Comments on the Nuclear Fuel Cycle Royal Commission Tentative Findings of 15 February 2016

A copy of what follows has been forwarded to the Law Society Bulletin.

Consent and the Siting of a Nuclear Waste Storage Facility

By Mr John Podgorelec*, Dr Alex Wawryk and Dr Peter Burdon†

The Nuclear Fuel Cycle Royal Commission (RC) was established by the South Australian Government on 19 March 2015 to undertake "an independent and comprehensive investigation into the potential for increasing South Australia's participation in the nuclear fuel cycle." As is widely known, nuclear and radioactive wastes present risks to the community and the environment that need to be managed in order to protect health and safety.[1] Facilities for the storage of intermediate level and high level waste are thus ordinarily located away from population centres.[2] In South Australia, the site(s) most likely to be proposed for such a facility would be in remote regional areas, where the people most likely to be affected by adverse incidents, and thus who bear a higher degree of risk, are native titleholders. While outback sites have been described as "benign and sparsely populated geology",[3] an accident could have such catastrophic effects on the health and culture of native titleholders that their continued existence could be threatened.

Thus, it was acknowledged by the RC Issues Paper No. 4, that the process for selecting a site requires consultation and negotiation with landholders and holders of native title rights.[4] The Royal Commission received submissions from a number of Aboriginal representative bodies, as well as the authors of this article through the Public Law and Policy Research Unit of the Law School of the University of Adelaide ('PLPRU Submission') in relation to the following question: What are the processes that would need to be undertaken to build confidence in the community generally, or specific communities, in the design, establishment and operation of such facilities?

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* Mr Podgorelec, Legal Counsel, International Human Rights Law. Mr Podgorelec has extensive experience in the practice of international human rights law. He has practised in this field in multiple jurisdictions including Australia, the USA, the UK and Mexico.

† Dr Alex Wawryk, Senior Lecturer, Adelaide Law School; Dr Peter Burdon, Associate Professor, Adelaide Law School.

[1] Nuclear Fuels Cycle Royal Commission, *Issues Paper Four: Management, Storage, and Disposal of Nuclear and Radioactive Waste*, 9.

[2] As above.

[3] Ziggy Switkowski, 'SA's royal commission on nuclear option is well-timed', Australian Financial Review, 11 February 2015.

[4] As above n 1.

Since the release of the Royal Commission's Tentative Findings on 15 February 2016, most media attention has focused on the findings in relation to the substantial estimated economic benefits of establishing a radioactive waste facility, but the findings regarding the requirement for free, prior and informed consent have received very little public attention.

Site selection and free, prior and informed consent

Wrestling with the difficulty of site selection of nuclear waste facilities is not an uncommon problem.[5] Learning from past failures and for considerations of equity, the environment, safety and security, a common theme for the need of a "voluntary" or "consent"-based approach to siting has emerged in the international community.[6] The processes regarding consultation over a facility to store toxic waste must be done in accordance with existing and developing international legal norms, and Australia's international legal obligations. These suggest that in regard to the disposal of hazardous wastes, free, prior and informed consent is required, as articulated by the UK Committee on Radioactive Waste Management in 2006: "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."[7]

Consistent with this theme of volunteerism and consent has been the development of the right to free, prior, and informed consent (FPIC) in relation to development projects and resource extraction within the territory of indigenous peoples within international law.[8] FPIC is more than consultation.[9] Its basic principles are to "ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorisation or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.[10]

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[5] *UK Committee on Radioactive Waste Management 2006 Report,* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/294118/700_-_CoRWM_July_2006_Recommendations_to_Government_pdf; *Blue Ribbon Commission on America's Nuclear Future*, Report to the US Secretary of Energy 2012, http://energy.gov/sites/ prod/files/2013/04/f0/brc_finalreport_jan2012.pdf.

[6] Ibid 1. US report at chapter 6; UK report 114.

[7] *UK Committee on Radioactive Waste Management 2006 Report,* above n5.

[8] Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 Nw. J. Int'l Hum. Rts. 54 (2011) 54.

[9] UN Human Rights Office of the High Commissioner, *The United Nations Declaration on the Rights of Indigenous Peoples, A Manual For Human Rights Institutions,* HR/PUB/13/1, 2013, 26, http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf.

[10] Above n 3, 54; and see generally U.N. Comm'n. on Human Rights, Sub-Comm. on the *Promotion and Protection of Human Rights Working Group on Indigenous Populations, Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, para 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005) (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation).

Unfortunately, Australia does not have a good track record in adopting a consensual process of site selection for potential nuclear waste storage facilities, or ensuring community consultation and support.[11] The PLPRU Submission to the Royal Commission argued that free prior and informed consent, obtained through proper consultation procedures, is essential to ensure that the decision to build a nuclear waste storage facility in a regional area of South Australia has not been imposed upon native title holders. As is recognised by the international community, this would be unethical.

Tentative Findings of the Royal Commission

It appears the Commission has embraced the international standard of FPIC by substantially reproducing the FPIC principles set out in multiple United Nations advisory papers.[12] It is intended that these principles will be used to guide the government in its quest to obtain community consent to build a nuclear waste storage facility.

One of the Key Tentative Findings explicitly stated at the outset of its Findings in relation to 'Social and Community Consent', is that "both social and community consent **must be obtained** for any new nuclear activity to commence in South Australia" (emphasis added).[13] The Commission defines social consent to mean "obtaining broad public support culminating in legislative endorsement of an activity by the relevant parliament", whereas community consent means "informed agreement from an affected community", although "unanimity is not required".[14] These statements give the clear impression that a lack of consent should equate to a veto over the project proceeding in a community. If so, it is an unambiguous recognition of the need to obtain full and prior consent to the construction of a facility to dispose of hazardous wastes, and is not merely a right for communities to be consulted.

While the principle sounds uncontroversial, it becomes far more challenging to observe if some communities (however they are defined) consent to the establishment of a radioactive waste storage facility and others do not. If community consent "does not require unanimity", this begs the question: what level of disagreement is acceptable for a hazardous waste facility to proceed? It doesn't take much imagination to perceive the potential for conflict and division that arises when a project promises large economic and financial benefits to the state, but where the risks are spread unevenly. Those members of the population who live far from the potential storage sites, and who perceive there are negligible risks either to the state at large or to themselves personally, or an acceptable level of risk given the financial benefits, may gladly give their consent. However, a regional town, or an indigenous

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[11] See, for example, Nina Brown and Sam Nina; Sowerwine, 'Irati Wanti: Senior Aboriginal Women Fight a Nuclear Waste Dump' (2004) 6(1) *Indigenous Law Bulletin* 11.

[12] Above nn 9, 10; see also UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent*, FAO, UNDP, UNEP, January 2013, 13 http://www.unredd.net/index.php?op:on=com_docman&task=doc_dowload&qid=8717&Itermid=53.

[13] Nuclear Fuel Cycle Royal Commission, *Tentative Findings*, 15 February 2016, 21

[14] Ibid.

community, who are closer physically and in terms of religious and cultural ties to the land, and who will bear the potential risks, may not consent.[15]

This is a possible if not likely scenario, given that many Aboriginal representative bodies have already communicated to the Commission "their unwillingness to contemplate any further nuclear activities", given the "general cynicism" within the Indigenous community, as to "the government's motives and its capability to deliver on commitments", based on past experience.[16] Given its terms of reference require it to focus only on the procedures most likely to gain support for a nuclear waste storage facility, the Commission makes no findings as to what happens if consent is not obtained. At most, the Commission finds that if the 'established and sophisticated frameworks through which Aboriginal communities in South Australia should be approached,' are followed, it will give the government the best chance of obtaining consent. It also sets out standards and principles for consultation that will ensure consent, if obtained, is 'free, prior and informed'; states that 'to the extent that any project would be proposed on land in which there are Aboriginal rights and interests, including native title rights and interests, they must be respected'; and acknowledges that it is 'essential to engage early' to build 'a meaningful relationship that may facilitate community consent for a project.'[17]

These findings don't really tell us much when it comes to the difficult end of consent, and in fact, seem to add an element of ambiguity. This is because current Australian law regarding 'native title rights and interests' – the 'established legal frameworks' to which the Commission refers - do not give indigenous peoples a right of veto regarding 'future acts' on native title land. It is not clear whether, at the end of the day, the Royal Commission is suggesting only that existing legal frameworks regarding only *procedural rights* must be followed and respected. Does the Commission imply that if consent is withheld by a particular Indigenous community, the Native Title Tribunal be called upon to arbitrate and determine the matter, in which case a nuclear waste facility may proceed? If so, not only is this is a long way from the requirement that actual consent be obtained but arguably it applies the 'established legal framework' to circumstances it was not designed to consider.

Alternatively, is the reference to respecting 'rights and interests' to be read in the context of its initial statement that social and community consent must be obtained, implying that indigenous peoples should have a right of veto after full consultations have been held? If so, this clearly goes beyond existing Australian law regarding rights to refuse consent to development projects. But surely the Commission's findings must be read in conjunction with its initial recommendation that social and community consent must be obtained, i.e. that there should be a right of veto, otherwise there is a contradiction between the treatment of non-indigenous communities and other communities.

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[15] On Tuesday 1 March, *The Advertiser* reported that residents of six communities across SA, NSW, Queensland and the NT that are being considered as potential sites for a national radioactive waste disposal facility do not want the waste stored in their communities: "Six waste sites hit objection", *The Advertiser,* 1 March 2016, 4.

[16] As above n 13, 22.

[17] Ibid.

Conclusion

The ongoing discourse in the nuclear storage facility discussions continues to present a view of the north of South Australia comprising vast swathes of 'empty land', consistently failing to acknowledge the religious, spiritual and cultural traditions of indigenous communities and their enduring connections to the land, as well as the value of the arid environment. While proponents and elements of the media focus on the estimated economic benefits of establishing a facility on 'geologically benign and sparsely populated land', our Indigenous and other regional communities are those that must bear the risks, with those that choose not to do so too often represented as obstacles to 'progress' and the restoration of SA's real or perceived economic misfortunes.

Given many Indigenous communities have already expressed opposition to a storage facility, potential conflict lies ahead. While the finding that free, prior and informed consent must be obtained is welcome, the question remains as to whether this will be followed by the existing, or future, governments. Although intended to guide government, the Tentative Findings arguably provide no strong assurance to communities. For example, they fall well short of making a finding that specific legislation be passed, or the Native Title Act be amended, to provide a right of veto over nuclear activities, including the storage of toxic wastes.

As referenced in the PLPRU Submission, proceeding with hazardous waste disposal projects without actual consent is not without substantial risk. A case in point is the failed program to develop a nuclear waste repository at Yucca Mountain in Nevada, USA. After an investment of over 20 years and billions of dollars in resources the fact that this project remains suspended speaks volumes about the difficulty of siting a facility over the objections of the host community. Also highlighted in the PLPRU submission is that a lack of consent is (a) inconsistent with lending policies of a growing number of international financial institutions and (b) may expose the government to multiple legal challenges and consequential lengthy project delays.

In the Commission's own words, the siting process must be transparent (and by inference fair). Crucial then to the Commission's final report is to make an unambiguous statement as to where Indigenous communities stand in the event that the only suitable land to site a nuclear waste facility falls within an Indigenous community and consent is withheld. How will the Commission recommend such a deadlock be broken? Is it by mothballing the project until actual consent is granted, or will it recommend the government force the matter to the courts? If it is the latter, then regardless of the government's best intentions by applying the international standard of FPIC, the Commission's first sentence in respect of consent should read "community consent must be obtained - unless it is an Indigenous community".