

Preliminary remarks

In many respects the proposed Bill so closely resembles the existing legislation that there may be said to be little point to the entire exercise. This submission argues that 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.

The passage of special laws to facilitate major projects is an important yet infrequently acknowledged and enduring aspect of environmental law in Australia. Such legislation has two broad objectives. The first is to exempt major developments from particular environmental laws. The second type of such legislation, are laws drafted either to pre-empt or to reverse rulings in public interest litigation that has questioned compliance with environmental laws.

Such legislation is problematic because it may offend the rule of law by restricting judicial review rights and thereby protecting arbitrary and wrongful decision making, by threatening to interfere with the exercise of judicial power, or principles against retrospective legislation. Seen more broadly, it is problematic because it entrenches exemptions from key provisions of environmental laws, making a mockery of claims to consistent levels of environmental assessment and protection.

The making of such laws to prevent scrutiny of the validity of approvals for development projects has up until recently been confined to jurisdictions such as NSW, Tasmania, SA and the NT. In NSW, special legislation was used in order to defeat litigation in relation to the following projects: Bengalla Coal Mine,¹ Kooragang Island coal terminal,² Port Kembla copper smelter³, Walsh Bay pier⁴ and the Sydney mega-tip waste transfer station.⁵ Other special projects and override legislation in NSW which has modified key environmental laws includes the *Filming Approval Act 2004*, the *Cloud Seeding Act*, *Forestry & National Parks Estate Act 1998*, and plantations legislation.

Commonwealth, State and Territory Governments in Australia often have a vested stake - either electorally or economically - in ensuring that major development projects do proceed. Such is the strength of such interests that they specifically block or modify the process for EIA of those projects.⁶ Projects are described as 'critical infrastructure', particularly in times of economic downturn. The capacity of governments to objectively assess the environmental impacts of these projects is compromised by the self-interested stake they have in them proceeding.

Lack of objects in the Bill

Surprisingly, the Bill does not contain any statutory objectives.

At a minimum, the bill could include a statement similar to the objects of s.3 of the ARPANS Act: "to protect the health and safety of people, and to protect the environment, from the harmful effects of [radiation](#)."

State Environmental Planning Policy No. 45 ('Permissible Mining').

Kooragang Coal Terminal (Special Provisions) Act 1997 (NSW).

Port Kembla Development (Special Provisions) Act 1997 (NSW).

Walsh Bay (Special Provisions) Act 1999 (NSW).

Clyde Waste Transfer Terminal (Special Provisions) Act 2003 (NSW).

Christoff, P., 'Degreening Government in the Garden State: Environment Policy under the Kennett. Government 1992-1997', (1998) 15 EPLJ 10-32

Further, and 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, geological, geographical, and other scientific considerations, as well as infrastructure considerations.

The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Nuclear Waste Management provides in Article 11 that those with waste management responsibilities:

“shall take the appropriate steps to ensure that at all stages of radioactive waste management individuals, society and the environment are adequately protected against radiological and other hazards.” (Article 11)

Further, it is notable that the objects clause in other environmental laws contains reference to the principles of ESD, in particular the need to promote the principle of inter-generational equity.⁷

Override of state and territory environmental laws

The Bill continues the existing Act’s problematic approach of excluding many State, Territory and Commonwealth laws that would otherwise apply to the broad range of activities contemplated by the Bill.⁸

Essentially, all Acts that would apply to site selection and construction and operation of the facility, including the transport of radioactive waste, are excluded. For example, the Bill would exclude operation of the NT’s *Nuclear Waste Transport, Storage and Disposal Prohibition Act 2004*, as well as similar laws in South Australia and Western Australia.

The exceptions are three Commonwealth Acts which apply in certain circumstances - the *ARPANS Act*, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Nuclear Non-Proliferation (Safeguards) Act 1987*.⁹

There is little doubt that the Commonwealth Parliament has constitutional power to enact laws which would displace the operation of Territory laws regarding radioactive waste.

The same is true in relation to State and Territory environmental laws. Such legislation would most likely rely for its validity upon following heads of power - the external affairs power, the corporations power, and the implied nationhood power.

The proposal for a radioactive waste facility at Woomera was not pursued largely due to the outcome of litigation in *State of South Australia v Honourable Peter Slipper MP* [2004] FCAFC 164

The Full Federal Court ruled there was ‘no urgent necessity for the acquisition’ of the privately owned land under the *Lands Acquisition Act 1989* (Cth), and issued orders quashing the land acquisition declarations.

The dump did not proceed for these reasons rather than due to the fact of South Australia being a State not a Territory.

⁷ EPBC Act. S.33, A.
Bill, ss. 11, 12, 19, 23, 24 and 30
Bill s. 24(2)

Selected List of NT environmental and safety legislation excluded

- DANGEROUS GOODS (ROAD AND RAIL TRANSPORT) ACT
- DISASTERS ACT
- ENVIRONMENT PROTECTION AUTHORITY ACT 2007
- ENVIRONMENTAL ASSESSMENT ACT
- ENVIRONMENTAL OFFENCES AND PENALTIES ACT 1996
- NATIONAL ENVIRONMENT PROTECTION COUNCIL (NORTHERN TERRITORY) ACT
- NUCLEAR WASTE TRANSPORT, STORAGE AND DISPOSAL (PROHIBITION) ACT 2004
- NORTHERN TERRITORY RAIL SAFETY ACT
- PLANNING ACT
- PUBLIC HEALTH ACT
- RADIATION PROTECTION ACT
- RADIATION (SAFETY CONTROL) ACT
- RADIOACTIVE ORES AND CONCENTRATES (PACKAGING AND TRANSPORT) ACT
- WASTE MANAGEMENT AND POLLUTION CONTROL ACT
- WORKPLACE HEALTH AND SAFETY ACT 2007
- WATER ACT

State and Territory environmental protection Acts – Hazardous Waste

What are the implications of excluding State and Territory laws?

The problem is that if State and Territory laws are excluded, and there are insufficient Commonwealth regulatory controls on the proposed activity, a regulatory void or vacuum is created.

At a minimum the Commonwealth needs to audit the proposed regulatory and risk management framework to ensure that important environmental protection aspects of State and Territory laws are replaced, if they are to be excluded.

The danger arises because, as a general point, Commonwealth environmental laws are not as comprehensive as State and Territory laws.

Many protections and much statutory guidance will go missing when State Acts are excluded. The following is a simple example - statutory listing of environmental protection objectives. In the Northern Territory's *Waste Management and Pollution Control Act*, s.15 sets out a series of statutory

environment protection objectives, which are not replicated in the Commonwealth *EPBC Act* or the *ARPANS Act* or the *ANSTO Act*. The Act provides

15. Purpose of environment protection objectives

The purpose of an environment protection objective is to establish the principles on which -

- (a) environmental quality is to be maintained, enhanced, managed or protected;
- (b) pollution, or environmental harm resulting from pollution, is to be assessed, prevented, reduced, controlled, rectified or cleaned up; and
- (c) effective waste management is to be implemented or evaluated.

Failure to Specify Environmental Standards

There are no environmental protection aspirations or even standards specified in the Bill.

The State and Territory Acts relating to waste which are excluded also enable the imposition of conditions relating to waste.

For example, from s.75 *Protection of the Environment Operations Act 1997 (NSW)*, such Acts cover:

- (1) Information about waste - relating to the creation, collection, storage, handling, transportation, treatment, processing, recovery, recycling, re-use or disposal of waste.
- (2) Environmental waste management plan - The conditions of a licence may require the holder of the licence to prepare, and comply with, an environmental waste management plan. Such a plan is to set out the manner in which the holder proposes to carry out the activity or work authorised or controlled by the licence in order to achieve the required environmental outcomes, and may include a closure plan
- (4) Waste received at premises - The conditions of a licence may include the following:
 - (a) conditions relating to the storage, handling or disposal of waste received at the premises to which the licence applies,
 - (b) conditions requiring the holder of the licence to take only certain classes and quantities of waste at those premises, or requiring the holder to refuse to accept certain classes and quantities of waste at those premises,
 - (c) conditions requiring the holder of the licence to provide incentives to encourage separation of waste delivered to those premises.
- (5) Other waste matters - The conditions of a licence may include the following:
 - (a) conditions relating to the storage, handling, treatment and processing of waste,
 - (b) conditions imposing responsibility on the holder of the licence for the proper disposal of waste transported from the premises to which the licence applies,
 - (c) conditions requiring the holder of the licence to report to the appropriate regulatory authority on any matters concerning waste transported from those premises,
 - (d) conditions requiring the holder of the licence to implement a re-use, recovery, recycling or take-back and utilisation scheme in respect of any product or item manufactured or sold by the holder that creates waste.
- (6) Transporting waste - The conditions of a licence may include the following:
 - (a) conditions relating to the construction, maintenance and cleaning of any container, vehicle or vessel used by the holder of the licence to transport waste,
 - (b) conditions relating to the times during which, the routes along which, and the waste facilities to which, waste may be transported by the holder of the licence,
 - (c) conditions imposing responsibility on the holder of the licence for the proper handling and disposal of waste transported by the holder.

Trust the Commonwealth to Regulate Itself?

The Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) has existing roles in regulating the Australian Government and its contractors' use of radiation sources and facilities with nuclear installations under the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act).

ARPANSA will be the regulator of the facility if constructed. Licences for siting, construction and operation of the facility will need to be obtained from ARPANSA.

However, ARPANSA is also likely to be the manager and operator of the facility. This potentially places ARPANSA in a **conflict of roles position** where it may be tempted to avoid difficult issues in the interests of smooth and uninterrupted day-to-day operation of the facility.

A fundamental defect associated with the Act is an institutional one. ARPANSA will not be at arms length from the operation of the facility.

There are serious problems associated with the Commonwealth government setting out to effectively regulate itself. "Trust us" is the essence of the approach.

For example, examine Part 5 relating to the Conduct of the facility. Section 22 fails to adequately create a clear institutional framework for operation and management of the facility. At a minimum there should be a cross-reference to the ARPANS Act inserted. There is merely mention of 'Commonwealth entity' and Commonwealth contractors. There are no obligations set out in relation to operation and maintenance of the facility or its decommissioning.

The regulatory framework for the operation of the waste dump is largely absent from this Bill and in some respects there are strong arguments for suggesting it should be incorporated within this Bill, or at least cross-referencing provisions inserted to clarify roles and responsibilities.

The existing ARPANS Act refers to a nuclear installation as including "a nuclear waste storage or disposal facility with an activity that is greater than the activity level prescribed by regulations made for the purposes of this section;" (ARPANS Act s.13)

The ARPANSA Act in s.83 provides the capacity to exclude the operation of State and Territory laws by means of making a regulation. The exclusion would apply in relation to activities of controlled persons in relation to a controlled apparatus or a controlled material or a controlled facility.

The ARPANSA Act requires that powers, duties, etc. under that Act be exercised in accordance with international agreements.(s.84)

Ownership of Nuclear Waste Unclear

The Bill does not clarify who will become the owner of waste once it is dumped or stored at the facility. State level legislation has provisions relating to who is the owner of waste.¹⁰

By contrast, the NSW *Protection of the Environment Operations Act 1997* specifies that "the person who has control of the waste or other substances is taken to be the owner." (Dictionary).

An unresolved question is - If a given Land Trust acting on behalf of traditional owners becomes the owners of the land - under Part 6 of the Bill, will they become the owners of the waste? The Bill

does not clarify who is the owner of the waste and who is legally responsible for radiation damage arising from operation of the facility (other than to indemnify Land Trusts under s.32).

Further, the Act does not create any financial mechanism to ensure funding for future management of the facility. State legislation provides for requirements for waste facility operators to lodge financial assurances such as a bank guarantee, bond, or other security (s.298, POEO Act 1997).

Waste Minimisation

The Bill does not anywhere set out a principle of waste minimisation.

This is at odds with the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (Vienna, 5 September 1997), Chapter 3 – Safety of Radioactive Waste Management.

Article 11, under General Safety Requirements – sets out:

“In so doing, each Contracting Party shall take the appropriate steps to:
... (ii) ensure that the generation of radioactive waste is kept to the minimum practicable;”

No Statement of Intention regarding International Obligations

Australia is a party to the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*.

This Convention requires Australia to “take the appropriate steps to ensure that at all stages of radioactive waste management individuals, society and the environment are adequately protected against radiological and other hazards.” (Article 11)

The Bill before the Committee contains no statement of intention regarding international obligations. This can be compared with the ARPANS Act, s.84 which states that powers are to be exercised in accordance with international agreements.

Bill does not prevent import of nuclear waste

The Bill, through its definitions of facility, controlled material, and spent nuclear fuel, does exclude (at present) use of the facility for the purpose of storing high-level radioactive material and spent nuclear fuel. (s.3)

However aside from this provision, the present Bill does not restrict the importation of other forms of nuclear waste.

In 1999 a Bill was put before the Senate which sought to amend the *Customs Act 1901* to prohibit the importation of radioactive substances for storage in Australia. (Customs Amendment (Anti-Radioactive Waste Storage Dump) Bill 1999).

Commonwealth EPBC Act

The EPBC Act regulates nuclear actions. This flows from s.21 which provides that:

1) A [constitutional corporation](#), the Commonwealth or [Commonwealth agency](#) must not [take](#) a [nuclear action](#) that has, will have or is likely to have a significant [impact](#) on the [environment](#).

The definition of 'Nuclear action' in s.22 includes:

(e) establishing or significantly modifying a large-scale disposal facility for [radioactive waste](#);

The latter is defined as “radioactive material for which no further use is foreseen.”

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 *EPBC Act 1999*.

It is theoretically possible that the project could be refused approval at that point.

Limited preservation of Commonwealth EPBC Act

There is a fundamental difficulty with the approach of the Bill because it not only blocks the operation of state and territory environmental protection laws, but it also blocks the full application of Commonwealth environmental law, particularly the EPBC Act.

Although the application of the EPBC Act is to some extent preserved, there are other provisions of the Bill which provided that act has no effect to the extent that it would "regulate, hinder or present" the doing of theme of the purpose of authorising activities (s.10) directed at selecting a site on which to construct and operate a facility. (Section 12)

The EPBC Act is ousted by the Bill in relation to site selection under s.10 by s.12. (as is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*)

However the EPBC Act is preserved in relation to the operation of the facility under s.22 (by s.24)

I would recommend that, at least, the application of the *EPBC Act* in relation to site selection is restored.

Implications of Exclusion of Environmental Impact Assessment Laws

The proposed legislation removes the obligation under State or Territory law to carry out a full and proper environmental impact assessment of the site for the facility.

This approach of the Bill in modifying the operation of state, territory and Commonwealth environmental impact assessment, and environmental protection laws in relation to the selection of a site for the facility appears to be *prima facie* inconsistent with international obligations under Article 13 of the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Nuclear Waste Management* [2003] ATS 21. ¹¹

That Article provides

13. 1. Each Contracting Party shall take the appropriate steps to ensure that procedures are established and implemented for a proposed radioactive waste management facility:

- (i) to evaluate all relevant site-related factors likely to affect the safety of such a facility during its operating lifetime as well as that of a disposal facility after closure;
- (ii) to evaluate the likely safety impact of such a facility on individuals, society and the environment, taking into account possible evolution of the site conditions of disposal facilities after closure;
- (iii) to make information on the safety of such a facility available to members of the public;

Fitness for Purpose of Saved Regulatory Regimes

There are limitations on the capacity of the ARPANS Act and the EPBC Act to regulate the construction, operation and management of the Facility, and the committee should consider that these Acts may require amendment in order to address this eventuality.

In particular, these Acts lack a regime for contaminated land management or control.

Further the *EPBC Act* is not designed to operate as a nuclear waste management Act, and the EPBC processes are largely only designed to manage issues of environmental impacts associated with more conventional land development, not as a statutory framework for managing and monitoring long-lived hazardous waste, pollution prevention, and site contamination.

Procedural Fairness

The present *Commonwealth Radioactive Waste Management Act 2005* provides that no person is entitled to procedural fairness in relation to a ministerial declaration that a site is selected for a facility (s.8).

The Bill diverges from this by providing a very limited right of hearing in relation to particular ministerial declarations and approvals.

The Explanatory Memorandum claims that “key decisions” under the Bill will require the Government to accord procedural fairness. However the picture is more complicated. .

The procedural fairness provisions (s.9 and s.17) ensure that the Minister must invite comments from each nominator, and, via public notices in the Gazette and newspapers, from persons with a right or interest in the relevant land. Comments from these persons need only be ‘taken into account’ by the Minister in deciding whether to approve a nomination (s.9(5)(e)) or declare a site (s13).

There is no obligation upon the Minister to respond to comments, or to publish a report containing the comments received.

The procedural fairness provisions apply only to those with a ‘right or interest in the land’, meaning that neighbours, those living in a community nearby, or the relevant State or Territory government do not have an opportunity to comment.

As the CLC has stated “This is contrary to best practice land-use and land planning community consultation processes, and contrary to the Australian Government’s ‘Code of Practice for the Near-

Surface Disposal of Radioactive Waste in Australia’ which recommend a process of establishing ‘public consent’.”

Limitations on Procedural Fairness – “Exhaustive Statement” Provision

In relation to Part 2 of the Act regarding Nomination of Sites, the Act constrains the ‘restoration’ of procedural fairness as follows.

Clause 9 of the Bill provides a very limited right of hearing in relation to certain declarations and approvals.

Sub-section 9(7) states that the procedural fairness requirements of s.9 are ‘taken to be an exhaustive statement of the natural justice hearing rule’.

Similar drafting applies under clause 17(5) of the Bill, regarding the Ministerial declaration of land as a selected site under s.13.

The implication is that the scope for review of the Minister’s decision at general law or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) is limited.

The process which the Minister must observe in making a declaration or approval decision regarding site nomination consists mainly of public notice requirements. In addition there is a requirement in ss. 9(6) and ss.17(3) to “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.”

The requirements set out by the Bill are not very onerous, so in practical effect it will be very unlikely that the Minister might fail to comply.

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

A strong justification is needed to reduce the scope of judicial review by removing the requirement to afford procedural fairness to those persons who are directly affected by administrative decision making.

The bill repeals the provision inserted into schedule 1 of the Administrative Decisions (Judicial Review) Act 1977 which presently prevents ADJR review of selected decisions (i.e., about a site nomination under section 3A, or a decision under section 3C or s.7 of the current Act).

Although the bill repeals paragraph (zc) of Schedule 1 of the ADJR Act, this repeal has limited practical effect because the provisions empowering the minister to make a declaration of land as a selected site express the exercise of that power to be in the Minister's "absolute discretion".

Promise to Restore Procedural Fairness is Limited in Reality

The only site under serious consideration appears to be Muckaty, given that a \$12 million agreement (secret) has been reached in relation to it.¹² The Bill seeks to preserve most of the previous decisions regarding Muckaty station. The Explanatory Memorandum admits that “The Bill will not introduce procedural fairness requirements in relation to the existing nomination and approval of this site”.

¹² Levy, “Nuclear Law Making” in Bonyhady, T. (2007) *Climate Law in Australia*, Federation Press.

In the present version of the Bill, there are clauses limiting the classes of persons entitled to procedural fairness, as well as and ‘absolute discretion’ clauses.

The practical effect of these is to render much of the so-called reinstatement of procedural fairness and ADJR Review ineffectual.¹³

In particular these include provisions:

- **limiting the class of persons** entitled to comment upon the proposed approval of a nomination and declaration of a selected site to “persons with a right or interest in the [subject] land”.¹⁴
- **the absolute discretion** conferred upon the Responsible Minister to make key approvals and declarations without being required to take any criteria or other matters into account in approving a site nomination or selecting a site.¹⁵

Procedural fairness for future generations

There is no procedural fairness for future generations – even though this is a stated component of the international nuclear law, and international environmental law. In particular, the bill does not anywhere take into account the Principle of intergenerational equity. This exists in limited form and applicability in the objects clause of the EPBC Act. That Act states at s.3A(c) “(c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the [environment](#) is maintained or enhanced for the benefit of future generations;”

The Bill is at odds with the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (Vienna, 5 September 1997), in Chapter 3 – Safety of Radioactive Waste Management – in Article 11, which requires:

Parties to take appropriate steps to:

- (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.

Judicial Review and the Rule of Law

In a previous submission to the Senate regarding radioactive waste in 2005, the Administrative Review Council reminded Senators that “the rule of law and the provision of remedies for rectifying unlawful government action or inaction is a paramount value in Australian society and under the Australian Constitution.”¹⁶ It submitted “as a general principle the Council considers that judicial review under the ADJR Act should only be excluded in very limited circumstances.”

Bill, ss. 4(4), 5(5), 7(4), 8(6), 14(2) and 16(6).

Bill sections 9(5)(c) and 17(2)(d). Sections 9(3), 9(6) and 17(3) require the Responsible Minister, in making key decisions under the Bill, to have regard only to the comments of classes of people entitled to make comments.

See Bill sections 8(1) and 13(2). By way of contrast, in determining whether or not to issue a facility licence, the CEO of the Australian Radiation Protection and Nuclear Safety Agency must take into account a range of matters outlined in paragraph 41 of the Australian Radiation Protection and Nuclear Safety Regulations 1999, and international best practice in relation to radiation protection and nuclear safety.

Administrative Review Council (2005) *Submission to Senate Employment, Workplace Relations and Education Committee*, Inquiry into the Commonwealth Radioactive Waste Management Bill 2005, Submission No.212.

The Explanatory Memorandum claims that “Key decisions under the current Act are not susceptible to review under the ADJR Act. Decisions under the Bill will be reviewable.” Again this picture of the Bill is incomplete.

The more detailed picture is that ADJR review is partially excluded (and effectively excluded by other provisions).

ADJR not restored in relation to Muckaty Site Nomination and Approval

The Bill retains the exemption of the Muckaty Site nomination and approval from both procedural fairness requirements and review under the ADJR Act. This is achieved via savings and transitional provisions in Schedule 2 of the Bill which save these nominations and approvals (under sections 3A and 3C) from the general repeal of the present Act, and simultaneously saves the exemption of those decisions from ADJR review.

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.

The previous nomination is also to be protected by a no-invalidity clause in s.4(4): see below. The result is to attempt to prohibit review. In addition, it is unclear whether a nomination is amenable to ADJR review because it may not meet the applicability tests such as “a decision of an administrative character made...under an enactment” (s.3), or to conduct deemed to be decisions (which includes a statutory requirement for a recommendation as a condition precedent to the making of a decision under that enactment) (s.3(3)).

It appears that there is some controversy over whether the processes in the present Act for obtaining a nomination from a Land Council were flawed. If that is the case there may be few grounds for preserving the nomination and approval under the present Act.

‘No invalidity’ clauses render the ‘restoration’ of ADJR almost meaningless

I must express concern about other provisions of the Bill which effectively place limitations upon the availability of judicial review and reduce the incentive for accountable decision making.

Privative clauses are statutory provisions that attempt to deprive the courts of judicial review jurisdiction and/or power to issue remedies that would be available in a judicial review application.

There are provisions of the Bill specifying that that a failure to comply with its procedural and due process provisions does not invalidate decisions taken by the Minister.

Specifically, the Bill contains so-called ‘no invalidity’ clauses in sections 4(4), 5(5), 7(4), 8(6), 14(2) and 16(6).

The Bill contains procedural and due process provisions with evidentiary requirements that go to the validity of a nomination and contain procedures intended to safeguard consent. These must not be overridden by separate provisions that render them ineffectual.

Restriction on the availability of judicial review under the ADJR Act is significant because judicial review under the ADJR Act is considered to be broader in scope than the residual options under s.75(v) *Constitution* or the *Judiciary Act 1903*. These actions typically require that an affected party is able to show that the exercise of Ministerial power amounted to a jurisdictional error, i.e. where the decision maker has exceeded their statutory authority.

It is not likely to be the case that the Bill can exclude review proceedings invoking s.75(v) of the *Constitution*. This question was considered in [*Plaintiff S157/2002 v Commonwealth*](#) (2003) [211 CLR 476](#) (Plaintiff S157), where the High Court held that s 75(v) entrenches a "minimum provision of judicial review" which limits the effectiveness of statutory attempts to impair the judicial review of Commonwealth administrative action. The joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in Plaintiff S157 emphasised that the minimum provision of judicial review entrenched by s 75(v) is a textual reinforcement of the constitutional importance of the rule of law.

There has been limited time available to preparing this submission and to discuss the privative clauses in the Bill at length. This subject is covered generally in the following references:

- Leighton McDonald (2010) "The entrenched minimum provision of judicial review and the rule of law" 21 Public Law Review ;
- Kirk J , "The Entrenched Minimum Provision of Judicial Review" (2004) 12 AJ Admin L 64.
- Aronson M , Dyer B and Groves M , Judicial Review of Administrative Action (4th ed, Lawbook Co., 2009) Ch 17.
- Aronson, M (2010) Commentary on "The entrenched minimum provision of judicial review and the rule of law" (2010) 21 PLR 35 at 37.

"Absolute Discretion Clauses"

These are featured in the following clauses of the Bill:

s.8(1) Approval of nominated land

s.13(2), 13(4) declaration of land as selected site, or as required for road access

s.16 Revocation of Minister's declaration

s.26(1) Declaration of intention to grant rights and interests in land to original owners

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

The result is that it would be difficult for an aggrieved party to show that any decision was affected by jurisdictional error.

Thus the available grounds of review may only include that the Minister exercised the power for an improper purpose, that the Minister took into account irrelevant considerations, or that the Minister decision was so unreasonable that no reasonable decision maker could have made it.

Aside from questions of jurisdictional error, even if the privative clauses are partly effective, there will remain some review jurisdiction available, particularly the injunctive jurisdiction against Commonwealth officers in cases of fraud or dishonesty (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 508; *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651 at 663; *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 165.)

Although fraud and dishonesty are entrenched grounds of judicial review in the High Court, the problem remains that this is an extremely narrowly constrained review jurisdiction, requiring a very unlikely set of circumstances in order to enliven it.