QUESTION ON NOTICE

Senator BARNETT—Thanks very much, Mr Davoren, for your evidence. I just want to go to this issue of procedural fairness. I have a submission here from the ANU that is expressing extreme concern about the bill in that regard. It has only just been received this morning, so I am just perusing it. It says:

… 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.

Those are pretty strong statements from the ANU, from Dr James Prest, who is a lecturer in the Australian Centre for Environmental Law. The main points cover the lack of objects of the bill, the effect of overriding state and territory environmental laws, restricted reinstatement of judicial review and restricted reinstatement of procedural fairness. Have you seen that submission and do you have any preliminary responses to it?

Mr Davoren—I have not had the chance to read that, but if you want us to make some comments on it and take that on notice I think we would be prepared to do that.

Senator BARNETT—That would be useful, I think.

RESPONSE

<u>On a lack of objects in the Bill</u>

In his submission, Dr Prest states:

> "Suprisingly, the Bill does not contain any statutory objectives".

On 30 March 2010, in the Senate Legal and Constitutional Affairs Legislation Committee, Dr Prest qualified this statement by stating "…the majority of environmental laws and I think laws more generally that are drafted these days tend to have an objects clause for the purpose of…guiding decision makers..."[1].

Objects clauses are not necessary and are not routinely included in legislation - the majority of Acts do not have an objects clause.

Objects clauses are sometimes included in legislation where the sponsors of the legislation consider that they may be useful to clarify the purpose of the legislation.

A decision to include an objects clause would be a drafting matter. Its presence (or absence) does not affect the scope of an Act.

By way of guidance, the long title of the *National Radioactive Waste Management Bill* makes clear the purpose of the legislation:

> 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.

In relation to Dr Prest's submission, that:

[1] See Hansard at page 33

> "…also remarkably the Bill does not contain a statutory objective of selection of the most suitable site on the Australian continent having regard to environmental…and other scientific considerations".[2]

The Department notes that the Bill proposes that its purpose be achieved by selecting a site based on volunteerism by landowners, an approach which is fully in accordance with international best practice.

The International Atomic Energy Agency's (IAEA) Safety Guide No. 111-G-3.1, *Siting of Near Surface Disposal Facilities*, states that it is not essential to locate the best possible site for a disposal facility. Rather, a proponent must demonstrate that the disposal system (site, facility design, waste packages, and institutional controls) complies with safety, technical and environmental requirements. Shortcomings in some site characteristics may be compensated for by engineered barriers, taking into consideration the entire disposal system's confinement and isolation capabilities. The IAEA has maintained this guidance in its current draft Safety Guide DS 356, *Near Surface Disposal of Radioactive Waste*.

The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) *Regulatory Guidance for Radioactive Waste Management Facilities: Near Surface Disposal Facilities; and Storage Facilities* (December 2006) states that the ARPANS Regulations require that disposal activities are in accordance with the *National Health and Medical Research Council Code of Practice for the Near Surface Disposal of Radioactive Waste* (the "NHMRC Near Surface Disposal Code"). This Code states in relation to siting criteria set out in the Code:

> *A potential site may not necessarily comply with all of these criteria. However, there should be compensating factors in the design of the facility to overcome any deficiency in the physical characteristics of the site.*

The Bill ensures the selected site will go through full environmental, heritage and nuclear regulatory processes.

<u>On overriding state and territory environment laws</u>

In his submission Dr Prest states:

> "if…there are insufficient Commonwealth regulatory controls on the proposed activity, a regulatory void or vacuum is created."[3]

There is no regulatory void. Dr Prest has not taken into account the central role of ARPANSA as the Commonwealth's nuclear regulatory agency.

The facility will be constructed, owned and operated under a Commonwealth Act of Parliament.

As a Federal Government Agency, ARPANSA, (as opposed to a state or territory agency), is responsible for regulating the Australian Government and its contractors'

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[2] At page 3
[3] At page 4

uses of radiation sources and facilities and nuclear installations, regardless of the State or Territory in which the radiation sources are located.

For example Commonwealth radioactive waste currently being stored by the Australian Nuclear Science and Technology Organisation at Lucas Heights, NSW, is regulated by ARPANSA.

A facility will be subject to regulatory controls under the *Australian Radiation Protection and Nuclear Safety Act 1998* and related regulations. Separate licences will need to be obtained from ARPANSA in order to site, construct, operate and close a facility.

On its website, ARPANSA notes:

> ARPANSA is guided by the principles of best practice set out in documents such as the Australian National Audit Office Better Practice Guide for Administering Regulation, March 2007 as well as guidance from international regulatory approaches set out in key documents of organisations such as the International Atomic Energy Agency.[4]

ARPANSA outlined its role in the evidence it gave to the Committee.

<u>On "trust the Commonwealth to regulate itself?"</u>

In his submission, Dr Prest states:

> "ARPANSA will be the regulator of the facility if constructed…However, ARPANSA is also likely to be the manager and operator of the facility."[5]

Dr Prest is mistaken. Under no circumstances can ARPANSA be the operator of the facility. ARPANSA has no authority under its legislation to manage and operate a facility, nor does the Bill create that authority.

<u>On "no statement of intention regarding international obligations"</u>

In his submission, Dr Prest states:

> "The Bill before the Committee contains no statement of intention regarding international obligations."[6]

An absence of a statement of intention does not negate Australia's duty to comply with those obligations.

<u>On the Bill not preventing the import of nuclear waste</u>

In his submission, Dr Prest states:

> "..the present Bill does not restrict the importation of other forms of nuclear waste."[7]

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[4] http://www.arpansa.gov.au/Regulation/branch/index.cfm
[5] At page 8
[6] At page 7
[7] At page 7

This is not the purpose of the Bill. Prevention of imports of other countries' nuclear waste is achieved through the *Customs (Prohibited Imports) Regulations 1956.*

It has been the policy of successive Australian Governments that Australia will not accept other countries' nuclear waste and the Rudd Government is strongly committed to this policy.

This policy position is enforced under the *Customs (Prohibited Imports) Regulations 1956* under which radioactive waste is a prohibited import. Consequently, no international radioactive waste will be managed at the facility.

The Bill includes a proscription on acceptance of high level waste, including spent nuclear fuel, at a facility established for managing Australia's radioactive waste.

<u>On administrative law generally</u>

In his submission, Dr Prest cited what he perceived to be limited grounds of review under the ADJR Act. Judicial review is always of a limited nature, and it is inappropriate for it to look at the substance of the decision.

Judicial review of administrative decisions ensures that the Government is governed by the rule of law. However, judicial review historically and currently does not consider the *merits* of a particular decision. The doctrine of the separation of powers means that where Parliament has given discretion to a decision-maker under legislation, it is not appropriate for the judiciary to inquire into the merits of the case.

Parliament is the supreme branch of Government in the Australian constitutional system. Judicial review ensures that the power is exercised according to law with due attention to procedural fairness, rationally, and without bias. Administrative decisions are rarely reviewed on their merits, and only where power is given to the courts by legislation. Executive accountability through Parliament is a more appropriate means of ensuring that Ministers are making the best decisions on the merits.

<u>On procedural fairness and the ADJR Act</u>

In his submission Dr Prest states:

> "The effect is that the Bill preserves the Muckaty site nomination and approval. It also attempts to insulate it from judicial review by removing the availability of ADJR review."[8]

Under the current Act, procedural fairness requirements did not apply to the nomination or the approval, nor was the nomination or approval susceptible to review under the *Administrative Decisions (Judicial Review)Act 1977* (ADJR Act).

Under the Bill, procedural fairness <u>will</u> apply to any decision to select a site as a facility, including the land at Muckaty Station that has already been nominated and approved as a site under the current Act.

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[8] At page 12

This decision will also be susceptible to review under the ADJR Act.

The purpose of the ADJR Act is to provide a form of judicial review that would be accessible to members of the public whose interests are affected by administrative decisions.

A person aggrieved by a decision to which the Act applies is entitled to make an application under the ADJR Act. The Federal Court has held that the expression 'a person aggrieved by a decision' should not be construed narrowly; a person will be aggrieved by a decision if they have a 'special interest in the subject matter of the action'.

The grounds for review under subsection 5(1) are not only a breach of procedural fairness but include:

- acting without power
- exercising a discretionary power in bad faith
- failing to take account of relevant considerations
- failing to observe necessary procedures required by law, and
- fraud.

In his submission, under the heading "Limitation on Procedural Fairness – "Exhaustive Statement Provision", Dr Prest states:

> "There is no requirement for the Minister to consider objective criteria such as the suitability of the site for a repository in terms of geology, geography, environmental protection."

Dr Prest's comments fail to separate the voluntary site selection process and the separate regulatory approval process for the establishment and operation of a facility on the selected site.

Once a site has been selected as a site for the facility, regulatory approval under the *Environment Protection and Biodiversity Conservation Act 1999* and the *Australian Radiation Protection and Nuclear Safety Act 1998* must then be obtained.

If regulatory approval cannot be obtained, a facility cannot be constructed or operated on the site.

It is the Minister for the Environment, Water, Heritage and the Arts, rather than the Minister for Resources and Energy, who will consider the suitability of the site in terms of geology, geography and environment protection. These matters will also be considered by the Chief Executive of ARPANSA in deciding whether to issue a siting licence for the facility.

<u>On the exhaustive statement of procedural fairness</u>

Dr Prest states that the reinstatement of procedural fairness "threatens to become largely symbolic and illusory, if not misleading and deceptive."

Procedural fairness requires certain standards and procedures to be observed in administrative decision-making. 'The precise contents of the requirements ... may

vary according to the statutory context; and may be governed by express statutory provision' (*Plaintiff S157/2002* (2003) 211 CLR 476, 489, per Gleeson CJ).

The provisions are not 'symbolic' but reflect the requirements of the hearing rule as set out by judicial decisions forming part of the common law. Setting out the particular requirements with regard to notice and timing in legislation provides certainty for the Minister and parties making submissions about what is required for the hearing process in this particular case.

The duty to provide procedural fairness does not extend to an obligation on the decision-maker to respond to submissions received. (Dr Prest criticises this in his submission, but this is not a legal requirement).

<u>On "procedural fairness for future generations"</u>

In his submission Dr Prest states:

> "there is no procedural fairness for future generations – even though this is a stated component of the international nuclear law..."[9]

The Department does not agree with this statement. By "procedural fairness for future generations" Dr Prest may be referring to the concept of intergenerational equity.

"Intergenerational procedural fairness" is not a legal test. There is a distinction between *procedural fairness*, which requires the observation of standards and procedures in administrative decision-making and *intergenerational equity*, which requires a consideration of impacts of decisions on future generations. These kind of considerations are not appropriate for assessment by the judiciary.

We assume that Dr Prest's reference to "the international nuclear law" is a reference to the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*. In relation to intergenerational equity, the convention states:

Article 1 (ii)

> *to ensure that during all stages of spent fuel and radioactive waste management there are effective defenses against potential hazards so that individuals, society and the environment are protected from harmful effects of ionizing radiation, now and in the future, in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations;*

<u>Article 4</u>

> *(vi) strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation;*
>
> *(vii) aim to avoid imposing undue burdens on future generations.*

[9] At page 11

The Government considers that by establishing a national radioactive waste management facility that is subject to stringent regulatory controls, future generations are being considered.

On no invalidity clauses

In his submission Dr Prest states:

> "Specifically, the Bill contains so-called 'no validity' clauses in sections 4(4), 5(5), 7(4), 8(6), 14(2) and 16(6)."

These clauses refer to formalities as part of the nomination, approval and gazettal process. These clauses provide that where such formalities are not followed, it will not invalidate a declaration.

For example, clause 7 outlines rules about nomination and provides that a nomination must specify a title diagram. In turn clause 7(4) provides that failure to comply with this rule does not invalidate a nomination.

These provisions have been included in the Bill so as to ensure that an approval of nominated land as a site, or a declaration that a site is the site for a facility, is not invalidated on the basis of a technical breach of the nomination rules.

On absolute discretion clauses

In his submission, Dr Prest states:

> "The Bill provides the Minister with some extremely broad decision-making powers, typified by the "absolute discretion" clauses."

Dr Prest suggests that the Minister's 'absolute discretion' limits procedural fairness. Clauses 9 and 17 of the Bill, which set out the procedural requirements that the Minister is obliged to follow in making his decision, make adequate provision for the requirement of procedural fairness. The decision-making process outlined in clauses 9 and 17 involve extensive inquiry processes and public consultation to ensure that interested parties are afforded the opportunity to provide their views to the Minister.

We note that similar provisions to sections 9 and 17 have been used in other Commonwealth legislation (see for example Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999*, particularly ss 131, 131AA, 131A).

In terms of ensuring accountability and the existence of proper safeguards, the Minister would be accountable to Parliament and the decision can be tested for lawfulness through judicial review.

QUESTION ON NOTICE

Okay. I am just getting my head around that. I just want to go now to the issue of the constitutionality of the bill. Clearly, with respect to Muckaty Station and activities and facilities in the Northern Territory, I do not think there is any doubt. What about potential other sites around Australia? What head of power is the Commonwealth relying upon? Is it confident about, and do you have legal advice to confirm, the constitutionality of this legislation to give you such power? Can you outline and describe those powers for us?

Mr Davoren—As a matter of process, I think we would not have got approval to draft the bill unless our legal advisers were quite convinced that we did have the constitutional authority to draft it. There are a number of relevant heads of power. There is an international convention in this area. There is the international Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, which was concluded in the nineties. That is quite a significant factor. And then of course there are other relevant powers relating to material from Defence. And then, of course, once we have a licence to site the facility from ARPANS, section 109 of the Constitution becomes relevant.

Senator BARNETT—Clearly from what you have said I can see that the external affairs power is relevant, relying on the international treaties that you have signed. The nationhood power—

Mr Davoren—It is also relevant.

Senator BARNETT—The nationhood power is relevant and the power with respect to Defence is relevant. Would you take it on notice to seek the advice of the A-G's office to explain to the committee the confidence that you have in the heads of other heads of power and the legal advice or otherwise that you have to assure us of the constitutionality of the bill, particularly with respect to areas outside of the Northern Territory. Would you be happy to take that on notice?

Mr Davoren—We will take it on notice, but with the caution that we will share our legal advice to the extent that we can.

Senator BARNETT—I understand that.

RESPONSE

The Department has sought legal advice on constitutional issues regarding the *National Radioactive Waste Management Bill 2010.*

The Department is confident that relevant heads of power under the Constitution have been taken into account in drafting the Bill.

For example, where international documents are ratified by Australia, the Commonwealth would attain a power to implement a convention pursuant to the external affairs power.

On 3 November 2003, the *Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management* (Joint Convention) entered into force for Australia.

The Department is cautious in not wishing to disclose legal advice and to not waive privilege in relation to that advice.

QUESTION ON NOTICE

CHAIR—Mr Davoren, I appreciate that you have only just been given the ANU's submission [from Dr JAMES PREST] this morning. Having taken a very cursory glance there are some questions here that this committee would like you to respond to. Particularly, we would want to know your response to the claims as to why there are no objects of the act. Also there is an issue here about whether or not the Dangerous Goods Act in the Northern Territory, or the Workplace Health And Safety Act—some of the state and territory acts that actually go to regulating the safety of the construction and transport of goods—would or would not still need to be enacted. If not, what federal legislation would take their place essentially? It would be useful if the department could look at the issues raised in the ANU's submission and on notice provide us with a response to the main areas of criticism that they raise.

Mr Davoren—We are happy to do that.

RESPONSE

Objects

Objects clauses are not necessary and are not routinely included in legislation - the majority of Acts do not have an objects clause.

Objects clauses are sometimes included in legislation where the sponsors of the legislation consider that they may be useful to clarify the purpose of the legislation.

A decision to include an objects clause would be a drafting matter. Its presence (or absence) does not affect the scope of an Act.

By way of guidance, the long title of the *National Radioactive Waste Management Bill 2010* makes clear the purpose of the legislation:

> 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.

Regulating the safety of the construction and transport of goods

The Bill authorises the construction and operation of a facility. However, regulatory approvals under the *Environment Protection and Biodiversity Conservation Act 1999* and licensing under the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS) must be obtained.

The Australian Radiation Protection and Nuclear Safety Agency regulates the Australian Government and its contractors' uses of radiation sources and facilities and nuclear installations through the administration of the ARPANS legislation, regulation and codes of practice. This would include the safe transport of radioactive material.