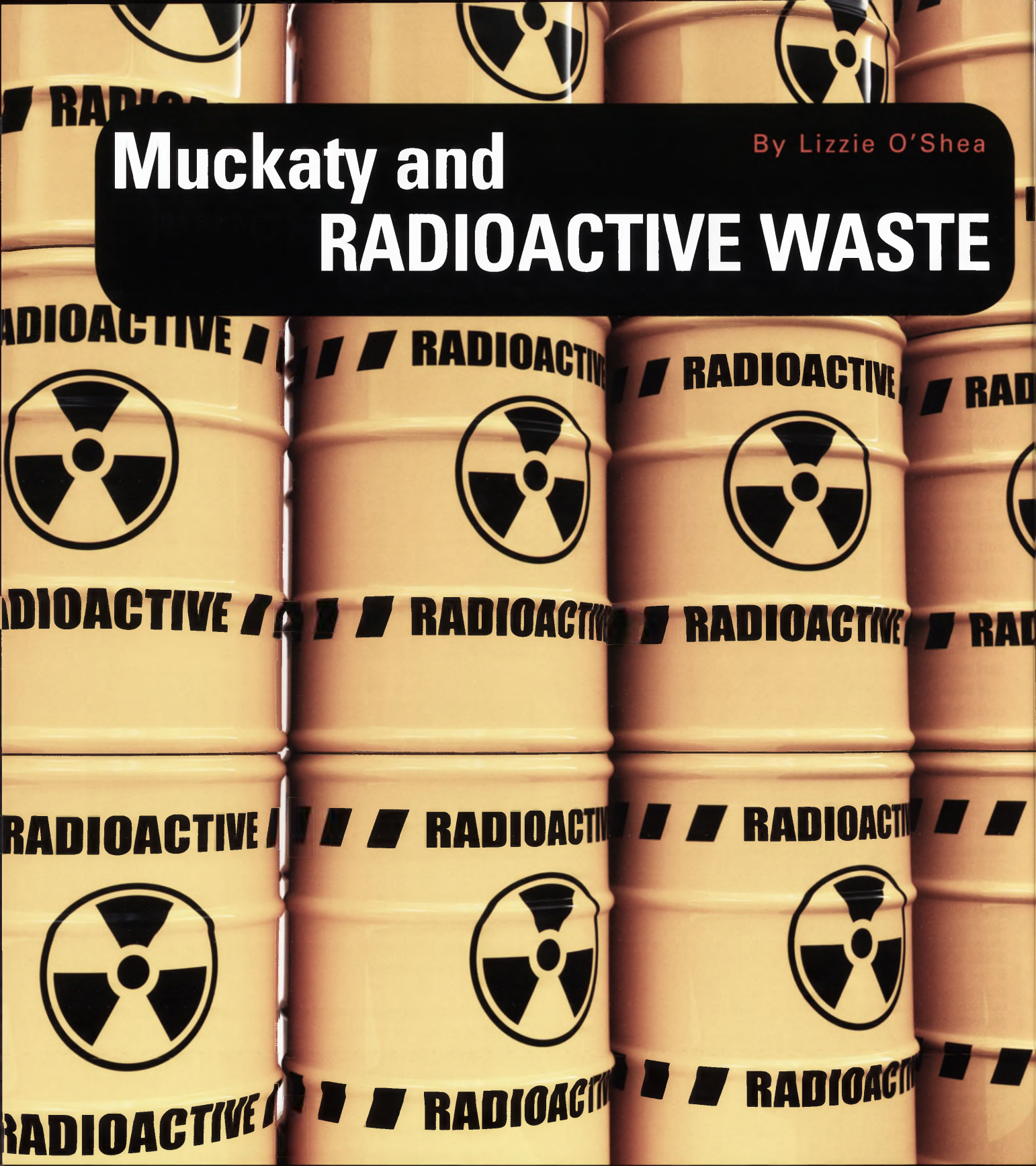
Muckaty and RADIOACTIVE WASTE

By Lizzie O'Shea



Muckaty Station is 120 kilometres north of Tennant Creek, in the semi-arid desert of Central Australia. The landscape consists of endless scrub stretching in all directions. Muckaty is also home to a precious political commodity, though it is not something that can be mined or sold. It has the inglorious privilege of having a parcel of land nominated to be the site of Australia's first radioactive waste dump.

Photo © Shutterstock.com.

For nearly three decades, various federal governments have attempted to advance the construction of such a facility. A number of sites have been considered in South Australia and the Northern Territory. Political interests prevailed in South Australia (coupled with the threat of a constitutional challenge) and focus began to shift to the Northern Territory. This culminated in the passage of the *Commonwealth Radioactive Waste Management Act* in 2005 which, at the request of the Northern Land Council, set up a process for nominating land to be the site of the dump. After a nomination, the second stage of the process is that the Minister for Resources makes a declaration that a nominated site is to be the site of the dump.

The legislation favoured nominations of Aboriginal land from Land Councils. This may seem like a form of economic benevolence (compensation would be payable to owners of the declared site), but it also looks a lot like the continuation of the great Australian political tradition of dumping difficult projects on Aboriginal land.

Muckaty currently is the only nomination but it has not yet been declared the site for the dump by the Minister. In June 2010, Mark Lane Jangala, a senior elder with traditional responsibilities for land in the area, issued proceedings alleging that the basis of this nomination was invalid. He was later joined in these proceedings by three other senior traditional elders, who have been fighting the nomination ever since.[1] Maurice Blackburn, together with Surry Partners, represents these litigants *pro bono*.

THE CONTEXT OF LAND RIGHTS

Land rights are a fascinating prism through which to consider how white and black fella law intersects and the relationship between law and politics. Plenty has been written about the history of the struggle, but it is important to provide a brief context to better understand the legal issues.

The campaign for land rights was part of a much broader campaign for Aboriginal rights and recognition, which gained significant momentum in the late 60s. Famously, in 1963, the government decided to excise a section of Yolngu land in Arnhem Land for a bauxite mine. The Yolngu from Yirrkala sent a bark petition to the House of Representatives demanding their land rights. Although unsuccessful, this put the issue on the national stage. Subsequent to this, the historic passage of the 1967 referendum, which saw Aboriginal people included in determining electorate populations, demonstrated that law reform was possible to advance the cause of Aboriginal people.

The times were changing and the political climate promised much for Aboriginal people, who had suffered under occupation without legal or political recognition of their 60,000-year history in this part of the world.

In 1973, pursuant to an election promise, Prime Minister Gough Whitlam commissioned Justice Woodward to draft a report on appropriate ways to recognise Aboriginal interests. The result was the *Aboriginal Land Rights Act (Northern Territory)* 1976 (ALRA). In many ways, ALRA is something of a visionary piece of legislation. Following Woodward's

> Justice Gray's 1997 land claim report on Muckaty is a highly significant document giving a thorough account of traditional relationships with land and between different groups of people.

recommendations, it bestows communal title on Aboriginal people which is inalienable. The right of Aboriginal people to consent or withhold consent to exploiting their property rights is a fundamental feature of the legislation.

Or course, the system of communal title according to Aboriginal tradition is not necessarily something easily accommodated by the western system of law. So in some ways, ALRA is also an emblem of political defeat. Whitlam had originally promised a policy of land rights nationally, but settled for a precedent set in the Commonwealth-controlled Northern Territory. The structure gives considerable control to Land Councils and few mechanisms for meaningful >>

resolutions of disputes. So while a land trust owns the land that is the subject of a land claim, legally it is an empty shell: it can only do things it is directed to do by the relevant Land Council. Land Councils have particular responsibilities, but this still remains a significant concentration of power in the hands of a statutory authority.

The structure of ALRA also provides that Land Councils have a statutory responsibility to assist Aboriginal people to make land claims by proving their traditional relationship to a particular area. In relation to the land in question around Muckaty Station, for example, this was a considerable undertaking. In 1991, anthropologists and lawyers from the Northern Land Council began work researching and collecting evidence on country to support the claim. This evidence was put before the Aboriginal Land Commissioner, a position held for a specific term by a judge of the Federal Court or Supreme Court of the Northern Territory – in this case, Justice Gray.

After years of extensive work, the land claim was determined in 1997 via a report by Justice Gray and his consultant anthropologists, Dr David Nash, Dr Peter Sutton and Petronella Morel. Justice Gray set out in his report his views about who had an interest in land and how those interests intersected according to Aboriginal law. As a result of this report, the land was handed back to Aboriginal people and is held by a trust – the Muckaty Land Trust. The trust is made up of Aboriginal people who hold the title of the land for the benefit of all the traditional landowners. Under ALRA, the Muckaty Land Trust is directed by the Northern Land Council.

Justice Gray found that there were seven descent groups that passed through the Muckaty Land Trust. These groups have different dreamings, including Milwayi (meaning 'two quiet snakes', who travel in a winding path), Yapayapa (meaning 'two small boys' who run in a jagged line across the area) and Ngapa (meaning 'rain' or 'water', which cuts across the land in vast swathes, like a rainstorm does). Justice Gray noted that the major dreamings involved in the land claim were travelling dreamings and that a group would have responsibility for a defined part of a dreaming track and the country surrounding that part of the track. Significantly, he noted that '[i]n the case of shared sites and land, no single group asserts its pre-eminence over the other... 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.'[2] This is understandable: in a desert climate, where resources like water are precious, there are good reasons why you make decisions in a way that ensures you get along with your neighbours.

Certainly, some traditional owners want the dump to proceed: but enthusiasm for the project from a certain section of Aboriginal people is not the test that the law requires to be satisfied.

The report of Justice Gray, like all land claim reports, is a snapshot in time, general in nature. It is not designed (nor is it able) to set out who specifically owns what and can speak for land in relation to a particular project. Nor is it timeless: ownership of land obviously changes over the years, through succession, for example. Nonetheless, it is a highly significant document: it is a thorough account of traditional relationships with land and between different groups of people. It is a key resource and the starting point for determining authority over land according to Aboriginal tradition and the nature of such authority.

In the Northern Territory, approximately 50 per cent of land has been the subject of land claims and is Aboriginal land. This reality also signifies a new phase in the history of Land Councils: away from assisting Aboriginal people to make land claims and towards helping them to exploit economic opportunities to develop this interest.

MUCKATY: THE NOMINATION

A section of the Muckaty Land Trust was nominated in May 2007 by the Northern Land Council under the *Commonwealth Radioactive Waste Management Act* 2005. It was accompanied by an anthropologists' report which set out the anthropological basis upon which the Northern Land Council claimed it had the authority to nominate the particular area of land. The nominated site sits adjacent to a sacred site which is associated with a number of dreamings, particularly for men's initiation ceremonies.

The nomination is based on anthropological material and conclusions derived from it, all of which are controversial. In short, the Northern Land Council's publicly stated position is that one sub-group of the Ngapa dreaming group are the exclusive traditional owners of the proposed site. According to the Northern Land Council, this sub-group are the only people from whom consent was required for the purposes of nominating the land and this was provided by the elders with the relevant authority.

The nomination resulted in an upfront payment of $200,000, with a promise of further compensation of around $11 million if the land is declared the site of the dump. It is perfectly understandable why Aboriginal people may be interested in a compensation package. Certainly, there are traditional owners of the land who want the dump to proceed and have actively pursued and promoted this nomination. The promise of economic opportunities is surely appealing to people who live in significant poverty. But enthusiasm for the project from a certain section of Aboriginal people is not the test that the law requires to be satisfied. Moreover, the idea that Aboriginal people must

accept a toxic waste dump on their land for hundreds of years in exchange for the funding of basic services (including the promise of education scholarships) is not something that would be acceptable in any other demographic setting.

The applicants all variously represent different dreaming groups who have an interest in the Muckaty Land Trust area. They have issued proceedings against the Northern Land Council and the Muckaty Land Trust (represented by the Northern Land Council) and the Commonwealth and the Minister for Resources (represented by the Australian Government Solicitor).[3] The applicants make a number of allegations about the conduct of these parties and, *inter alia*, seek a declaration that the nomination is invalid and to restrain the Minister from acting on the nomination. The causes of action are:

1. Misleading and deceptive conduct;
2. Breach of statutory duty;
3. Breach of fiduciary duty;
4. Improper purpose;
5. *Ultra vires* and error of law; and
6. Unlawful conduct on the part of the Minister.

The allegations all raise legal questions about the nature and extent of duties and responsibilities owed by Land Councils and the Minister to Aboriginal people.

These issues are complicated by a genuine disagreement between a range of senior elders with significant traditional responsibilities for the area. Many lawyers in the *pro bono* field can be squeamish about such political complexities; but to pretend they do not exist is to deny Aboriginal people their rights and dignity. Part of the problem is that the law does not really explain how to manage a situation like this and the effect of this is that Land Councils maintain significant influence over the outcome. No doubt this case is frustrating for Aboriginal people who want to take advantage of this significant economic opportunity, but for traditional owners of Muckaty land opposed to the dump, it is akin to a real estate agent coming in and giving your house away without obtaining your agreement first.

This case has the potential to set a benchmark for Land Councils and the Commonwealth in dealing with significant projects on Aboriginal land. It will involve evidence from expert anthropologists who presumably will consider the basic requirements for managing different interests in land, especially in contentious circumstances. But it will also involve considering other processes and duties outside of this, including due process and proper exercise of administrative powers. It is an important opportunity for the court to set minimum standards, which may end up being helpful for all parties involved.

The case has faced a number of delays to date, but it is currently expected that a trial will take place in the first half of 2014, with evidence most likely taken in Melbourne (where the case was issued) and potentially on country on Muckaty. In the interim, separate to the court proceedings, a strong and vibrant support campaign has sprung up around the Muckaty mob standing up to defend their land over the six years since the nomination. This support has come from a wide range of sources, perhaps most notably the Australian Council of Trade Unions (ACTU) and Public Health Association of Australia, which have called for an open inquiry to establish how and where radioactive waste should be stored as an alternative to the nomination. The idea is to identify how to manage this issue according to best practice, rather than political expediency.

This is a challenging case: it involves litigating against powerful respondents and representing people of limited means in a remote setting, who are trying to cope with deep divisions within their own community. But it is also an honour to be part of a case that has the potential to have a real impact on the lives of Aboriginal people. Hopefully, this case can mark the beginning of a new chapter of Australian legal and political history, characterised by genuine respect for the land rights of Aboriginal people. ■

Notes: **1** *Jangala & Ors v Cth & Ors* - VID 433 of 2010. **2** Aboriginal Land Commissioner Report for Warlmanpa (Muckaty Pastoral Lease) Land Claim No. 135, p45. **3** *Jangala,* see n1 above.

Lizzie O'Shea *is is responsible for Maurice Blackburn's Social Justice Practice which runs public interest litigation.* **PHONE** *(03) 9605 2636* **EMAIL** *O'Shea@mauriceblackburn.com.au.*