



Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006

Kirsty Magarey
Law and Bills Digest Section

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Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006

Date introduced: 2 November 2006

House: House of Representatives

Portfolio: Education, Science and Training

Commencement: On Royal Assent

Purpose

To provide a discretionary legislative mechanism for the return of land that has been used as a radioactive waste storage facility to the Land Trust to which it first belonged. The Bill also

- removes the process of nominating a site for consideration for use as a Commonwealth radioactive waste storage facility from the application of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act), and
- removes the mandatory nature of requirements governing the process of making a nomination.

Background

Basis of policy commitment

The background to this Bill is largely covered by the Bills Digest for the *Commonwealth Radioactive Waste Management Act 2005* (the Principal Act).¹ This legislation, along with the *Commonwealth Radioactive Waste Management (Related Amendment) Act 2005* was introduced in order to facilitate the process of developing the proposed Commonwealth radioactive waste management facility in the Northern Territory.

The two previous Bills have already excluded many of the procedural guarantees normally accorded to decisions taken under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA). This Bill adds the process of making nominations for a site to the list of decisions to which the ADJR Act does not apply. This list of decisions excluded from the ADJR Act (Schedule 1) is already quite extensive, containing some thirty-seven items, many of which cover multiple statutes.

The Land Councils in the Northern Territory are statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA), a Commonwealth statute. As such they do, in the usual course of events, attract the jurisdiction of the ADJR

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Act. There have been significant cases run based on the ADJR Act and these have involved, for instance, examinations of the process through which a Land Council determines the traditional owners of land. The ALRA is a complex piece of legislation designed to establish an administrative system for determining even more complex questions of land ownership. These issues are resolved by examining historical connections and questions of genealogy and identification, issues of both sensitivity and significance. It is unsurprising that it has been the subject of litigation. The Principal legislation's curtailment of administrative provisions governing the area attracted the ire of the Central Land Council, who commented that their effect was to 'abrogate due process and override a series of important considerations that should inform decision making with respect to the siting of a nuclear waste facility in Australia'.²

There has not been a great deal of media interest in this new Bill. The AAP had a story documenting objections by 'environmentalists' and calls by the Arid Lands Environment Centre for the Northern Land Council (the NLC) to protect traditional Aboriginal owners.³ The second reading speech specifies that the Bill is designed to 'prevent politically motivated challenges to a land council nomination.'⁴

Compared to the legislative impact of the Principal Act these amendments are less significant.

Financial implications

The Explanatory Memorandum states that these amendments will have minimal financial impact.⁵ The legislation proposes a limited indemnity for Land Trusts which are receiving land no longer used as waste storage. The *Explanatory Memorandum* says that, given the relevant land will not be returned to its traditional owners until it has been released from the regulatory control established under the *Australian Radiation Protection and Nuclear Safety Act 1998*, it is not expected that any costs of indemnity will arise.

Main provisions

Schedule 1 – Amendments

Administrative Decisions (Judicial Review) Act 1977

The Principal Act and the *Commonwealth Radioactive Waste Management (Related Amendment) Act 2005* overrode or restricted the application of laws that might hinder the development of the proposed Commonwealth radioactive waste management facility in the Northern Territory. **Item 1** of this Bill continues this process by exempting the process of nomination of a site from the operation of the ADJR Act. Under s3A of the Principal Act both the Chief Minister of the NT and a Land Council can nominate sites,

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and this amendment makes these nominations exempt, removing the opportunity for review by the courts.

Commonwealth Radioactive Waste Management Act 2005

The rest of the amendments are to the Principal Act. **Item 2** introduces a definition of a Land Trust into the Principal Act. Land Trusts established under the ALRA are the bodies which actually hold the land belonging to traditional owners. They are administered through the Land Councils.

Item 3 modifies section 3B in an interesting manner. Section 3B established the rules that must be followed by the Chief Minister or a Land Council when they make a nomination of a site. **Item 3** inserts **proposed sub-section 2A** which negates the legal significance of Section 3B by stipulating that failure to comply with these rules has no legal effect – i.e. a nomination will still be valid. The rules previously stipulated a number of matters, including, for instance a requirement that a nomination include evidence that the traditional Aboriginal owners of the land have been consulted, and that they understand both the nature and effect of the proposed nomination and the things that might be done on or in relation to the land if the Minister approves the nomination. It also includes provisions that there must be evidence that the traditional Aboriginal owners as a group have consented to the proposed nomination being made (that consent as a group being determined in accordance with section 77A of the ALRA), and that any Aboriginal community or group that may be affected by the proposed nomination have been consulted and have had adequate opportunity to express its view to the Land Council. The impact of the amendment would effectively be to render these requirements into non-binding recommendations, whose breach has no legal effect.

Item 4 continues the logic of **item 3** by amending section 3D of the Principal Act so that neither decisions by the Minister (section 3C) nor nominations by Land Councils or the Chief Minister (section 3A) need provide procedural fairness. Section 3C already has provisions ensuring that a Ministerial approval can be made without the safeguards provided for in section 3B. Another amendment provided for in **proposed subsection 7(5A)** would also negate the effect of the rules in section 3B by safeguarding a Ministerial declaration of a site which has been made in breach of section 3B.

Item 6 inserts a new part (**Part 4A**) to the Principal Act which 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'. **Proposed section 14A** sets out the features of the land to be returned. These define the land to have been Aboriginal land in the beginning, the nature of the original acquisition and the fact that the facility has been abandoned in accordance with the *Australian Radiation Protection and Nuclear Safety Act 1998*, i.e. it is no longer needed as a radioactive waste storage facility and it has been declared to be safe. **Proposed section 14 B and C** establish a mechanism whereby the Minister (in his or her absolute discretion) can declare the land is no longer needed. The declaration must specify the land and the Land Trust to which he or she intends to return

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it. To come within these provisions, the Land Trust must be the same Land Trust (or its successor) which held the land before it was acquired by the Commonwealth. The declaration must be published in the *Gazette* and the Land Trust must be notified in writing. Provided these conditions are met, and the Land Trust has consented to the return of the land within the prescribed time frame (12 months, in the first instance), the Minister must make a declaration returning the land as a grant of estate in fee simple (with mineral rights reserved) or releasing the Commonwealth's interests in the land.

Proposed section 14H provides for an indemnity by the Commonwealth to the Land Trusts specified in the return of land. The indemnity covers the Land Trust against any action, claim or demand brought against the Land Trust in respect of any liability arising from, or damage caused by, ionising radiation from the transport or management of 'controlled material' at the facility. This indemnity is reduced to the extent that any fault on the part of the Land Trust is involved (**proposed sub-section 14H (2)**). Furthermore the indemnity will not operate if the Land Trust does not notify the Commonwealth, in writing, of the issue 'as soon as practicable' (**proposed sub-section 14H (3)**) and it must then follow the directions of the Commonwealth in relation to the claim.

Concluding comments

The Commonwealth's proposed amendments governing the return of land seem to be a compromise between the Commonwealth's need for an unfettered fee simple ownership of land for the purposes of the proposed radioactive waste storage facility and the traditional owner's desire to have their land returned to them. The legislation does not guarantee the return of this land, but it does provide a process which should be followed if it is, in the Commonwealth's discretion, to be returned in this manner. There does not seem to be any provision which necessitates the return of the land in this framework.

The changes to the legislative nomination process for land have a more significant legal effect. The Minister commented on these provisions, which change the nature of the conditions for a nomination:

I can assure the House that, should a nomination be made, I will only accept it if satisfied that these criteria have been met [i.e. the criteria governing the consultations and information that must be provided to and about traditional owners before a nomination is made].⁶

The second reading speech is accepted as a tool in statutory interpretation, but only in so far as it clarifies the intention of ambiguous legislative provisions. The legislation provides unambiguously that there is no binding legal need to ensure the criteria have been met.

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The Minister went on the point out that:

What the government will not accept is speculative legal challenges against the land council or me, as minister, that are designed, not to ensure that Aboriginal people have given informed consent to a land nomination, but to frustrate and delay establishment of the facility.⁷

The legislation effectively removes the basis for these, and other, challenges to a nomination by making the conditions non mandatory.

Endnotes

1. Angus Martyn, Commonwealth Radioactive Waste Management Bill 2005, *Bills Digest no. 59, 2005–06*, 28 October 2005 and Angus Martyn, Commonwealth Radioactive Waste Management (Related Amendment) Bill 2005, *Bills Digest no. 60, 2005–06*, 28 October 2005, Parliamentary Library, Canberra.
2. Central Land Council, Submission 144, Senate Employment, Workplace Relations and Education Legislation Committee Enquiry, *Commonwealth Radioactive Waste Management Bill 2005 and Commonwealth Radioactive Waste Management (Related Amendments) Bill 2005*, p. 14.
3. AAP, Waste laws sideline traditional owners', November 9, 2006. <http://www.news.com.au/business/story/0,23636,20729264-31037,00.html>
4. House of Representatives, *Hansard*, 2 November 2006, p. 1
5. Explanatory Memorandum, p. 2.
6. House of Representatives, *Hansard*, 2 November 2006, p. 1.
7. *ibid.*

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