SUPPLEMENTARY SUBMISSION TO THE SENATE INQUIRY INTO THE COMMONWEALTH RADIOACTIVE WASTE MANAGEMENT (REPEAL AND CONSEQUENTIAL AMENDMENT) BILL 2008

ON BEHALF OF MUCKATY ELDERS AND TRADITIONAL OWNERS OPPOSED TO THE NOMINATION OF THE RADIOACTIVE WASTE FACILITY WITHIN THE MUCKATY LAND TRUST[1]

2 DECEMBER 2008

This submission seeks to reply to matters raised during the Senate Committee hearings of November 2008.

The CRWMA is not consistent with the 'scheme' of the Land Rights Act

On 17 November, the following evidence was given to the Committee[2]:

> ***Senator LUDLAM***—*One of the provisions of the amendments that were made in 2006 to the act provided that site nominations from land councils would still be valid even in the absence of consultation with and consent from traditional owners. That is section 3C(6) of the amendment act. Did the Northern Land Council have a position on whether that was acceptable or not?*
> ***Mr Levy***—*The Northern Land Council had a position in the Senate committee hearing and it supported that amendment. The reason the amendment was supported was because the NLC regarded it as being consistent with the existing structure of the Lands Right Act. That was my legal advice to the NLC and that remains my legal advice. As for your earlier question, which is the genesis of that amendment, I cannot recall where it came from. Again, I would have to check my file, but I suspect that it came from Commonwealth legal officers picking over the bill and seeing things which they wanted to fix. I do not recall its precise genesis.*
> ***Senator LUDLAM***—*But just to be clear, your advice to the NLC at that time was that it was appropriate for the provision to go into the amendment act that meant the NLC would not need to consult with or get consent from traditional owners in the area concerned?*
> ***Mr Levy***—*No, that is not my advice to the NLC.*
> ***Senator LUDLAM***—*I beg your pardon, sorry.*
> ***Mr Levy***—*I have misled you, I apologise. It is unlawful for a land council to nominate Aboriginal land to be a waste facility or for that matter to be a lease for a mine or a lease for a corner store or a lease for a buffalo licence—it is unlawful for a land council to do so without the consent of the traditional owners. The Land Rights Act, since its inception, has had a provision about the extent and the validity of a full council resolution directing a land trust to grant a lease or approving an exploration or mining agreement or now, because of this amendment, nominating land. My advice is simply that the amendment that was made in 2006 is consistent with the existing scheme of the act. But it remains unlawful for a land council to make a nomination which does not have the consent of the traditional owners.*

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[1] The list of Muckaty Traditional Owners who have been referred to in correspondence and are said to be opposed to the proposed Radioactive Waste Facility can be found at **Schedule 1** of the Submission to the Senate Inquiry on behalf of Traditional Owners opposed to the proposed waste facility;

[2] Transcript of hearing before the Senate Committee – 17 November 2008;

Senator LUDLAM*—As the law stands at the moment, it does not require consent of all the traditional owners of the area because of that particular provision which removes the land council from that obligation.*
Mr Levy*—That is a misconception, with respect; that is not the case.*

There is an obvious tension in the Commonwealth Radioactive Waste Management Act 2005 ("the Act") in this regard which requires resolution. Relevantly, section 3B of the Act states:

3B Rules about nominations

(1) A nomination must:
- (a) be in writing; and
- (b) be made to the Minister; and
- (c) specify the land nominated by reference to portion number (if any), survey points (if available) and geographical coordinates; and
- (d) contain evidence of all interests in the land; and
- (e) if there is a sacred site within the meaning of the Aboriginal on or near the land—contain evidence that the persons for whom the site is sacred or is otherwise of significance are satisfied that there is no substantial risk of damage to or interference with the sacred site as a result of the nomination or subsequent action under this Act; and
- (f) if the land is nominated by the Chief Minister of the Northern Territory—contain evidence of consent to the nomination by all persons holding interests in the land; and

....

- (g) if the land is nominated by a Land Council—contain evidence that:
  - (i) the Land Council has consulted with the traditional Aboriginal owners of the land; and
  - (ii) the traditional Aboriginal owners understand the nature and effect of the proposed nomination and the things that might be done on or in relation to the land under this Act if the Minister approves the nomination; and
  - (iii) the traditional Aboriginal owners as a group have consented to the proposed nomination being made (that consent as a group being determined in accordance with section 77A of the *Aboriginal Land Rights (Northern Territory) Act 1976*); and
  - (iv) any Aboriginal community or group that may be affected by the proposed nomination has been consulted and has had adequate opportunity to express its view to the Land Council.

Although this section prima facie appears to provide for a significant consultation arrangements which may be said to be consistent with requirement and provisions under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act), the section has little real affect as a result of Section 3C(6) of the Act which states:

3C Approval of nominated land

....

(6) Failure to comply with subsection 3B(1) does not affect the validity of an approval.

In other words, in the event that the provisions of the Act which purport to require (using the mandatory term 'must'):

1. evidence of all interests in the land;
2. the effect on sacred sites;
3. evidence of consent by all persons holding interests in the land;
4. consultation with traditional owners;
5. traditional owner understanding of the proposal;
6. traditional owners as a group consenting; and
7. an opportunity to provide traditional owners views an approval;

are not complied with, an approval of a site will still be regarded as valid.

It is surprising that Mr Levy of the Northern Land Council considers this legislation to be consistent with the Land Rights Act. It is important that some inconsistencies between the two pieces of legislation be drawn to the attention of the Committee.

Section 19(5) of the Land Rights Act provides for a consultation process to be undertaken in the context of a grant, transfer or surrender of an estate of interest in land. Section 19(6) of the Land Rights Act gives rise to a similar effect as Section 3C(6) of the CRWMA however a clear difference sits between the two Acts in that Section 19(6) of the Land Rights Act provides for a fraud exception. No such exception is provided for under the CRWMA and hence the provisions are clearly distinguishable.

Section 23(3) of the Land Rights Act provides further for consultation mechanisms in the context of a Land Council carrying out its functions as prescribed. This section does not contain any section similar to section 3C(6) of the CRWMA and hence, a clear distinction can be drawn between the two pieces of legislation in the context of requirements for consultation.

Furthermore, a further, clear and somewhat concerning difference between the two pieces of legislation is through the removal of any avenue for Judicial Review and the express denial of procedural fairness. The legislation is clearly different in this regard.

It is the submission on behalf of the Muckaty Traditional Owners opposed to the waste facility that the CRWMA is not consistent with the 'scheme' of the Land Rights Act.

Contractual Arrangements between the Muckaty Land Trust, the Northern Land Council and the Commonwealth.

On 17 November 2008, the following evidence was provided to the Senate Committee:

> ***Mr Levy****—At the moment the act exists and the NLC supported it and continues to support it. If the Labor Party has a policy of repealing it, with some fine print about existing contracts—there is an existing contract between the Muckaty Land Trust, NLC and the Commonwealth*

Furthermore, the committee was informed on 28 November 2008 that payments had been made to certain members of the Muckaty community who are supportive of the proposed facility in the sum of $200,000 pursuant to these contractual arrangements.

No such contract has been viewed by the Committee, nor has any such contract been referred to at any meeting held with members of the Muckaty community.

As is clear, this land trust is a shared land trust and any contractual arrangements with the land trust are arrangements with the entirety of the land trust, hence any payments made pursuant to any contract with the land trust must be payments made to all members of the land trust and not a select few.

In addition to the matter raised above, any such contract, if and when it is produced to the committee, must be made available to all members of the Muckaty Land Trust as it concerns land of which they are the Traditional Owners.

The Land Commissioners Report 1997 must prevail

During the hearing on 17 November 2008 the following evidence was given[3]:

> ***Senator BIRMINGHAM***—*That legal advice would have been based on the premise that the full council has to respect the rights of those traditional owners who have particular authority over a particular piece of land; is that correct?*
> ***Mr Levy***—*That is right, and that is always the way full council approaches things.*
> ***Senator BIRMINGHAM***—*The anthropological advice to which you referred in response to questioning from Senator Ludlam, was that provided verbally or in writing?*
> ***Mr Levy***—*No, it was provided in the form of a comprehensive anthropological report required by the legislation which, under that legislation, has to be submitted to the minister in relation to the then minister's decision as to whether or not to accept the nomination.*
> ***Senator BIRMINGHAM***—*Is that a public document?*
> ***Mr Levy***—*No, it is a private document.*
> ***Senator BIRMINGHAM***—*It is a private document. The minister in question in this instance is?*
> ***Mr Levy***—*The then minister Julie Bishop.*

The anthropological report referred to provides an inconsistent view to that as set out and found after extensive hearings, of the 1997 Land Commissioners Report. The Land Commissioners Report identifies that sites, Murunju-Mantangi (66), Karakara (51), Lungkarta (50), Karntawarrlki (74), and an unnamed site (109) which are in the immediate vicinity of the site for the proposed facility are affiliated with the following groups.

1. Murunju-Mantangi (66) is recognised as a Yapayapa site[4];
2. Karakara (51) is recognised as a Yapayapa site[5];
3. Lungkarta (50) is recognised as a Ngarrka site[6];
4. Karntawarralki (74) is recognised as a Milwayi site[7]; and
5. the unnamed site (109) is recognised as a Ngarrka site[8].

(See attachment 1 – Map showing location of sacred sites in proximity to the proposed facility)

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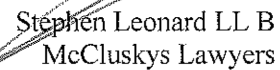
[3] Transcript of hearing before the Senate Committee – 17 November 2008;
[4] 18 March 1997 Land Commissioners Report at page 43;
[5] 18 March 1997 Land Commissioners Report at page 43;
[6] 18 March 1997 Land Commissioners Report at page 41;
[7] 18 March 1997 Land Commissioners Report at page 40;
[8] 18 March 1997 Land Commissioners Report at page 41;

It is critical in this context to note that the Land Commissioners Report of 1997 does not recognise any Ngapa sites in the immediate vicinity to the location of the proposed facility yet it is continuously asserted that the proposed facility is to be located on land which the Ngapa speak for. There is, without doubt, a legitimate dispute on this point and surely, the Land Commissioners Report of 1997 must prevail over an undisclosed and potentially self serving anthropological study.

No evidence has been provided to the Committee concerning this purported anthropological study to date. No anthropologists have made submissions on behalf of the Northern Land Council at any of the hearings and to date no such report has been viewed by the Committee. In the event that such evidence is provided however, it ought have little to no weight as it has not been tested nor has any party had an opportunity to respond to the matters raised therein. In any event, the comprehensive findings concerning scared sites at Muckaty within the 1997 Land Commissioners Report following extensive hearings must be considered as the best evidence and authority on this issue. The 1997 Land Commissioners report must prevail.



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