issue and that 'ultimately these matters must be resolved in a legal forum or through a mechanism that is competent to resolve such disputes between groups of traditional owners'.²⁷ Accordingly, the committee cannot conclude that the evidence provided by the NLC misled its inquiry into the Bill or raises any matter of privilege for further consideration by the Senate.

Senator Trish Crossin
Chair

24 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, p. 40.

25 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, pp 39-40.

26 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, p. 40.

27 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill 2010 [Provisions]*, May 2010, p. 40.