



Commonwealth Radioactive Waste Management Bill 2005

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Contents

Purpose.	2
Background.	2
The production of radioactive waste in Australia and its disposal and storage	2
The decision for a Commonwealth radioactive waste management facility	4
The Commonwealth's Constitutional powers with respect to the Commonwealth radioactive waste management facility	5
Main Provisions	6
Part 1 - Preliminary.	6
Part 2 – Selecting the site for a Facility.	6
Part 3— Acquisition or extinguishment of rights and interests	7
Part 4 – Conducting activities in relation to selected site	8
Part 5 – Miscellaneous.	8
Schedule 1	9
Concluding Comments.	9
Endnotes.	10

Commonwealth Radioactive Waste Management Bill 2005

Date Introduced: 13 October 2005

House: House of Representatives

Portfolio: Education, Science and Training

Commencement: On the day after Royal Assent

Purpose

To strengthen the Commonwealth's legal ability to develop and operate the proposed Commonwealth radioactive waste management facility in the Northern Territory. The Bill achieves this by:

- providing legislative authority to undertake the various activities associated with the proposed facility
- overriding or restricting the application of laws that might hinder the facility's development and operation, and
- providing for the acquisition or extinguishment of rights and interests related to land on which the facility may be located.

Background

The production of radioactive waste in Australia and its disposal and storage

Radioactive waste is generally classified on the basis of how much radiation it emits and what form of radiation it emits, as well as the length of time for which it will continue to emit radiation. In this respect, radioactive waste is normally divided into four [categories](#):

- Low-level,
- Intermediate-level, short lived
- Intermediate-level, long lived; and
- High-level.

These categories are not included in any Commonwealth legislation. They do, however, form the basis of various technical guidelines that are employed by various Australian authorities regarding the transport, storage and/or disposal of radioactive waste – for example the 1992 [Code of Practice for the near-surface disposal of radioactive waste in Australia](#).

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Australia does not produce any high level waste, which typically is produced by nuclear power plants. In respect of other categories of waste, [according to the Department of Education, Science and Training](#):

Australia has accumulated approximately 3,700 cubic metres of low level and short-lived intermediate level radioactive waste from over forty years of research, medical and industrial uses of radioactive materials. This total does not include uranium mining wastes, which are disposed of at mine sites. Over half of Australia's current low level and short-lived intermediate level waste by volume comprises ten thousand drums of lightly contaminated soil. This soil is a legacy of Commonwealth Scientific and Industrial Research Organisation (CSIRO) research into processing radioactive ores during the 1950s and 1960s.

Australia generates a very small amount of low level and short-lived intermediate level radioactive waste. Each year, Australia produces approximately 40 cubic metres of such radioactive waste – less than the volume of one shipping container. By comparison, Britain and France each produce around 25,000 cubic metres of low level waste annually.

...low level and short-lived intermediate level waste will be generated by the decommissioning of the [Lucas Heights] High Flux Australian Reactor (HIFAR) and the replacement research reactor. Depending on the decommissioning options chosen, between 500 and 2,500 cubic metres of waste will be generated by the decommissioning of each reactor.

Australia holds approximately 500 cubic metres of long-lived intermediate level radioactive waste. This includes waste from the production of [radiopharmaceuticals](#), wastes from mineral sands processing, and used sources from medical, research and industrial equipment.

The question of developing a near-surface repository (the Repository) for disposal of Australia's low level and short-lived intermediate level radioactive waste has been around since the 1980s. However, in 1992 the then ALP Commonwealth Government initiated a formal process to identify a site for the Repository. In 2000, the Coalition Commonwealth Government decided that it would also start a similar process to find a site for a proposed facility to store¹ (the Store) long-lived intermediate level radioactive waste produced by Australian Government agencies.

By 2003, the possible sites for the Repository had been reduced to two, both in South Australia. Following Commonwealth environmental assessment under the *Environment Protection and Biodiversity Conservation Act 1999*, site 40a near Woomera was chosen by the Commonwealth and an application submitted to the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) for a licence to construct and operate the Repository. Site 40a was South Australian crown land and the Commonwealth commenced compulsory acquisition procedures under the *Lands Acquisition Act 1989*. Because the South Australian Government was intending to pass legislation that would frustrate the acquisition process, the Commonwealth used special urgency provisions in

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the *Lands Acquisition Act* to effect the acquisition. This was successfully challenged by South Australia in the Federal Court, with the [decision](#) of the Full Bench being handed down in June 2004. At that time, the Commonwealth had not selected a short-list of sites for the proposed Store.

Further background on Australian radioactive waste management issues can be found in Parliamentary Library chronology [Radioactive Waste and Spent Nuclear Fuel Management in Australia](#).

The decision for a Commonwealth radioactive waste management facility

Shortly after the 2004 Federal Court decision, the Prime Minister [announced](#) that the Australian Government would construct co-located facilities on Commonwealth land for the management of low and intermediate level radioactive waste produced by Australian Government agencies. As part of this announcement, the Prime Minister stated that:

The Australian Government will be examining sites on Commonwealth land, both onshore and off shore, for the establishment of a suitable facility.²

In August 2004, the ALP Northern Territory Government introduced the Nuclear Waste Transport, Storage and Disposal (Prohibition) Bill 2004 into Parliament. The ostensible purpose of this bill was to prevent waste from outside the Northern Territory being transported into and stored in the Northern Territory. In introducing the Bill, the Northern Territory Minister for Environment and Heritage said:

Let me make it very clear that the Northern Territory government has an absolute mandate to introduce this legislation. The *Northern Territory (Self-Government) Act* makes it clear that the disposal and storage of hazardous, dangerous waste is the domain of the Northern Territory government. The Prime Minister, when speaking on this issue on 19 July, ruled out taking advantage of the fact that we are not a state when he said the rights of the Territory will no less be respected than the rights of other parts of the country. The rights of the Territory would clearly not be respected were the Commonwealth to overrule this legislation.

This bill legislates to prohibit a nuclear waste dump to the full extent of the Territory parliament's capacities. It would be wrong for me to propose that this bill, when enacted, would offer some sort of cast-iron guarantee that there will not be a nuclear waste dump in the Territory - it does not. The capacity of the Territory to regulate Commonwealth instrumentalities has limitations³ and the Commonwealth can, if they wish, remove our right to legislate on this matter. Both South Australia and Western Australia have similar legislation, with similar limitations.⁴

The Bill became law in the Northern Territory in November 2004.

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In 30 September 2004, the Commonwealth Minister for Environment and Heritage, Senator Ian Campbell [commented](#) with respect to the Prime Minister's announcement regarding the co-located facility:

The only options that we're pursuing are on offshore islands. I think the reality of this is that there's no one on the mainland who particularly wants a nuclear waste dump in their backyard, and that is why we're pursuing the practical option of going to an offshore island, so the Northern Territorians can take that as an absolute categorical assurance.⁵

However, in July 2005, the Commonwealth Minister for Education, Science and Training [announced](#) three potential sites, all in the Northern Territory. He stated:

A comprehensive analysis of Commonwealth offshore and onshore land took into account issues such as compatibility with current land use, safety of people and the environment, security of radioactive waste and operational considerations such as adequacy of transport infrastructure. As a consequence of this analysis, no offshore sites were considered sufficiently appropriate to warrant further on-site investigation.⁶

These potential sites are Commonwealth Defence Department properties at Mount Everard, Harts Range and Fishers Ridge. The first two are near Alice Springs, with Fishers Ridge near Katherine. The three potential sites are listed in **Schedule 1** of the Bill. A map showing their location is included in the July 2005 announcement by Minister for Education, Science and Training mentioned above.

The Commonwealth's Constitutional powers with respect to the Commonwealth radioactive waste management facility

Since all three of the possible sites for the facility are Commonwealth land, the Commonwealth has the ability under section 52(i) of the Constitution to legislate with respect to the sites and authorise activities on them, and in relation to them, including legislating to exclude the application of Northern Territory law. Under the principles of section 122 of the Constitution (the Territories power), any Northern Territory law that is 'inconsistent with, or repugnant to, Commonwealth legislation has no effect': *Attorney-General (Northern-Territory) v Hand* 25 FCR 345 at 367.

There are a range of other constitutional powers that may serve to support those parts of the Bill that authorise activities outside of the sites and the Northern Territory. For example, the external affairs power (section 51(xxix)) could be relevant by virtue of Australia being a party to the [1997 Convention on the Safety of Radioactive Waste Management](#). By expediting the development of the proposed facility, the Bill could be said to support the broad objectives of the Convention. The 'implied nationhood' power could also be relevant to support legislation that essentially seeks to allow the Commonwealth to safely store waste generated by its agencies.

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If the Commonwealth has the constitutional ability to legislate on a subject, it also has the power to explicitly exclude or limit the operation of State or Territory law with respect to matters dealt with by the legislation. For example, section 83 of the *Australian Radiation Protection and Nuclear Safety Act 1999* provides that:

If a law of a State or Territory, or one or more provisions of such a law, is prescribed by the regulations, that law or provision does not apply in relation to the following:

- (a) an activity of a controlled person in relation to a controlled apparatus or a controlled material;
- (b) an activity of a controlled person in relation to a controlled facility.

Main Provisions

Part 1 - Preliminary

New section 3 contains a number of definitions, including those of ‘Commonwealth contractor’ and ‘subcontractor’. The effect of these two definitions, combined with new **sections 4** and **12**, is that persons and companies with very remote legal contractual connections to the Commonwealth will potentially be exempted from State and Territory law when undertaking work connected to the proposed facility.

Part 2 – Selecting the site for a Facility

New section 4 provides the Commonwealth or a person working on behalf of the Commonwealth (including contractors and subcontractors) with the legislative authority to do anything in the Northern Territory ‘necessary for or incidental to the purposes’ of selecting one of the three sites listed in **Schedule 1** on which to construct and operate a facility. **New subsection 4(3)** provides a non-exhaustive list of the sort of activities which would fall into this category. **New subsection 4(4)** places various obligations on persons engaged in such activities outside of the sites – essentially to cause as little damage or inconvenience as possible to the relevant land and occupiers.

New section 5 effectively excludes State and Territory laws from operating where they would ‘regulate, hinder or prevent the doing of a thing authorised by section 4’. **New section 5(1)** does state that only certain types of State and Territory laws (eg 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. Indeed, even if a State or Territory law fell outside the type listed in **new subsection 5(1)**, the law could be excluded by prescribing it under regulation: **new subsections 5(2)-(3)**. This prescribing power also allows parts of laws, rather than the whole, to be excluded. Conversely, **new subsection 5(4)** provides that the regulations may prescribe a State or Territory law, or

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part of it, *such that it has effect* despite anything in **new section 5**. This allows the Commonwealth to limit the exclusions discussed above if thought appropriate.

New subsection 6(1) 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 4’. Again a prescription power under regulation exists (**subsection 6(2)**) to allow for the exclusion of other Commonwealth laws, or parts of laws.

Part 3— Acquisition or extinguishment of rights and interests

Part 3 allows the relevant Minister to acquire and/or extinguish various rights and interests both in the site finally selected for the facility or other land in the Northern Territory where this is required for providing all-weather road access to that site.

In making decisions under **new section 7** as to which of the sites in **Schedule 1** will be the location of the facility, and whether land will be required for road access, the Minister need not accord any person procedural fairness: **new section 8**. The decisions, in the form of declarations, must be published in the *Gazette* within 7 days, although a failure to do so does not invalidate the legal effect of any declaration: **new subsections 7(3)-(4)**. Declarations are not legislative instruments (**new subsection 7(7)**) and thus are not disallowable by Parliament. Also, due to the Commonwealth Radioactive Waste Management (Related Amendment) Bill 2005, any declaration under **new section 7** is not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

All existing rights and interests of the selected site are automatically acquired or extinguished by the Commonwealth in the relevant declaration, whereas only those specified in any declaration regarding land for road access are so. In both cases, such rights may include mineral rights and native title rights and interests. The acquisition and/or extinguishment of rights and interests under **new section 9** has effect despite any other law of the Commonwealth or the Northern Territory, including the *Lands Acquisition Act 1989* and the *Native Title Act 1993*: **new section 10**. As the Explanatory Memorandum notes, this means that

it is not necessary for the Commonwealth to comply with any and all provisions of those Acts relating to preliminary processes for the acquisition or extinguishment of rights and interests in relation to land.

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Part 4 – Conducting activities in relation to selected site

Part 4 is broadly similar to **Part 2** except that it deals with activities once the final site has been selected, and with limited exceptions applies to activities Australia-wide, rather than just those in the Northern Territory.

New section 12 provides the Commonwealth or a person working on behalf of the Commonwealth with the legislative authority to do anything ‘necessary for or incidental to’ the various things listed **new subsection 12(2)**. These range from gathering information necessary for the Commonwealth licensing of the facility, building access roads, constructing, operating – including transport radioactive waste to and from the site - and decommissioning the facility.⁷ As noted above, with the exception of road construction and grading, **new section 12** authorises these activities taking place anywhere in Australia.

New section 13 effectively excludes State and Territory laws from operating where they would ‘regulate, hinder or prevent the doing of a thing authorised by section 12’. **New sections 13(1)-(2)** do state that only certain types of State and Territory laws (eg laws relating to ‘the uses or proposed use of land or premises’) are excluded, but again the range is so wide they are likely to give almost complete coverage. Even if a State or Territory law fell outside the types listed in **new subsections 13(1)-(2)**, the law could be excluded by prescribing it under regulation: **new subsections 13(3)-(4)**. This prescribing power also allows parts of laws, rather than the whole, to be excluded. **New subsection 13(5)** provides that the regulations may prescribe a State or Territory law, or part of it, *such that it has effect despite anything in new section 13*. This allows the Commonwealth to limit the exclusions discussed above if thought appropriate.

New subsection 14(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 12’. However **subsection 14(2)** provides that the following laws *cannot* be prescribed:

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

Part 5 – Miscellaneous

New sections 15 and **16** contain some standard provisions on compensation. **New section 15** provides for ‘reasonable’ compensation to be payable to a person whose right or interest has been acquired, extinguished or otherwise affected under **new section 9**. **New section 16** provides that, if the effect of the Bill (once in operation) would result in Constitutional acquisition of property from a person ‘otherwise than on just terms’, again

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reasonable compensation must be paid. In both cases, if the Commonwealth and the person claiming compensation do not agree on the amount, the person to whom the compensation is payable may institute proceedings in the Federal Court to determine, and recover, the amount payable.

New section 17 is a standard regulation-making power.

Schedule 1

This lists the three possible sites for the Facility: Mt Everard, Harts Range and Fishers Ridge.

Concluding Comments

The Bill is designed strengthen the Commonwealth's legal ability to develop and operate the proposed Commonwealth radioactive waste management facility in the Northern Territory.

It explicitly overrides the operation of both Territory and State laws that 'regulate, hinder or prevent' the facility's development and operation, although the Bill retains the flexibility to permit the operation of any Territory or State laws if the Commonwealth considers this appropriate. The Bill also overrides the application of various Commonwealth laws that might present some procedural delays in progressing the facility. The construction and operation of the facility would however still be subject to the usual approval and licensing provisions of the *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Environment Protection and Biodiversity Conservation Act 1999*.

The Bill makes it clear that the Governments decision on the preferred site is not disallowable by Parliament, is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, and the Government owes no legal obligation of procedural fairness towards anybody affected by the decision.

It would be helpful if the Government could clarify whether property owners or occupiers whose property or business might suffer a reduction in value from having the facility located alongside or nearby would be eligible for compensation under the 'injurious affection' principle or something comparable. 'Injurious affectation' occurs where there is a reduction in value of a person's remaining property where part of the land is acquired and the reduction is caused due to the *purpose* of the acquisition rather than the mere act of acquisition. Certainly if any rights or interests are extinguished or acquired by the Commonwealth in selecting the final site and any land required for providing all-weather road access, then compensation is payable in the usual manner for the land acquired. However, in the case of Fishers Ridge, the possible site apparently lies within a cattle

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property, and the occupiers are reportedly concerned that their stock might become less attractive to the export trade if the facility is located there.⁸ Unlike some State compulsory acquisition legislation, the Commonwealth *Land Acquisition Act 1989* says nothing about injurious affection and thus its application is uncertain: see Douglas Brown, *Land Acquisition*, LexisNexis Butterworths, 2004 pp. 168-172.

Endnotes

- 1 As opposed to dispose.
- 2 The Hon John Howard, *Radioactive Waste Management*, Media release, 14 July 2004.
- 3 Section 5 of the Bill provided that ‘a provision of this Act relating to the transport, storage or disposal of nuclear waste does not have any effect to the extent it is inconsistent with a law of the Commonwealth but the provision must not be taken to be inconsistent with that law if it can be complied with without contravention of that law’.
- 4 Ms Scrymgour, Northern Territory Legislative Assembly Hansard Debates, 18 August 2004.
- 5 ‘Election 2004: ALP candidate for Solomon sceptical about Minister’s promise not to build nuclear waste dump in Northern Territory’, *PM*, 30 September 2004.
- 6 The Hon Brendan Nelson, *Responsible management of radioactive waste in Australia*, Media Release, 15 July 2005.
- 7 **New subsection 12(3)** also enables any activity mentioned in new **subsection 4(3)**, but done once the site has been selected, to come within the legislative authority granted by **new section 12**.
- 8 ‘Graziers in the dumps about nuclear waste site’, *Australian*, 1 October 2005, p. 10.

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