



**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**THIRTEENTH REPORT**

**OF**

**2005**

**30 November 2005**



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# **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

## **MEMBERS OF THE COMMITTEE**

Senator R Ray (Chair)  
Senator B Mason (Deputy Chair)  
Senator G Barnett  
Senator D Johnston  
Senator A McEwen  
Senator A Murray

## **TERMS OF REFERENCE**

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



# **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

## **THIRTEENTH REPORT OF 2005**

The Committee presents its Thirteenth Report of 2005 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Commonwealth Radioactive Waste Management Bill 2005

Workplace Relations Amendment (Better Bargaining) Bill 2005

# Commonwealth Radioactive Waste Management Bill 2005

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 13 of 2005*. The Minister for Education, Science and Training responded to the Committee's comments in a letter dated 29 November 2005. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 13 of 2005*

Introduced into the House of Representatives on 13 October 2005  
Portfolio: Education, Science and Training

#### **Background**

This bill ensures the Commonwealth's power (notwithstanding any state or territory legislation) to select specified Commonwealth land as a site for the management of radioactive waste. The bill provides for the establishment and operation of a radioactive waste management facility together with an access route.

The bill effects the acquisition or extinguishment of all interests in the selected site and any access route, and provides compensation for affected parties.

The bill ensures that, after the selection of a site, Commonwealth regulatory processes under the *Environment Protection and Biodiversity Conservation Act 1999*, *Australian Radiation Protection and Nuclear Safety Act 1998* and the *Nuclear Non-Proliferation (Safeguards) Act 1987* must be complied with.

#### **Trespass on personal rights and liberties** **Clauses 5, 10 and 13**

It is one of the clear purposes of clauses 5, 10 and 13 of this bill that the terms of this bill will override any contrary provisions contained in legislation of any of the states or of the Northern Territory, and will override any possible future contrary legislation of the States and the Northern Territory.



It appears, therefore, that these clauses trespass on any individual rights and liberties contained (or to be contained) in the relevant state or territory legislation. The Committee **leaves for the Senate as a whole** the question of whether it trespasses on those rights *unduly*.

*The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Relevant extract from the response from the Minister***

The Committee questioned whether clauses 5, 10 and 13 of the Bill might trespass unduly on personal rights and liberties by overriding any contrary provisions contained in Northern Territory or State legislation. I believe these provisions are essential and do not trespass unduly on personal rights and liberties.

These provisions are needed because State and Territory jurisdictions (including the Northern Territory) have introduced specific laws purporting to prohibit the establishment of a radioactive waste management facility and the transportation of radioactive material for such a facility. In addition, the Northern Territory government has made it clear that it will do everything possible to halt or frustrate the Commonwealth's actions.

Although the Committee did not seek advice in relation to this matter it nonetheless thanks the Minister for this response. The provisions seek to override state or Northern Territory legislation. This raises the possibility that individual rights contained in such legislation will be adversely affected. The Committee, according to its usual practice, leaves it for the Senate to determine whether these provisions *unduly trespass* on any such rights or liberties.

*The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

**Absolute ministerial discretion**  
**Abrogation of procedural fairness**  
**Clauses 7 and 8**

Clause 7 would give the Minister an absolute discretion to declare that a site – or part of a site – is selected as the site for a radioactive waste management facility, and that all or specified rights or interests in land in the Northern Territory are required for providing all-weather access to such a site, while clause 8 provides that no person ‘is entitled to procedural fairness in relation to the Minister’s making of’ either of those declarations.

The explanatory memorandum, unhelpfully, fails to set out any justification for these measures, instead merely repeating the text of the provisions of the bill.

These clauses clearly make rights, liberties or obligations dependent upon non-reviewable discretions. The Committee **seeks the Minister’s advice** as to the justification for the inclusion of this absolute ministerial discretion and for the abrogation of procedural fairness. The Committee also **seeks the Minister’s advice** as to whether such declarations ought be contained in legislative instruments and subject to the usual tabling and disallowance regime in the *Legislative Instruments Act 2003*.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee’s terms of reference.*

***Relevant extract from the response from the Minister***

The Committee also questioned whether clauses 7 and 8 of the Bill and the provisions of the RA Bill make rights, liberties or obligations unduly dependent upon non-reviewable decisions and sought justification for the absolute discretion to declare a site for a facility and queried why such a declaration should not be a legislative instrument.

These provisions are designed to avoid collateral legal challenges to the site selection process. As stated above, there have been a series of publicly threatened actions by the Northern Territory government and others to delay, obstruct or prevent the Commonwealth's activities. Such challenges caused significant delays

and, ultimately, the abandonment of the proposed national low-level repository in South Australia.

The Government does not believe that a declaration by the Minister under clause 7 of the Bill falls within the definition of “legislative instrument” in section 5 of the *Legislative Instruments Act 2003* as it is not an “instrument of a legislative character.” A declaration by the Minister will apply the law in a particular case rather than determine the law or alter the content of the law.

Further detailed comments can be found at paragraphs 21-24, 30 and 31 of my department’s submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Commonwealth Radioactive Waste Management Bills.

Thank you for allowing me to clarify these matters for your Committee.

The Committee thanks the Minister for this response and for clarifying the intended operation of these clauses.

There are two issues of oversight which may be raised by these provisions. The first is the question of whether there should be a greater level of parliamentary scrutiny of any declaration made under clause 7, for instance by subjecting such instruments to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003*. The Minister does not believe such instruments would be legislative in character, and draws the Committee’s attention to supporting material in the department’s submission to a Senate legislation committee inquiry into the bill. The Committee leaves it to the Senate to determine whether the provision provides for sufficient parliamentary scrutiny of such declarations.

The second issue relates to the removal of any entitlement to procedural fairness, under clause 8. The response contends that the provisions ‘are designed to avoid collateral legal challenges to the site selection process’ and refers to the delays that might be occasioned by possible legal challenges. This response appears to confirm the possibility that any rights which might be affected by decisions made under clause 7 will therefore be dependent upon non-reviewable decisions. The Committee, according to its usual practice, leaves it for the Senate to determine whether any such rights are made *unduly* dependent upon such decisions.

*The Committee draws Senators’ attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee’s terms of reference.*

# Workplace Relations Amendment (Better Bargaining) Bill 2005

## *Introduction*

The Committee dealt with an amendment to this bill in *Alert Digest No. 11 of 2005*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 29 November 2005. A copy of the letter is attached to this report.

### *Extract from Amendment section of Alert Digest No. 11 of 2005*

The Committee considered this bill in its *Alert Digest No. 3 of 2005* and determined not to make any comment on the bill as introduced. The bill was amended in the House of Representatives on 7 September 2005.

#### **Possible retrospectivity**

##### **Schedule 2, item 2; Schedule 3, item 2; Schedule 5, item 7**

The amendments add a new Schedule 5, dealing with pattern bargaining, and introduces amendments to vary the application provisions in relation to Schedules 2 and 3 of the bill. These application provisions, including a provision relating to the new Schedule 5, provide that amendments will apply in relation to industrial action engaged in or organised after the commencement of the relevant Schedule, whether or not the action began *before* that commencement.

These amendments have been described in the House as having a retrospective effect. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. It appears that the effect of the application provisions may be to strengthen the position of one of the parties to ongoing negotiations, possibly at an advanced stage in those negotiations.

The Committee **seeks the Minister's advice** as to whether the provisions of the bill, as amended, have a retrospective effect and, if so, whether that retrospectivity will operate to the detriment of any person.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### ***Relevant extract from the response from the Minister***

The proposed legislation does not operate retrospectively because it does not change the rights and obligations of affected parties with effect prior to the commencement of the legislation. The legislation only operates with prospective effect, even though in some cases it may rely on past events to create a factual chain of events.

#### *Schedule 2, item 2*

These amendments would enable a bargaining period to be suspended to allow for cooling off, or where industrial action threatens to cause significant harm to a third party. Any industrial action taken during suspension would not be protected. The application provision would make it clear that suspension may be ordered regardless of when the bargaining period was first notified. This does not alter the rights and obligations of affected parties as they were before commencement, as the provisions do not remove protected status from any industrial action taken before commencement. Therefore the provisions, taken as a whole, cannot be said to operate retrospectively.

#### *Schedule 3, item 2*

This amendment would make it clear that industrial action that is taken by or against two or more companies that are related to the employer-and which may be treated as a 'single employer' for the purposes of paragraph 170LB(2)(b)-is not protected. This is consistent with Australian Government's policy that protected industrial action should not be available to be taken in support of a proposed 'multiple business' agreement.

The proposed amendment only affects the scope of the immunity conferred by section 170ML (protected action) after its commencement. The application provision would clarify that the amending provision operates in relation to industrial action engaged in after commencement, regardless of when the bargaining period (under which the industrial action was purportedly taken under) was first notified. It does not alter the immunity of industrial action taken before commencement, and therefore cannot be said to have retrospective operation.

#### *Schedule 5, item 7*

These amendments would:

- provide that industrial action is not protected if taken to support claims by a negotiating party that is engaging in pattern bargaining;

- require the suspension or termination of a bargaining period if a negotiating party is engaged in pattern bargaining in relation to the proposed agreement; and
- provide for injunctions to stop or prevent industrial action taken to support claims by a negotiating party that is engaging in pattern bargaining.

The application provision would make it clear that the amending provisions apply to pattern bargaining, or industrial action taken to support pattern bargaining, that occurs after the commencement of the provisions. That is regardless of when that course of conduct first began, or when a bargaining period (under which industrial action was purportedly taken) was first notified. The amending provisions do not change the status of industrial action taken before commencement and, accordingly, do not have retrospective action.

In summary, the provisions of the Bill, as amended, do not have the alleged retrospective effect, and therefore no issue of individual rights and liberties arises.

The Committee thanks the Minister for this response.

Brett Mason  
Deputy Chair



MINISTER FOR EDUCATION, SCIENCE AND TRAINING  
THE HON DR BRENDAN NELSON MP

**RECEIVED**

29 NOV 2005

Senate Standing C'ttee  
for the Scrutiny of Bills

Senator B. Mason  
Deputy Chair  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

29 NOV 2005

Dear Minister 

I refer to the Committee's comments on the Commonwealth Radioactive Waste Management Bill 2005 (the Bill) and the Commonwealth Radioactive Waste Management (Related Amendments) Bill 2005 (the RA Bill) contained in Scrutiny of Bills Alert Digest No. 13 of 2005 dated 9 November 2005.

The Committee questioned whether clauses 5, 10 and 13 of the Bill might trespass unduly on personal rights and liberties by overriding any contrary provisions contained in Northern Territory or State legislation. I believe these provisions are essential and do not trespass unduly on personal rights and liberties.

These provisions are needed because State and Territory jurisdictions (including the Northern Territory) have introduced specific laws purporting to prohibit the establishment of a radioactive waste management facility and the transportation of radioactive material for such a facility. In addition, the Northern Territory government has made it clear that it will do everything possible to halt or frustrate the Commonwealth's actions.

The Committee also questioned whether clauses 7 and 8 of the Bill and the provisions of the RA Bill make rights, liberties or obligations unduly dependent upon non-reviewable decisions and sought justification for the absolute discretion to declare a site for a facility and queried why such a declaration should not be a legislative instrument.

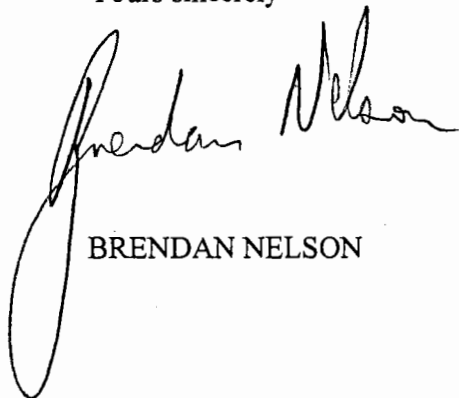
These provisions are designed to avoid collateral legal challenges to the site selection process. As stated above, there have been a series of publicly threatened actions by the Northern Territory government and others to delay, obstruct or prevent the Commonwealth's activities. Such challenges caused significant delays and, ultimately, the abandonment of the proposed national low-level repository in South Australia.

The Government does not believe that a declaration by the Minister under clause 7 of the Bill falls within the definition of "legislative instrument" in section 5 of the *Legislative Instruments Act 2003* as it is not an "instrument of a legislative character." A declaration by the Minister will apply the law in a particular case rather than determine the law or alter the content of the law.

Further detailed comments can be found at paragraphs 21-24, 30 and 31 of my department's submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Commonwealth Radioactive Waste Management Bills.

Thank you for allowing me to clarify these matters for your Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read "Brendan Nelson". The signature is fluid and cursive, with the first name "Brendan" written in a larger, more prominent script than the last name "Nelson".

BRENDAN NELSON





**The Hon Kevin Andrews MP**

**Minister for Employment and Workplace Relations  
Minister Assisting the Prime Minister for the Public Service**

Senator Brett Mason  
Deputy Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

**RECEIVED**  
29 NOV 2005  
Senate Standing Committee  
for the Scrutiny of Bills

Dear Senator Mason

I am writing in response to comments published in the *Alert Digest* (No. 11 of 2005), dated 14 September 2005. This was forwarded to my Office by the Secretary of the Standing Committee for the Scrutiny of Bills, Mr Richard Pye (by correspondence dated 15 September 2005).

The Committee seeks advice as to whether the provisions of the *Workplace Relations Amendment (Better Bargaining) Bill 2005* (the Bill), as amended, have a retrospective effect, and, if so, whether that retrospectivity will operate to the detriment of any person.

The proposed legislation does not operate retrospectively because it does not change the rights and obligations of affected parties with effect prior to the commencement of the legislation. The legislation only operates with prospective effect, even though in some cases it may rely on past events to create a factual chain of events.

*Schedule 2, item 2*

These amendments would enable a bargaining period to be suspended to allow for cooling off, or where industrial action threatens to cause significant harm to a third party. Any industrial action taken during suspension would not be protected. The application provision would make it clear that suspension may be ordered regardless of when the bargaining period was first notified. This does not alter the rights and obligations of affected parties as they were before commencement, as the provisions do not remove protected status from any industrial action taken before commencement. Therefore the provisions, taken as a whole, cannot be said to operate retrospectively.

*Schedule 3, item 2*

This amendment would make it clear that industrial action that is taken by or against two or more companies that are related to the employer—and which may be treated as a ‘single employer’ for the purposes of paragraph 170LB(2)(b)—is not protected. This is consistent with Australian Government’s policy that protected industrial action should not be available to be taken in support of a proposed ‘multiple business’ agreement.

The proposed amendment only affects the scope of the immunity conferred by section 170ML (protected action) after its commencement. The application provision would clarify that the amending provision operates in relation to industrial action engaged in after commencement, regardless of when the bargaining period (under which the industrial action was purportedly taken under) was first notified. It does not alter the immunity of industrial action taken before commencement, and therefore cannot be said to have retrospective operation.

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- provide for injunctions to stop or prevent industrial action taken to support claims by a negotiating party that is engaging in pattern bargaining.

The application provision would make it clear that the amending provisions apply to pattern bargaining, or industrial action taken to support pattern bargaining, that occurs after the commencement of the provisions. That is regardless of when that course of conduct first began, or when a bargaining period (under which industrial action was purportedly taken) was first notified. The amending provisions do not change the status of industrial action taken before commencement and, accordingly, do not have retrospective action.

In summary, the provisions of the Bill, as amended, do not have the alleged retrospective effect, and therefore no issue of individual rights and liberties arises.

Yours sincerely



KEVIN ANDREWS

29 November 2005