The Parliament of the Commonwealth of Australia

Advisory report on the National Radioactive Waste Management Bill 2010

House of Representatives
Standing Committee on Climate Change, Environment and the Arts

December 2010
Canberra

ISBN 978-0-642-79402-4 (Printed version)

ISBN 978-0-642-79403-1 (HTML version)

Contents

Membership of the Committee

Chair	Mr Tony Zappia MP	
Deputy Chair	Dr Mal Washer MP	
Members	Mr Adam Bandt MP (from 25/11/10)	Ms Nola Marino MP
	Ms Anna Burke MP	Mr Wyatt Roy MP
	Ms Jill Hall MP	Mr Kelvin Thomson MP

Committee Secretariat

Secretary	Ms Julia Morris
Inquiry Secretaries	Ms Julia Searle
	Dr Kate Sullivan
Office Manager	Ms Tamara Palmer
Administrative Officer	Ms Kane Moir

Terms of reference

On 21 October 2010, the *National Radioactive Waste Management Bill 2010* was referred to the Committee by the Selection Committee. For a copy of the bill and Explanatory Memorandum, see Appendix B.

List of recommendations

National Radioactive Waste Management Bill 2010

Recommendation 1

That the House of Representatives pass the *National Radioactive Waste Management Bill 2010*.

1

National Radioactive Waste Management Bill 2010

Referral of inquiry

1.1 The *National Radioactive Waste Management Bill 2010* (the bill) was referred to the House Standing Committee on Climate Change, Environment and the Arts on 21 October 2010 by the Selection Committee for inquiry and report by the end of the Autumn sittings in 2011.[1]

Background

1.2 The bill was introduced and the second reading moved in the House of Representatives by the Minister for Resources, Energy and Tourism, the Hon Martin Ferguson MP, on 21 October 2010. The Minister explained that the purpose of the bill is to establish a facility for managing, at a single site, radioactive waste currently stored at a number of locations across the country.[2]

1.3 The bill repeals and replaces the *Commonwealth Radioactive Waste Management Act 2005*. The bill also restores some review and procedural

---

1 House of Representatives, *Votes and Proceedings*, 21 October 2010, p. 111.

2 House of Representatives, *Official Hansard*, 21 October 2010, p. 1063.

fairness rights in the process of selecting a site for the proposed Commonwealth radioactive waste management facility.[3]

Outline of bill

1.4 The Explanatory Memorandum outlines the objectives of the bill as follows:

> The Bill ensures the Commonwealth's power to make arrangements for the safe and secure management of radioactive waste generated, possessed or controlled by the Commonwealth.
>
> This legislative framework is based on volunteerism. No site can be considered as a potential location for a radioactive waste management facility without the voluntary nomination of that site and agreement of persons with relevant rights and interests.
>
> The Bill repeals the *Commonwealth Radioactive Waste Management Act 2005* and applies a decision making process based on natural justice. Natural justice puts in place a code of fair procedure. At its core is "the hearing rule"; a right to be heard by the Minister before a decision is reached.
>
> The Bill also reinstates the *Administrative Decisions (Judicial Review) Act 1977*. This will allow a person aggrieved by a decision to apply for judicial review and ensure a higher level of accountability for decisions.
>
> A facility will not be established unless it meets environmental and regulatory approvals under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Nuclear Non-Proliferation (Safeguards) Act 1987*.
>
> A regional consultative committee will also be established to communicate with local communities during the environmental and regulatory approval process, construction and operational stages of the project. This open and informed process will help raise awareness through dialogue, address local concerns and ensure government transparency when establishing a national radioactive waste management facility.[4]

3 Parliamentary Library, *Bills Digest No. 52*, 2010-11, p. 3.

4 National Radioactive Waste Management Bill 2010, Explanatory Memorandum, p. 2.

Conduct of inquiry

1.5 The Committee considers that:

- the subject matter of the bill has been the subject of earlier thorough inquiries, including by the Senate Legal and Constitutional Affairs Legislation Committee;
- opportunities for comment have been available during earlier processes;
- the recommendations of the Senate Committee were substantially addressed in the revised bill that has been the subject of this inquiry by the Committee;
- the merits of a bill in a parliamentary sense are matters for the parliament;
- the regulatory approval process related to the establishment of a facility will enable other environmental and safety issues to be raised; and
- the further delay caused by reconsideration of all elements raised in earlier discussions of this issue will continue to defer the resolution of the issue of the storage of radioactive waste in Australia.

1.6 These points are further outlined in the Committee's comments below.

Committee comment

Extensive past scrutiny of issue

1.7 The Committee notes that the history of an effort to build a radioactive waste management facility in Australia is a lengthy one. Further background on the history of Australian radioactive waste management issues can be found in the Parliamentary Library's chronology, 'Radioactive Waste and Spent Nuclear Fuel Management in Australia'.[5]

1.8 Several bills relating to this matter have been referred to Senate Committees in recent years—a detailed timeline is set out at Appendix A.

5 See <http://www.aph.gov.au/library/pubs/online/RadioactiveWaste.htm>, viewed 25 November 2010.

1.9 The Committee highlights the lengthy history of extensive scrutiny of this issue.

2010 Senate inquiry into previous version of bill

1.10 The Committee recognises that a previous and substantially similar version of the bill was considered by the Senate Legal and Constitutional Affairs Legislation Committee in early 2010. [6]

1.11 The Senate Committee received 238 submissions and undertook public hearings in Canberra and Darwin during March and April 2010. In its May 2010 report, the Committee recommended passage of the bill and made five additional recommendations (see discussion below). The report included a dissenting report from the Australian Greens with four recommendations:

- Procedural fairness and judicial review must be restored to the Muckaty Land Trust nomination.
- The Bill should be amended to ensure that State and Territory laws apply so as to assist to manage the environmental impacts and risks as thoroughly as possible.
- Establishment of Commission with its first task to conduct an inventory of international best practices to be used in the Australian context.
- That the legislation be amended to provide clear guidelines, timelines, consultation obligations and reporting obligations on the Minister before the process of site assessment proceeds any further.[7]

1.12 In reaching its conclusions, the Senate Committee received submissions and considered issues surrounding:

- preservation of the Muckaty Station site nomination;
- the bill's preferencing of a Northern Territory site;
- consultation on the bill and site selection;
- procedural fairness and judicial review; and
- other legal issues.[8]

---

6 The Committee's report is available at: <http://www.aph.gov.au/Senate/committee/legcon_ctte/radioactivewaste/report/index.htm>, viewed 25 November 2010.

7 Senate Legal and Constitutional Affairs Legislation Committee, *National Radioactive Waste Management Bill [Provisions]*, May 2010, p. 55, 57 and 59.

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

Senate Committee recommendations incorporated in current bill

1.13 The recommendations from the Senate Legal and Constitutional Affairs Legislation Committee majority report on the previous version of the bill were as follows:

- Recommendation 1: The committee recommends that, as soon as possible, the Minister for Resources, Energy and Tourism undertake consultations with all parties with an interest in, or who would be affected by, a decision to select the Muckaty Station site as the location for the national radioactive waste facility.
- Recommendation 2: The committee recommends that proposed section 21 of the Bill be amended to make the establishment of a regional consultative committee mandatory, immediately following the selection of a site for the radioactive waste facility.
- Recommendation 3: The committee recommends that proposed sections 9 and 17 of the Bill be amended to require the Minister to respond in writing to comments received in accordance with the Bill's procedural fairness requirements.
- Recommendation 4: The committee recommends that the Explanatory Memorandum be amended to include a detailed rationale for, and explanation of, the Minister's absolute discretion in relation to decision making under the Bill.
- Recommendation 5: The committee recommends that the Bill be amended to include an objects clause.
- Recommendation 6: The committee recommends that, subject to consideration of the preceding recommendations, the Senate pass the Bill.[9]

1.14 The Minister for Resources, Energy and Tourism, in his second reading speech on the current bill, noted that:

> The bill includes changes recommended by the Senate Legal and Constitutional Affairs Legislation Committee in May 2010 ... The bill and explanatory memorandum have been amended to incorporate all of these recommendations, other than recommendation 3 ...
>
> the intent of recommendation 3 will be met by posting, online, detailed reasons for key decisions as they are made, in line with

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

requirements of the *Administrative Decisions (Judicial Review) Act 1977*.[10]

1.15 The Committee is satisfied that all of the Senate Committee recommendations, other than recommendation 3, have therefore been incorporated in the current bill and Explanatory Memorandum, with other arrangements having been made to meet the requirements of recommendation 3.

Due process followed

1.16 The Committee is aware of the extensive Senate Committee inquiry process conducted for the previous version of the bill, as described above. It has considered the key issues raised in evidence to the Senate Committee through submissions and public hearings. It has also considered the Senate Committee report conclusions and recommendations.

1.17 As previously discussed, the Committee further notes that the Senate Committee report's recommendations are reflected in the current bill and Explanatory Memorandum, and through other arrangements.

1.18 The Committee is satisfied that due process was followed in the Senate Committee inquiry.

Committee briefing

1.19 The Committee was briefed on the current bill and the Government's response to the recommendations of the Senate Legal and Constitutional Affairs Legislation Committee report by senior officials of the Department of Resources, Energy and Tourism.

1.20 Officials reaffirmed that the bill incorporated the Senate Committee recommendations and that there had been extensive past scrutiny of these issues.

Federal Court case

1.21 A court challenge to the Muckaty station nomination has been lodged in the Federal Court, for report back to the court by the end of January 2011.[11]

---

10 House of Representatives, *Official Hansard*, 21 October 2010, p. 1064.

11 Parliamentary Library, *Bills Digest No. 52*, 2010-11, p. 8.

1.22 The Committee does not provide any comment on this matter as it is before the courts.

Extent of regulatory process

1.23 The Committee notes that, following passage of the bill, and once a site has been selected, regulatory processes under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act) must be implemented. This includes environmental assessment under the EPBC Act and the provision of licences under the ARPANS Act to construct and operate a facility, and to transport radioactive material to the facility.

1.24 The Committee is aware that the timeframes for selecting a site and concluding regulatory processes are significant and Australia is expecting reprocessed long-lived intermediate level material to be returned from France in 2015 and the United Kingdom in 2016.[12]

Conclusion

1.25 The Committee concludes that the bill should be passed.

Recommendation 1

That the House of Representatives pass the *National Radioactive Waste Management Bill 2010*.

Tony Zappia MP
Chair

12 House of Representatives, *Official Hansard*, 21 October 2010, p. 1064.

Dissenting Report by the Australian Greens

Inquiry of the House of Representatives Standing Committee on Climate Change, Environment and the Arts into the National Radioactive Waste Management Bill 2010

The Australian Greens do not support the findings of this Inquiry.

In choosing not to take evidence or hear witness statements other than from the Proponent of the project, the majority report bases its judgement entirely on the existence of a single departmental briefing and an earlier committee report which, while narrowly premised and deeply flawed, at least took evidence from sources outside Government.

Radioactive waste dump legislation in Australia has been subject not just to one recent Senate Inquiry, but two. Curiously, the majority report notes the second report but omits any mention of the first, which tabled a unanimous report strongly urging a rethink of the coercive approach favoured to date.

As outlined in the Australian Greens dissenting report to the Senate Legal and Constitutional Affairs Committee report of 7 May 2010, this bill is flawed on four key grounds:

a) An inadequate framework for managing radioactive waste, most notably the lack of procedural fairness or avenues for judicial review, and a lack of sound science being used to inform it.

b) Wholesale overriding of State and Territory laws, suspension of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, exclusion of the Native Title Act 1993 and suspension of the Judicial Review Act is alarming and heavy handed.

c) Failure to uphold international best practice particularly in relation to securing social licence and community acceptance of a radioactive waste facility.

d) Excessive discretionary power given to a Minister operating with an absolute minimum of transparency, and the withholding of key documents.

In failing to call for submissions, the Standing Committee has based its findings on a single briefing from officials of the Department of Resources, Energy and Tourism, who are working at Minister Martin Ferguson's direction to implement the waste dump policy.

To commit a report on this issue to the public record without seeking evidence is, the Australian Greens believe, a failure to uphold the committee's obligation to provide an independent assessment of this piece of legislation. At the very least we believe the committee should take evidence from those Aboriginal custodians who have found themselves on the front line of this long-running and polarised debate through no fault or wish of their own.

In this regard I attach a letter from the Traditional Owners of the Manuwangku/Warlmanpa Land Trust written to all members of the 43rd Parliament stating their clear objection to the Muckaty waste dump, and requesting again that the Minister and all Members of Parliament consult with them (Attachment 1). The letter states:

> *The last two governments didn't listen to us - you must be different. We have been fighting for the last five years to say we don't want the waste dump in the land. We are again inviting Minister Martin Ferguson and all members of the new parliament to come down and face us in our own country. Come and sit with us and hear the stories from the land.*

It is a great indictment on the parliamentary process and indeed this Inquiry that Recommendation 1 of the Senate Legal and Constitutional Affairs Committee majority report of 7 May 2010 specifically addressing consultation with affected parties is still yet to be implemented.

The Recommendation reads:

> *The committee recommends that as soon as possible the Minister for Resources Energy an Tourism undertake consultations with all parties with an interest in or who would be affected by a decision to select the Muckaty Station site as the location for the national radioactive waste facility.*

The legislation in question proposes to site a facility for Australia's most long lived and hazardous waste materials under an utterly deficient legal framework. The siting decision for the nation's first Radioactive Waste dump will be subject to less oversight than we would consider appropriate for a shopping centre car park.

It is also worth emphasising that the Climate Change, Environment and the Arts Committee has not investigated any environmental, social or scientific issues or impacts of this bill. A letter sent to this committee on 11 November 2010 by the Australian Conservation Foundation is of major concern in this regard. The letter

outlines many serious and unresolved problems with the legislation in its current form. It reminds us that the Bill will override the Aboriginal Heritage Act and the Environmental Protection and Biodiversity Conservation Act during the site nomination, and it encourages the committee to conduct an open, robust and comprehensive assessment of the legislation and radioactive waste management in Australia.

The letter states:

> *We need to take the time and have the processes now that can get the policy architecture right for the long term management of Australia's radioactive waste. ACF supports an approach that is informed by a transparent and credible process, robust and independent science, accountability and community consent – all things identified in Labor's federal platform but not adequately reflected in this legislation.*

The letter is attached in full (Attachment 2).

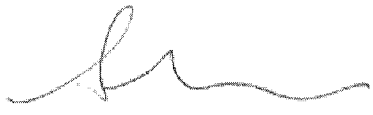
The Australian Greens are certain that, had the Inquiry called for public submissions and held formal public and transparent hearings, the committee would have heard far more evidence on these environmental, social and scientific issues.

To further outline reasons for the strong opposition of the Australian Greens to this legislation and the House Standing Committee's decision to wave it through without examining its merits, Senator Scott Ludlam's dissenting report to the 2010 Legal and Constitutional Affairs Committee Inquiry is attached (Attachment 3).

Recommendation 1: That the House of Representatives requires the Standing Committee on Climate Change, Environment and the Arts to conduct a full Inquiry into the *National Radioactive Waste Management Bill 2010*, calling for submissions and considering evidence.

Recommendation 2: That the House of Representatives notes the failure of the Minister for Resources and Energy to adopt Recommendation 1 of the Senate Legal and Constitutional Affairs Committee majority report of 7 May 2010, and requests it be adopted urgently.

Recommendation 3: That the House of Representatives not pass the *National Radioactive Waste Management Bill 2010*.



Adam Bandt
Member for Melbourne

September 22, 2010

To all Members of the 43rd federal parliament

We are the Traditional Owners of the Manuwangku/Warlmanpa Land Trust who do not want the nuclear waste dump.

We are the nguramala from the land. The people from the land.

We are all the groups, Ngapa, Milwayi, Wintirku, Ngarrka and Yapakurla nguramala.

You are a new parliament for Australia. We are asking that you give us a new start as Aboriginal people who are being threatened with this nuclear waste dump.

There is a bill that will soon come before this parliament, the National Radioactive Waste Management Bill. It will target our land for the waste dump. We are the Aboriginal people who own the land and the dreamings you are talking about. We are asking that you reject this bill and scrap Muckaty as a site for the waste dump.

The last two governments didn't listen to us - you must be different. We have been fighting for the last five years to say we don't want the waste dump in the land.

We are again inviting Minister Martin Ferguson and all members of the new parliament to come down and face us in our own country. Come and sit with us and hear the stories from the land.

In the federal election people in our area didn't vote for the big parties because they want change. Our local member for Barkly Gerry McCarthy wrote in the Tennant Times that the election results show clearly people in this region do not want the waste dump. There was a big vote for the Greens because of the strong stand they have taken fighting against the dump. All members of this parliament should listen to the words of Gerry McCarthy.

Warren Snowdon shouldn't call his electorate Lingiari if he is supporting the waste dump. Vincent Lingiari fought for Land Rights and Warren Snowden is betraying this name.

We heard Liberal Party leader Tony Abbott says he wants to help Aboriginal people in Cape York to control their land. If you really care about Land Rights you will stop your party's support for the waste dump laws and for what is happening to us, which goes against the Aboriginal Land Rights Act (NT) 1976. We want to develop our communities, but should not have to destroy

country to do this.

We do not want to have to sell our country just to get houses, roads and opportunities for education. Our houses are in very bad condition and overcrowded. The government has already said that there will be no new houses built on our homelands or our town camps under the Intervention, but there will be funding if we accept a nuclear waste dump. Why should we have to accept a dump to get basic rights?

Our ceremonies and our designs don't come from nothing. These come from the ground itself. We are carrying them on from our ancestors way back in time. If you destroy our land we will have no culture. We will have no law that keeps us surviving through the years.

We say no to the nuclear waste dump.

Please reply to our letter c/o Minister Gerry McCarthy. PO Box 796, Tennant Creek, NT, 0861

Name	**Tjukurrpa Wingkarra Nguramala**
Bunny Napurula	Milwayi Bunny Nabarula
May Foster	Wintiku MAY FOSTER
Janet Thompson	Milwayi - Janet Thompson
BRIAN WILLIAMS	Milwayi
Isobel Phillips	Wintiku.
EILEEN WILLIAMS	Milwayi
Beverly Williams	Milwayi
CHRISTINE MORTON	WIRTIKU.
Dianne Stokes	Yapakurla.
AnneMarie Gaskell	Yapakurla
Rebekah Stokes	Yapakurla
Jeannie Sambo	Milwayi
William GRAHAM	NGARRKA.
Gladys Brown	Milwayi
BEATTA JUDERSON	NGAPA.

Zappia, Tony (MP)

From: D.Sweeney@acfonline.org.au
Sent: Thursday, 11 November 2010 5:14 PM
To: Zappia, Tony (MP)
Subject: Re HoR Climate change, Environment and the Arts Committee Inquiry into radioactive waste laws....

Dear Mr Zappia,

I write to you in your capacity as the Chair of the Standing Committee on the Environment, Climate Change and the Arts in relation to the referral of the National Radioactive Waste Management (NRWM) Bill. I note that on 21 October 2010 the Selection Committee asked the Committee to inquire into and report on the *National Radioactive Waste Management Bill 2010*.

ACF strongly supports this referral as we believe there are serious and unresolved problems with the legislation in its current form and we would welcome an open, robust and comprehensive assessment of this legislation and radioactive waste management in Australia. The responsible radioactive waste management is an issue of long standing with ACF and that we have deep concerns over the proposed NRWM Bill.

We need to take the time and have the processes now that can get the policy architecture right for the long term management of Australia's radioactive waste. ACF supports an approach that is informed by a transparent and credible process, robust and independent science, accountability and community consent – all things identified in Labor's federal platform but not adequately reflected in this legislation.

Some suggestions and tests for the scope and terms of reference of the inquiry include:

- Is it consistent with international best practise?
- Does the Bill provide for an open, transparent and fair process based on the full restitution of procedural rights and informed by sound science?
- Why is it necessary for the NRWMB to override the Aboriginal Heritage Act and Environmental Protection and Biodiversity Conservation Act during the site nomination phase?
- Why is it necessary for the NRWMB to override any current or future state/territory laws and how is it proposed to ensure that state and territory responsibilities and expertise are best engaged in relation to radioactive waste management?
- Does the Bill provide effectively for free, prior and informed consent by Indigenous people in relation to lasting radioactive waste impacts?

The NRWMB identifies only one site in the Northern Territory that will be further assessed for the federal radioactive dump – an area on the Muckaty Land Trust, north of Tennant Creek. This nomination is highly contested and currently the subject of Federal Court action. The focus on Muckaty is also contrary to the findings of a 2008 Senate Committee Inquiry into the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008, which recommended that no particular jurisdiction be targeted in the site selection process.

ACF would welcome the opportunity to engage with this Inquiry process, including by discussing the scope and terms of reference for the Inquiry with you to ensure the process allows for full examination of laws that will have an impact on the land and communities for many thousands of years and we welcome any further insight that you might be able to provide.

All best wishes,

Dave Sweeney

Dave Sweeney
Nuclear Free Campaigner
Australian Conservation Foundation
Floor 1, 60 Leicester St, CARLTON VIC 3053, Australia
Ph 03 9345 1130 Mob 0408 317 812 Fax 03 9345 1166
d.sweeney@acfonline.org.au
www.acfonline.org.au

Looking for a new job? Find out how 3.7 million new jobs could be created across Australia by cutting pollution and investing in a cleaner economy - visit our interactive jobs map www.acfonline.org.au/jobs-map

Attachment 3: Senate Legal and Constitutional Affairs Legislation Committee–copy of Senate dissenting report by Australian Greens (May 2010)

Senate Dissenting Report by Australian Greens

Introduction

1.1 This deeply flawed Bill has been strongly criticised throughout this inquiry by the majority of submitters, and has no place on the Australian statute books. It is the view of the Australian Greens that it should not proceed.

1.2 Much of the evidence and the majority of submissions made to this inquiry registered deep disappointment that Resources Minister Martin Ferguson has reversed ALP policy and broken an explicit 2007 election promise on the most appropriate way to handle Australia's nuclear waste.

1.3 The Australian Greens share this disappointment because on nuclear waste policy our parties shared some common ground on the objective of: 'establish[ing] a consensual process of site selection, which looks to agreed scientific grounds for determining suitability and the centrality of community consultation and support.'[1]

1.4 The government has not delivered on the spirit or letter of this promise through this legislation. Instead it has set itself up for a divisive and entirely avoidable confrontation with a community unwilling to host the nation's radioactive waste. The government should take time to seriously consider the criticism and amendments offered by other parties, as well as senior members of its own party.

1.5 The legislation should be rejected on four grounds:

a) **An inadequate framework**, for managing radioactive waste, most notably the lack of procedural fairness or avenues for judicial review.

b) **Wholesale overriding of State and Territory laws**, suspension of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, exclusion of the Native Title Act 1993 and suspension of the Judicial Review Act is alarming and heavy handed.

c) **Failure to uphold international best practice** particularly in relation to securing social licence and community acceptance of a radioactive waste facility.

d) **Excessive discretionary power given to a Minister operating with an absolute minimum of transparency**, and the withholding of key documents.

1.6 After some introductory comments on the Committee's report, followed by a recent history of this legislation, this dissenting report will provide detail on these four grounds for rejecting the National Radioactive Waste Management Bill 2010.

---

1 Statement by Shadow Science Minister, Senator Kim Carr, 27 September 2007.

The Committee's Report

1.7 Senate Committee process for reviewing legislation is a very important mechanism in the creation of Australian law because it provides an opportunity for experts and public opinion to register concern. Very often, Senate Committee processes are opportunities for legislation to be improved, particularly when the government actually wants legislation to be improved.

1.8 This Senate Committee report is imbalanced. Significant effort and investment was made in generating draft language suggestions and argumentation for the Committee to consider in order to address this imbalance. All but two typos and the deletion of 6 words were rejected with no explanation or opportunity for discussion, which is why I am appending my detailed contribution to this report.

The road to Muckaty

1.9 The government's handling of this legislation has been characterised by two years of delay, followed by extreme haste.

1.10 The ALP expressed outrage when Prime Minister John Howard rammed the much criticised Commonwealth Radioactive Waste Management Act (CRWMA) through the Senate in a matter of hours. At that time, the ALP called Howard's legislation 'extreme, arrogant, heavy-handed, draconian, sorry, sordid, extraordinary and profoundly shameful,' and promised to repeal it.

1.11 The ALP also opposed the Howard Government's 2006 amendments to the CRWMA which made it possible for a land council to nominate a site for a radioactive waste dump, which led directly to the nomination of a site on Muckaty Station, 120km north of Tennant Creek.

1.12 The CRWMA is now cited in legal textbooks as a case study of defective legislation.[2]

1.13 After winning Government, Prime Minister Kevin Rudd took the regrettable decision to transfer responsibility for radioactive waste management out of the science portfolio and into the resources portfolio, held by Minister Martin Ferguson. In the absence of the necessary background, expertise or willingness to follow through with the ALP's election commitments, the matter lapsed for several months.

1.14 In 2008, a government-dominated Senate Environment, Communications and the Arts Committee reported on an Australian Greens bill to repeal the CRWMA. It found that the CRWMA legislation was unfair and discriminatory, that consultations and decision making processes should reflect the interests of all clan groups in the

---

2 Australian Policy Handbook, cited in Mr. Dave Sweeney's evidence provided to the Committee hearing held 30 March 2010, p. 41.

immediate area, that a new foundation for building Australia's nuclear waste policy was needed, and that the legislation should be repealed.

1.15 The Senate Committee stated, 'The fact that the Muckaty nomination remains current is in itself a cause of community concern which overlays discussion about the future appropriate management of Australia's radioactive waste.'

1.16 After two years of stubborn silence and repeated calls on the government to uphold its election promise to repeal it, Minister Martin Ferguson eventually introduced virtual duplicate legislation which preserves the Muckaty nomination and introduces total Ministerial discretion over site selection.

1.17 This Bill was tabled in late February 2010, with the government proposing 11 working days in which to conduct an inquiry which would limit itself to legal and constitutional issues only.

1.18 After a demand from the Australian Greens for a credible deadline the Committee was eventually given more time to conduct this inquiry and issue this report.

1.19 It is extremely regrettable that the Committee refused to visit the proposed dump site, Tennant Creek or the Barkly region, despite the specific targeting of this area in the legislation.

The Muckaty Nomination

1.20 While its advocates frequently use the phrase 'international best practice', the government's approach fails many of these principles and basic standards, and ignores strong cautions arising from overseas experience.

1.21 One example is the UK Committee on Radioactive Waste Management's statement that, 'There is a growing recognition that it is not ethically acceptable for a society to impose a radioactive waste facility on an unwilling community.'

1.22 Instead, our government seeks to pass legislation that will allow precisely this to occur, to the people of the Barkly region north of Tennant Creek.

1.23 Muckaty Station exists on a floodplain and is an area of high seismic activity and great natural beauty. The ALP Member for Barkley, Gerry McCarthy offered to show the Committee:

> ...some of the best cattle country in the world, lands that are traversed by Indigenous and non-Indigenous people regularly, a site that has great water potential from aquifer sources, a site that has excellent grassland, a site that has an annual fire history and a site that, from 1998, has had a significant seismological history. It is a very habitable place. It is a very beautiful place.

1.24 When in Opposition, NT Senator Crossin stated that these lands in the Northern Territory are 'connected to indigenous people through their spirituality, so it's not exactly our land, I don't believe, to play around with.' She was right. The proposed dump site near Tennant Creek in the Northern Territory, the only option currently under consideration, is immediately adjacent to a sacred Milwayi men's site known as at Karakara.[3]

1.25 Senator Crossin also observed that the Howard government gave itself powers to, 'pretty much do what it wants and it seems like the interests of Aboriginal people here again are going to be denied.' Again, she was right.

1.26 A significant number of Aboriginal people with traditional obligations to the lands in question do not believe their views are being accurately represented by the statutory authority that has governance over their lands, the Northern Land Council. Their repeated and eloquent invitations for Minister Ferguson to visit their land have been ignored, over a period of several years. In one letter to the Minister which was subsequently tabled in Parliament, they state:

> ...we want to see each other face to face where we can have a few questions to ask why you are not listening to the biggest forum of people... We want you to know that Traditional Owners are waiting to show you that the country means something to them. That is why we want you to come along and to see because we don't want that rubbish dump to be here in Muckaty area.

1.27 The people who signed this letter are from families listed in the 1997 Land Commissioners report that established the Muckaty Land Trust.

1.28 The 2008 Senate Inquiry into this matter elaborated at length on the importance of the Land Commissioners report because it granted title to five groups jointly, due the clearly interconnected ownership of the land and the overlapping dreaming shared by the Milwayi, Yapayapa, Ngarrka, Winrtiku and Ngapa people.

1.29 Stephen Leonard who made a submission for and on behalf of the Muckaty Traditional Owners emphasised the importance of this document:

> In 1997, after hearing years of tested evidence in a transparent and objective tribunal framework, the Aboriginal Land Commission found that there was clearly joint and interconnected 'ownership' between the five main groups in the Muckaty Land Trust where dreaming overlapped. This was a core reason why a single Land Trust was granted. Furthermore the Report clearly indicated that the nominated site was jointly 'owned' by at least 3 to 5 groups, the Milwayi, Yapayapa, Ngarrka and perhaps the Winrtiku and Ngapa.

1.30 The basis upon which the Muckaty Land Trust was established clearly recognised overlapping and group responsibilities for this country.

---

3 Submission from Stephen Leonard, lawyer representing Muckaty Traditional Owners.

1.31 The current process isolates a number of people as the exclusive 'owners' in the white sense of having a title deed, imposing a framework which is convenient from a 'divide and rule' perspective but at odds with the way Aboriginal people approached land ownership under traditional law. In evidence to the committee, the Australian Public Health Association pointed out the health implications of this kind of divisive strategy.[4]

1.32 Consultants engaged by the NLC have produced a confidential anthropological report. The government refuses to table this document in the Senate, and is currently resisting producing it pursuant to my request under Freedom of Information laws. The Northern Land Council rests its entire case on this document but refuses to reveal it, even to other members of the Muckaty Land Trust whose country it concerns and whose family names are likely cited.

1.33 The Australian Greens do not support continued consideration of the Muckaty nomination, and believed it should be immediately withdrawn from the site selection process.

a) An inadequate framework

1.34 Considering this bill establishes the framework for the management of Australia's most dangerous industrial wastes for the next three hundred years, it is a breathtakingly flawed piece of legislation. The ANU's James Prest summarised the legislation accurately in his submission to the committee:

> ...the re-instatement of procedural fairness and judicial review rights proposed by the Bill is so very tightly constrained and limited by other provisions to the extent that the re-instatement exercises threatens to become largely symbolic and illusory, if not misleading and deceptive.

1.35 **The Bill currently lacks an objects clause**, commonly included in legislation 'to guide decision makers in the event of statutory ambiguity and secondly, assisting courts and tribunals in the same situation if there is a problem with statutory ambiguity,' according to the evidence provided by ANU Lecturer Dr. James Prest. The Greens welcome the Committee has called for an objects clause to be inserted

1.36 **The Bill currently lacks detail about how this project will be financed over a period of several hundred years**. The Bill as is, 'does not set out a framework for the future financial implications of running this facility, other than to essentially rely upon the Commonwealth to underwrite and provide appropriations.'[5]

1.37 **The Bill in no way restores procedural fairness to the process of selecting the Muckaty site.** Legal experts who provided evidence to the committee characterised this Bill as one that 'shifted the goalposts to essentially move the normal

---

4 http://www.aph.gov.au/hansard/senate/commttee/S12917.pdf

5 Dr. Prest evidence given 30 March 2010, p 35.

apparatus of environmental law to one side and impose a special legislative regime for the approval of a particular project.' Such laws necessarily reduce or remove the common law concept that accords procedural fairness where an administrative decision affects rights, interests and legitimate expectations of affected persons.

1.38 Despite the words 'procedural fairness' being used repeatedly, the Bill does not reinstate procedural fairness, and the Muckaty nomination is insulated from it. As lawyers from the Northern Territory EDO stated:

> The claim that procedural fairness is reinstated is an intentional nonsense...

1.39 In the context of this uniquely defective piece of legislation, the term 'procedural fairness' is interpreted to mean the ability to make a submission to the Minister which he is then free to ignore, as the following exchange during the committee's hearings on 30 April established:

> **Senator TROOD**—So, if a decision were made to proceed with the Muckaty Station site, does this bill provide any more procedural fairness in relation to that site than was in the previous bill?
>
> **Mr Davoren**—I think it does in that the minister is obliged to accept submissions on decisions relating to that site. There was no such opportunity under the previous act.
>
> **Senator TROOD**—But he is not obliged to do anything other than receive those submissions, is he?
>
> **Mr Davoren**—And consider them.
>
> **Senator TROOD**—But that could be a two-minute exercise. He is not required to take evidence about them; he is not required to explore them. As your answers to Senator Ludlam made clear, he is not required to assess those submissions in relation to any particular criteria that this bill now provides that were not in the previous bill, is he?
>
> **Mr Davoren**—No, he is not.
>
> **Senator TROOD**—So the essence of the case for procedural fairness in relation to what is the preferred site is that the minister is required to receive submissions. Is that it?
>
> **Mr Davoren**—That is what I understand.

1.40 There are no rights for persons other than those 'with an interest in the land' to make a submission. It is likely that people will miss notification of the submission , given there is no requirement for any details to be provided in the notification that would identify what it is actually about in plain language. Forcing submissions to be made in writing is extremely prejudicial to Aboriginal people, and since there are no objectives or criteria in the Act, and nothing to guide the Minister's decision, it is impossible for a person to know what to make a submission about.

1.41 There is no right for a person to see information on which the Minister will base his decision (eg anthropological reports and evidence from Land Councils as to

compliance with the Aboriginal Land Rights Act), and in particular there is no right to see information adverse to a particular person's interests.

1.42 The Minister is free to literally make the decision on the flip of a coin if he chooses: nothing in this bill is designed to prevent the kind of entirely arbitrary decision making that seems to be Minister Ferguson's preferred mode of operation.

Judicial review

1.43 The claim that 'judicial review' is reinstated is misleading, as the Bill continues the intentional design feature of the 2005 Act in ensuring there are no grounds on which a judicial review can be based, and no access to information on which to base a review.

1.44 Access to judicial review depends in part on criteria against which to judge whether the Minister has upheld his or her obligations. As the committee established during the hearing on March 30:

> **Senator LUDLAM**—...My understanding of administrative law is that the minister's decision-making will be benchmarked against the criteria that are set, but you have just acknowledged that there are no criteria, so what form of review will be possible in that instance? On what grounds could you bring a claim that the minister did not do what he was supposed to do?
>
> **Mr Davoren**—There is the opportunity for people to give their views on the adequacy of the site.
>
> **Senator LUDLAM**—You cannot go into court with a view. If it is a judicial review you are seeking, you
>
> need to say the minister did not do what he should have done, but you have just said that there are not any criteria to guide him.
>
> **Mr Davoren**—No. The minister has to make a decision about whether to select the site and then proceed with its assessment.
>
> **Senator LUDLAM**—There is not really any process at all, is there, of actual site selection.

Recommendation 1

Procedural fairness and judicial review must be restored to the Muckaty Land Trust nomination.

b) Overriding State and Territory Laws

1.45 Legal experts have cautioned against the Commonwealth arbitrarily stripping powers from the States and Territories by suspending the application of all state and territory laws, environment protection and regulations, Aboriginal heritage laws, as well as health and safety standards. The Northern Territory Chief Minister and his government are firmly opposed, noting the obvious flaws in the Commonwealth's

strategy of suspending the operation of laws designed to safeguard public health, heritage and the environment.

1.46 Given there will be insufficient Commonwealth controls, personnel or infrastructure in any remote area dump, suspending the body of law designed to safeguard the public and the environment is simply dangerous and jettisons long established regulatory frameworks and standards for the protection of public health, the labour force, the environment, heritage, the receiving community and people along the transport corridor. It fails to take into consideration the fact that State or Territory emergency service personnel and infrastructure will be needed should an accident or incident arise, and that nuclear waste will be transported past the doors of many Australian homes, often on roads prone to accidents and extreme weather conditions, particularly flooding.

1.47 In their submission, lawyers from the Northern Territory EDO cautioned against excluding all laws which merely regulate or inhibit a radioactive waste dump, arguing that the Bill should be changed to ensure that State and Territory laws apply so as to assist to manage the environmental impacts and risks as thoroughly as possible. The EDO stressed the absurdity of suspending particularly any regulation of the transport of radioactive waste.

1.48 The EDO also pointed out the inadequacy of the Commonwealth laws that are being left in operation under this legislation – in particular the EPBC Act and the ARPANS Acts are frameworks that have *not* been designed to address the types of environmental, economic and social risks posed by a radioactive waste facility and associated activities it entails. The operation of the EPBC is flawed according to the Australian National Audit Office and the Hawke Review. It only relates to 'likely significant impacts on the environment' on a national scale, implying a reduced concern about local or regional impacts, economic of social impacts.

1.49 The ARPANS Act is based on the existence of complementary State and Territory regulation, and is not able to address issues not directly related to radioactivity. As the NT EDO stated:

> It is hypocritical to say that the ARPNS Act is a rigorous regime, when the core requirements of the ARPNS Act contained in the Code for Waste Disposal are for the site to be strategically selected from a range of options based on science – which has been effectively prevented by the 2010 Bill. This makes one of the main strengths of the ARPNS Act framework completely defunct.

1.50 The EDO noted the effect of the Commonwealths constitutional immunities and land acquisition to not limit the purported limits on the type or source of radioactive waste in the 2010 Bill's definition of facility'.

Recommendation 2

The Bill should be amended to ensure that State and Territory laws apply so as to assist to manage the environmental impacts and risks as thoroughly as possible.

c) International Best Practice

1.51 The Committee was provided a briefing in answer to questions on notice posed by Senator Feeney which described the international frameworks, best practice standards and details about the UK, Swedish and Hungarian case studies.

1.52 It is very difficult to miss the emphasis placed by the IAEA, by the OECD Nuclear Energy Agency, International Commission on Radiological Protection, EU, the UK and the Japanese on winning public confidence and obtaining social licence and community consent for the siting of radioactive waste facilities.

1.53 Australia is either a member of these institutions and treaties, or we have strong relationships with these countries considered to be like-minded on many fronts, which it makes it all the more regrettable that Australia is lagging behind on this aspect of international best practice.

1.54 The phrase 'international best practices' is used frequently by supporters of this legislation, but it appears to be very little understood. Certainly it was difficult to find an agency prepared to speak about the Australian government's understanding of internationally regarded principles on transparency, community participation, and stakeholder involvement in the decision making around nuclear waste.

1.55 ANSTO claimed, 'we are not experts on those matters...in the areas of public consultation on the matters that relate to this.' That is, despite ANSTO's CEO being ' charged with responsibility to take into account best international practice.'

1.56 **The UN Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Managemen**t – to which Australia is party – notes that 'public consultation on radioactive waste management strategies was not only a good practice to follow, but was also essential for the development of a successful and sustainable policy.'

1.57 **The IAEA** in 2007 noted examples of states which, having used undemocratic methods lacking public involvement and acceptance, have 'had to reconsider their programs'. One of the conclusions of the study was that 'reassessment can become necessary because past decisions were not reached through socially acceptable process.'[6]

---

6 IAEA, Factors Affecting Puablic and Political Acceptance for the Implementation of Geological Disposal (IAEA-TECDOC-1566) Vienna, October 2007.

1.58 According to the IAEA, there is a need for, 'a clear legal framework; a strong independent regulatory function; competent license or operators; clear lines of responsibility and accountability; public involvement in the decision making process; adequate financial provisions; clear, integrated, plans on how spent fuel and radioactive waste will be managed to ensure continued safety into the future, and as this could be for decades, to avoid creating a legacy situation that would impose undue burden on future generations...'[7]

1.59 **The OECD Nuclear Energy Agency** recognises that, 'the public, and especially the local public, are not willing to commit irreversibly to technical choices on which they have insufficient understanding and control'.

1.60 The Nuclear Energy Agency's report on the *Decommissioning and Dismantling of Nuclear Facilities, Status, Approaches, Challenges* stated, 'It is openly accepted that openness and transparency are essential for the winning of public approval...The local public is increasingly demanding to be involved in such planning and this may accelerate the introduction of concepts such as 'stepwise decision making'. The challenge for the future, therefore, will be satisfactory development of systems of consulting the public, and local communities in particular, and the creation of sources of information in which the public can have full confidence.'

1.61 **The European Union** requires member states to adhere to certain social principles in terms of site selection. The European Union *Inventory of Best Practice in the Decommissioning of Nuclear Installations*, 30 June 2006 concluded, 'Final waste repositories must be sited where local communities are willing to give their consent to these facilities for many generations. Experience has shown that, without this consent the project will sooner or later be cancelled, stopped or indefinitely delayed – one way or the other. Therefore siting must focus on three key issues: the safety of the repository system; the impact on local image and socio-economy, the importance of public acceptance and how it can be reached.'

1.62 **The UK Committee on Radioactive Waste Management** sets out a very detailed set of recommendations on how to proceed with the siting of a radioactive waste facility.

> *Recommendation 11:* Willingness to participate should be supported by the provision of community packages that are designed both to facilitate participation in the short term and to ensure that a radioactive waste facility is acceptable to the host community in the long term. Participation should be based on the expectation that the well-being of the community will be enhanced.

---

7 IAEA, The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management – Summary Report First Review Meeting of the Contracting Parties Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 24 December 1997.

Recommendation 12: Experience from the UK and abroad clearly demonstrates the failure of earlier 'top down' mechanisms (often referred to as Decide-Announce-Defend) to implement long-term waste management facilities. 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.'

Recommendation 3

Establishment of Commission with its first task to conduct an inventory of international best practices to be used in the Australian context.

d) Total ministerial discretion

1.63 It is difficult to recall a piece of legislation that vests so much control in the hands of a single Minister. To be specific:

- the decision as to whether the Muckaty nomination proceeds is entirely in the hands of the Minister and no rights of appeal apply.
- no written criteria exist against which the Minister is to judge the suitability of the Muckaty site.
- No timeline exists on which the Minister is required to consider evidence or make a decision.
- no statement of reasons for the decision is required by the Minister there is no obligation to publish a list or summary of submissions received.

1.64 Sections 8 (1) and 13 (2) confer absolute discretion upon the minister to make key approvals and declarations without being required to take any criteria or other matters into account in approving a state nomination or selecting a site.

Recommendation 4

That the legislation be amended to provide clear guidelines, timelines, consultation obligations and reporting obligations on the Minister before the process of site assessment proceeds any further.

Scope of this inquiry

1.65 This inquiry sought opinions only on matters of legal and constitutional significance, intentionally sidelining the wide community interest in environmental, social, technical and ethical dimensions of the Government's policy.

1.66 This intentional narrowing of the terms of reference of the inquiry means that this report is silent on the most obvious question of all: why the Australian Government is so determined to place radioactive waste at a central 'remote' site.

1.67 The answer was provided most accurately by former Science Minister Brendan Nelson, who in 2005 asked 'why on earth can't people in the middle of nowhere have low level and intermediate level waste?' His successor in the Science portfolio, Julie Bishop, noted that all the sites on the Government's shortlist were 'some distance from any form of civilisation.'

1.68 It has been a profound shock to many supporters of the Australian Labor Party that coercive attempts to dump radioactive waste out in 'terra nullius' did not end with the election of the Rudd Government, but have in fact picked up exactly where the former Government left off. This government opened his first term with an apology. If this legislation is allowed to proceed, it will close his first term owing another apology to Aboriginal Australians.

1.69 The report of this committee has ignored the findings of the previous ECA committee report into the repeal of the CRWMA, which did take the time to investigate issues beyond a narrow constitutional focus. In evidence given in 2008, both ANSTO and the scientific peak body FASTS acknowledged that politics, not science or some vague notion of international best practice was driving the Government to dump waste in regional communities:

> **Mr McIntosh**—We cannot really comment upon that policy process. We understand, and I know that you say to leave politics aside, but politics frankly was the determining factor.
>
> ...
>
> **CHAIR**—So then why does Australia mainly look at remote sites?
>
> **Mr McIntosh**—I believe it is for political reasons, Senator.[8]
>
> ...
>
> **Mr Smith**—It would appear to be that politically the pragmatics seem to be that that is the only viable site at the moment that I am aware of for a Commonwealth facility.

1.70 When questioned on the feasibility of returning the reprocessed spent fuel to the Lucas Heights facility in Sydney, ANSTO acknowledged that there were no technical barriers to doing so.

> **Senator LUDLAM**—....Can you turn to the question of the spent fuel or the reprocessed material that is to be returned from overseas. What would be the constraints on ANSTO should that material be returned to Lucas Heights rather than to a remote dump? What would you need to provide on-site?
>
> **Mr McIntosh**—We would have to build a facility similar in nature to the proposed store for the Commonwealth facility.

---

8 McINTOSH, Mr Steven, Senior Adviser, Government Liaison, Australian Nuclear Science and Technology Organisation.

Senator LUDLAM—Is there anything technical preventing that from occurring, leaving politics to one side?

Mr McIntosh—No.

Senator LUDLAM—Has ANSTO or any other agency ever done a full assessment of what that would look like?

Mr McIntosh—No. There is been a full assessment done of what it would look like at the Commonwealth site, and presumably it would look the same, but we have not done any planning for such an action on-site because we have been told by government—and at the end of the day we are directed by government—that this waste will not be returning to our site. Why would we waste resources planning for something we have been told will not happen?[9]

1.71 In additional comments to the 2008 report, I wrote the following:

The Greens do not believe that the nuclear industry – in Australia and around the world – has ever demonstrated that remote dumps are the most appropriate solution for the disposal of radioactive waste. At some time in the future this may become the case – if the industry is able to demonstrate, for example, that the waste can be safely contained for the long time periods in question.

However, for as long as the industry is unable to demonstrate that it has found a safe way of guaranteeing safe isolation of radioactive waste for tens of thousands of years, the Greens believe the material should remain on-site, close to the point of production, where it can be monitored, re-packaged as necessary, and subjected to as little transport and movement as possible.

This option essentially allows for the greatest future flexibility, and does not foreclose potential future management options which may arise as waste management technologies evolve (for example through synroc, nanotechnology, transmutation or some other technique).

This is not necessarily an argument for the long-term 'disposal' of this waste at the Lucas Heights facility either; ANSTO has acknowledged that the feasibility of this option has never been evaluated.

The essential point is that whatever process arises from the current debate over the repeal of the CRWMA, it should not simply repeat the mistakes of the past in proceeding to the foregone conclusion that a remote community will one day host a radioactive waste dump, and that it's simply a question of whom. A much broader field of options must be assessed, leaving open the possibility that in the light of a properly constituted deliberative process, the decision may be taken to forestall final 'disposal' until such time as the industry can prove such a facility will be safe.

---

9 McINTOSH, Mr Steven, Senior Adviser, Government Liaison, Australian Nuclear Science and Technology Organisation.

Nothing has happened since that time to change this view, apart from an obvious entrenchment of the Rudd Government's determination to repeat the divisive and failure-prone strategies of the past.

It is not scientific or engineering best practice lining up Muckaty station and its custodians for radioactive waste, but a more predatory political calculation. It is a strategy that could not have been better calibrated to spark determined opposition from people with nowhere else to go, who were not asked and did not consent to hosting this toxic intergenerational memorial site. Behind them has arisen a much broader coalition of Australians with a more fair-minded idea of what constitutes regional economic development. The Rudd Government will stand condemned for attempting this strategy of overruling a community when the basic outlines of a workable approach were laid out in the findings of the 2008 Senate inquiry.

There is still time for the Rudd Government to reconsider whether it wants the Muckaty campaign to end up in textbooks as a bruising example of 'world's worst practice' in radioactive waste management.

Senator Scott Ludlam

Australian Greens

APPENDIX 1 - Australian Greens

Timeline

In December 2005 the Howard Government passed the *Commonwealth Radioactive Waste Management Act* (CRWMA) through the Senate, overriding relevant NT legislation prohibiting radioactive waste dumping and identifying three sites for a proposed national waste dump. The legislation prevented the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 from having effect during investigation of potential dump sites, and it excluded the Native Title Act 1993 from operating at all. Procedural fairness was also extremely curtailed through the suspension of the Judicial Review Act.

In 2006 amendments were made to allow the act to override the Aboriginal Land Rights Act procedures requiring informed consent from all affected people and groups. These changes explicitly stated that site nominations from Land Councils are valid even in the absence of consultation with and consent from traditional owners.

On 6 March 2007, a media statement from Kim Carr, Trish Crossin and Warren Snowdon committed Federal Labor to:

- Legislate to restore transparency, accountability and procedural fairness including the right of access to appeal mechanisms in any decisions in relation the sighting of any nuclear waste facilities;
- Ensure that any proposal for the siting of a nuclear waste facility on Aboriginal Land in the Northern Territory would adhere to the requirements that exist under the Aboriginal Land Rights, Northern Territory Act (ALRA);
- Restore the balance and, pending contractual obligation, will not proceed with the establishment of a nuclear waste facility on or off Aboriginal land until the rights removed by the Howard government are restored and a proper and agreed site selection process is carried out; and
- Not arbitrarily impose a nuclear waste facility without agreement on any community, anywhere in Australia.

At the 45th ALP National Conference held 31 July – 2 August 2007 the ALP policy platform was agreed in Chapter 5 to:

- Repeal the Commonwealth Radioactive Waste Management Act 2005;
- Establish a process for identifying suitable sites that is scientific, transparent, accountable, fair and allows access to appeal mechanisms;
- Ensure full community consultation in radioactive waste decision-making processes; and
- Commit to international best practice scientific processes to underpin Australia's radioactive waste management, including transportation and storage.

In September 2007, under the amended process, Muckaty, 120 km north of Tennant Creek, was nominated by the Northern Land Council. The site was added to the short-list of potential sites, when former Science Minister Julie Bishop accepted the contentious nomination.

On 27 September 2007 then Shadow Science Minister, Senator Kim Carr, stated: 'Labor is committed to repealing the Commonwealth Radioactive Waste Management Act and establishing a consensual process of site selection. Labor's process will look to agreed scientific grounds for determining suitability. Community consultation and support will be central to our approach.'

December 2007 Minister Ferguson given portfolio carriage of this issue – no reason was given to explain the first ever shift by any federal government of this portfolio area from Science to Resources

February 2008, Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

In September 2008, Senator Ludlam tabled the Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008 which was referred to an Inquiry of the Environment, Communication and the Arts Committee that received 103 submissions and held hearings in Canberra and Alice Springs.

October 2008, Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

In December 2008 the government dominated Committee reported exposing the extraordinarily coercive nature of the legislation, its deficiencies and consequences, the Committee has recommended that this discriminatory and flawed legislation be repealed in the first few Parliamentary sitting weeks of 2009. The Committee has also outlined an entirely new approach to finding a solution to this complex and long standing problem, a process founded on rigorous consultation, voluntary consent, environmental credibility, and which utilises best practice models tested internationally.

17 February 2009 the government votes against a motion in the Senate calling for repeal of the commonwealth Radioactive Waste Management Act and for implementation of the Senate Committee's recommendations and ALP policy.

12 May 2009 the government votes against a motion in the Senate calling for repeal of the commonwealth Radioactive Waste Management Act and for implementation of ALP policy.

2 June 2009 Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

January 2010 – Greens initiate Freedom of Information request for the secret anthropology report, Parsons Brinkerhoff reports and all correspondence and evidence of consultation relating to the Muckaty nomination

Feb 2010 Estimates committee hearings reveal the Department of Resources is waiting for instructions from the Minister's office before proceeding.

25 February 2010 – Government introduces National Radioactive Waste Management Bill, referred to Committee for reporting 30 April.

3 March 2010 – Senator Ludlam addresses public meeting in Tennant Creek with TOs, local business people, ALP reps and pastoralists; strong community opposition registered.

15 March 2010 – Greens order for production of documents forces government to hand over the technical surveys conducted by Parsons Brinkerhoff, including the final report submitted to the department on 18 March 2009 and several peer reviewed reports.

Easter 2010 – Greens attend Easter gathering in Tennant Creek, 300 strong demonstration, support legal consultation and challenge work begins.

12 April large presence at Darwin Senate Inquiry Hearing

APPENDIX 2 – Australian Greens

Efforts to address this imbalanced report

Senate Committee processes provide an important opportunity for legislation to be improved, and in many cases improvement does occur as a result of input from stakeholders and experts.

This is not one of those occasions. This report presents an unbalanced and closed-minded justification for a foregone conclusion. Significant effort and investment was made in generating draft language suggestions and argumentation for the Committee to consider in order to address this imbalance.

All but two typos and the deletion of 6 words were rejected with no explanation or opportunity for discussion. For this reason I am appending my detailed contribution to this report.

Recommendations:

Recommendation 3: The committee recommendations that proposed sections 9 and 17 of the Bill be amended to require the Minister ~~to respond in writing to~~ take into accounts comments received in accordance with the Bill's procedural fairness requirements.

Recommendation 4: The committee recommends that the ~~Explanatory Memorandum~~ Bill be amended to include ~~a detailed rationale for, and explanation of,~~ a set of objectives and criteria to guide the Minister's ~~absolute~~ discretion in relation to decision making under this Bill.

This recommendation is so weak as to be redundant. Instead of a justification for absolute Ministerial discretion in the Explanatory Memorandum, which is of extremely limited value to anyone, the Committee should argue for a simple set of objectives and measurable requirements to guide the Minister. Given minimal standards in legislation around significantly less toxic or volatile materials routinely elaborates such guidance and standards of accountability, it's absurd for the Committee to arrive at

Chapter 1

- The initial section identified as 'Purpose of the Bill' also combines some aspects of what goes often into Committee reports as a 'Referral to the Committee' section.

- I see some utility in separating out these two aspects and request that a Referral to the Committee section come first, incorporating paragraphs 1.22, 1.23 and 1.24 followed by a 'Purpose of the Bill' section that starts with current para 1.3 and adds the following additional paragraph containing factual purpose elements, drawn from the Bills Digest description of the Purpose of the Bill.

New paragraph suggestion: The Bill provides legislative authority to undertake the various activities associated with the proposed facility and overrides or restricts the application of all State, Territory laws that might hinder the facility's development and operation. The Bill will restore some review rights and procedural fairness rights to the decision making process for future site selection, with these rights not applying to a pre-existing nomination. Unlike the current Act, the Bill also allows for a site to be selected outside the Northern Territory.

Para 1.23 A citation here should be to the ALP National Platform, and given that it is referred to various times in the report, the full policy should be provided to readers either in the text or a footnote.

Insert text suggestion: 'Labor is committed to a responsible, mature and international best practice approach to radioactive waste management in Australia. Accordingly, a Federal Labor Government will:

· not proceed with the development of any of the current sites identified by the Howard Government in the Northern Territory, if no contracts have been entered into for those sites.

· repeal the Commonwealth Radioactive Waste Management Act 2005.

· establish a process for identifying suitable sites that is scientific, transparent, accountable, fair and allows access to appeal mechanisms. ...

· ensure full community consultation in radioactive waste decision-making processes.

· commit to international best practice scientific processes to underpin Australia's radioactive waste management, including transportation and storage.

(ALP National Platform 2007, Chapter 5)

- 1.25 This is simply an insufficient recounting of a robust Senate Inquiry process, especially when this Committee is making recommendations that run quite counter to its findings. There should be a paragraph addressing that. After this para I request that the four recommendations be duplicated in full (text provided below) or at least a summary of the findings should be cited, such as

- **Suggested summary paragraph**' The government led Senate Environment, Communications and the Arts Committee found that Howard's legislation was unfair and discriminatory, that consultations and decision making processes should reflect the interests of all clan groups in the immediate area, that a new foundation for building Australia's nuclear waste policy was needed, and that Howards legislation should be repealed. The Senate Committee stated, 'The

fact that the Muckaty nomination remains current is in itself a cause of community concern which overlays discussion about the future appropriate management of Australia's radioactive waste.'

- para 3.19 please provide a figure for the total amount of pro forma letters received

Chapter 2

- 2.4 – 2.5. These two paragraphs do not adequately cover the subject heading. A fuller explanation of the implications is needed. My suggestion is that we take what is currently in brackets in 2.4 and make it into a stand alone sentence with the implications spelled out.

- **Suggested text:** This site was nominated and approved under the current Act in 2007 which did prevent the act of nomination itself, in addition to the Minister's decisions about such nominations, being subject to procedural fairness or legal challenge on the basis of absence of voluntary informed consent.

- 2.9 A fuller explanation of the implications is needed.

Suggested additional sentence for end of paragraph 2.9: However, he is not required to assess those submissions in relation to any particular criteria. (Quote from Senator Trood, Hansard p. 10)

Chapter 3

- 3.8 A lengthy but selective quote is taken from the Land Commissioner's report, but not the key finding of the Land Commissioner that the Land Trust must be held in common by 5 groups due to interweaving and overlapping associations and responsibilities for the land. I propose we insert:

- 'Another issue as to the primacy of responsibility arises because of the overlapping of dreaming tracks. This has resulted in a considerable number of shared sites and areas of land, to be found elsewhere in this chapter. Occurrences of this kind are common in semi-arid country in Central Australia. Different groups with different dreaming will often share sites because spiritual focus often coincides with the existence of the necessities of life, especially water. In the case of shared sites of land, no single group seeks to assert its pre-eminence over another. When witnesses were asked about who should speak for particular sites which are shared by more than one group, they would invariably respond by naming the senior people from each of the groups involved. As a result, it is possible to say that 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.'

One submitter provided a description that could also suffice: 'In 1997, after hearing years of tested evidence in a transparent and objective tribunal framework, the Aboriginal Land Commission found that there was clearly joint and interconnected 'ownership' between the five main groups in the Muckaty Land Trust where dreaming overlapped. This was a core reason why a single Land Trust was granted. Furthermore the Report clearly indicated that the nominated site was jointly 'owned' by at least 3 to 5 groups, the Milwayi, Yapayapa, Ngarrka and perhaps the Winrtiku and Ngapa. ' Stephen Leonard's submission.

- 3.18 **Suggested additional sentence after Mr. Levy's quote:** Other reasons explained as contributing to this situation is that the NLC have withheld access to any anthropological or other evidence, the NLC has not provided any legal advice or support to project critics, the Muckaty site was at this stage one of four under consideration (not the sole site as it is now), and because it is very difficult to take legal action pertaining to a hypothetical scenario.

- 3.36 – **Suggested additional sentence after the quote from the Department**: Critics of the Bill asserted that retention of the contested Muckaty nomination undermines the value of the Departments emphasis on voluntarism, which is not defined in the Bill.

- 3.48 – **Suggested additional sentence after the quote from the Department**: Critics of the Bill described the Departments definition of consultation as deeply flawed, asserting that consultation should commence before site nomination, not in a partial and modular fashion after the site has been nominated.

Significant input was provided to the Committee from environmental law experts on the weaknesses of the EPBC, and the ARPANS Act, which should be cited.

Suggested new paragraphs after conclusion of 3.48:

Submissions received by the Committee questioned the ability of the EPBC and the ARPANS Act to fulfil all of the functions assigned. It was noted that the principle code the ARPANS Act adopts is the *Code of Practice for the Near-surface disposal of radioactive waters in Australia (1992)* is 18 years old, with many sections not applying to the selection of Muckaty regarding seismology, water , flora or fauna, cultural or historical significance, or consultation processes. There are no basic offences under the ARPNS Act for the release of radioactive material (i.e. pollution) into the environment which provides the absolute starting point of all pollution and contamination laws. The regulatory affect of this is that, to the extent that an activity or incident is not prohibited or controlled expressly in a license issued under that Act, it is allowed to occur.

The EPBC Act was also seen by legal experts to have diminished value in regulating radioactive waste as the Act only relates to 'likely significant impacts on the environment' on a national scale, making it unconcerned about local or regional impacts, economic and social impacts, and only concerned with identifiable likely impacts at time of conceptual design, not ongoing risk or compliance management. As highlighted by the Australian National audit Office (ANAO), there are significant shortfalls in the enforcement of the Act in its early years of operation. When ANAO conducted its first audit of the Act in 2002, there had been no prosecutions under the Act. When the ANAO conducted its second audit in 2006, there had only been one successful prosecution.

Concern was also noted regarding the findings of the 2007 Audit that found, 'Implementation of the compliance and enforcement strategy has been generally slow – particularly in regard to managing compliance with conditions on approval. The department did not have sufficient information to know whether conditions on the decision are generally met or not. There has been insufficient follow up on compliance by the department for those individual or organisations subject to the Act and little effective management of the information that has been provided. Consequently, the department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective. This is not consistent with good practice and does not encourage adherence to condition set by the Minister.

- 3.50 **Suggested additional sentence:** Critics of the Bill observed that a consultative committee should acknowledge the national dimension of the issue and noted federal Labor's commitment to a national approach, which should also address the legitimate concerns of transport corridor communities.

- 3.59 **Suggested additional sentence:** Critics of this Bill and the NLC's approach to site selection argued that perpetuating the Muckaty nomination perpetuates the worst oversights in a site selection process that lacked fairness. They noted that strong community interest and the unique nature of the nations first purpose built radioactive waste facility should raise, not lower, the bar on getting the policy framework right guided by international best practice.

- 3.62 **Suggested additional sentence:** Critics of this Bill expressed concern that this requirement was far too constrained, calling for the legislation to include benchmarks and criteria against which the Minister would be required to assess submissions.

- 3.72 **Suggested additional sentence:** Critics of this Bill argued that triggering the ARPANS and EPBC Acts after site selection comes at a late stage when project momentum towards an approval is well underway. They also noted that involving ARPANSA in the site nomination process would adhere to international best practice standards.

- 3.77 **Suggested additional sentence:** Critics of the Bill, including the Central Land Council argued that that 'no invalidity' clauses put more weight on the need for industry certainty than Traditional Owner consent.

- 3.84. **Suggested additional sentence**. Critics of the Bill argued that the site nomination process continues to be at odds with international best industry practice and a range of other instruments including Article 29 of the UN Declaration on the Rights of Indigenous Peoples.

- 3.92 **Suggested additional sentence:** The ACF called for, 'a comprehensive and publicly available matrix of risks posed by the siting, construction and operation of the Facility (including the transportation of hazardous waste) and an analysis of how the laws that are saved by the Bill (including controlled facility licence conditions issued under the ARPANS Act) will address those risks in the absence of the displaced laws. Without this, affected communities cannot have confidence that the risks are adequately addressed.'

- 3.95 International best practice was discussed by many submitters, and was the subject of a paper provided to the committee in response to a question on notice. Given how much the phrase is used, I propose that the Committee's handling of international best practice be much more detailed.

-

  Suggested text: The Committee was provided a briefing in answer to questions on notice posed by Senator Feeney which described the international frameworks, best practice standards and details about the UK, Swedish and Hungarian case studies.

  The UN Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management – to which Australia is party – notes that 'public consultation on radioactive waste management strategies was not only a good practice to follow, but was also an essential for the development of a successful and sustainable policy.'

  The IAEA in 2007 noted examples of states which, having used undemocratic methods lacking public involvement and acceptance, have 'had to reconsider their programs' one of the conclusions of the study was that 'reassessment can become necessary because past decisions were not reached through socially acceptable process'[10] According to the IAEA, there is a need for, 'a clear legal framework; a strong independent regulatory function; competent license or operators; clear lines of responsibility and accountability; public involvement in the decision making process; adequate financial provisions; clear, integrated, plans on how spent fuel and radioactive waste will be managed to ensure

10 IAEA, Factors Affecting Public and Political Acceptance for the Implementation of Geological Disposal (IAEA-TECDOC-1566) Vienna, October 2007.

continued safety into the future, and as this could be for decades, to avoid creating a legacy situation that would impose undue burden on future generations...'[11]

The OECD Nuclear Energy Agency recognises that, 'the public, and especially the local public, are not willing to commit irreversibly to technical choices on which they have insufficient understanding and control'. The Nuclear Energy Agency & OECD's report on the *Decommissioning and Dismantling of Nuclear Facilities, Status, Approaches, Challenges* stated, 'It is openly accepted that openness and transparency are essential for the winning of public approval...The local public is increasingly demanding to be involved in such planning and this may accelerate the introduction of concepts such as 'stepwise decision making'. The challenge for the future, therefore, will be satisfactory development of systems of consulting the public, and local communities in particular, and the creation of sources of information in which the public can have full confidence.'

The European Union requires member states to adhere to certain social principles in terms of site selection. The European Union *Inventory of Best Practice in the Decommissioning of Nuclear Installations*, 30 June 2006 concluded, 'Final waste repositories must be sited where local communities are willing to give their consent to these facilities for many generations. Experience has shown that, without this consent the project will sooner or later be cancelled, stopped or indefinitely delayed – one way or the other . Therefore siting must focus on three key issues: the safety of the repository system; the impact on local image and socio-economy, the importance of public acceptance and how it can be reached.'

The UK Committee on Radioactive Waste Management sets out a very detailed set of recommendations on how to proceed with the siting of a radioactive waste facility. Recommendation 11: Willingness to participate should be supported by the provision of community packages that are designed both to facilitate participation in the short term and to ensure that a radioactive waste facility is acceptable to the host community in the long term. Participation should be based on the expectation that the well-being of the community will be enhanced. Recommendation 12: Experience from the UK and abroad clearly demonstrates the failure of earlier 'top down' mechanisms (often referred to as Decide-Announce-Defend) to implement long-term waste management facilities. 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

---

11 IAEA, The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management – Summary Report First Review Meeting of the Contracting Parties Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 24 December 1997.

acceptable for a society to impose a radioactive waste facility on an unwilling community.'

- 3.108 **Suggested additional sentence**: Critics of the Bill emphasised the extent to which the nomination of Muckaty fails to meet key benchmarks recognised as international best practice, and that evidence of contestation indicates that the Muckaty nomination has achieved an insufficient degree of volunteerism.

- 3.109 **Suggested additional sentence**: Critics of the Bill emphasised that science should drive the process of the best possible site selection and be given more weight than the convenience of nominations.

- 3.112 **Suggested additional sentence after the second sentence:** The committee notes criticism of the current approach particularly with regards to limited transparency and secret documents that impedes an increased understanding by key stakeholders.

  It is necessary in this paragraph to qualify the proportions of the waste arising from 'beneficial sources' such as industrial applications and nuclear medicine, and that half of the total Commonwealth proportion of waste is 2,000 cubic metres of contaminated soil from the CSIRO.

  Suggested additional sentence: The Committee notes that critics of the Bill expressed a view that there is time to improve the policy architecture given that 95% of Australia's radioactive waste is currently in secured storage at two Commonwealth sites and the portions of waste to be received from Europe (35 cubic metres) is a small amount compared to 530 cubic metres at Lucas Heights and the CSIRO's 2,000 cubic metres of contaminated soil.

- 3.113 **Suggested sentence after first sentence**: The Committee notes criticism that these standards were not upheld for the Muckaty nomination.

  Suggested sentence at the conclusion of the paragraph: The committee notes that with the exception of historic legacy wastes, all other sites currently using and storing waste will continue to do so past the development of any national facility as the sources will continue to emanate from those hospitals and labs.

- 3.114: I believe the language in this paragraph is too strong given the relative brevity of this inquiry, and the acknowledged restrictions placed by the Committee on its terms of referenced focused almost exclusively on the legal and constitutional aspects of this Bill . Given these restrictions, on what basis does the committee assert this omnibus statement?

- 3.116 There should be reference in this paragraph to the fact that this finding is contrary to the findings of the Senate Committee Environment Communications Committee.

Suggested text to be inserted after the first sentence 'While the Senate Committee Environment Communications Committee found that, 'The fact that the Muckaty nomination remains current is in itself a cause of community concern which overlays discussion about the future appropriate management of Australia's radioactive waste', the Legal and Constitutional Committee notes that it's preservation was specifically requested...continue paragraph

- 3.117 Suggest striking much of the last sentence of this paragraph, 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.~~

  While the Committee's process was longer than the government initially intended, the short time frame for submission was a limiting factor on all stakeholders putting forward their views. The Committee also had a restricted terms of reference to legal and constitutional issues, which was a limiting factor on all stakeholders putting forward their views. The Committee was repeatedly called to go to Tennant Creek and was unwilling to do so. Had it done so it would have helped to compensate for the fact that providing rights to Aboriginal people to be heard in written form only is prejudicial. The failure to visit Muckaty or hold a hearing in Tennant Creek reduces claims about the process engaging all stakeholders.

- 3.118 The committee notes that it 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.

- **Suggested additional sentence:** These documents have been requested through a Senate Order for the Production of Documents and an FOI request by a member of the Committee.

- Between 3.116 and 3.117 there is a leap of logic the Committee may wish to rectify in redrafting the logic of arguments presented. Given how key these documents are to establishing the extent to which the site nomination was genuinely voluntary, how then is it possible for the Committee to arrive at the conclusion expressed in 3.103 that this is a voluntary nomination? On what factual basis?

- 3.119 The committee should indicate that it intends to stand aside from these questions at an earlier stage of the report. It would be preferable and more honest for the content in 3.105 and 3.106 to appear in the 'Referral to the Committee' component of the report to flag the Committee approach is restricted to the legal components and that the Committee stands aside from making comment on Indigenous cultural practice and the adequacy consultation process.

- **If reference to legal challenge remains in this part of the report suggested additional sentence:** The committee notes that the lack of procedural fairness requirements for the existing Muckaty nomination makes any legal challenge difficult, compounded by the fact that any such challenge would be actively opposed rather than supported by the challenger's representative body, the NLC, whose strongly held position on the nomination of Muckaty makes any other 'competent' or meaningful resolution mechanism unlikely.

- 3.121. The Committee should reconsider the argumentation in defence of no invalidity clauses in this paragraph. The current language is patronising and fails to reflect the seriousness of this issue within the legal and constitutional terms of reference adopted by the Committee, or the procedural irregularities surrounding the Muckaty nomination, which amount to far more than ' a failure to adhere to mere formalities or minor aspects of process.'

- 3.128 **Suggested additional sentence:** The committee notes that recourse to an ADJR appeal after a siting decision has been made increases the burden on those opposed to the nomination than if they were able to challenge the site nomination itself.

- 3.132 **Suggested addition to second last sentence in the paragraph:** ... The committee also received substantial evidence on the regulatory role and processes of ARPANSA in relation to the proposed facility, [add: although it notes objection to ARPANSA not being included at the site nomination stage].

Full text of the Recommendations of the 2008 Inquiry

Recommendation 1

Noting there is a current nomination put forward by some Ngapa traditional owners seeking to have a facility sited on their country, the committee recommends that with regard to this nomination the process from this point forward should comply with the *Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia.* The process should: Not rely on the suspension by the current Act of any of the procedural rights of other interested parties; and Not proceed any further until those pieces of Commonwealth legislation suspended from operation by the Commonwealth Radioactive Waste Management Act again apply.

Recommendation 2

The committee recommends that the Act be repealed and replaced with legislation founded on the principles outlined in Recommendation 3. The committee recommends that this legislation should be introduced into the Parliament in the Autumn 2009 sittings. A new policy on radioactive waste should provide a fair, transparent and

scientifically sound foundation on which Australia can conduct radioactive waste management. The committee believes that the evidence it has received, and international best practice, support several key features of this new policy approach.

Recommendation 3

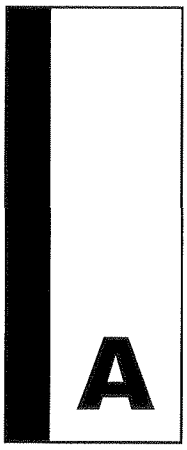
The committee recommends that radioactive waste policy be placed on a new footing, relying on five key founding principles:

- It should be built on a foundation of trust through engagement with governments, stakeholders and communities;
- It should place an emphasis on voluntary engagement rather than coercion;
- It should be grounded in sound science and best technological and engineering practice;
- It should look to national solutions for national waste management challenges; and
- It should have a fair, equitable and transparent Commonwealth legislative foundation.

Recommendation 4

The committee recommends that legislation to replace the existing Act should have at least the following three key differences from the existing Act:

- It should not remove procedural rights and opportunities afforded to affected parties;
- It should not suspend the operation of relevant Commonwealth laws; and
- It should not discriminate against or target one jurisdiction over others.



Appendix A

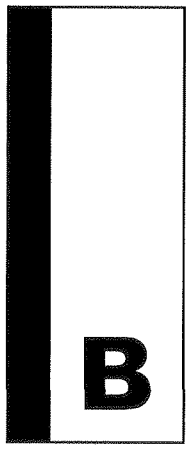
Timeline

Date	Item	Comment
	40TH PARLIAMENT	
13.10.05	**Commonwealth Radioactive Waste Management Bill 2005** introduced into the House **Commonwealth Radioactive Waste Management (Related Amendment) Bill 2005** introduced into the House The bills were passed on 2.11.05 with 12 and 4 amendments respectively.	The purpose of bill was to 'strengthen the Commonwealth's legal ability to develop and operate the proposed Commonwealth radioactive waste management facility in the Northern Territory' (p. 2, Bills Digest) The purpose of the bill was to 'exclude the operation of the Administrative Decisions (Judicial Review) Act 1977 in relation to Ministerial decisions made under section 7 of the Commonwealth Radioactive Waste Management Bill' (p. 2, Bills Digest)
7.11.05	Bill introduced into the Senate after passing the House	
9.11.05	Senate referral of both bills to Senate Employment, Workplace Relations and Education Legislation Committee	• 233 submissions • 1 public hearing in Canberra on 22.11.05

	for examination and report by 28.11.05	
29.11.05	Senate report tabled	Government report recommended that the bills be passed. Opposition report recommended that the bills be rejected.
14.12.05	Bill received royal assent— **Commonwealth Radioactive Waste Management Act 2005** Bill received royal assent— **Commonwealth Radioactive Waste Management (Related Amendment) Act 2005**	
	41ST PARLIAMENT	
2.11.06	**Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006** introduced into the House	The bill provided 'a discretionary legislative mechanism for the return of land that has been used as a radioactive waste storage facility to the Land Trust to which it first belonged. The Bill also • removes the process of nominating a site for consideration for use as a Commonwealth radioactive waste storage facility from the application of the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act), and • removes the mandatory nature of requirements governing the process of making a nomination' (p. 2, Bills Digest)
8.11.06	Senate referral of bill to the Senate Employment, Workplace Relations and Education Committee for examination and report by 30.11.06	• 63 submissions • 1 public hearing in Canberra on 27.11.06
30.11.06	Senate report tabled	Government report recommended that the bill be passed. Opposition, Australian Democrats and Greens dissenting report recommended that the bill not proceed.
30.11.06	Bill introduced into the Senate after	

	passing the House	
11.12.06	Bill received royal assent—**Commonwealth Radioactive Waste Management Legislation Amendment Act 2006**	
	42ND PARLIAMENT	
25.09.08	**Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008** introduced into the Senate Bill did not proceed	PRIVATE SENATORS BILL (Senator Ludlam, Australian Greens, WA) The purpose of the bill was to repeal the Commonwealth Radioactive Waste Management Act 2005.
25.09.08	Senate referral of Bill to the Senate Environment, Communications and the Arts Committee for report by 18.12.08	• 103 submissions • 3 public hearings o Alice Springs—17.11.08 and 18.11.08 o Canberra—28.11.08
18.12.08	Senate report tabled	Government report made 4 recommendations. Opposition report made 2 recommendations.
24.02.10	**National Radioactive Waste Management Bill 2010** introduced into the House	The bill is 'intended to repeal and replace the existing Commonwealth Radioactive Waste Management Act 2005. The bill will restore some review rights and procedural fairness rights to the process of selecting a site for the proposed Commonwealth radioactive waste management facility, and enables the establishment of a regional consultative committee. Unlike the current act, the bill also allows for a site to be selected outside the Northern Territory' (p. 3, Bills Digest)
18.03.10	Bill passed House with no amendments	
25.02.10	Senate referral of Bill to the Senate Legal and Constitutional Affairs Legislation Committee for report by 30.04.10	• 238 submissions received (+ 57 form letters) • 2 public hearings o Canberra—30.03.10 o Darwin—12.04.10
30.4.10	Senate interim report tabled	
7.05.10	Senate report tabled	Government report made 6 recommendations.

		Opposition report made 1 recommendation. Australian Greens report made 4 recommendations.
11.05.10	Bill introduced into the Senate after passing the House. Second reading moved	
28.09.10	**BILL LAPSED AT END OF PARLIAMENT**	
	43RD PARLIAMENT	
21.10.10	National Radioactive Waste Management Bill 2010 introduced in the House. Second reading moved	The purpose of the bill is to 'establish a facility for managing at a single site, radioactive waste currently stored at a host of locations across the country ... The bill repeals the Commonwealth Radioactive Waste Management Act 2005' (p. 2, Explanatory Memorandum)
21.10.10	Bill referred to the House Standing Committee on Climate Change, Environment and the Arts for report by the end of the Autumn sittings in 2011	



Appendix B

National Radioactive Waste Management Bill 2010 and Explanatory Memorandum

2010

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

National Radioactive Waste Management Bill 2010

No. , 2010

(Resources, Energy and Tourism)

A Bill for an Act to make provision in relation to the selection of a site for, and the establishment and operation of, a radioactive waste management facility, and for related purposes

Contents

A Bill for an Act to make provision in relation to the selection of a site for, and the establishment and operation of, a radioactive waste management facility, and for related purposes

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *National Radioactive Waste Management Act 2010*.

2 Commencement

This Act commences on the day this Act receives the Royal Assent.

3 Object of Act

The object of this Act is to provide for:

(a) the selection of a site for a radioactive waste management facility on voluntarily nominated land in Australia; and

(b) the establishment and operation of such a facility on the selected site;

to ensure that radioactive waste generated, possessed or controlled by the Commonwealth or a Commonwealth entity is safely and securely managed.

4 Definitions

In this Act:

Aboriginal land means Aboriginal land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976.*

Commonwealth contractor means:

(a) a person who is a party to a contract with the Commonwealth or a Commonwealth entity; or

(b) a person who is a subcontractor for a contract with the Commonwealth or a Commonwealth entity.

Commonwealth entity means:

(a) a body corporate established for a public purpose by or under an Act; or

(b) a company in which a controlling interest is held by any one of the following persons, or any 2 or more of the following persons together:

(i) the Commonwealth;

(ii) a body covered by paragraph (a).

controlled material means controlled material within the meaning of the *Australian Radiation Protection and Nuclear Safety Act*

1998, but does not include high level radioactive material or spent nuclear fuel.

facility means a facility for the management of controlled material generated, possessed or controlled by the Commonwealth or a Commonwealth entity.

general nomination start time means the time at which a declaration under section 6 takes effect.

high level radioactive material means material which has a thermal energy output of at least 2 kilowatts per cubic metre.

Land Council means a Land Council within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Land Trust means a Land Trust within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

nominator of land means the following:

(a) a Land Council that nominated the land as a potential site under subsection 5(1);

(b) a person who nominated the land as a potential site under subsection 7(2) or (3).

selected site means the site, or the specified part of a site, in relation to which a declaration by the Minister under subsection 14(2) is in effect.

site means a site approved by the Minister under section 9.

spent nuclear fuel means material that:

(a) is or was capable of producing energy by a self-sustaining chain process of nuclear fission; and

(b) has been irradiated in, and permanently removed from, a nuclear reactor (which is a structure containing material to which paragraph (a) applies in such an arrangement that a self-sustaining chain process of nuclear fission can occur in the structure without an additional source of neutrons).

statutory authority, in relation to the Crown in right of the Commonwealth, a State or a Territory, means any authority or

body (including a corporation sole) established by a law of the Commonwealth, the State or Territory other than a general law allowing incorporation as a company or body corporate.

subcontractor, for a contract, means a person who is a party to:

(a) a contract with a Commonwealth contractor (within the meaning of paragraph (a) of the definition of ***Commonwealth contractor***); or

(b) a contract with another subcontractor (under a previous application of this definition).

traditional Aboriginal owners means traditional Aboriginal owners within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Part 2—Nomination of sites

Division 1—Nomination by a Land Council

5 Nomination by a Land Council

(1) A Land Council may, before the general nomination start time, nominate Aboriginal land in the area of the Land Council as a potential site.

Note: After the general nomination start time, certain persons may nominate land in a State or Territory as a potential site—see Division 2 of this Part.

(2) 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 Land Rights (Northern Territory) Act 1976* 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) 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.

(3) The Minister may request further information from the Land Council.

(4) Failure to comply with subsection (2) does not invalidate a nomination.

(5) A nomination is not a legislative instrument.

Division 2—General nominations

6 Minister may declare that nominations can be made under section 7

(1) The Minister may make a declaration in writing that nominations of potential sites may be made under section 7.

Note: After a declaration is made:

(a) a nomination cannot be made under section 5 (see subsection 5(1)); and

(b) the Minister must not approve land nominated under section 5, or declare land so nominated to be the selected site for a facility (see subsections 9(2) and 14(3)).

(2) In deciding whether to make a declaration, the Minister must have regard to whether it is unlikely that a facility will be able to be constructed and operated on Aboriginal land that has been nominated as a potential site under section 5 (whether or not that land has been approved as a site under section 9).

(3) A declaration takes effect at the time specified in the declaration, which must not be earlier than the time the declaration is made.

(4) A copy of a declaration must be published in the *Gazette* within 7 days of the declaration being made.

(5) Failure to comply with subsection (4) does not invalidate a declaration.

(6) A declaration is not a legislative instrument.

7 Nominations of potential sites

Nominations may be made

(1) If a declaration under section 6 is in effect, a person or persons may, in accordance with this section, nominate land in a State, the Australian Capital Territory or the Northern Territory as a potential site.

Nominations by holders of certain interests in land

(2) A person may nominate land under this subsection as a potential site if:

(a) the person holds an interest in the land; and

(b) the interest is:

(i) an estate in fee simple; or

(ii) a lease of land granted by or on behalf of the Crown, a Minister of the Crown, a statutory authority or any other prescribed person, under a law of the Commonwealth, a State or a Territory; and

(c) the person does not hold the interest as a joint tenant or a tenant in common.

(3) The persons who, as joint tenants or tenants in common, hold one of the following interests in land may jointly nominate the land under this subsection as a potential site:

(a) an estate in fee simple;

(b) a lease of the land granted by or on behalf of the Crown, a Minister of the Crown, a statutory authority or any other prescribed person, under a law of the Commonwealth, a State or a Territory.

Nominations where native title exists

(4) A person may nominate land under this subsection as a potential site if:

(a) an approved determination of native title covers an area containing the land; and

(b) the approved determination of native title determines that:

(i) native title exists in relation to the land; and

(ii) the native title rights and interests confer possession, occupation, use and enjoyment of the land on the native title holders to the exclusion of all others; and

(c) one of the following applies:

(i) in the case of an approved determination of native title by the Federal Court—the person is a prescribed body corporate that holds the native title rights and interests concerned on trust, or is an agent prescribed body

corporate in relation to the native title rights and interests concerned;

(ii) in the case of an approved determination of native title by a recognised State/Territory body—the person is a body corporate that holds the native title rights and interests concerned on trust, or that is determined in relation to the native title under a provision of a law of the State or Territory concerned that corresponds to section 57 of the *Native Title Act 1993*.

(5) In this section:

agent prescribed body corporate has the same meaning as in the *Native Title Act 1993*.

approved determination of native title has the same meaning as in the *Native Title Act 1993*.

prescribed body corporate has the same meaning as in the *Native Title Act 1993*.

recognised State/Territory body has the same meaning as in the *Native Title Act 1993*.

8 Rules about nominations

(1) A nomination made under section 7 must:

(a) be in writing; and

(b) be made to the Minister; and

(c) specify the land nominated in accordance with subsection (2); and

(d) in the case of a nomination under subsection 7(2) or (3)—contain evidence that the interest in the land held by the nominator or nominators of the land is an interest referred to in subparagraph 7(2)(b)(i) or (ii) or subsection 7(3); and

(e) in the case of a nomination under subsection 7(4)—contain evidence of the matters specified in that subsection; and

(f) contain such other evidence (if any) as is prescribed by the regulations, including, but not limited to, the following:

(i) evidence that one or more specified groups of persons have been consulted in relation to the nomination;

(ii) evidence that one or more specified groups of persons are satisfied of specified matters in relation to the nomination;

(iii) evidence that one or more specified groups of persons have consented to the making of the nomination.

(2) For the purposes of paragraph (1)(c), land must be specified by reference to:

(a) survey points (if available); and

(b) geographical coordinates; and

(c) whichever of the following is appropriate:

(i) portion number;

(ii) district, division, section and block;

(iii) certificate of title;

(iv) plan and lot number;

(v) volume and folio number;

(vi) lot on plan;

(vii) title identifier;

(viii) parcel identifier;

(ix) deposited plan;

(x) title diagram;

(xi) registered plan;

(xii) a descriptor of a kind similar to a descriptor referred to in this paragraph.

(3) The Minister may request further information from a nominator of the land.

(4) Failure to comply with subsection (1) does not invalidate a nomination made under section 7.

(5) A nomination made under section 7 is not a legislative instrument.

Division 3—Approval of nominated land

9 Approval of nominated land

(1) Subject to subsection 10(6), the Minister may, in his or her absolute discretion, approve in writing land, or a specified part of land, nominated as a site under section 5 or 7.

(2) Despite subsection (1), the Minister must not, after the general nomination start time, approve land nominated as a site under section 5.

(3) The Minister does not have a duty to consider a nomination.

(4) An approval takes effect at the time specified in the approval, which must not be earlier than the time the approval is made.

(5) A copy of an approval must be published in the *Gazette* within 7 days of the approval being made.

(6) Failure to comply with subsection (5) of this section, or subsection 5(2), 6(4) or 8(1), does not invalidate an approval.

(7) An approval is not a legislative instrument.

Division 4—Procedural fairness in relation to Minister's declarations and approvals

10 Procedural fairness in relation to Minister's declarations and approvals

Declaration under section 6

(1) Before the Minister decides to make a declaration under section 6, the Minister must:
  (a) give a notice in writing to each Land Council; and
  (b) publish a notice:
    (i) in the *Gazette*; and
    (ii) in a daily newspaper that circulates generally in each State, the Australian Capital Territory and the Northern Territory.

(2) A notice under paragraph (1)(a) or (b) must:
  (a) state that the Minister proposes to make a declaration under section 6; and
  (b) invite comments on the proposed declaration; and
  (c) specify the address to which comments may be sent; and
  (d) specify the date by which comments must be received, which must be at least 60 days after the notice is given or published.

(3) In deciding whether to make a declaration under section 6, the Minister must take into account any relevant comments in response to an invitation referred to in paragraph (2)(b).

Approval under section 9

(4) Before the Minister decides to approve land, or a specified part of land, under section 9, the Minister must:
  (a) give a notice in writing to each nominator of the land; and
  (b) publish a notice:
    (i) in the *Gazette*; and

(ii) in a daily newspaper that circulates generally in each State, the Australian Capital Territory and the Northern Territory; and

(iii) in a local newspaper (if any) circulating in the area in which the land is situated.

(5) A notice under paragraph (4)(a) or (b) must:

(a) state that the Minister proposes to approve land, or a specified part of land, under section 9; and

(b) if the notice is given under paragraph (4)(a)—invite each nominator of the land to comment on the proposed approval; and

(c) if the notice is published under paragraph (4)(b)—invite persons with a right or interest in the land to comment on the proposed approval; and

(d) specify the address to which comments may be sent; and

(e) specify the date by which comments must be received, which must be at least 60 days after the notice is given or published.

(6) In deciding whether to approve land, or a specified part of land, under section 9, the Minister must take into account any relevant comments given to the Minister, by a nominator of the land, or a person with a right or interest in the land, in response to an invitation referred to in paragraph (5)(b) or (c).

Exhaustive statement

(7) This section is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to:

(a) the Minister's decision whether to make a declaration under section 6; and

(b) the Minister's decision whether to approve land, or a specified part of land, under section 9.

Part 3—Selecting the site for a facility

11 Authority to conduct activities

(1) This section applies to:

(a) the Commonwealth; and

(b) a Commonwealth entity; and

(c) a Commonwealth contractor; and

(d) an employee or agent of a person mentioned in paragraph (a), (b) or (c).

(2) A person to whom this section applies may, in a State or Territory, do anything necessary for or incidental to the purposes of selecting a site on which to construct and operate a facility.

(3) Without limiting subsection (2), the person may do any or all of the following under that subsection (whether or not on a site):

(a) gain access to and enter land and drive vehicles or fly aircraft to and from it;

(b) in order to drive vehicles to and from land—use existing roads or construct roads on, or grade, land;

(c) construct or rehabilitate bores;

(d) operate drilling equipment;

(e) extract water;

(f) collect samples of flora and fauna;

(g) place monitoring equipment (including meteorological and hydrological measuring equipment);

(h) build structures to protect bores, monitoring equipment or other things;

(i) move or extract sand, gravel, soil, mineral and rock samples;

(j) conduct seismic or geological investigations;

(k) conduct archaeological or heritage investigations;

(l) clear vegetation.

(4) A person doing a thing under this Part must:

(a) take all reasonable steps to ensure that the doing of the thing causes as little detriment and inconvenience, and does as

little damage, as is practicable to the land and to anything on, or growing or living on, the land; and

(b) remain on the land only for such period as is reasonably necessary; and

(c) leave the land, as nearly as practicable, in the condition in which it was immediately before the thing was done.

12 Application of State and Territory laws

(1) A law, or a provision of a law, of a State or Territory (whether written or unwritten), so far as it relates to:

(a) the use or proposed use of land or premises; or

(b) the environmental consequences of the use of land or premises; or

(c) the archaeological or heritage values of land, premises or objects (including the significance of land, premises or objects in the traditions of Indigenous people); or

(d) controlled material, radioactive material or dangerous goods; or

(e) licensing (however described) in relation to:

(i) employment; or

(ii) carrying on a particular kind of business or undertaking; or

(iii) conducting a particular kind of operation or activity;

has no effect to the extent that it would, apart from this section, regulate, hinder or prevent the doing of a thing authorised by section 11.

(2) The regulations may prescribe a law, or a provision of a law, of a State or Territory for the purposes of this subsection. The prescribed law or provision has no effect to the extent that it would, apart from this subsection, regulate, hinder or prevent the doing of a thing authorised by section 11.

(3) Regulations made for the purposes of subsection (2) may prescribe a law, or a provision of a law, whether or not it is a law or a provision of a kind described in subsection (1).

(4) The regulations may prescribe a law, or a provision of a law, of a State or Territory for the purposes of this subsection. The prescribed law or provision has effect despite anything else in this section.

13 Application of Commonwealth laws

(1) The following laws have no effect to the extent that they would, apart from this section, regulate, hinder or prevent the doing of a thing authorised by section 11:

(a) the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;

(b) the *Environment Protection and Biodiversity Conservation Act 1999*.

(2) The regulations may prescribe another law, or a provision of another law, of the Commonwealth for the purposes of this subsection. The prescribed law or provision has no effect to the extent that it would, apart from this subsection, regulate, hinder or prevent the doing of a thing authorised by section 11.

Part 4—Acquisition or extinguishment of rights and interests

Division 1—Minister may declare a site as the site for a facility

14 Minister's declaration of land as selected site or required for road access

(1) This section applies if:

(a) land has been nominated as a site under section 5 or 7; and

(b) the Minister has approved the nominated land, or a specified part of the nominated land, as a site under section 9.

(2) Subject to section 18, the Minister may, in his or her absolute discretion, declare in writing that the site approved by the Minister, or a specified part of the site, is selected as the site for a facility. The declaration may specify all or some of the rights or interests in the selected site.

(3) Despite subsection (2), the Minister must not, after the general nomination start time, make such a declaration in relation to land nominated as a site under section 5.

(4) Subject to section 18, the Minister may, in his or her absolute discretion, declare in writing that all or specified rights or interests in land in a State or Territory specified in the declaration are required for providing all-weather road access to the selected site.

(5) To avoid doubt, rights and interests specified in a declaration under subsection (2) or (4) may include the following:

(a) rights to minerals (if any);

(b) native title rights and interests (if any);

(c) an interest in the land, being an interest that did not previously exist;

(d) an easement in gross (if any).

(6) To avoid doubt, this section has effect subject to section 9 of the *Racial Discrimination Act 1975*.

(7) A declaration under subsection (2) or (4) is not a legislative instrument.

15 Formalities relating to Minister's declarations

(1) A copy of a declaration under subsection 14(2) or (4) must be published in the *Gazette* within 7 days of the declaration being made.

(2) Failure to comply with subsection (1) of this section, or subsection 5(2), 6(4), 8(1) or 9(5), does not invalidate a declaration.

16 When Minister's declarations take effect etc.

(1) A declaration under subsection 14(2) or (4) takes effect at the time specified in the declaration, which must not be earlier than the time the declaration is made.

(2) The Minister may, subject to this section, make more than one declaration under subsection 14(2) or (4), but only one declaration under subsection 14(2) may be in effect at a particular time.

(3) If:

(a) a declaration under subsection 14(2) (the ***original declaration***) is in effect at a particular time; and

(b) at that time, the Minister makes another such declaration (the ***later declaration***);

the Minister is taken, immediately before the time of effect specified in the later declaration, to have revoked the original declaration under section 17.

17 Revocation of Minister's declaration

(1) The Minister may, in his or her absolute discretion, revoke in writing a declaration made under subsection 14(2).

(2) A revocation takes effect at the time specified in the revocation, which must not be earlier than the time the revocation is made.

(3) To avoid doubt, if a declaration made under subsection 14(2) is revoked:

(a) the revocation does not affect the operation of section 19 in relation to the land that was, immediately before the revocation, the selected site; and

(b) on and from the revocation, Part 5 does not apply to that land.

(4) Section 18 does not apply to a revocation under this section.

(5) A copy of a revocation must be published in the *Gazette* within 7 days of the revocation.

(6) Failure to comply with subsection (5) does not invalidate a revocation.

(7) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply to a revocation.

Division 2—Procedural fairness

18 Procedural fairness in relation to Minister's declarations

(1) Before the Minister decides to make a declaration under section 14 in relation to land, the Minister must:

(a) give a notice in writing to each nominator of the land; and

(b) publish a notice:

(i) in the *Gazette*; and

(ii) in a daily newspaper that circulates generally in each State, the Australian Capital Territory and the Northern Territory; and

(iii) in a local newspaper (if any) circulating in the area in which the land is situated.

(2) A notice under paragraph (1)(a) or (b) must:

(a) state that the Minister proposes to make a declaration under subsection 14(2) or (4); and

(b) set out details of the proposed declaration; and

(c) if the notice is given under paragraph (1)(a)—invite each nominator of the land to comment on the proposed declaration; and

(d) if the notice is published under paragraph (1)(b)—invite persons with a right or interest in the land to comment on the proposed declaration; and

(e) specify the address to which comments may be sent; and

(f) specify the date by which comments must be received, which must be at least 60 days after the notice is given or published.

(3) In deciding whether to make a declaration under section 14, the Minister must take into account any relevant comments given to the Minister, by a nominator of the land, or a person with a right or interest in the land, in response to an invitation referred to in paragraph (2)(c) or (d).

(4) A reference in this section to each nominator of the land, in relation to a declaration under subsection 14(4) that rights or interests in land are required for providing all-weather road access

to the selected site, is a reference to each person who nominated the selected site under section 5 or 7.

Exhaustive statement

(5) This section is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Minister's decision whether to make a declaration under section 14.

Division 3—Acquisition or extinguishment

19 Acquisition or extinguishment

(1) At the time a declaration under subsection 14(2) takes effect, any rights or interests in the selected site that are specified in the declaration are, by force of this section:

(a) acquired by the Commonwealth or extinguished; and

(b) freed and discharged from all other rights and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.

(2) At the time a declaration under subsection 14(4) takes effect, the rights or interests in the specified land that are specified in the declaration are, by force of this section:

(a) acquired by the Commonwealth or extinguished; and

(b) freed and discharged from all other rights and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.

20 Application of Commonwealth and State or Territory laws

(1) Section 19 has effect despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten).

(2) Without limiting subsection (1), section 19 has effect despite the following laws of the Commonwealth:

(a) the *Lands Acquisition Act 1989*;

(b) the *Native Title Act 1993*.

21 Notice to Registrar-General or other appropriate officer

(1) The Secretary of the Department may lodge with the Registrar-General, the Registrar of Titles or other appropriate officer of a State or Territory a copy of a Minister's declaration under section 14, certified by writing signed by the Secretary.

(2) The officer with whom the copy is lodged may deal with and give effect to it as if it were a grant, conveyance, memorandum or instrument of transfer of relevant rights and interests done under the laws of the State or Territory.

Division 4—Regional consultative committee

22 Regional consultative committee

(1) Immediately after a declaration under subsection 14(2) takes effect, the Minister must, by writing, establish a committee to be known as the regional consultative committee.

Note: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(2) The functions of the committee are:

(a) to facilitate communication between the Commonwealth, the operator of the facility (if any) at the selected site and persons living in or near the region where the selected site is situated; and

(b) such other functions as are prescribed under paragraph (4)(a).

(3) An instrument made under subsection (1) is not a legislative instrument.

(4) The regulations may prescribe matters relating to the committee, including, but not limited to, the following:

(a) the functions of the committee;

(b) the operation and procedures of the committee;

(c) membership of the committee;

(d) term of appointment of members;

(e) remuneration of members;

(f) resignation of members;

(g) disclosure of interests by members;

(h) termination of appointment of members;

(i) leave of absence of members.

(5) If no regulations are in force under subsection (4), the committee may operate in the way determined in writing by the committee.

Part 5—Conducting activities in relation to selected site

23 Authority to conduct activities

(1) This section applies to:

(a) the Commonwealth; and

(b) a Commonwealth entity; and

(c) a Commonwealth contractor; and

(d) an employee or agent of a person mentioned in paragraph (a), (b) or (c).

(2) A person to whom this section applies may, in relation to the selected site, do anything necessary for or incidental to any or all of the following:

(a) gathering or preparing information for a Commonwealth regulatory scheme that relates to:

(i) the construction or operation of a facility; or

(ii) anything done in preparation for the construction or operation of a facility;

(b) conducting activities that relate to gathering or preparing information for such a regulatory scheme;

(c) preparing the selected site for a facility;

(d) preparing to construct and operate a facility;

(e) constructing a facility;

(f) constructing roads on, or grading, land in a State or Territory;

(g) erecting fences and other access controls on land specified in the declaration under subsection 14(4);

(h) operating a facility;

(i) maintaining a facility;

(j) keeping a facility safe;

(k) decommissioning a facility.

(3) Without limiting subsection (2), the person may, under that subsection, do a thing mentioned in subsection 11(3) in relation to the selected site.

(4) Subsection (2) extends to doing things outside the selected site.

(5) A person to whom this section applies may, in relation to the selected site:

(a) transport (including through a State or Territory) people and materials (including controlled material) to or from a facility; and

(b) use transport infrastructure for that transport.

24 Application of State and Territory laws

(1) A law, or a provision of a law, of a State or Territory (whether written or unwritten), so far as it relates to:

(a) the use or proposed use of land or premises; or

(b) the environmental consequences of the use of land or premises; or

(c) the archaeological or heritage values of land, premises or objects (including the significance of land, premises or objects in the traditions of Indigenous people); or

(d) controlled material, radioactive material or dangerous goods; or

(e) licensing (however described) in relation to:

(i) employment; or

(ii) carrying on a particular kind of business or undertaking; or

(iii) conducting a particular kind of operation or activity;

has no effect to the extent that it would, apart from this section, regulate, hinder or prevent the doing of a thing authorised by section 23.

(2) A law, or a provision of a law, of a State or Territory (whether written or unwritten), so far as it relates to the transport of controlled material, radioactive material or dangerous goods, has no effect to the extent that it would, apart from this section, regulate, hinder or prevent transport authorised by section 23.

(3) The regulations may prescribe a law, or a provision of a law, of a State or Territory for the purposes of this subsection. The prescribed law or provision has no effect to the extent that it

would, apart from this subsection, regulate, hinder or prevent the doing of a thing authorised by section 23.

(4) Regulations made for the purposes of subsection (3) may prescribe a law, or a provision of a law, whether or not it is a law or a provision of a kind described in subsection (1) or (2).

(5) The regulations may prescribe a law, or a provision of a law, of a State or Territory for the purposes of this subsection. The prescribed law or provision has effect despite anything else in this section.

25 Application of Commonwealth laws

(1) The regulations may prescribe a law, or a provision of a law, of the Commonwealth for the purposes of this subsection. The prescribed law or provision has no effect to the extent that it would, apart from this subsection, regulate, hinder or prevent the doing of a thing authorised by section 23.

(2) The regulations must not prescribe any of the following laws, or any provision of the following laws:

(a) the *Australian Radiation Protection and Nuclear Safety Act 1998*;

(b) the *Environment Protection and Biodiversity Conservation Act 1999*;

(c) the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

Part 6—Granting of rights and interests in land to original owners

26 Application of Part

Declaration under subsection 14(2)

(1) This Part applies if:

(a) immediately before a declaration under subsection 14(2) took effect, land that was the subject of the declaration was Aboriginal land (the ***relevant land***); and

(b) as a result of the declaration, the Commonwealth acquired, under section 19, an estate in fee simple in the relevant land; and

(c) a facility on the relevant land has been abandoned in accordance with the *Australian Radiation Protection and Nuclear Safety Act 1998*; and

(d) the Commonwealth holds an estate in fee simple in the relevant land.

Declaration under subsection 14(4)

(2) This Part also applies if:

(a) immediately before a declaration under subsection 14(4) took effect, all or part of the land that was the subject of the declaration was Aboriginal land (the whole, or that part, of the land being ***relevant land***); and

(b) as a result of the declaration, the Commonwealth acquired, under section 19, rights or interests in the relevant land; and

(c) the facility mentioned in paragraph (1)(c) has been abandoned in accordance with the *Australian Radiation Protection and Nuclear Safety Act 1998*; and

(d) the Commonwealth holds all or some of those rights or interests in the relevant land.

Part does not apply to nominations under section 7

(3) However, this Part does not apply to a declaration referred to in subsection (1) or (2) if the declaration relates to land nominated under section 7.

27 Declaration of intention to grant rights and interests in land to original owners

(1) The Minister may, in his or her absolute discretion, declare in writing that the land that was the subject of the declaration under subsection 14(2) is no longer required for the facility mentioned in paragraph 26(1)(c).

(2) The declaration must:

(a) specify all the relevant land; and

(b) state that the Minister intends to make a declaration under section 28 granting the rights and interests specified in section 29 in specified land to a specified Land Trust.

(3) Land specified under paragraph (2)(b) may be all or part of the relevant land, but all of the specified land must, in total, be all of the relevant land.

(4) A Land Trust may be specified under paragraph (2)(b) in relation to specified land only if:

(a) the Land Trust held title to the specified land immediately before the declaration under subsection 14(2) or (4) (as the case may be) took effect; or

(b) the Land Trust has succeeded to the functions of a Land Trust mentioned in paragraph (a) of this subsection.

(5) Within 7 days of the declaration being made, the Minister must:

(a) publish a copy of the declaration in the *Gazette*; and

(b) notify a specified Land Trust in writing that the Minister intends to make a declaration under section 28.

(6) A declaration is not valid unless:

(a) it specifies and states the matters mentioned in subsection (2); and

(b) the Minister complies with subsection (5).

(7) A Land Trust specified in a declaration may consent in writing to the granting of the rights and interests specified in section 29 in the specified land.

(8) A declaration is not a legislative instrument.

28 Declaration granting rights and interests in land to original owners

(1) The Minister must make a declaration in writing that an estate in fee simple is granted in specified land to a specified Land Trust if:

(a) the Commonwealth holds an estate in fee simple in the specified land; and

(b) the specified Land Trust has, under subsection 27(7), consented to the granting of an estate in fee simple in the specified land within:

(i) 12 months of the day on which the declaration under section 27 was published in the *Gazette*; or

(ii) such longer period as is prescribed in the regulations.

(2) The Minister must make a declaration in writing that the rights and interests specified in subsection 29(3) are granted in specified land to a specified Land Trust if:

(a) the Commonwealth holds rights or interests (other than an estate in fee simple) in the specified land; and

(b) the specified Land Trust has, under subsection 27(7), consented to the granting of the rights and interests specified in subsection 29(3) in the specified land within:

(i) 12 months of the day on which the declaration under section 27 was published in the *Gazette*; or

(ii) such longer period as is prescribed in the regulations.

(3) A declaration takes effect at the time specified in the declaration, which must not be earlier than the time the declaration is made.

(4) A declaration is not a legislative instrument.

(5) The Minister may include one or more declarations under subsections (1) and (2) in the same document.

29 Grant of rights and interests in land to original owners

Grant of estate in fee simple

(1) If the Minister makes a declaration under subsection 28(1), then at the time the declaration takes effect:

(a) an estate in fee simple is granted, by force of this subsection, in the specified land to the specified Land Trust; and

(b) the land is taken, for all purposes, to be Aboriginal land.

(2) The estate in fee simple is subject to the reservations that:

(a) the right to any minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of the land, being minerals all interests in which are vested in the Commonwealth, remains with the Commonwealth; and

(b) rights to explore for minerals, and leases or licences to mine for minerals, on or below the surface of the land may be granted under section 124 of the *Lands Acquisition Act 1989*.

Grant of other rights and interests

(3) If the Minister makes a declaration under subsection 28(2), then at the time the declaration takes effect, any rights and interests:

(a) that are held by the Commonwealth in the specified land; and

(b) that were acquired by the Commonwealth, under section 19, in the specified land from the specified Land Trust or another Land Trust;

are granted, by force of this subsection, in the specified land to the specified Land Trust.

Validity of earlier rights, interests and actions

(4) The granting of rights and interests in land under subsection (1) or (3) does not affect:

(a) the validity of any rights or interests acquired, created or granted (whether under this Act or otherwise) in relation to the land; or

(b) the validity of the construction, operation, maintenance, decommissioning or abandoning of a facility on the land, or the doing of any other thing in relation to the land;

before the declaration under section 28 takes effect.

30 No earlier rights and interests granted

To avoid doubt, the making of a declaration under section 28 does not create or grant any rights or interests in land before the declaration takes effect.

31 Application of Commonwealth, State and Territory laws

Section 29 has effect despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten).

32 Notice to Registrar-General

(1) The Secretary of the Department may lodge with the Registrar-General for the Northern Territory (or other appropriate officer) a copy of a Minister's declaration under section 28, certified by writing signed by the Secretary.

(2) The officer with whom the copy is lodged may deal with and give effect to it as if it were a grant, conveyance, memorandum or instrument of transfer of relevant rights and interests done under the laws of the Northern Territory.

33 Indemnity by Commonwealth

(1) The Commonwealth must indemnify each Land Trust specified in a declaration under section 28, and keep the Land Trust indemnified, against any action, claim or demand brought or made against the Land Trust in respect of any liability arising from, or damage caused by, ionising radiation from any act done or omitted to be done by or on behalf of the Commonwealth in relation to the transport of controlled material to or from, or the management of

controlled material at, a facility on the land specified in the declaration.

(2) The amount of the indemnity is reduced to the extent to which any fault on the part of the Land Trust, or its employees, agents or contractors, contributed to the liability or damage.

(3) Subsection (1) does not apply in relation to an action, claim or demand unless:

(a) the Land Trust notifies the Commonwealth, in writing, of the action, claim or demand as soon as practicable; and

(b) the Land Trust follows any directions of the Commonwealth in relation to the action, claim or demand.

34 Regulations

The regulations may prescribe any modifications of this Act that are necessary or convenient to deal with transitional matters arising from the making of a declaration under section 27 or 28.

Part 7—Miscellaneous

35 Compensation

(1) If rights or interests are acquired, extinguished or otherwise affected under section 19, the Commonwealth is liable to pay a reasonable amount of compensation to a person whose right or interest has been acquired, extinguished or otherwise affected.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

36 Compensation for acquisition of property

(1) If the operation of this Act would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

37 Indemnity by Commonwealth and management of Northern Territory controlled material for section 5 nominations

(1) This section applies if the selected site was nominated under section 5.

Indemnity by Commonwealth

(2) The Commonwealth must indemnify the Northern Territory, and keep the Northern Territory indemnified, against any action, claim or demand brought or made against the Northern Territory in respect of any liability arising from, or damage caused by, ionising radiation from any act done or omitted to be done by or on behalf of the Commonwealth in relation to the transport of controlled material to or from, or the management of controlled material at, a facility on the selected site.

(3) The amount of the indemnity is reduced to the extent to which any fault on the part of the Northern Territory, or its employees, agents or contractors, contributed to the liability or damage.

(4) Subsection (2) does not apply in relation to an action, claim or demand unless:

(a) the Northern Territory notifies the Commonwealth, in writing, of the action, claim or demand as soon as practicable; and

(b) the Northern Territory follows any directions of the Commonwealth in relation to the action, claim or demand.

Management of Northern Territory controlled material

(5) If controlled material that is generated by activities in the Northern Territory is managed at a facility on the selected site, the Commonwealth must not charge the Northern Territory for the management.

38 Severability—additional effect of Act

Without limiting its effect apart from this section, this Act also has the effect it would have if:

(a) each reference to a facility were expressly limited to a facility within a Territory; and

(b) each reference to the doing of things, or things done, on or in relation to land were expressly limited to a reference to the doing of things, or things done, on or in relation to land within a Territory.

39 Regulations

The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

40 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Repeal and consequential amendments

Part 1—Repeal of the Commonwealth Radioactive Waste Management Act 2005

1 The whole of the Act

Repeal the Act.

Part 2—Consequential amendment

Administrative Decisions (Judicial Review) Act 1977

2 Paragraph (zc) of Schedule 1

Repeal the paragraph.

Schedule 2—Transitional provisions

1 Saving—nominations and approvals

(1) Despite the repeal of Part 1A of the *Commonwealth Radioactive Waste Management Act 2005* by item 1 of Schedule 1, a nomination under section 3A of the old radioactive waste law continues in force, after the commencement time, as if it had been made under section 5 of the new radioactive waste law.

(2) Despite the repeal of Part 1A of the *Commonwealth Radioactive Waste Management Act 2005* by item 1 of Schedule 1, an approval under section 3C of the old radioactive waste law continues in force, after the commencement time, as if it had been made under section 9 of the new radioactive waste law.

(3) Section 3D of the old radioactive waste law, and the old ADJR Act, continue to apply, after the commencement time, in relation to a nomination or an approval continued in force by this item.

(4) Section 10 of the new radioactive waste law, and the new ADJR Act, do not apply in relation to a nomination or an approval continued in force by this item.

(5) To avoid doubt, section 18 of the new radioactive waste law, and the new ADJR Act, apply in relation to a declaration under section 14 of the new radioactive waste law that relates to an approval continued in force by this item.

(6) In this item:

commencement time means the time at which item 1 of Schedule 1 commences.

new ADJR Act means the *Administrative Decisions (Judicial Review) Act 1977* as in force immediately after the commencement time.

new radioactive waste law means the *National Radioactive Waste Management Act 2010* as in force immediately after the commencement time.

old ADJR Act means the *Administrative Decisions (Judicial Review) Act 1977* as in force immediately before the commencement time.

old radioactive waste law means the *Commonwealth Radioactive Waste Management Act 2005* as in force immediately before the commencement time.

1

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Resources and Energy,
the Honourable Martin Ferguson AM, MP)

NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

Outline

The purpose of the Bill is to establish a facility for managing at a single site, radioactive waste currently stored at a host of locations across the country.

It will ensure the safe and responsible management of this waste arising from medical, industrial and research uses of radioactive material in Australia.

The Bill ensures the Commonwealth's power to make arrangements for the safe and secure management of radioactive waste generated, possessed or controlled by the Commonwealth.

This legislative framework is based on volunteerism. No site can be considered as a potential location for a radioactive waste management facility without the voluntary nomination of that site and agreement of persons with relevant rights and interests.

The Bill repeals the *Commonwealth Radioactive Waste Management Act 2005* and applies a decision making process based on natural justice. Natural justice puts in place a code of fair procedure. At its core is "the hearing rule"; a right to be heard by the Minister before a decision is reached.

The Bill also reinstates the *Administrative Decisions (Judicial Review) Act 1977.* This will allow a person aggrieved by a decision to apply for judicial review and ensure a higher level of accountability for decisions.

A facility will not be established unless it meets environmental and regulatory approvals under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Nuclear Non-Proliferation (Safeguards) Act 1987.*

A regional consultative committee will also be established to communicate with local communities during the environmental and regulatory approval process, construction and operational stages of the project. This open and informed process will help raise awareness through dialogue, address local concerns and ensure government transparency when establishing a national radioactive waste management facility.

Part 1 – Preliminary

Part 1 of the Bill outlines preliminary details and the object of the Bill. The objects clause states that the Bill will provide for the selection of a site for a radioactive waste management facility on volunteered land in Australia. The establishment and operation of a facility on the selected site will ensure that radioactive waste generated, possessed or controlled by the Commonwealth or a Commonwealth entity is safely and securely managed.

Part 2-Nomination of sites

Part 2 of the Bill provides that a Land Council in the Northern Territory may nominate land as a potential site. Under the existing Site Nomination Deed, the Northern Land Council is entitled to nominate other sites on Ngapa land. This provision maintains that entitlement.

The Minister may also open a nation-wide volunteer site nomination process. In deciding whether to initiate this process, the Minister must have regard to whether it is unlikely that a facility will be able to be constructed and operated on Aboriginal land that has been nominated as a potential site under clause 5, whether or not that land has been approved as a site under clause 9. Certain persons, including certain native title holders may also volunteer their land as a potential site.

Procedural fairness requirements will apply to any decision to approve a potential site and to any decision to open the nation-wide site nomination process.

Part 3-Selecting the site for a facility

Part 3 of the Bill allows relevant persons to conduct activities for the purpose of selecting a site.

Certain State, Territory and Commonwealth laws will not apply to activities under Part 3 to the extent that they would regulate, hinder or prevent these activities.

Part 4-Acquisition or extinguishment of rights and interests

Part 4 of the Bill allows the Minister to select a site as the site for a facility and also to identify an area of land required for providing all-weather road access to the selected site.

Procedural fairness requirements will apply to these decisions.

Part 4 of the Bill allows for the acquisition or extinguishment of rights and interests in relation to the selected site and land required for an access road.

Part 4 of the Bill provides that the Minister must establish a regional consultative committee immediately after a site has been selected for a facility.

Part 5-Conducting activities in relation to selected site

Part 5 of the Bill preserves rules in the current Act allowing relevant persons to conduct activities in relation to the selected site.

Certain State, Territory and Commonwealth laws will not apply to activities under Part 5 to the extent that they would regulate, hinder or prevent these activities. However, the *Australian Radiation Protection and Nuclear Safety Act 1998,* the *Environment Protection and Biodiversity Conservation Act 1999* and the *Nuclear Non-Proliferation (Safeguards) Act 1987* must be complied with.

Part 6-Granting of rights and interests in land to original owners

Part 6 of the Bill preserves rules in the current Act allowing the Minister to grant rights and interests in certain land acquired under the Bill back to the original owners. This refers to land that was nominated by a Land Council before the nation-wide volunteer site nomination process.

Part 7-Miscellaneous

Part 7 of the Bill provides for the payment of compensation to persons whose rights or interests are acquired, extinguished or otherwise affected by the selection of a site for a facility.

Part 7 of the Bill also preserves rules in the current Act conferring certain advantages on the Northern Territory if the site selected is one nominated by a Land Council before the opening of the nation-wide volunteer site nomination process.

Schedule 1

Schedule 1 of the Bill repeals the *Commonwealth Radioactive Waste Management Act 2005* (the current Act) and amends the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act).

The current Act provides that no person is entitled to procedural fairness in relation to the key decisions to be made under the Act. The Bill will require the Government to accord procedural fairness in relation to such decisions.

Key decisions under the current Act are not susceptible to review under the ADJR Act.

Decisions under the Bill will be reviewable.

The repeal and amendment satisfies a 2007 ALP Platform commitment.

The Government has removed from further consideration three sites on Defence land in the Northern Territory identified by the former Government. These sites were at Harts Range (Alcoota) and Mount Everard in the Alice Springs region and Fishers Ridge in the Katherine region.

Schedule 2

In 2007, a site on Ngapa clan land at Muckaty Station in the Northern Territory was nominated and approved as a site under the current Act. The Government will honour the commitment made to the Ngapa traditional owners.

Accordingly, Schedule 2 contains a saving provision to ensure that the site will remain an approved site. The Bill will not introduce procedural fairness requirements in relation to the existing nomination and approval of this site, but procedural fairness requirements will apply to any decision to select the site as the site for a facility.

Procedural Fairness and Absolute Discretion

Under the Bill certain decisions are made by the Minister relating to approving and selecting a site, subject to regulatory approval, for a radioactive waste management facility.

The Bill states that the Minister may make the decision or perform an action in his or her absolute discretion.

In an administrative law context, to state in legislation that a decision-maker may make a decision or perform an action in his or her absolute discretion, serves to emphasise that the decision-maker is free to make or not to make the decision or free to do or not do an action. It also serves to identify that the Minister is unambiguously responsible for the resulting decision or action.

At the same time the Minister cannot make a decision or perform an action capriciously.

Limitations on the Minister's freedom to make decisions under the Bill are implied from the subject matter, scope and purpose of the legislation. Key decisions are guided by natural justice requirements, including extension of a right to be heard to any person potentially affected by a proposed decision or action.

The basic requirement of procedural fairness is that a person whose rights, interests or legitimate expectations are adversely affected by a decision is given a reasonable opportunity of putting his or her case. The traditional elements of procedural fairness are:

- A decision-maker must give a person whose rights, interests or legitimate expectations may be affected by a decision notice that a decision will be made, the information on which the decision may be based and the opportunity to provide a submission; and
- A decision-maker must be free from any apprehension of bias.

The Minister is also subject to an obligation to provide reasons, on request, under the *Administrative Decisions (Judicial Review) Act 1977*. Judicial review, of key decisions, is available under the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1901*, on the grounds that a decision-maker has failed to take a relevant consideration into account when exercising a power.

The weight given to a particular factor in making a decision is always a matter of discretion for the individual decision-maker but can be challenged if the weight attributed is unreasonable.

The Minister has also agreed to undertake consultations with all parties with an interest in, or who would be affected by a decision to select the Muckaty Station site as the location for a facility.

Scientific Rationale

Australia's current radioactive waste inventory stands at just over 4,020 m^3 of low level and short-lived intermediate level radioactive waste and approximately 600 m^3 of long-lived intermediate waste.

Most existing stores in Australia were not specifically designed for long term radioactive waste storage. Centralisation minimises the risk of inadvertent loss or control of radioactive material with consequential safety and security risks.

Radioactive waste management is governed by rigorous national and international standards. Extensive experience has been gained from over 100 low-level waste disposal facilities in more than 30 countries and a range of geological conditions.

Once the facility is constructed, low level waste will be disposed of by burial. This waste includes lightly contaminated laboratory waste such as paper, plastic, glassware and protective clothing, contaminated soil, smoke detectors and emergency exit signs.

Intermediate waste will be stored at the site. This includes waste from production of nuclear medicines, waste arising from overseas reprocessing of spent research reactor fuel and disused medical and industrial sources such as radiotherapy sources and soil moisture meters.

Environmental and Regulatory Approval Processes

Radioactive waste management is one of the most regulated industrial activities in the world. The Bill ensures Australia upholds the highest safety standards for radioactive waste management and also meets its international obligations.

Under the Bill, site selection processes (Part 4) will not guarantee the establishment of a facility. The Bill complements environmental and nuclear regulatory processes. Part 5 of the Bill ensures that environmental and nuclear regulatory approvals must be obtained.

The regulatory approval processes are those specified by the *Environment Protection and Biodiversity Conservation Act 1999*, the *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

State and Territory Laws

Australian Government facilities are regulated through the Commonwealth. In the case of a radioactive waste management facility, laws of particular relevance include the *Environment Protection and Biodiversity Conservation Act 1999* for broad environmental impacts and the *Australian Radiation Protection and Nuclear Safety Act 1998* for radiological impacts.

One effect of permitting State and Territory laws to apply would be to permit legislation prohibiting siting of a facility and transporting waste.

For this reason, State and Territory laws will not apply to certain activities under the Bill, to the extent that these laws may regulate, hinder or prevent these activities from taking place.

Financial Impact

Overall, the financial impact of the legislation is considered to be negligible. Provision for any costs, including any liability of the Commonwealth to compensate persons for any

acquisition etc. of their interests in land affected by the Bill, would be sought to supplement the existing administrated appropriation for Outcome 1 of the Department of Resources, Energy and Tourism.

NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1 – Short Title

Provides for the Act to be cited as the *National Radioactive Waste Management Act 2010*

Clause 2 - Commencement

Provides for the Act to commence on the day the Act receives the Royal Assent.

Clause 3 – Object of Act

Outlines that the object of this Act is to provide for the selection of a site for a radioactive waste management facility on voluntarily nominated land in Australia and to establish and operate a facility on a selected site to ensure the safe and secure management of radioactive waste generated, possessed or controlled by the Commonwealth or a Commonwealth entity.

Clause 4 – Definitions

This clause sets out the definitions of terms that are relied upon in other provisions throughout the Bill.

Part 2 – Nomination of sites

Clause 5 – Nomination by a Land Council

Clause 5(1) provides that a Land Council may, before the time when a declaration under clause 6 takes effect, nominate Aboriginal land in the area of the Land Council as a potential site.

Subclause 5(2) also provides rules in relation to such nominations.

Subclause 5(3) allows the Minister to request further information from a nominator.

Subclause 5(4) provides that failure to comply with subsection (2) does not invalidate a nomination.

Subclause 5(5) provides that a nomination under this clause is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 6 - Minister may declare that nominations can be made under section 7

Clause 6 will allow the Minister to allow persons with a threshold level of interest in land in a State, the Northern Territory or the Australian Capital Territory to nominate that land as a potential site for a facility.

Subclause 6(2) provides that it is a relevant consideration to the Minister's exercise of power under clause 6 whether it is unlikely that a facility will be able to be constructed and operated on Aboriginal land that has been nominated as a potential site under clause 5, whether or not that land has been approved as a site under clause 9.

To avoid doubt, it is the intention that such Aboriginal land includes land to which Schedule 2 item 1(1) relates.

Subclause 6(4) provides that a declaration must be published in the *Gazette* within seven days of the declaration being made. However, subclause 6(5) provides that a failure to comply with subclause 6(4) does not invalidate a declaration.

Subclause 6(6) provides that a declaration made under subclause 6 is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 7 – Nominations of potential sites

Subclause 7(1) provides that if a declaration under clause 6 is in effect, a person or persons may in accordance with this clause, nominate land in a State, the Australian Capital Territory or the Northern Territory as a potential site.

Subclause 7(2) provides that a person with an interest specified in this subclause may nominate land as a potential site. These interests include an estate in fee simple, a lease of land granted by or on behalf of the Crown, a Minister of the Crown, a statutory authority or

any other prescribed person, under a State or a Territory but not an interest as a joint tenant or a tenant in common.

Subclause 7(3) provides that persons who as joint tenants or tenants in common hold specified interests in land may nominate the land as a potential site. These interests include an estate in fee simple or a lease of the land granted by or on behalf of the Crown, a Minister of the Crown, a statutory authority or any other prescribed person, under a law of the Commonwealth, a State or a Territory.

Subclause 7(4) provides that certain native title holders may nominate land as a potential site if an approved determination of native title covers an area containing the land; and the approved determination of native title determines that native title exists in relation to the land and the native title rights and interests confer possession, occupation, use and enjoyment of the land on the native title holders to the exclusion of all others. Where subclause 7(4)(a) and (b) apply, subclause 7(4)(c) provides that one of the following must apply:

- in the case of an approved determination of native title by the Federal Court–the person is a prescribed body corporate that holds the native title rights and interests concerned on trust, or is an agent prescribed body corporate in relation to the native title rights and interests concerned.
- in the case of an approved determination of native title by a recognised State/Territory body-the person is a body corporate that holds the native title rights and interest concerned on trust, or that is determined in relation to the native title under a provision of a law of the State and Territory concerned that corresponds to section 57 of the *Native Title Act 1993*.

Subclause 7(5) provides definitions for the purposes of clause 7.

Clause 8 – Rules about nominations

Subclause 8(1) provides rules in relation to nominations made under clause 7. Subclause 8(2) provides what must be specified in the reference to land under subclause 8(1)(c).

Subclause 8(3) allows the Minister to request further information from a nominator of the land.

Subclause 8(4) provides that a failure to comply with subclause 8(1) does not invalidate a nomination made under clause 7.

Subclause 8(5) provides that a nomination under this clause is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 9 - Approval of nominated land

Clause 9, subject to clause 10(6), allows the Minister in his or her absolute discretion to approve, in writing, land, or a specified part of land, nominated as a site under clause 5 or clause 7. The approval must be published in the *Gazette* within seven days of the approval being made. The clause provides that a failure to gazette an approval, or a failure of a

nomination to which an approval relates to comply with the relevant rules of nomination, will not invalidate an approval.

Subclause 9(7) provides that an approval is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 10 - Procedural fairness in relation to Minister's declarations and approvals

Subclauses 10(1) and (2) provide that the Minister must give a notice to each Land Council and publish a notice in the *Gazette* and a national daily newspaper stating that the Minister proposes to make a declaration under clause 6 and inviting comments on the proposed declaration.

Subclause 10(3) provides that in deciding whether to make a declaration under clause 6, the Minister must take into account any relevant comments received in response to an invitation.

Subclauses 10(4) and (5) provide that the Minister must give a notice to each nominator and publish a notice in the *Gazette*, a national daily newspaper and any local newspaper circulating in the area in which the land is situated, stating that the Minister proposes to approve land under clause 9 and inviting comments on the proposed approval by nominators and persons with a right or interest in the land.

Subclause 10(6) provides that in deciding whether to make an approval under clause 9, the Minister must take into account any relevant comments received in response to an invitation.

Subclause 10(7) provides that clause 10 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Minister's decision whether to make a declaration opening the nation-wide volunteer site nomination process and the Minister's decision whether to approve land as a site.

Part 3 – Selecting the site for a facility

Clause 11 – Authority to conduct activities

Clause 11(1) and(2) allows the Commonwealth, a Commonwealth entity, a Commonwealth contractor and an employee or agent of any of these persons to do anything in a State or Territory necessary for, or incidental to, the purposes of selecting a site on which to construct and operate a facility.

Subclause 11(3) provides a non-exhaustive list of things the Commonwealth etc. may do.

Subclause 11(4) provides that a person doing a thing under this Part must:

(a) take all reasonable steps to ensure that the doing of the thing causes as little detriment and inconvenience, and does as little damage, as is practicable to the land and to anything on, or growing or living on, the land; and
(b) remain on the land only for such period as is reasonably necessary; and
(c) leave the land, as nearly as practicable, in the condition in which it was immediately before the thing was done.

Clause 12 – Application of State and Territory laws

Clause 12(1) provides that a law, or a provision of a law, of a State and Territory, insofar as it relates to the matters described in this subclause has no effect to the extent that it would, apart from this clause, regulate, hinder or prevent the doing of a thing authorised by clause 11.

Clause 12(2) provides that the regulations may prescribe a law, or a provision of a law, with the effect that that law etc. has no effect to the extent that it would, apart from this subclause, regulate, hinder or prevent the doing of a thing authorised by clause 11.

Clause 12(4) provides that the regulations may prescribe a law, or a provision of a law, with the effect that the law etc. has effect despite anything else in this clause.

Clause 13 – Application of Commonwealth laws

Clause 13(1) provides that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999* have no effect to the extent that they would, apart from this clause, regulate, hinder or prevent the doing of activities authorised in clause 11.

Clause 13(2) provides that the regulations may prescribe another law, or a provision of another law, with the effect that the law etc. has no effect to the extent that it would, apart from clause 13, regulate, hinder or prevent the doing of a thing authorised by clause 11.

Part 4 – Acquisition or extinguishment of rights and interests

Clause 14 – Minister's declaration of land as selected site or required for road access

Subclause 14(1) provides that clause 14 applies if land has been both nominated and approved as a site.

Subclause 14(2) provides that, subject to clause 18, the Minister may, in his or her absolute discretion, declare in writing that the site approved by the Minister, or a specified part of the site, is selected as the site for a facility. The declaration may specify all or some of the rights and interests in the selected site. The effect of selecting a site is that Part 5 applies in relation to the selected site. The effect of specifying rights or interests in the selected site is that clause 19 applies in relation to those rights and interests.

Subclause 14(3) provides that the Minister may not, after the general nomination start time, make a declaration under subclause 14(2) in relation to land nominated by a Land Council as a site under clause 5.

Subclause 14(4) provides that, subject to clause 18, the Minister may, in his or her absolute discretion, declare in writing that all or specified rights or interests in land in a State or Territory specified in the declaration are required for providing all-weather road access to the selected site. The effect of specifying rights or interests is that clause 19 applies in relation to those rights and interests.

Subclause 14(5) provides that, to avoid doubt, rights and interests specified in a declaration under subclause 14(2) or (4) includes rights to minerals (if any), native title rights and interests (if any), an interest in land that did not previously exist and an easement in gross (if any).

Subclause 14(6) provides that to avoid doubt, clause 14 has effect subject to section 9 of the *Racial Discrimination Act 1975*.

Subclause 14(7) provides that a declaration under subclause 14(2) or (4) is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 15 – Formalities relating to Minister's declarations

Subclause 15(1) provides that a declaration under clause 14(2) or (4) must be published in the *Gazette* within seven days of the declaration being made. However, subclause 15(2) provides that a failure to comply with subclause 15(1) does not invalidate a declaration. Subclause 15(2) also provides that failure to comply with this subclause or subclause 5(2), 6(4), 8(1) or 9(5) does not invalidate a declaration.

Clause 16 - When Minister's declarations take effect etc.

Subclause 16(1) provides that a Minister's declaration under clause 14(2) or (4) takes effect at the time specified in the declaration, which must not be earlier than the time the declaration is made.

Subclause 16(2) and (3) operate so that the Minister may make more than one declaration under each of subclauses 14(2) and (4), but that there may only be one declaration under subclause 14(2) in effect at a particular time. That there may only be one declaration under subclause 14(2) in effect at a particular time means that there is only one 'selected site' at a particular time and Part 5 may therefore only apply in relation to one site at a particular time.

Clause 17 - Revocation of Minister's declaration

Subclause 17(1) provides the Minister may in his or her absolute discretion revoke a declaration under subclause 14(2).

Subclause 17(2) provides that a revocation takes effect at the time specified in the revocation, which must not be earlier than the time the revocation is made.

Subclause 17(3) provides that, to avoid doubt, the revocation of a declaration made under subclause 14(2) does not affect the operation of clause 19 in relation to the land to which the declaration relates but, on and from the revocation, Part 5 does not apply to that land.

Subclause 17(4) provides that clause 18 does not apply to a revocation under this clause.

Subclause 17(5) provides that a copy of a revocation must be published in the *Gazette* within seven days of the declaration being made. However, subclause 17(6) provides that a failure to comply with subclause 17(5) does not invalidate a revocation.

Subclause 17(7) provides that section 33(3) of the *Acts Interpretation Act 1901* does not apply to a revocation. This subclause should not be taken to imply that section 33(3) does not apply in relation to other clauses.

Clause 18 - Procedural fairness in relation to Minister's declarations

Clause 18 provides an entitlement to procedural fairness in relation to a Minister's declaration under clause 14 and exhaustively describes that entitlement.

Subclauses 18(1) and (2) provide that the Minister must give a notice to each nominator and publish a notice in the *Gazette*, a national daily newspaper and any local newspaper circulating in the area in which the land is situated, stating that the Minister proposes to make a declaration under clause 14 and inviting comments on the proposed declaration by nominators of the land and persons with a right or interest in the land.

Subclause 18(3) provides that in deciding whether to make a declaration under clause 14, the Minister must take into account any relevant comments received in response to an invitation.

Subclause 18(4) provides that a reference in this clause to each nominator of the land, in relation to a declaration under subclause 14(4) that rights or interests in land are required for providing all-weather road access to the selected site, is a reference to each person who nominated the selected site under clause 5 or 7.

Subclause (5) provides that clause 18 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Minister's decision to make a declaration under clause 14.

Clause 19 - Acquisition or extinguishment

Subclause 19(1) has the effect of providing that, at the time of a declaration under subclause 14(2) has effect, any rights or interests in the selected site that are specified in the declaration are acquired by the Commonwealth or extinguished and freed and discharged from all other rights and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.

Subclause 19(2) has the effect of providing that, at the time of a declaration under subclause 14(4) has effect, any rights or interests in the selected site that are specified in the declaration are acquired by the Commonwealth or extinguished and freed and discharged from all other rights and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.

Clause 20 - Application of Commonwealth and State or Territory laws

Subclause 20(1) provides that clause 19 has effect despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten).

It is the intention that subclause 20(1) will apply to any law of the Commonwealth, a State or a Territory, regardless whether that law is a law of the State or Territory in which the selected site is located.

Subclause 20(2) has the effect of providing that, without limiting subclause 20(1), clause 19 has effect despite the *Lands Acquisition Act 1989* and the *Native Title Act 1993*.

Clause 21 - Notice to Registrar-General or other appropriate officer

Subclause 21(1) provides that the Secretary of the Department may lodge with the Registrar-General, the Registrar of Titles or other appropriate officer of a State, the Australian Capital Territory or the Northern Territory, a copy of a Minister's declaration under clause 14, certified by writing signed by the Secretary.

Subclause 21(2) provides that the officer with whom the copy is lodged may deal with and give effect to it as if it were a grant, conveyance, memorandum or instrument of transfer of relevant rights and interests done under the laws of the State or Territory.

Clause 22 - Regional consultative committee

Subclause 22(1) provides that immediately after a declaration under subclause 14(2) takes effect, the Minister must, by writing, establish a committee to be known as the regional consultative committee.

Subclause 22(2) provides that the functions of the committee are to facilitate communication between the Commonwealth, the operator of the facility (if any) at the

selected site and persons living in or near the region where the selected site is situated and such other functions as are prescribed under subclause 22(4)(a).

Subclause 22(3) provides that an instrument made under subclause (1) of this clause is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Subclause 22(4) provides that the regulations may prescribe matters relating to the committee, including, but not limited to, the following:

(a) the functions of the committee
(b) the operation and procedures of the committee
(c) membership of the committee
(d) term of appointment of members
(e) remuneration of members
(f) resignation of members
(g) disclosure of interests by members
(h) termination of appointment of members
(i) leave of absence of members.

Subclause 22(5) provides that if no regulations are in force under subclause 22(4), the committee may operate in the way determined in writing by the committee.

Part 5 – Conducting activities in relation to selected site

Clause 23 - Authority to conduct activities

This clause provides identified persons and classes of persons with the authority to do certain things in relation to the selected site for a facility or on land acquired for the purposes of providing all-weather road access to the selected site.

Subclause 23(1) has the effect of providing that clause 23 applies to the Commonwealth, a Commonwealth entity and a Commonwealth contractor as well as an employee or agent of these persons.

Subclause 23(2) has the effect of providing that a person to whom clause 23 applies may, (in relation to the selected site), do anything necessary for or incidental to any or all of the following:

(a) gathering or preparing information for a Commonwealth regulatory scheme that relates to the construction or operation of a facility or anything done in preparation for the construction or operation of a facility;
(b) conducting activities that relate to gathering or preparing information for such a regulatory scheme;
(c) preparing the selected site for a facility;
(d) preparing to construct and operate a facility;
(e) constructing a facility;
(f) constructing roads on, or grading, land in a State or Territory;
(g) erecting fences and other access controls on land specified in the declaration under subclause 14(4);
(h) operating a facility;
(i) maintaining a facility;
(j) keeping a facility safe;
(k) decommissioning a facility.

A Commonwealth regulatory scheme mentioned in subclause 23(2) includes, but is not limited to, the *Environment Protection and Biodiversity Conservation Act 1999* and the *Australian Radiation Protection and Nuclear Safety Act 1998*.

Subclause 23(3) provides that, without limiting subclause 23(2), the person may, under that subclause, do a thing mentioned in subclause 11(3) in relation to the selected site.

Subclause 23(4) provides that subclause 23(2) extends to doing things outside the selected site.

Subclause 23(5) provides that a person to whom clause 23 applies may, in relation to the selected site, transport (including through a State or Territory) people and materials (including controlled material) to or from a facility; and use transport infrastructure for that transport.

Clause 24 - Application of State and Territory laws

Clause 24 limits the application of State and Territory laws in specified ways.

Subclause 24(1) has the effect of providing that a law (or a provision of a law) of a State or Territory (whether written or unwritten) so far it relates to:

(a) the use or proposed use of land or premises; or
(b) the environmental consequences of the use of land or premises; or
(c) the archaeological or heritage values of land, premises or objects (including the significance of land, premises or objects in the traditions of Indigenous people); or
(d) controlled material, radioactive material or dangerous goods; or
(e) licensing (however described) in relation to employment, carrying on a particular kind of business or undertaking or conducting a particular kind of operation or activity,

has no effect to the extent that it would (apart from clause 24) regulate, hinder or prevent the doing of a thing authorised by clause 23.

Subclause 24(2) provides that a law (or provision of a law) of a State or Territory (whether written or unwritten), so far as it relates to the transport of controlled material, radioactive material or dangerous goods, has no effect to the extent that it would (apart from clause 24) regulate, hinder or prevent transport authorised by clause 23.

Subclause 24(3) provides that the regulations may prescribe a law (or provision of a law) of a State or Territory for the purposes of subclause 24(3) as a law or provision that has no effect to the extent that it would (apart from subclause 24(3)) regulate, hinder or prevent the doing of a thing authorised by clause 23.

Subclause 24(4) provides that regulations made for the purposes of subclause 24(3) may prescribe a law (or a provision of a law) whether or not it is a law or provision of a kind described in subclause 24(1) or (2).

Subclause 24(5) provides that the regulations may prescribe a law (or provision of a law) of a State or Territory for the purposes of subclause 24(5). The prescribed law or provision has effect despite anything else in subclause 24.

Clause 25 - Application of Commonwealth laws

Subclause 25(1) provides that the regulations may prescribe a law (or provision of a law) of the Commonwealth for the purposes of subclause 25(1) as a law or provision that has no effect to the extent that it would (apart from subclause 25(1)) regulate, hinder or prevent the doing of a thing authorised by clause 23.

Subclause 25(2) provides that the regulations must not prescribe any of the following laws, or any provision of the following laws:

(a) the *Australian Radiation Protection and Nuclear Safety Act 1998*;
(b) the *Environment Protection and Biodiversity Conservation Act 1999*;
(c) the *Nuclear Non-Proliferation (Safeguards) Act 1987.*

Part 6 – Granting of rights and interests in land to original owners

Clause 26 - Application of Part

Subclause 26 sets out how Part 6 applies to a declaration under subclauses 14(2) and (4). However, subclause 26(3) provides that Part 6 does not apply to a declaration under subclause 14(2) or (4) if the declaration relates to land nominated under the nation-wide volunteer site nomination process.

Subclause 26(1) provides that Part 6 applies if:

(a) immediately before a declaration under subclause 14(2) took effect, land that was the subject of the declaration was Aboriginal land (the relevant land); and
(b) as a result of the declaration, the Commonwealth acquired (under clause 19) an estate in fee simple in the relevant land; and
(c) a facility on the relevant land has been abandoned in accordance with the *Australian Radiation Protection and Nuclear Safety Act 1998*; and
(d) the Commonwealth holds an estate in fee simple in the relevant land.

Subclause 26(2) provides that Part 6 applies if:

(a) immediately before a declaration under subclause 14(4) took effect, all or part of the land that was the subject of the declaration was Aboriginal land (the whole, or that part, of the land being relevant land); and
(b) as a result of the declaration, the Commonwealth acquired, under clause 19, rights or interests in the relevant land; and
(c) the facility mentioned in subclause 26(1)(c) has been abandoned in accordance with the *Australian Radiation Protection and Nuclear Safety Act 1998*; and
(d) the Commonwealth holds all or some of those rights or interests in the relevant land.

Subclause 26(3) provides that this Part does not apply to a declaration referred to in subsection (1) or (2) if the declaration relates to land nominated under clause 7.

Abandonment of a facility under the *Australian Radiation Protection and Nuclear Safety Act 1998* means that the facility has been released from regulatory control. This cannot occur until decommissioning and any subsequent monitoring has been completed.

Clause 27 - Declaration of intention to grant rights and interests in land to original owners

Subclause 27(1) provides that the Minister may (in his or her absolute discretion) declare in writing that the land that was the subject of the declaration under subclause 14(2) is no longer required for the facility mentioned in subclause 26(1)(c).

Subclause 27(2) provides that the declaration must:

(a) specify all the relevant land; and
(b) state that the Minister intends to make a declaration under clause 28 granting the rights and interests specified in clause 29 in specified land to a specified Land Trust.

Subclause 27(3) provides that land specified under subparagraph 27(2)(b) may be all or part of the relevant land, but all of the specified land must, in total, be all of the relevant land.

This allows for different specified parts of the relevant land to be returned to different Land Trusts.

Subclause 27(4) provides that a Land Trust may be specified under subparagraph 27(2)(b) in relation to specified land only if:

(a) the Land Trust held title to the specified land immediately before the declaration under subclause 14(2) or (4) (as the case may be) took effect; or
(b) the Land Trust has succeeded to the functions of a Land Trust mentioned in subparagraph (4)(a).

Subclause 27(5) provides that, within seven days of the declaration being made, the Minister must publish a copy of the declaration in the *Gazette* and notify a specified Land Trust in writing that the Minister intends to make a declaration under clause 28.

Subclause 27(6) provides that a declaration is not valid unless it specifies and states the matters mentioned in subclause 27(2) and the Minister complies with subclause 27(5).

Subclause 27(7) provides that a Land Trust specified in the declaration may consent in writing to the granting of the rights and interests specified in clause 29 in the specified land.

Subclause 27(8) provides that a declaration made under subclause 27(1) is not a legislative instrument. This provision is included to assist readers, as the declaration is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Clause 28 - Declaration granting rights and interests in land to original owners

Subclause 28(1) provides that the Minister must make a declaration in writing that an estate in fee simple is granted in specified land to a specified Land Trust if the Commonwealth holds an estate in fee simple in the specified land and the specified Land Trust has, under subclause 27(7), consented to the granting of an estate in fee simple in the specified land within:

- 12 months of the day on which the declaration under clause 27 was published in the *Gazette*; or
- such longer period as is prescribed in the regulations.

Subclause 28(2) provides that the Minister must make a declaration in writing that the rights and interests specified in subclause 29(3) are granted in specified land to a specified Land Trust if the Commonwealth holds rights or interests (other than an estate in fee simple) in the specified land and the specified Land Trust has, under subclause 27(7), consented to the granting of the rights and interests specified in subclause 29(3) in the specified land within:

- 12 months of the day on which the declaration under clause 27 was published in the Gazette; or
- such longer period as is prescribed in the regulations.

Clause 28(3) provides that a declaration has effect at the time specified in the declaration (which must not be earlier than the time the declaration is made).

Subclause 28(4) provides that a declaration made under subclause 28(1) or (2) is not a legislative instrument. This provision is included to assist readers, as the declarations are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Subclause 28(5) provides that the Minister may include one or more declarations under subclause 28(1) and (2) in the same document.

Clause 29 - Grant of rights and interests in land to original owners

Clause 29 provides for the grant of rights and interests in land to original owners as a grant of estate in fee simple (subclauses 29(1) and (2)), a grant of other rights and interests (subclause 29(3)) and the effect on the validity of earlier rights, interests and actions (subclause 29(4)).

Subclause 29(1) provides that, if the Minister makes a declaration under subclause 28(1), then at the time the declaration has effect, an estate in fee simple is granted (by force of subclause 29(1)) in the specified land to the specified Land Trust and the land is taken, for all purposes, to be Aboriginal land.

Subclause 29(2) provides that the estate in fee simple is subject to the reservations that:

(a) the right to any minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of the land (being minerals all interests in which are vested in the Commonwealth) remains with the Commonwealth; and
(b) rights to explore for minerals, and leases or licences to mine for minerals, on or below the surface of the land may be granted under section 124 of the *Lands Acquisition Act 1989*.

Subclause 29(3) provides that, if the Minister makes a declaration under subclause 28(2), then at the time the declaration has effect, any rights and interests that are held by the Commonwealth in the specified land and were acquired by the Commonwealth (under clause 19) in the specified land from the specified Land Trust or another Land Trust, are granted (by force of subclause 29(3)) in the specified land to the specified Land Trust.

Subclause 29(4) provides that the granting of rights and interests in land under subclause 29(1) or (3) does not affect the validity of any rights or interests acquired, created or granted (whether under this Act or otherwise) in relation to the land or the validity of the construction, operation, maintenance, decommissioning or abandoning of a facility on the land, or the doing of any other thing in relation to the land, before the declaration under clause 28 has effect.

Clause 30 - No earlier rights and interests granted

Clause 30 provides that, to avoid doubt, the making of a declaration under clause 28 does not create or grant any rights or interests in land before the declaration has effect.

Clause 31 - Application of Commonwealth, State and Territory laws

Clause 31 provides that clause 29 has effect despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten).

Clause 32 - Notice to Registrar-General

Subclause 32(1) provides that the Secretary of the Department may lodge with the Registrar-General for the Northern Territory (or other appropriate officer) a copy of a Minister's declaration under clause 28, certified by writing signed by the Secretary.

Subclause 32(2) provides that the officer with whom the copy is lodged may deal with and give effect to it as if it were a grant, conveyance, memorandum or instrument of transfer of relevant rights and interests done under the laws of the Northern Territory.

Clause 33 - Indemnity by Commonwealth

Subclause 33(1) provides that the Commonwealth must indemnify each Land Trust specified in a declaration under clause 28 and keep the Land Trust indemnified against any action, claim or demand brought or made against the Land Trust in respect of any liability arising from, or damage caused by, ionising radiation from any act done or omitted to be done by or on behalf of the Commonwealth in relation to the transport of controlled material to or from or the management of controlled material at a facility on the land specified in the declaration.

Clause 33(2) provides that the amount of the indemnity is reduced to the extent to which any fault on the part of the Land Trust, or its employees, agents or contractors, contributed to the liability or damage.

Clause 33(3) provides that subclause 33(1) does not apply in relation to an action, claim or demand unless the Land Trust notifies the Commonwealth, in writing, of the action, claim or demand as soon as practicable and the Land Trust follows any directions of the Commonwealth in relation to the action, claim or demand.

Clause 34 - Regulations

Clause 34 provides that the regulations may prescribe any modifications of this Act that are necessary or convenient to deal with transitional matters arising from the making of a declaration under clauses 27 or 28.

Part 7 – Miscellaneous

Clause 35 - Compensation

Subclause 35(1) provides that, if rights or interests are acquired, extinguished or otherwise affected under clause 19, the Commonwealth is liable to pay a reasonable amount of compensation to a person whose rights or interests have been acquired, extinguished or otherwise affected.

Subclause 35(2) provides that if the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Clause 36 - Compensation for acquisition of property

Subclause 36(1) provides that, if the operation of the Act would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

Subclause 36(2) provides that, if the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Subclause 36(3) defines ***acquisition of property***, and ***just terms*** for the purposes of clause 36. These terms are defined as having the same meaning as in paragraph 51(xxxi) of the Constitution.

Clause 37 - Indemnity by Commonwealth and management of Northern Territory controlled material for section 5 nominations

Subclause 37(1) provides that this clause applies if the selected site was nominated under clause 5.

Subclause 37(2) provides that the Commonwealth must indemnify the Northern Territory, and keep the Northern Territory indemnified against any action, claim or demand brought or made against the Northern Territory in respect of any liability arising from, or damaged caused by, ionising radiation from any act done or omitted to be done by or on behalf of the Commonwealth in relation to the transport of controlled material to or from, or the management of controlled material, at a facility on the selected site.

Subclause 37(3) provides that the amount of the indemnity is reduced to the extent to which any fault on the part of the Northern Territory, or its employees, agents or contractors, contributed to the liability or damage.

Subclause 37(4) provides that subclause 37(2) does not apply in relation to an action, claim or demand unless the Northern Territory notifies the Commonwealth, in writing, of the action, claim or demand as soon as practicable and follows any directions of the Commonwealth in relation to the action, claim or demand.

Subclause 37(5) provides that if controlled material that is generated by activities in the Northern Territory is managed at a facility on the selected site, the Commonwealth must not charge the Northern Territory for the management.

Clause 38 – Severability-additional effect of Act

Clause 38 provides that, without limiting the effect apart from this clause, the Bill also has effect it would have if:

(a) each reference to a facility were, limited to a facility within a Territory; and
(b) each reference to the doing of things, or things done, on or in relation to land was expressly limited to a reference to the doing of things, or things done, or in relation to land within a Territory.

This clause is designed to ensure that the Bill is capable of being read down so that it is supported by section 122 of the Constitution.

Clause 39 - Regulations

Clause 39 provides that the Governor-General may make regulations prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Clause 40 - Schedule(s)

Clause 40 provides that each Act that is specified in a Schedule to this Bill is amended or repealed as set out in the applicable items in the Schedule concerned and any other item in a Schedule to this Bill has effect according to its terms.

Schedule 1 – Repeal and consequential amendments

Part 1 – Repeal of the Commonwealth Radioactive Waste Management Act 2005

Item 1 repeals the whole of the *Commonwealth Radioactive Waste Management Act 2005*.

Part 2 - Consequential amendment

Item 2 repeals paragraph (zc) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977*.

Schedule 2 – Transitional provisions

Item 1 - Saving–nominations and approvals

Item 1(1) provides that despite the repeal of Part 1A of the *Commonwealth Radioactive Waste Management Act 2005* by item 1 of Schedule 1, a nomination under section 3A of the *Commonwealth Radioactive Waste Management Act 2005* continues in force, after the commencement time, as if it had been made under clause 5 of the Bill.

Item 1(2) provides that despite the repeal of Part 1A of the *Commonwealth Radioactive Waste Management Act 2005* by item 1 of Schedule 1, an approval under section 3C of the

Commonwealth Radioactive Waste Management Act 2005 continues in force, after the commencement time, as if it had been made under clause 9 of the Bill.

Item 1(3) provides that section 3D of the *Commonwealth Radioactive Waste Management Act 2005* and the old ADJR Act continue to apply, after the commencement time, in relation to a nomination or approval continued in force by this item.

Item 1(4) provides that clause 10 of the Bill and the new ADJR Act do not apply in relation to an approval continued in force by this item.

Item 1(5) provides that to avoid doubt, clause 18 of the Bill and the new ADJR Act apply in relation to a declaration under clause 14 of the Bill that relates to an approval continued in force by this item.

Item 1(6) provides definitions for Item 1, Schedule 2.