



**Australian Government**  
**Department of Resources,  
Energy and Tourism**

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the National Radioactive Waste Management Bill 2010

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## **1. Introduction**

The purpose of this submission is to provide information about the *National Radioactive Waste Management Bill 2010*.

## **2. Background**

On 24 February 2010, the Minister for Resources and Energy, Martin Ferguson AM MP introduced the *National Radioactive Waste Management Bill 2010* to the Australian Parliament.

The Bill repeals and replaces the *Commonwealth Radioactive Waste Management Act 2005* (current Act).

## **3. Overview of the Bill**

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

### 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.

### 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.

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.

## 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.

The Minister may also open a nation-wide volunteer site-nomination process. In deciding to allow such nominations, 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 4, whether or not that land has been approved as a site under clause 8.

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.

Once a site has been selected, Part 4 of the Bill also provides that the Minister may establish a regional consultative committee.

## 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.

*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 will apply to such activities.*

## 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 Aboriginal land nominated by a Land Council before any

nation-wide site nomination process, and acquired under the Bill, back to the original owners.

#### 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.

### **4. Overview of the Facility Siting Process**

Under the Bill, there are three steps to establishing a radioactive waste management facility:

1. Land is voluntarily nominated by a Land Council or, potentially, by any person with a sufficient interest in land.
2. The Minister may approve a nomination. Once a nomination is approved, low impact biophysical assessments take place to determine whether the site is potentially suitable for a radioactive waste management facility.
3. The Minister may declare land has been selected as the site for the facility.

Once a preferred site is selected, the proposal to construct the facility at that site will be referred to the Minister for the Environment, Heritage and the Arts for assessment under the *Environment Protection and Biodiversity Conservation Act 1999*. Community and stakeholder consultation will take place as part of this process.

Should the Minister for the Environment, Heritage and the Arts approve its construction, licences for siting, construction and operation of the facility will need to be obtained from the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA).

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. 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 this existing nomination and approval of this site, but procedural fairness requirement will apply to any decision to select the site as the site for a facility.

## **5. International Obligations**

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.

As a party to the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, Australia needs to promote the consistent, safe and responsible management of radioactive waste.

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

Radioactive waste management is governed by rigorous national and international standards. Centralisation will also ensure uniform inventory management for radioactive waste currently stored in a multitude of small suburban and regional stores across Australia.

## **6. Differences between the National Radioactive Waste Management Bill 2010 and the current Act**

The *National Radioactive Waste Management Bill 2010* repeals and replaces the 2005 legislation. The main differences between the Bill and current Act are:

- procedural fairness now applies to key decisions;
- review under the ADJR Act of decisions is now available under the Bill;
- all sites must be voluntarily nominated; and
- potentially, sites across Australia (not just in the Northern Territory) can be voluntarily nominated.

### Procedural fairness and judicial review

Unlike the position under the 2005 legislation, key decisions to be made under the Bill will be subject to a right to accord procedural fairness. Decisions to be made under the Bill will be amenable to review under the ADJR Act.

See further our submission under the heading 'Procedural Fairness'.

### All sites must be voluntarily nominated

Unlike the position under the 2005 legislation, a site can no longer be automatically imposed on a community. Under the Bill, a site must be voluntarily nominated by a person with a sufficient interest in that land.

### Potentially, sites across Australia can be nominated – the Bill does not single out the Northern Territory

Under the Bill, if the Minister decides to open up the nation-wide volunteer site nomination process, any person with a sufficient interest in land in a State or Territory (not just land in the Northern Territory) may nominate that land as a site.

Under the 2005 legislation, a facility can only be located in the Northern Territory.

## **7. Procedural Fairness**

The Bill provides a right to procedural fairness and review under the ADJR Act in relation to:

- a decision to approve the nomination of a site;
- a decision to open up a nation-wide voluntary site nomination process; and
- a decision to select a site as the site for a facility.

Procedural fairness will apply to a decision to select any site, including a site at Muckaty Station. This decision will also be potentially open to review under the ADJR Act.

### Gazettal of decisions

Gazettal provides a person with a right or interest in affected land to provide comments before a decision is made.

The Minister must consider any relevant comments before making a decision.

### Regional Consultative Committee

Once a site is selected, the Bill allows the Minister to establish a regional consultative committee. The committee will facilitate communication between the Commonwealth, the operator of the facility and communities living in or near the region of the site.

## **8. Interaction with State and Territory Legislation**

### Pre-site selection process

Before a site is selected, certain activities (Part 3 activities) need to take place, to ensure land is suitable for a radioactive waste management facility.

These may include:

- geological and geotechnical investigations;
- hydro-geological and hydrological evaluations;
- mineral prospectivity investigations;
- biological and environmental studies;
- meteorological analysis; and
- an evaluation of transportation capabilities to the site.

Certain Commonwealth, State and Territory laws may regulate, hinder or prevent these activities, for example the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999*.

As a result, Clause 11 and 12 provide that certain State, Territory and Commonwealth laws have no effect to the extent that they would regulate, hinder or prevent these activities.

At the same time, the Bill will ensure that responsible measures are followed when undertaking these activities. The Bill provides that persons must:

- take all reasonable steps to ensure that the activities cause as little detriment and inconvenience, and do as little damage, as is practicable to the land and to anything on, or growing or living on the land;
- remain on the land only for such period as is reasonably necessary; and
- leave the land, as nearly as practicable, in the condition in which it was immediately before conducting the activities.

### Site selection

Once a site is selected, Clause 18 provides that the Commonwealth will acquire or extinguish rights and interests in the land on which the facility will be located. This will be subject to just terms of compensation.

Clause 18 has effect despite any other law of the Commonwealth, a State or Territory.

### Construction and operation of a facility

Further activities (Part 5 activities) will also need to occur in order to gather information for a Commonwealth regulatory scheme applying to construction and operation of a facility.

Certain State, Territory and Commonwealth laws will not apply to Part 5 activities to the extent that they would regulate, hinder or prevent these activities from taking place.

However, regulatory approvals, under the *Environment Protection and Biodiversity Conservation Act 1999* and the *Australian Radiation Protection and Nuclear Safety Act 1998* must be obtained in order to construct and operate a radioactive waste management facility.

## **9. Decisions are not legislative instruments**

The Government does not believe that approvals and declarations to be made by the Minister under the Bill fall within the definition of “legislative instrument” in section 5 of the *Legislative Instruments Act 2003*. Clauses of the Bill, which provide that an approval or declaration is not a legislative instrument, are included for guidance only, and do not imply that, without those provisions, the declaration would be a legislative instrument. This is explained further in the Explanatory Memorandum accompanying the Bill.