Submission from:
Friends of the Earth, Australia
Anti-nuclear and Clean Energy Campaign

Contact:
Jim Green B.Med.Sci. (Hons.) PhD
National nuclear campaigner
Friends of the Earth, Australia
PO Box 222 Fitzroy, Victoria 3065.

To: Julie Dennett
Secretary, Senate Legal and Constitutional Committee
PO Box 6100, Parliament House, Canberra, ACT, 2600.
legcon.sen@aph.gov.au

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

INQUIRY INTO THE NATIONAL RADIOACTIVE WASTE MANAGEMENT BILL 2010

1. INTRODUCTION AND SUMMARY

Friends of the Earth requests the opportunity to appear before a hearing of the Senate Legal and Constitutional Committee to elaborate on the content of this submission. Friends of the Earth has been actively involved with debates over radioactive waste management in Australia for many years and has made detailed submissions to every relevant government inquiry over the past 12+ years – the SA repository EIS, ARPANSA inquiry, NSW government inquiry, and the 2005, 2006 and 2008 Senate inquiries regarding the proposed repository in the NT.

The National Radioactive Waste Management Bill (NRWMB) 2010 is open to challenge because of its extensive and unjustifiable extinguishment of legitimate rights and interests. These include the rights and interests of Aboriginal custodians and the states and territories.

The NRWMB is somewhat less draconian than the legislation it replaces in relation to the NT – but the difference is marginal. The NRWMB is far more draconian in relation to the rights of other states/territories than the legislation it replaces.

It is imperative that the Committee travel to Tennant Creek to hear from Traditional Owners, or alternatively provide resources for Traditional Owners to travel to appear at a Committee hearing in Darwin or Canberra or elsewhere.

Surely the Committee can not be contemplating making it practically impossible for affected Traditional Owners to attend a hearing?

2. THE NRWMB'S EXTINGUISHMENT OF RIGHTS & INTERESTS

This summary draws in part from a Parliamentary Library report dated 9 March 2010 although Friends of the Earth takes responsibility for any errors and interpretations.

The NRWMB overrides various state, territory and Commonwealth laws and it overrides and undermines various rights of Australian citizens including Aboriginal Traditional Owners.

Site nominations contain similar procedural elements as section 3B of the Commonwealth Radioactive Waste Management Act (CRWMA) 2005/06 in relation to providing evidence of consultation and consent with Traditional Owners – but as with the CRWMA, the new Bill specifies that a failure to comply with these elements does not invalidate a nomination, nor is the nomination disallowable by Parliament. In short, the NRWMB severely curtails requirements for consultation and consent, and one of the most offensive aspects of the CRWMA 2005/06 is retained in the new Bill.

Likewise, section 7 contains procedural elements in relation to providing evidence of consultation and consent with 'specified groups of persons' but a failure to comply with these elements does not invalidate a nomination, nor is the nomination disallowable by Parliament.

The Bill provides the Minister with excessive powers. Section 8 enables the Minister to, 'at his or her absolute discretion' give written approval of land nominated under sections 4 or 6. The Minister is under no duty to consider a nomination.

The NRWMB explicitly excludes state/territory laws from operating where they would 'regulate, hinder or prevent' the Commonwealth from doing work to investigate the suitability of potential sites and then the construction and operation of the proposed facility, including the transporting of radioactive materials. The NRWMB retains the flexibility to permit the operation of any state/territory laws if the federal government considers this appropriate – however the application of state/territory laws ought not be at the whim of the federal government.

Section 11(1) states that only certain types of state/territory laws (e.g. laws relating to 'the uses or proposed use of land or premises') are excluded, but the range of laws mentioned is so wide they are likely to give almost complete coverage. Even if a state/territory law fell outside the type listed in subsection 11(1), the law could be excluded by prescribing it under regulation.

Subsection 12(1) of the NRWMB provides that two Commonwealth laws – the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and the Environment Protection and Biodiversity Conservation Act 1999 – have no effect where they would 'regulate, hinder or prevent the doing of a thing authorised by section 10'. Again a prescription power under regulation exists (subsection 10(2)) to allow for the exclusion of other Commonwealth laws, or parts of laws.

The failure to observe the consultative and consent arrangements in relation to the nomination of a site by the Chief Minister or a Land Council does not invalidate the nomination or any subsequent Commonwealth Ministerial approval of a nomination.

The nomination of a site is not reviewable under the Administrative Decisions (Judicial Review) Act 1977 (ADJRA) and is not disallowable by Parliament. Likewise, a government decision on a preferred site is not disallowable by Parliament and is not reviewable under the ADJR Act and the Government owes no legal obligation of procedural fairness towards anybody affected by the decision.

If the Minister makes an error of law in the processes applying to site nominations, approval of nominations, and selection of the preferred site, the NRWMB restores the right of an 'aggrieved person' to seek judicial review under the ADJR Act. But the Bill also retains the provisions of the 2005/06 CRWMA that a failure to comply with certain procedural elements does not invalidate the nominations.

Part 4 of the NRWMB allows the Minister to acquire and/or extinguish various rights and interests both in the site finally selected for the facility or other land where this is required for providing all-weather road access to that site. The rights and interests specified in a subsection 13(2) or (4) declarations may include rights to minerals and native title rights.

Section 14 specifies that a failure to comply with various procedural elements in the nomination, Ministerial approval or declaration process does not invalidate a declaration, nor is the declaration disallowable by Parliament. However, the declaration must comply with section 17 procedural fairness requirements.

Subsection 18(1) provides that at the time any subsections 13(2) or 13(4) declaration has effect, any rights or interest in the selected site or road-access land 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.

The acquisition and/or extinguishment of rights and interests under section 18 has effect despite any other law of the Commonwealth, State or Territory, including the Commonwealth's Lands Acquisition Act 1989 and the Native Title Act 1993.

Part 5 deals with activities once the final site has been selected. It is virtually identical to existing section of the CRWMA 2005/06 and provides for extensive overrides of state, territory and Commonwealth laws to the extent that they would regulate, hinder or prevent these activities. Subsection 23(5) provides that the regulations may prescribe a State or Territory law, or part of it, such that it has effect despite anything in section 23.

Subsection 24(1) provides that the Commonwealth may prescribe by regulation a Commonwealth law, or part of it, so that it has no effect to the extent it would otherwise 'regulate, hinder or prevent the doing of a thing authorised by section 22'. Subsection 24(2) provides that the following laws cannot be prescribed in relation to construction and operation of the repository: 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.

Part 6 is virtually identical to existing Part 4A in the CRWMA 2005/06. It provides a legislative structure for the future return of Aboriginal Land to its original owners. The return is to be made in the Minister's 'absolute discretion'. It appears that the repository could continue to operate *ad infinitum*. There is no requirement for the site to be returned to its original owners.

Section 36 provides for an indemnity for the Northern Territory (government). However it appears that this indemnity only applies if the site nomination was through a Land Council. Why this restriction? Neither the Explanatory Memorandum nor the Minister's second reading speech explain the restriction.

The NRWMB contains provisions to facilitate the establishment of a radioactive waste facility outside of the NT. It is not clear that the Commonwealth has constitutional power to enact legislation to construct and operate a facility outside the territories.

To summarise: the NRWMB is somewhat less draconian than the legislation it replaces in relation to the NT but far more draconian in relation to the rights of other states/territories than the legislation it replaces. Overall, the NRWMB is as deeply flawed as the legislation it replaces – legislation that senior Labor MPs and Senators described as 'extreme', 'arrogant', 'heavy-handed', 'draconian', 'sorry', 'sordid', 'extraordinary' and 'profoundly shameful'.

3. THE MUCKATY NOMINATION IS STRONGLY CONTESTED

"All along we have said we don't want this dump on our land but we have been ignored. Martin Ferguson has avoided us and ignored our letters but he knows very well how we feel. He has been arrogant and secretive and he thinks he has gotten away with his plan but in fact he has a big fight on his hands. We won't be letting that dump go ahead on our land because our duty is to look after that special place for future generations and that's exactly what we plan to do."
-- Dianne Stokes, Muckaty Traditional Owner

If the federal government was confident about the integrity and validity of the strongly contested Muckaty nomination, it would test and reassess the nomination rather than enshrining it in legislation.

The Committee should recommend a reassessment of the validity of the Muckaty nomination. The reassessment should be carried out independently of the Northern Land Council (NLC) because of the NLC's real or apparent conflict of interest (discussed below).

Members of Friends of the Earth have spoken to numerous Muckaty Traditional Owners in recent years and we have been told countless stories about improper and inadequate processes – Traditional Owners failing to receive answers to questions from the NLC and the government, letters unanswered, information being withheld, etc.

Key information such as the contract and the anthropologist's report have been kept secret.

Resources Minister Martin Ferguson claims that Ngapa Traditional Owners support the nomination of the Muckaty site but he knows that many Ngapa Traditional Owners oppose the dump — he received a letter opposing the dump in May 2009 signed by 25 Ngapa Traditional Owners and 32 Traditional Owners from other Muckaty groups.

The following resolution was unanimously passed by the NT Labor Conference in April 2008: "Conference understands the nomination of Muckaty as a potential radioactive dump site, made under the CRWMA legislation, was not made with the full and informed consent of all Traditional Owners and affected people and as such does not comply with the Aboriginal Land Rights Act (ALRA). Conference calls for the Muckaty nomination to also be repealed when the CRWMA legislation is overturned."

Ministers Jenny Macklin, Kim Carr, Peter Garrett and Warren Snowdon among others have acknowledged the distress and opposition of many Muckaty Traditional Owners.

Kim Carr stated in 2007 that it was committed to "establishing a consensual process of site selection" and noted that the Muckaty nomination was "highly controversial". (Kim Carr, Shadow Minister for Industry, Innovation, Science and Research, 'Rights flattened as government steamrolls towards waste dump', media release, 27 September 2007).

A joint ALP media release issued in 2007, from Senator Trish Crossin, Senator Kim Carr, Minister Peter Garrett and Minister Warren Snowdon said: "Labor understands that many families in the [Muckaty] area are strongly opposed to the waste dump idea, and that these families are concerned their rights have been ignored in the process".

Labor Senator Trish Crossin (5/12/06) spoke in Parliament about the relevance of the CRWMA to the Muckaty site in the NT:

> "This is also about the five families who belong to Muckaty Station, three of whom live on adjoining land. Senator Scullion himself said — and I will be interested to see the Hansard at some stage — that this was about ensuring that anyone who was on land adjacent to the Northern Land Council boundaries could provide no objections. That is exactly the political reality of this bill. This bill is about cutting out all the people affected by Muckaty Station, not just some of the traditional owners but a majority of them — not the ones who live within the Northern Land Council boundary but the ones who live within the Central

Land Council boundary. I have a copy of a letter that was written by those people to the chairperson of the Northern Land Council, Mr John Daly, back in July. It states:

'Dear Mr Daly,
We write to you with deep concern.
In the past, we have trusted the Northern Land Council (NLC) to protect our Homelands …
Mr Daly, why are you talking to David Tollner and Nigel Scullion for us about our country? Why are you helping the Commonwealth Government to take control of our land to build a nuclear waste facility? …
Mr Daly, we ask you to stop talking for us. We do not want a nuclear waste facility built on our land.'

This bill is exactly about silencing these traditional owners."

Jenny Macklin said in Parliament in November 2006:

"However, I am aware that there are a number of possible sites under consideration for nomination, one of which is a property known as Muckaty Station.
I am aware of this possibility because I have spoken to traditional owners and families from the property and surrounding areas, who asked to speak to me about the possible nomination of their lands for use as a nuclear waste dump.
These traditional owners oppose the nomination of Muckaty.
And these women expressed their considerable concern, indeed their distress, at this prospect, because they told me that they feel their rights, their views, their concerns and their lands are being trampled upon by this Government.
The Bill under consideration by the House today will magnify that distress, because it openly and harshly rips away the legal requirement that any nomination of indigenous land for a nuclear waste dump must have the full and informed consent of the traditional owners of that land."

The NLC and the government justify the Muckaty nomination on the basis of a secret anthropological report. The secret report is arguably inconsistent with the 1997 Land Commissioner's Report (see submission 95a to the 2008 Senate inquiry by Stephen Leonard from McLusky's Lawyers on behalf of Muckaty Elders and Traditional Owners opposed to the Muckaty nomination, <www.aph.gov.au/Senate/Committee/eca_ctte/radioactive_waste/submissions/sublist.htm>)

THE NORTHERN LAND COUNCIL'S CONFLICT OF INTEREST

The Northern Land Council (NLC) stands to gain financially if the Muckaty nomination proceeds. Thus the NLC has a real or apparent conflict of interest – on the one hand the Council stands to gain financially if the radioactive waste dump/store proceeds, on the other hand the Council is meant to represent the interests of all Traditional Owners regardless of their support for or opposition to the dump/store.

It should be stressed that this conflict of interest is not of the NLC's making and acknowledging the conflict of interest is not meant as a criticism of the NLC. The conflict of interest stems from government legislation concerning the financing of Land Councils and from agreement/s between the Commonwealth and the NLC.

The NLC's conflict of interest casts a pall over the legitimacy of the Muckaty nomination and related processes such as the secret anthropological report.

The NLC's conflict of interest may explain some unfortunate and otherwise inexplicable aspects of the process, e.g.:
* the NLC describing Traditional Owners opposed to the radioactive dump/store as "dissidents"
* the NLC's support for the CRWMA 2005/06 legislation which inter alia allows the imposition of a radioactive dump/store without any consultation with or consent from Traditional Owners (which, in turn, calls into question whether the NLC was in breach of its statutory responsibilities).
* false statements such as the NLC's claim that "every Australian directly benefits from radiological medical treatment ...produced at Lucas Heights".

The NLC's conflict of interest may explain the anger and distress of numerous Traditional Owners. For example Marlene Bennett told a hearing of the Senate Environment, Communications and the Arts Legislation Committee:

"I am also very disappointed in the NLC consultation process. The NLC is the Aboriginal people's voice, and they failed to represent them. ... I think the consultation process was very flawed and that the time for trying to pull the wool over people's eyes is past. Open and honest discussion should be happening involving all the right people, not just with certain elements of the people." (Alice Springs, 17/11/08.)

The Committee should recommend a reassessment of the validity of the Muckaty nomination. The reassessment should be carried out independently of the Northern Land Council (NLC) because of the NLC's real or apparent conflict of interest.

4. A RESPONSIBLE APPROACH TO RADIOACTIVE WASTE MANAGEMENT

There is a long history of failed attempts to impose nuclear waste dumps on unwilling or divided communities around the world, and a long history of governments attempting to short-cut due process only to fail in their efforts to impose nuclear dumps. A proper process is not only a worthy end in itself but is also more likely to result in the establishment of a waste management facility? It seems that this lesson has yet to be learnt in Canberra despite the worldwide experience and the Howard government's failed attempt to impose a dump in SA.

Serious flaws in the current process include the failure to establish the case for a remote repository, and conversely, the acknowledgement of numerous interested parties that ongoing waste storage at Lucas Heights is viable (e.g. ARPANSA, DEST, ANA, ANSTO). In 2004 a senior DEST official told an ARPANSA hearing that the government was relying on a "general feeling" that a remote repository was required. Six years later, that "general feeling" has yet to be tested with a thorough analysis of all available options.

Mr Ferguson's NRWMB Explanatory Memorandum states that: "Most existing stores 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." In response:
* Most existing stores will continue to act as long term waste stores even if the proposed NT dump/store proceeds because of ongoing waste production at ANSTO, science institutions, universities, hospitals etc. If they are not up to scratch, that situation needs redress regardless of the current debate over the proposed NT dump/store.
* Mr Ferguson has no evidence whatsoever to support his assertion that: "Centralisation minimises the risk of inadvertent loss or control of radioactive material with consequential safety and security risks."

A common-sense, scientifically-sound approach to radioactive waste management would involve the following:

Firstly, as with the production of all other hazardous materials, it needs to be demonstrated that radioactive waste is not being produced unnecessarily. Since the Lucas Heights 'OPAL' nuclear research reactor is the major source of the waste in question, a government serious about waste minimisation would be sensibly exploring non-reactor options for medical and scientific applications. Last year a Lucas Heights nuclear scientist told a Parliamentary hearing that he expected a non-reactor method of producing the most commonly-used medical isotope, technetium-99m, to be available in 7-10 years. Such options require serious investigation and support.

Measured by radioactivity, the reactor (and in particular its spent nuclear fuel) is the source of well over 90% of the waste in question. The Labor Party opposed the construction of the new 'OPAL' research reactor while in Opposition.

Another sensible waste minimisation strategy would be to curb the profit-driven overuse of diagnostic imaging technologies in private medical practices; successive governments have recognised the problem but have been slow to act.

Secondly, all options for radioactive waste management need to be considered — not just the option of 'remote' repositories (which are always more remote for some people than for others). This includes the option of ongoing storage at Lucas Heights. ANSTO is not only the source of most of the waste but it is also host to most of Australia's radioactive waste management expertise. All the relevant organisations have acknowledged that ongoing storage at Lucas Heights is a viable option —ANSTO, the Australian Radiation Protection and Nuclear Safety Agency, the Australian Nuclear Association and even Mr Ferguson's own department.

Additionally, requiring ANSTO to store its own waste is the best — and perhaps the only — way of focussing the Organisation's collective mind on the importance of waste minimisation principles.

Thirdly, if a site selection process is required it ought to be based on scientific and environmental siting criteria, as well as on the principle of voluntarism. In 2005, the Howard government chose the NT, and ruled out NSW, for purely political reasons. When the federal Bureau of Resource Sciences conducted a national repository site selection study in the 1990s, informed by scientific, environmental and social criteria, the Muckaty area did not even make the short-list as a "suitable" site.