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Dr Ian Holland
Secretary
Senate Standing Committee on Environment,
Communications and the Arts
Department of the Senate
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Parliament House
CANBERRA ACT 2600

Dear Dr Holland

Inquiry into provisions of the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008

During the Department's appearance before the Committee on 28 November 2008 we undertook to provide further information in response to senators' questions.

Power of the Commonwealth to establish a facility in a State

The Committee Chair asked for information on the ability of the Commonwealth to establish a radioactive waste management facility in a State.

It is the Department's view that, if the Australian Radiation Protection and Nuclear Safety Agency has issued a licence in respect of a facility, any State law purporting to prohibit the actions authorised by that licence would be inconsistent with the *Australian Radiation Protection and Nuclear Safety Act 1998*. Accordingly, the State law would be invalid by operation of s109 of the Constitution.

The Department is also of the view that s52(i) of the Constitution would be relevant to a facility constructed on land acquired from a State.

Site nomination agreement

Senators Ludlam, Ian MacDonald and Pratt variously asked:

- who signed the site nomination agreement on behalf of the Muckaty Aboriginal Land Trust;
- for the site nomination agreement to be tabled;
- what would be the effect on the agreement should the Bill be enacted; and
- who were the beneficiaries of the initial payment made under the agreement.

The Minister for Innovation, Industry, Science and Research, Senator the Hon Kim Carr, on behalf of the Minister for Resources and Energy, provided an answer on 14 May 2008 to former Senator Lyn Allison's request for a copy of the nomination agreement (Senate Question No. 356 refers).

In particular, Senator Carr indicated that the parties to the agreement are the Commonwealth, the Northern Land Council (NLC) and the Muckaty Aboriginal Land Trust. Senator Carr also

indicated that the agreement contained confidential information provided by the NLC and the Land Trust, and did not provide a copy of the agreement.

The next payment by the Commonwealth under the agreement, and all subsequent payments, can occur only if the Minister for Resources and Energy declares, under the *Commonwealth Radioactive Waste Management Act 2005* ('the CRWM Act'), the nominated land to be the site for the facility.

Under the site nomination agreement, the beneficiaries of the initial payment made by the Commonwealth are the traditional Aboriginal owners (that is, members of the Ngapa clan associated with the Lauder families) of, and any other Aboriginals concerned in relation to, the nominated land. For the purpose of the agreement, "traditional Aboriginal owners" and "Aboriginals concerned" have the same definition as the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Anthropological report

Senator Ludlam requested the Department provide a copy of the anthropological report identifying the traditional Aboriginal owners of areas of land on Muckaty Station.

The anthropological report contains information of a highly culturally sensitive nature regarding sacred sites on Muckaty Station. The NLC provided the report to the then Minister for Education, Science and Training, the Hon Julie Bishop MP (at the time the responsible minister for the CRWM Act), on the understanding that its distribution would be restricted to the Minister and those officials providing advice to her in respect of the nomination.

The Department requests that the Committee have regard to the NLC's request in relation to the report. The supplementary submission to the Committee by the NLC may already have answered some questions. This included some non-confidential excerpts from the anthropological report. Specifically, the supplementary submission states that:

The NLC's nomination of a site on Muckaty Station for consideration as a Commonwealth repository was based on comprehensive consultations during 2006 and 2007 and anthropological advice as to the identity of the traditional Aboriginal owners and their consent. In accordance with s 3B(1) of the Act the NLC provided a detailed anthropological report to the Minister then responsible for that statute. The authors of the report were Mr Robert Graham, Dr Brendan Corrigan and Mr Kim Barber. Each has substantial experience as an anthropologist in the Northern Territory (and elsewhere), having respectively received graduate qualifications in 1982, 1993 and 1982, and in the case of Dr Corrigan postgraduate qualifications in 2007.

Mr Graham is currently the NLC's anthropology branch manager, and has conducted considerable anthropological research in the general region of Muckaty Station, including in relation to Amadeus to Darwin gas pipeline in 1996, the Alice Springs to Darwin railway in 1998, the Federal Court native title hearing regarding Newcastle Waters Station in 2006, and the nomination of a site for consideration as a radioactive waste repository on Muckaty Station in 2006 and 2007. Dr Corrigan also has conducted considerable anthropological research regarding Muckaty Station, particularly in the context of a 2004 agreement regarding the Bootu Creek manganese mine located to the east on the Banka Banka pastoral lease and an associated lease for a haulage road along the southern boundary of Muckaty Station to transport ore to the railway. The site nominated for consideration as a radioactive waste repository is located immediately to the north of the haulage road, and Dr Corrigan conducted research specifically in relation to the nomination in 2006 and 2007. Mr Barber was the NLC's anthropology branch manager at the time of the nomination, has substantial experience over 25 years in the Northern Territory, the

Kimberley, Pilbara and Goldfields in Western Australia, and supervised the conduct of research in relation to the nomination and attended all consultation meetings.

The report includes significant information regarding sacred sites and matters of cultural sensitivity to Aboriginal people, and was provided to the Minister on the basis that it and such culturally sensitive information would not be published. For that reason the report cannot be provided to the Senate Committee. However, to assist the Committee, relevant information is provided below. This information establishes that the NLC properly, comprehensively and accurately performed its functions in relation to the identification of the traditional Aboriginal owners of the nominated site, the conduct of consultations with traditional Aboriginal owners and other interested or affected Aboriginal persons or groups, and the nomination based on the consent of the Ngapa traditional Aboriginal owners responsible for the site.

Concerning the Traditional Owners of the Muckaty site, the submission states that:

In 1997 the Aboriginal Land Commissioner, Justice Gray, published his report in the Warlmanpa (Muckaty Pastoral Lease) Land Claim No 135 (lodged in 1991), and recommended that all land claimed be granted as Aboriginal land. The hearing was conducted in 1993 and 1994. The evidence before the Commissioner included oral testimony from senior Aboriginal persons, and an anthropologists' report and site register. The land was granted as Aboriginal land in 1999.

Furthermore:

The Commissioner recognised that in relation to Muckaty Station the "Ngapa group has three branches, each focused on a different part of the Ngapa dreaming track".¹ The Ngapa dreaming involves desert rain, a dreaming which "crosses the claimed land in a broad swath",² "as rain itself does".³ It is no surprise that large areas or swathes of land on Muckaty Station associated with this dreaming are Ngapa country. The NLC has identified an additional two Ngapa branches or groups regarding land outside Muckaty Station. The close relationship between Ngapa groups may give rise to "overlapping responsibilities"⁴ such as may also arise in relation to other neighbouring groups, however each group constitutes a separate group of traditional Aboriginal owners in relation to that part of the Ngapa dreaming track and associated land for which they have primary spiritual responsibility.

The NLC's anthropological advice was (and remains) that members of the Ngapa branch or group associated with the Lauder families are the traditional Aboriginal owners of the nominated site. The group is comprised by approximately 40 persons.⁵ Members of other Ngapa groups are the traditional Aboriginal owners for other land. This advice was consistent with previous consultations regarding other developments such as the Amadeus to Darwin gas pipeline in 1996, the Alice Springs to Darwin railway in 1998, and the haulage road on Muckaty Station for the Bootu Creek manganese mine in 2004 - all of which traverse the length or breadth of the station and cross the country of different traditional owning groups from whom separate consent (relating only to their respective country) was required under the Land Rights Act. This advice was also iterated during consultations with senior (and other) representatives of other Ngapa groups (and of other neighbouring groups),

¹ Muckaty Land Claim Report para 3.7.

² Muckaty Land Claim Report para 4.5.1.

³ Anthropological report, Muckaty Land Claim, Dr Sutton, Dr Nash, Petronella Morel, p 23.

⁴ Muckaty Land Claim Report para 3.7.

⁵ A precise figure is not presently available.

who confirmed that they did not have primary spiritual responsibility for the nominated site. This means that they are not traditional Aboriginal owners for that land (which is not, using native title terminology, their country or the country for which they speak) and, although consulted, their consent for the nomination was not required under the Act or under Aboriginal tradition. (Nor would their consent have been required if the nomination had instead been negotiated under the Land Rights Act or the Native Title Act 1993.)

Siting a facility in a remote area

During evidence before the Committee on 28 November 2008, Mr Steven McIntosh of the Australian Nuclear Science and Technology Organisation stated the remote locations were chosen for waste facilities for "political reasons".

The Department draws the Committee's attention to the National Health and Medical Research Council's *Code of practice for the near-surface disposal of radioactive waste in Australian (1992)* and the International Atomic Energy Agency's Safety Series No. 111-G-3.1 *Siting of Near Surface Disposal Facilities*.

Both publications recommend that the near-surface disposal facilities be located in areas of low population density with low population growth potential. Relevant extracts are attached.

Yours sincerely



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unlikely to rise to within five metres of the waste, and the hydrogeological setting should be such that large fluctuations in the water table are unlikely;

- c. the geological structure and hydrogeological conditions should permit modelling of groundwater gradients and movement, and enable prediction of radionuclide migration times and patterns;
- d. the disposal site should be located away from any known or anticipated seismic, tectonic or volcanic activity which could compromise the stability of the disposal structures and the integrity of the waste;
- e. the site should be in an area of low population density and in which the projected population growth or the prospects for future development are also very low;
- f. the groundwater in the region of the site which may be affected by the presence of a facility should ideally not be suitable for human consumption, pastoral or agricultural use; and
- g. the site should have suitable geochemical and geotechnical properties to inhibit migration of radionuclides and to facilitate repository operations.

Other factors which shall also be considered are:

- h. the site for the facility should be located in a region which has no known significant natural resources, including potentially valuable mineral deposits, and which has little or no potential for agriculture or outdoor recreational use;
- i. the site should have reasonable access for the transport of materials and equipment during construction and operation, and for the transport of waste into the site;
- j. the site should not be in an area which has special environmental attraction or appeal, which is of notable ecological significance, or which is the known habitat of rare fauna or flora;

448. Jurisdiction over the land, or ownership, may in some countries be a significant factor with respect to economics and public acceptance. Early control or ownership of the site by the operator or government would simplify the site planning and evaluation efforts, shorten the time required for activation of the facility and reduce the problems associated with the withdrawal of land from other uses.

449. *Data needs*

The data should include:

- existing land resources and uses and jurisdiction over them
- foreseeable development of land in the area of interest.

POPULATION DISTRIBUTION

450. *Guideline*

The site should be located such that the potential hazard of the disposal system on the current population and projected future population is acceptable.

451. Consideration should be given to avoiding areas of high population density. The selection of candidate sites should be performed on the basis of appropriate suitability factors, taking into account the likelihood of future disturbances and radiation protection aspects of the population potentially affected by the releases of radionuclides from the disposal facility.

452. *Data needs*

At the area survey stage, large scale maps should be prepared showing major population centres and regions with population density as a function of distance.

453. At the site characterization stage, more detailed data should be collected based on the most recent census, extrapolated as appropriate.