



## National Radioactive Waste Management Bill 2010

This is a later edition of a Digest previously prepared for the 42<sup>nd</sup> Parliament.

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## National Radioactive Waste Management Bill 2010

**Date introduced:** 21 October 2010

**House:** House of Representatives

**Portfolio:** Resources, Energy and Tourism

**Commencement:** On Royal Assent

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

### Purpose

The National Radioactive Waste Management Bill 2010 (the Bill) is intended to repeal and replace the existing *Commonwealth Radioactive Waste Management Act 2005* (the Act).

The Bill will restore some review rights and procedural fairness rights to the process of selecting a site for the proposed Commonwealth radioactive waste management facility, and requires the establishment of a regional consultative committee. Unlike the current Act, the Bill also allows for a site to be selected outside the Northern Territory.

### Background

#### History of the Bill

The previous version of this Bill was introduced into Parliament on 24 February 2010. It passed the House of Representatives without amendment on 18 March and subsequently introduced into the Senate on 11 May, but not debated. The Bill was subject to review by the Senate Legal and Constitutional Affairs Committee, which reported on 7 May 2010. The recommendations<sup>1</sup> of the committee were:

- Recommendation 1 - The committee recommends that, as soon as possible, the Minister for Resources, Energy and Tourism undertake consultations with all parties with an interest in, or who would be affected by, a decision to select the Muckaty Station site as the location for the national radioactive waste facility.

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1. The Australian Greens submitted a dissenting report. Liberal Senators made additional comments, but supported the recommendations. Further details are at pages 7-8 of this Digest.

- Recommendation 2 - The committee recommends that proposed section 21 of the Bill be amended to make the establishment of a regional consultative committee mandatory, immediately following the selection of a site for the radioactive waste facility.
- Recommendation 3 - The committee recommends that proposed sections 9 and 17 of the Bill be amended to require the Minister to respond in writing to comments received in accordance with the Bill's procedural fairness requirements.
- Recommendation 4 - The committee recommends that the Explanatory Memorandum be amended to include a detailed rationale for, and explanation of, the Minister's absolute discretion in relation to decision making under the Bill.
- Recommendation 5 - The committee recommends that the Bill be amended to include an objects clause.
- Recommendation 6 - The committee recommends that, subject to consideration of the preceding recommendations, the Senate pass the Bill.

Recommendations 2, 3 and 5 required amendment of the Bill. The current version of the Bill incorporates the requisite amendments for 2 and 5. In relation to recommendation 3, the Minister's second reading speech states:

Given the possibility of a large number of submissions being received at various decision-making points, the intent of recommendation 3 will be met by posting, online, detailed reasons for key decisions as they are made, in line with requirements of the Administrative Decisions (Judicial Review) Act 1977.<sup>2</sup>

Note that **new section 7**, which deals with who can nominate potential sites under the 'general nomination' process, has been amended to explicitly allow for a nomination on land where an 'approved determination of native title' exists.

## The proposed Commonwealth Radioactive Waste Management Facility

Extensive historical background on the proposed Commonwealth Radioactive Waste Management Facility is set out in the Bills Digest to the Act.<sup>3</sup> That legislation, along with the *Commonwealth Radioactive Waste Management (Related Amendment) Act 2005*, and the subsequent *Commonwealth Radioactive Waste Management Legislation Amendment Act 2006*, were intended to facilitate the process of selecting a site, and then developing, and eventually operating, a Commonwealth radioactive waste management facility in the Northern Territory.

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2. M Ferguson (Minister for Resources and Energy) 'Second reading Speech: National Radioactive Waste Management Bill 2010', House of Representatives, *Debates*, 21 October 2010, p. 1064, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-10-21%2F0005%22>
  3. A Martyn, *Commonwealth Radioactive Waste Management Bill 2005*, Bills Digest, no. 59, 2005–06, 28 October 2005, Parliamentary Library, Canberra, 2005.

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At the time of the passing of the Act, three potential sites for the facility had been identified by the former Howard Government in the Northern Territory. These were all Commonwealth Defence Department properties: Mount Everard and Harts Range (both near Alice Springs) and Fishers Ridge (near Katherine). All three sites are listed in Schedule 1 to the Act. The Act also allowed the Chief Minister of the Northern Territory to nominate other potential sites, as long as they were not on Aboriginal land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976*. Northern Territory indigenous Land Councils were also able to nominate sites on Aboriginal land.

In May 2007, the Northern Land Council nominated an Aboriginal land site on Muckaty station, about 120 km from Tennant Creek. In September 2007, the nomination was approved under the provisions of the Act by the then Minister for Education, Science and Training, the Hon Julie Bishop MP, triggering the legal powers and protections conferred by the Act to potential facility sites.

Over 2006-2008, consultants Parsons Brinckerhoff undertook extensive studies in order to consider the suitability of the three Defence sites and Muckaty station as a location for the facility, including detailed studies of the sites' physical, biological and socioeconomic environments. Following a peer review process, the final report was submitted to the Department of Resources, Energy and Tourism in March 2009. The report has not been released, and the Government has previously stated it does not intend to make that report publicly available.<sup>4</sup>

However, the Government has said that the Mount Everard, Harts Range and Fishers Ridge sites are no longer being considered as potential sites.<sup>5</sup> The Muckaty station nomination is still afoot.

In terms of the types of waste that might be stored at the proposed facility, the Minister's second reading speech states:

Australia produces low level and intermediate level waste through its use of radioactive materials.

Low level waste includes lightly contaminated light laboratory waste such as paper, plastic, glassware and protective clothing, contaminated soil, smoke detectors and emergency exit signs.

Intermediate level waste arises from the production of nuclear medicines, from overseas reprocessing of spent research reactor fuel and from disused medical and industrial sources such as radiotherapy sources and soil moisture meters.

During the last 50 years, about 4,000 cubic metres of low level and short-lived intermediate level radioactive waste has accumulated in Australia.

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4. Senator Carr, 'Answer to Question without notice: Commonwealth radioactive waste management facility project', [Questioner: Senator Ludlam], Senate, *Debates*, 26 November 2009, p. 9034
  5. M Ferguson, 'Second Reading speech: National Radioactive Waste Management Bill 2010', House of Representatives, *Debates*, 24 February 2010, p. 5, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-02-24%2F0013%22>

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It is currently stored at interim facilities located in suburban and regional areas across Australia, in some cases under less than ideal management arrangements.

By comparison, Britain and France annually produce around 25,000 cubic metres of low and short-lived intermediate level waste. But unlike the current situation in Australia, Britain and France dispose of such waste in purpose-built repositories.<sup>6</sup>

## The Commonwealth Radioactive Waste Management Act 2005

The Act 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 the final site from those listed in Schedule 1 or otherwise nominated<sup>7</sup> and then developing, operating and eventually decommissioning the facility.

The Act also provides that various state, territory and Commonwealth legislation does not apply to various stages of the facility. For example, the Act explicitly overrides the operation of both Territory and State laws that 'regulate, hinder or prevent' the facility's development and operation, although it retains the flexibility to permit the operation of any Territory or State laws if the Commonwealth considers this appropriate.<sup>8</sup> It also overrides the application of the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA) as far they might apply to the site selection process only.<sup>9</sup> The construction and operation of the facility would however still be subject to the usual Commonwealth approval and licensing provisions, including the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPNS Act) and the EPBCA.<sup>10</sup>

Other significant features of the Act include:

- the failure to observe the consultative and consent arrangements in relation to nomination of a place as a potential site by the Chief Minister or a Land Council, does not invalidate the nomination or any subsequent Commonwealth Ministerial approval of the nomination
- the nomination of place is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJRA) and is not disallowable by Parliament
- the Government's decision on the preferred site is not disallowable by Parliament, is not reviewable under the ADJRA, and the Government owes no legal obligation of procedural fairness towards anybody affected by the decision.

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6. M Ferguson (Minister for Resources and Energy) 'Second reading Speech: National Radioactive Waste Management Bill 2010', op cit.

7. Such nominations have to be approved by the responsible Commonwealth Minister, now being the Minister for Resources and Energy.

8. Sections 5 and 13 of the Act.

9. Section 6 of the Act.

10. Section 14 of the Act.

When in Opposition, the ALP stated that it was 'committed to repealing the *Commonwealth Radioactive Waste Management Act* and establishing a consensual process of site selection'.<sup>11</sup>

## Committee consideration

The previous version of the Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report in May 2010. Details of the inquiry are at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/radioactivewaste/info.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/radioactivewaste/info.htm).

The current version of the Bill has been referred to the House of Representatives Standing Committee on Climate Change, Environment and the Arts for inquiry and report by the end of the Autumn period of sittings in 2011. Details of the inquiry are at <http://www.aph.gov.au/house/committee/cea/radioactivewaste/index.htm>

At the time of writing, no submissions had been posted on the committee's website.

## Policy position of non-government parties/independents

The Coalition supported the previous version of the Bill in the House of Representatives when it was debated there in March 2010. Liberal Senators also supported the report of the Senate Legal and Constitutional Affairs committee, but also recommended that:

...the Bill be amended to require that an independent review of the national radioactive waste facility and its operations be conducted within five years of the commencement of its construction; the review should consider the adequacy of the legal and regulatory regimes governing the safe and secure operation and effective management of the facility. A further independent review should be conducted within each ten years of the facility's operation.

The Bill does not contain any such amendment.

With respect to the current Parliament, it has been reported that new Northern Territory Country Liberal, Natasha Griggs would 'consider' crossing the floor on the nuclear waste dump issue.<sup>12</sup>

The Greens opposed the previous version of the Bill in their May 2010 dissenting Senate Committee report, stating

The legislation should be rejected on four grounds:

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11. Senator Carr (Shadow Minister for Industry, Innovation, Science and Research), *Rights flattened as government steamrolls towards waste dump*, media release, 27 September 2007, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FEHFO6%22>
  12. M Schliebs, 'Top End MP "will cross floor"', *The Australian*, 1 September 2010, p. 7, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F160564%22>

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- a) **An inadequate framework**, for managing radioactive waste, most notably the lack of procedural fairness or avenues for judicial review.
- b) **Wholesale overriding of State and Territory laws**, suspension of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, exclusion of the *Native Title Act 1993* and suspension of the Judicial Review Act is alarming and heavy handed.
- c) **Failure to uphold international best practice** particularly in relation to securing social licence and community acceptance of a radioactive waste facility.
- d) **Excessive discretionary power given to a Minister operating with an absolute minimum of transparency**, and the withholding of key documents.

More recently, Greens MP Adam Bandt has said:

The Australian Greens welcome the referral of the Federal Government's controversial bill to establish Australia's national radioactive waste dump to a House of Representatives parliamentary committee.

"This is great news and may ensure real scrutiny is brought to bear on Labor's proposal to dump radioactive waste in Central Australia," said Greens spokesperson on nuclear issues Senator Scott Ludlam.

"Labor abused the Senate oversight process by whitewashing a committee report earlier this year. This represents the first test of the committee system under the new parliament."<sup>13</sup>

## Position of major interest groups

The Northern Territory government has previously opposed the potential locating of the facility in the Northern Territory,<sup>14</sup> and there are no obvious reports of any different position being taken.

Reports suggest that there are mixed feelings amongst the traditional owners of the Muckaty station site regarding the potential for the facility to be located there, including elements of strong opposition.<sup>15</sup> A court challenge to the Muckaty Court nomination has been lodged in the Federal Court, but the action is now reportedly under mediation, for report back to the Court in the new year.<sup>16</sup>

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- 13. A Bandt, *Opportunity for new approach on nuclear waste dump*, media release, 21 October 2010, viewed 23 November 2010, [http://adam-bandt.greensmps.org.au/600\\_media\\_sub.php?page=1](http://adam-bandt.greensmps.org.au/600_media_sub.php?page=1)
  - 14. B Langford, 'Waste dump con job', *Northern Territory News*, 25 February 2010, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FMWZV6%22>
  - 15. N Wasley and J Green, 'Sense needed to tackle N-waste', *Canberra Times*, 26 February 2010, p. 21, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FX40W6%22>,
  - 16. A Betts 'Muckaty debate' *Northern Territory News*, 2 November 2010, viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F330515%22>

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## Financial implications

The Explanatory Memorandum to the Bill states:<sup>17</sup>

Overall, the financial impact of the legislation is considered to be negligible. Provision for any costs, including any liability of the Commonwealth to compensate persons for any acquisition etc. of their interests in land affected by the Bill, would be sought to supplement the existing administrated appropriation for Outcome 1 of the Department of Resources, Energy and Tourism.

## Main issues

The Bill incorporates a requirement on the part of the Minister to accord procedural fairness in relation to:

- declaring that general nominations for potential facilities sites may be made, as opposed to restricting nominations to Northern Territory Land Councils, and
- declaring that a particular site has been selected for the facility.<sup>18</sup>

Such a requirement is explicitly excluded under the current Act. The new requirement is not however unduly onerous – it necessitates the Minister inviting comment from specified persons or entities, and ‘tak[ing] into account any relevant comments given’.

In the event that the Minister makes an error of law in the processes applying to site nominations, approval of nominations, and selection of the preferred site, the Bill restores the right of an ‘aggrieved person’ to seek judicial review under the ADJR Act. However, the Bill also retains the current provisions of the Act that a failure to comply with certain procedural elements does not invalidate the nominations etc.

The Bill also contemplates, in the event that the Minister declares that general nominations for facility sites may be made, that the facility could be built outside the Northern Territory. However, depending on the circumstances, it is perhaps arguable that the Commonwealth does not have clear constitutional power to enact legislation to construct and operate a facility outside the territories, although the external affairs and implied nationhood power may provide sufficient power. This is covered in more depth in the discussion of **new section 37** in the main provisions section of this Digest.

The Bill retains the existing provisions of the Act that effectively exclude State and Territory laws from operating where they would ‘regulate, hinder or prevent’ the Commonwealth from doing work

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17. Explanatory Memorandum, National Radioactive Waste Management Bill 2010, pp. 6-7.

18. The same procedural fairness requirement applies to a declaration regarding land necessary for all-weather road access to the site: see **new section 10** of the Bill.

to investigate the suitability of potential sites and then the construction and operation of the proposed facility, including the transporting of radioactive materials.

## Key provisions

### Part 1 - Preliminary

**New section 3** (which is one of the two major changes to the Bill compared to the previous version) sets out the Act's object. Essentially, it is to provide for:

- the selection of a site for a radioactive waste management facility on voluntarily nominated land in Australia and
- the establishment and operation of the facility on a selected site

to ensure the safe and secure management of radioactive waste generated, possessed or controlled by the Commonwealth or a Commonwealth entity.

As mentioned earlier in this Digest, this section has been added following the recommendation of the Senate Legal and Constitutional Affairs report of 7 May 2010. The Committee suggested the addition to assist any judicial interpretation of the (once passed and assented to) Act.

**New section 4** contains a number of definitions, including those of 'Commonwealth contractor'. This includes a subcontractor to a Commonwealth contract. The effect of this definition is that persons and companies with fairly remote legal contractual connections to the Commonwealth will potentially be exempted from a wide range of State and Territory law when undertaking work connected to the proposed facility.

### Part 2 – Nomination of sites

**New section 5** allows for nomination of potential sites on Northern Territory Aboriginal land by the relevant Land Council. However, such a nomination may only be done before the 'general nomination start time'. General nominations are done under **new sections 6-8** (see below). This 'general nomination start time' will be fixed by the Commonwealth Minister by a written declaration made under **new section 6**, at some unspecified future date. The declaration is not a legislative instrument, and hence not disallowable by Parliament.

**New section 5** nominations contain similar procedural elements as existing section 3B of the Act (particularly in relation to providing evidence of consultation and consent with the relevant

traditional Aboriginal owners). As with the current Act, however, a failure to comply with these elements does not invalidate a nomination, nor is the nomination disallowable by Parliament.<sup>19</sup>

In respect of general nominations, these may be made under **new section 7** by the owner of the relevant land, or by the certain leaseholders,<sup>20</sup> or in certain cases the body corporate holder of native title rights and interests in the land. Such section 7 nominations can only be made following a Ministerial declaration under **new section 6**. Before making such a declaration, 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 **new section 5**. This avenue for general nominations opens up a fall-back option if it appears that any Land Council nominated sites are not feasible for a facility for whatever reason. It is notable that a general nomination can be for a site outside the Northern Territory – the Act currently only allows for sites within the Northern Territory.

As previously mentioned, the allowance for general nominations under **new subsection 7(4)** where an ‘approved determination of native title’ exists over the relevant area is a new provision compared to the previous version of the Bill. Neither the Minister’s second reading speech nor the Explanatory Memorandum shed light on why this addition has been made. However, it is possible that it is intended to put relevant native title land on a similar footing to freehold title, and also leasehold title on Crown land. Note that nomination of native title land can only be made where the title confers exclusive use of the land on the holder.

**New section 8** contains procedural elements (particularly in relation to providing evidence of consultation and consent with ‘specified groups of persons’<sup>21</sup>) on section 7 nominations but again, a failure to comply with these elements does not invalidate a nomination, nor is the nomination disallowable by Parliament.

**New section 9** enables the Minister to, ‘at his or her absolute discretion’ give written approval of land, or part of land, nominated under **new sections 5 or 7**.<sup>22</sup> A failure to observe procedural elements (which have been largely discussed above) does not invalidate any section 8 approval, nor is the approval disallowable by Parliament as it is not a legislative instrument. **New section 8** essentially replicates the equivalent section (section 3C) currently in the Act.

**New section 10**, dealing with procedural fairness for section 5 declarations and section 8 approvals, is a major change as compared to the current Act. Existing section 3D of the Act specifies that ‘no person is entitled to procedural fairness’ in relation to a section 3A nomination of a site or section 3C Ministerial approval of a nomination. **New section 10** contains a process that ‘taken to be an

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19. This is because the nomination is not a legislative instrument under new subsection 5(5).

20. So, for example, a leaseholder of Crown land could make a nomination, but a leaseholder of privately owned land could not – specifics are contained in **new subparagraph 7(2)(b)(ii)**.

21. These groups would presumably be specified in regulations.

22. Note that under **new subsection 9(2)**, an approval of a site nominated under new section 5 cannot be done after the general nomination start time. The Minister is also under no duty to consider a nomination.

exhaustive statement of the requirements for natural justice' for **new section 6** declarations and **new section 9** approvals. It makes no mention of natural justice in relation to nominations.<sup>23</sup>

In relation to natural justice for a **new section 6** declaration, the Minister must invite comments from all Land Councils and the general public (with a minimum 60 day period for comments to be received) on the proposed declaration, and then take these into account in deciding whether to make the declaration.

In relation to **new section 9** approvals, 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 – again with a minimum 60 day period for comments to be received. Comments from these persons must be taken into account by the Minister in deciding whether to approve the nomination.<sup>24</sup>

### Part 3 – Selecting the site for the facility

**New section 11** provides the Commonwealth or a person working on behalf of the Commonwealth (including contractors and their employees or agents) with the legislative authority to do anything in a state or territory 'necessary for or incidental to the purposes' of selecting a site on which to construct and operate a facility. **New subsection 11(3)** provides a non-exhaustive list of the sort of activities which would fall into this category. **New subsection 11(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 11** differs from the equivalent section 4 in the Act in that extends to all states and territories – not just the Northern Territory, but otherwise is the same.

**New section 12** effectively excludes State and Territory laws from operating where they would 'regulate, hinder or prevent the doing of a thing authorised by section 11'. **New section 12(1)** does state that only certain types of State and Territory laws (eg laws relating to 'the use 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 12(1)**, the law could be excluded by prescribing it under regulation: **new subsections 12(2)-(3)**.<sup>25</sup> This prescribing power also allows parts of laws, rather than the whole, to be excluded. Conversely, **new subsection 12(4)** 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 12**. This allows the Commonwealth to limit the exclusions discussed above if thought appropriate. **New section 12** is the same as section 5 in the current Act.

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23. Noting however, that under the Bill judicial review under the ADJRA may be available.

24. **New subsection 10(6)**.

25. Regulations are of course disallowable.

**New subsection 13(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 11'. Again a prescription power under regulation exists (**subsection 13(2)**) to allow for the exclusion of other Commonwealth laws, or parts of laws. **New section 13** is the same as section 6 in the current Act.

## Part 4 - Acquisition or extinguishment of rights and interests

**Part 4** allows the Minister to acquire and/or extinguish various rights and interests<sup>26</sup> 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.

**New subsection 14(2)** enables the Minister to declare that a nominated site, or part of that site, has been selected as the site for the facility.<sup>27</sup> Under **new subsection 14(4)**, a declaration may also be made that all or specified rights or interests in land in a State or Territory are required for providing all-weather road access to the selected site. Subsection 14(2) declarations may be revoked, but there is no provision for revocations in relation to subsection 14(4) declarations.

**New section 15** specifies that a failure to comply with the 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 **new section 18** procedural fairness requirements, which sets out a process that is 'taken to be an exhaustive statement of the requirements for natural justice'. By comparison, the Act currently specifically provides that the Minister need not accord any person procedural fairness in making a declaration selecting a site or land for road access.

Under **new section 18**, the Minister must invite comments from each nominator<sup>28</sup>, and via public notices in the Gazette and newspapers, from persons with a right or interest in the relevant land, with a minimum 60 day period for comments to be received. Comments from these persons must be taken into account by the Minister in deciding whether to make the **new section 14** declaration.

**New subsection 19(1)** provides that at the time any **new subsections 14(2) or 14(4)** declaration has effect, any rights or interests 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,

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26. Rights and interests specified in a **new subsection 14(2) or (4)** declaration may include rights to minerals (if any), native title rights and interests (if any), an interest in land that did not previously exist, and an easement in gross (if any).

27. It must have been approved under **new section 9**.

28. If the declaration in question is under **new subsection 14(4)** – land required for road access – a 'nominator' is a person that nominated the site for which the relevant access is required.

mortgages, encumbrances, contracts, licences, charges and rates. This is little different from the equivalent section of the current Act.

The acquisition and/or extinguishment of rights and interests under **new section 19** 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*: **new section 20**. This is identical to existing section 10 in the Act. Although the Explanatory Memorandum to the Bill makes no real comment on the provision, the Explanatory Memorandum to the current Act (then Bill) noted that the provision has the effect 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.

**New section 22** requires that a regional consultative committee be established, and is entirely new as compared to the current Act. The previous version of the Bill made the establishment of the committee only an option for the Minister, not a requirement. Once a site selection declaration (**new subsection 14(2)**) has taken effect, the Minister must establish such a committee. The functions of the committee are to facilitate:

- communication between the Commonwealth, the operator of the facility (if any) at the selected site and persons living in or near the region where the selected site is situated, and
- such other functions as are prescribed via regulation.

Regulations may, amongst other things, also prescribe the membership of the committee.

## Part 5 – Conducting activities in relation to selected site

**Part 5** is broadly similar to **Part 3** of the Bill except that it deals with activities once the final site has been selected. It is also virtually identical to existing Part 4 in the Act.

**New section 23** 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 23(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.<sup>29</sup>

**New section 24** effectively excludes State and Territory laws from operating where they would 'regulate, hinder or prevent the doing of a thing authorised by section 23'. **New subsections 24(1)-(2)** do state that only certain types of State and Territory laws (for example, 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

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29. **New subsection 23(3)** also enables any activity mentioned in **new subsection 11(3)**, but done once the site has been selected, to come within the legislative authority granted by **new section 23**.

give almost complete coverage. Even if a State or Territory law fell outside the types listed in **new subsections 24(1)-(2)**, the law could be excluded by prescribing it under regulation: **new subsections 24(3)-(4)**. This prescribing power also allows parts of laws, rather than the whole, to be excluded. **New subsection 24(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 24**. This allows the Commonwealth to limit the exclusions discussed above if thought appropriate. **New section 24** is the same as section 13 in the current Act.

**New subsection 25(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 23'. However **subsection 25(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*.

This means these laws will continue to apply.

## Part 6 – Granting of rights and interests in land to original owners

**Part 6** is virtually identical to existing Part 4A in the Act. That Part was added to the Act by the *Commonwealth Radioactive Waste Management Legislation Amendment Act 2006*.

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'. **New section 26** sets out the features of the land to be returned. These define the land to have been Aboriginal land before a subsection 14(2) declaration, 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*, that is, it is no longer needed as a radioactive waste storage facility and it has been declared to be safe.

**New sections 27 and 28** 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 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 from the date of publishing in the relevant *Gazette*, 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.

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**New section 33** provides for an indemnity by the Commonwealth to the Land Trusts specified in the declaration of 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 subsection 33(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 subsection 33(3)**) and it must then follow the directions of the Commonwealth in relation to the claim.

## Part 7 – Miscellaneous

**New sections 35** and **36** contain some standard Commonwealth legislative provisions on compensation. **New section 35** provides for ‘reasonable’ compensation to be payable to a person whose right or interest has been acquired, extinguished or otherwise affected under **new section 19**. **New section 36** 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 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 37** is a revised form of section 16A Act. Section 16A requires the Commonwealth to indemnify the Northern Territory,<sup>30</sup> and keep the Northern Territory indemnified against any ‘action, claim or demand brought or made against the Northern Territory in respect of any liability arising from, or damage caused by, ionising radiation from any act done or omitted to be done by or on behalf of the Commonwealth in relation to the transport of controlled material to or from, or the management of controlled material, at a facility on the selected site’. The amount of the indemnity is reduced by the extent to which any fault on the part of the State or Territory, or its employees, agents or contractors, contributed to the liability or damage. The indemnity only applies if the Northern Territory both gives the Commonwealth written notification of the action, claim or demand as soon as practicable, and follows any directions of the Commonwealth in relation to the action, claim or demand.

New section 37 is broadly similar, **however it applies only if the nomination of the selected site was through section 5 (nomination of Aboriginal land by the relevant Land Council)**. Unfortunately neither the Explanatory Memorandum nor the second reading speech provide any background to the perceived need for this entirely new provision, including why it effectively only applies should the proposed facility be built on Aboriginal Land in the Northern Territory, as opposed to other locations.

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30. The indemnity must be maintained over time.



**New section 38** provides a constitutional ‘safety net’ in the event that the purported operation of the Bill to a prospective facility outside a territory is beyond the constitutional power of the Commonwealth.<sup>31</sup>

Certainly, the Commonwealth has the power under section 122 of the Constitution to legislate with respect to a prospective facility in a Territory. 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.

There are a range of other constitutional powers that may arguably serve to support those parts of the Bill that authorise activities outside of the territories. 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 Spent Fuel Management and the Safety of Radioactive Waste Management.<sup>32</sup> 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, although the scope of that power is uncertain.

However, depending on the circumstances, there may still be doubts that the Constitution would support those parts of the Bill that potentially authorise, or are related to, activities for a facility that may be outside of the territories. In this case, new section 38 allows the Bill to effectively operate so it only applies in relation a facility, and other relevant land, within a territory.

## Schedule 1

**Item 1** repeals the current Act.

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- 31. Once a place is validly acquired by the Commonwealth for a public purpose, section 52 of the Constitution does give the Commonwealth the exclusive power to pass laws with respect to that place. However, amongst other things, some aspects of the Bill apply before any acquisition has taken place.
  - 32. See also G Carney, ‘Constitutional framework for regulation of the Australian uranium industry’ *Australian Resources and Energy Law Journal*, 26 (2007), p. 235 at 247 viewed 23 November 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FUHCP6%22>

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**Item 2** repeals the current exemption from the ADJR Act in respect of site nominations, approval of nominations, and selection of the preferred site.

## Schedule 2

Schedule 2 is designed to effectively preserve the legal status of the 2007 Muckaty station nomination. However, should it be eventually selected as the facility site by the Commonwealth under a **new section 14** Ministerial declaration, the new procedural fairness requirements in **new section 18** will apply to that declaration process.

## Concluding comments

The issue of the proposed Commonwealth Radioactive Waste Management Facility is a contentious one, particularly as both this Bill and the current Act allow for the overriding of Territory and State law in particular. The Bill does restore and address some procedural fairness requirements and judicial review rights to the process, which were excluded by the Howard Government through the passing of the Act in 2005, and later amendments in 2006.

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