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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Secretary

**Submission in relation to the National Radioactive Waste Management Bill 2010**

I would like to thank the Committee for the opportunity to make a submission in relation to its inquiry into this Bill. Should the Committee have any queries, please do no hesitate to contact me.

Yours sincerely,

Dr Patrick Emerton
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**Submission in relation to the National Radioactive Waste Management Bill 2010**

This submission is concerned with two aspects of those clauses of the National Radioactive Waste Management Bill 2010 ("the Bill") which override the operation of existing legislative provisions.

The first of these aspects is the Bill's overriding of the operation of State and Territory environmental and heritage protection law (clauses 11, 19(1), 23). One important responsibility of State and Territory governments is to ensure the management and protection of the environment and heritage within their jurisdictions. Although it is generally accepted that the Commonwealth should override the states when such overriding would *increase* the degree of protection (as was the case with the legislation at issue in the well-known *Tasmanian Dam Case* (1983) 158 CLR 1), this legislation is distinctive in allowing very general overriding of State and Territory law in order to disregard the protection of heritage and environment that such law mandates.

Even if it is conceded that the management of radioactive waste raises particular issues that cannot be resolved within the framework of ordinary environmental or heritage protection laws – itself a contentious claim – it would be possible for the Bill to make much more specific provision in respect of the suspension of such laws. For example, in lieu of clause 11(2), which permits the wholesale setting aside of State and Territory laws by way of regulation, it would be possible to institute a regime under which such laws were prima facie operative, but in certain circumstances (eg following the failure of negotiations between the Commonwealth and the State or Territory in question) were able to be suspended by regulation in respect of a particular activity or consideration undertaken pursuant to clause 10. The same is true of the rest of clause 11, and clause 23: specific and piecemeal suspension consequent in narrowly specified circumstances could replace the current provisions without undermining the purposes of the Bill.

The second aspect of override which this submission addresses is that which concerns the rights of Indigenous Australians. Clause 12(1)(a) suspends the operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* in relation to activities undertaken to determine the suitability of a nominated site. Clause 19 suspends all Commonwealth laws in respect of the process of acquisition of a site, including the *Native Title Act 1993*. Clause

24(1) permits the suspension of Commonwealth laws by way of regulation, including those protecting the cultural and legal interests of Indigenous Australians, as far as the establishment and operation of any site is concerned.

These provisions are highly objectionable. They appear to reflect the same attitude, in the formulation of policy and its legislative implementation, as was shown by the suspension of the *Racial Discrimination Act 1975* in relation to the Northern Territory intervention – namely, one which treats the claims and interests of Indigenous Australians as not meriting the same respect as those of other Australians. We could not imagine steps being taken to develop a site for the storage of radioactive waste without regard being given to the cultural and heritage values of non-Indigenous Australians. It is outrageous, then, that the Bill should seek to override the statutory protection conferred upon comparable Indigenous claims and interests – statutory protection which was enacted precisely because it was recognised that, being a minority and disadvantaged culture within the Australian community, Indigenous Australians could not rely upon the weight of public opinion, or the ordinary give-and-take of policy development and implementation, to protect their legitimate claims and interests.

This sort of approach is now recognised to have been flawed in relation to the Northern Territory intervention. It would be a grave error, then, to replicate it by passing the Bill in its current form.

The Bill in its current form would also be contrary to Australia's professed commitment to the values set forth in the Declaration on the Rights of Indigenous Peoples. Articles 11 and 29 of the Declaration guarantee that indigenous people shall be free to enjoy their culture, heritage and lands, and shall not have hazardous material stored on their lands unless they have given free, prior and informed consent. The Bill would also be contrary to Australia's obligations under the International Covenant on Civil and Political Rights, which at Article 27 guarantees the rights of minorities. Interference with burial sites, for example by excavation or road-making, would also potentially violate Articles 17 and 23 (pertaining to privacy and the family).

For these reasons, the Bill should be opposed in its current form.