SUBMISSION TO ECONOMICS LEGISLATION COMMITTEE OF THE AUSTRALIAN PARLIAMENT

ON THE

National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020

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About the Author

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Introduction

In September 2019 I presented a submission to *The National Radioactive Waste Management Facility Taskforce* following a call by Department of Industry, Innovation and Science. Unfortunately, I missed the call for submissions in 2018. Nevertheless, I raised critical concerns about the validity of the ***National Radioactive Waste Management Act 2012 (NRWM Act)*** in relation to the Australian Constitution, and also the lawfulness of the process about site selection. I also raised concerns about breaches of South Australian law.

It seems that my concerns were either ignored or dismissed. I again raise these critical matters for the attention of the Economics Legislation Committee. If they are not responded to, then it would not be too much a stretch of the imagination to have them resolved in a higher court of law, quite possibly the High Court of Australia.

In my view, the Economics Legislation Committee should not make any decision on the Amendment Bill until all issues I have countenanced have been resolved.

Main Concerns

1. It is contended that inconsistency between the federal ***National Radioactive Waste Management Act 2012 (NRWM Act)*** and the South Australian ***Nuclear Waste Storage (Prohibition) Act 2000 (NWSP Act)*** (and other similar state/territory laws), has been manufactured by the Australian Parliament. This is a serious issue, and one that not even the Senate Standing Committee for the Scrutiny of Bills has acknowledged. It is incomprehensible why this matter was not addressed way back in 2010 during the establishment of the NRWM Act.

   It is also contended that there are Constitutional matters that need to be resolved to affirm the safety of the federal law, including the Amendment Bill, because at the moment there are sufficient concerns relating to inconsistency between federal and state laws to inhibit the lawful and constitutional passage of the Amendment Bill.

   One case that could have significant importance is a High Court case of 1947 *Melbourne Corporation v Commonwealth,* in which there became an implied limit on Commonwealth legislative power under the Constitution of Australia. The ***Melbourne Corporation principle*** as it became known, renders

constitutionally invalid any Commonwealth law that is otherwise valid under a head of power in Section 51 or some other part of the Constitution if it:

a. places a special burden on the states;
b. significantly impairs, curtails or weakens the capacity of states or state agencies to exercise their constitutional powers or functions.

Thus, a Commonwealth law may be invalid, regardless of whether it has power enumerated in Section 51 (i.e. the 40 areas listed at S 51) of the Constitution if it discriminates against a State or the States in a manner that prevents them from performing their governmental functions or it otherwise undermines that continued existence of the States or their capacity to function as governments. Consider the following example.

A South Australian government function is to protect the health, safety and welfare of the people and the environment in which they live. This is an overarching function, and is clearly enunciated in the ***Environment Protection Act 1993***, and it is also an object of the ***NWSP Act.*** That function and purpose are stripped away by the federal ***NRWM Act*** which both prevents and undermines a capacity of the South Australian government to function. By rendering inoperative the State's ***NWSP Act***, there is a direct effect on the operation of the ***Environment Protection Act 1993*** at **Section 5-Environmental harm** and **Section 9-Territorial and extra-territorial application of Act**, and also on the function of the state government to protect its people. There might also be effects that ripple into other state laws, such as the SA Development Act.

The views of several legal experts, and support of my thesis, are further described in my initial submission (Sep 2019).

2. The SA state government is exposed to challenge on why it has allowed the Commonwealth government to ostensibly render inoperative one of its laws - the ***NWSP Act*** - and to severely compromise another - the Environment Protection Act 1993. The SA government has a duty to all its citizens, and it has condoned a process that has contravened its own law in terms of expenditure of funds in searching for a nuclear waste storage site. Implicated in the unlawful activities are the District Council of Kimba and The Flinders Ranges Council. The Amendment Bill should not proceed until all contentious matters have been resolved.

3. If a licence ultimately **is** granted by the federal government to the Kimba site, then under South Australia's ***NWSP Act*** a further inquiry into social and environmental impacts by the state's Parliament must be held. Neither the federal Minister (now Keith Pitt) nor the state government has made any public statement accordingly. Furthermore, if the SA Parliamentary committee is prevented from doing it's work under its own law, as now might appear to be the case, then where does that leave the proper function of State Parliament? Following on from point 2 above, herein lies another Constitutional matter.

4. 28 sites were initially identified during the preliminary site selection process that commenced in 2015. The locations of these do not appear to have been publicly revealed. Seven sites were then shortlisted under Minister Frydenberg's tenure. The final six sites were located in South Australia, New South Wales, Queensland, and Northern Territory.

What is known about the site selection procedure and why one site was chosen over another? There does not seem to be any information in the public domain as to the detail of decisions to **deselect** any site. And why ultimately was South Australia the only state to contain the final three sites?
As a matter of **public interest**, the method of site selection should be made known. How do we the public have confidence in the process, and that there was no bias one way or the other?
What made "Napandee" stand out from the rest? The people of Kimba and the people of South Australia deserve to know.

5. The means by which the (former) federal Minister has sought "community acceptance" for the nuclear waste site are of concern. A tiny community poll seems to have informed the final decision, and contradicts the Minister's stated position of "broad community support". Just 0.037% of the voting public in SA have had a say. This is not broad community support. The ***NRWM Act*** contains no methodology at all on how site selection was to be conducted, therefore it was contrived without a lawful basis. There are firm grounds on why the rest of the voters in SA should have their views expressed. We are all supposed to be living in a democracy, not one limited by Ministerial decree and the decision of a tiny minority.

6. The Commonwealth has announced it would be taking over the voluntarily offered site, and therefore Section 123 of the Constitution of Australia should be examined carefully about the means by which consent should be given to the surrender of land in the State. For "state land" this requires the consent of the SA government and moreover, its people, via 'the majority of the electors of the State voting upon the question' about the Commonwealth land acquisition which will 'increase, diminish, or otherwise alter the limits of the State'. Although private land has been chosen, albeit with a Native Title question hanging over it, the ultimate question about Section 123, and excluding the vast majority of electors in the state, should be clarified. The Amendment Bill should not proceed until this question is resolved.

7. Following on from point 6, why did South Australia become the only state to be chosen for the nuclear waste site, knowing that a Citizens Jury in 2016 had rejected a major nuclear waste storage industry in South Australia following the outcomes of the Nuclear Fuel Cycle Royal Commission?
The Citizens Jury was substantially more representative of the views of the people of SA, in comparison with the very small poll of the eligible residents of the District Council of Kimba that the Minister appears to have formed his decision on. If the "broad community support" test is applied, then the Citizen Jury's outcome should have been included, but it was ignored, and thus it exposes a concern that the Minister has sidestepped his Ministerial responsibilities and duties, and particularly his requirement as a Minister to uphold "the sole objective of advancing the public interest" (see Statement of Ministerial Standards 2018).
It should also be noted that the Senate Inquiry of 2018 into selection of a site in SA, appeared to have been conducted as a fait accompli, in other words, a foregone conclusion. And yet, this inquiry did not even test the safety of the federal law, and the implications of the Constitution and state laws. It is a failing with respect to public trust.

8. The Minister swore an oath before the representative of Australia's Head of State (the Governor General) ***"to well and truly serve the people of Australia"***. The oath is no different from taking an oath in a court of law, and so if decisions made by a Minister of the Australian government are found to have **not** well and truly served the people of Australia, or they are found to have been untrue, then perjury has been committed. Perjury in a court of law is a criminal offence.
In the site selection process, the Minister is compelled by oath to "well and truly serve" every citizen of

Australia, not just a specific land owner who would financially benefit from hosting a nuclear waste facility, or a small rural Council that might be convinced of an economic windfall attributed to the proposed facility. The whole of the Australian populace must be considered, or at the very least the South Australian people, and it is this point where the process of site selection has again failed.
Furthermore, reliance on local community polls that represent just a few hundred voters to test public acceptance of the proposed facility is a very poor method to substantiate overall community acceptance, and has likely compromised the public interest test.

The actions and decisions of the former Minister Canavan need to be tested in terms of the **Statement of Ministerial Standards.** For federal ministers the requirements include the following statements;

> 1.2 In recognition that public office is a public trust, therefore, the people of Australia are entitled to expect that, as a matter of principle, Ministers will act with due regard for integrity, fairness, accountability, responsibility, and the public interest, as required by these Standards.
>
> 1.4 When taking decisions in or in connection with their official capacity, Ministers must do so in terms of advancing the public interest – that is, based on their best judgment of what will advance the common good of the people of Australia.
>
> 6.1 Ministers are expected to conduct all official business on the basis that they may be expected to demonstrate publicly that their actions and decisions in conducting public business were taken with the sole objective of advancing the public interest.

Senate Brief No. 14 provides a succinct account of the responsibilities of a Minister from the Senate (as was the status of the former Minister when he made a decision on site selection). The Minister is responsible to the Prime Minister alone but accountable to the Senate. Therefore any decision made about selecting a South Australian site for the proposed nuclear waste facility would most likely need to be referred to the Senate. This aspect seems not to have been understood by impartial observers, including politicians, of the process, and should be tested at the political level.
Concerned Senators and indeed all of the Senate should have been involved in the site selection decision that had been taken. However, as the incumbent and responsible Minister Pitt is now in the House of Representatives, what does this make of former Minister Canavan's snap decision? The decision on site selection was announced on Saturday morning 1 February 2020, and by the afternoon Senator Canavan had resigned.

Thus, herein lies the **public interest** test. Former Minister Canavan's conduct in the whole site selection process, and his behaviour in many other non-aligned issues, raises a number of concerns about the process. The haste with which the Amendment Bill is now progressing needs to be halted until all contentious matters have been satisfactorily addressed.

9. The Senate Inquiry of 2018 did not examine the legal ramifications of establishing a nuclear waste storage facility in SA. Indeed, it appears that the most practical and sensible approach has never been considered. It is this, as I described in my submission in September 2019 -

"… there is significant opportunity right now to acquire drought-ravaged outback properties in (either) Queensland, New South Wales, or Victoria to locate the nation's nuclear wastes, and to follow through on the federal government decision of 2004. The reason for nominating these states is because that is where a substantial proportion of Australia's nuclear wastes are derived.
*In the **national interest**, a nuclear waste facility would then be on federal government-owned land, not private land as is currently proposed.*
*In the **public interest**, it could mean the salvation of families whose land could be purchased and their lives turned around for the better."*

My initial point was that the national nuclear waste facility site could be used to rescue a station family crippled by drought by the federal government acquiring a remote property. It makes sense. It makes no sense to locate such a facility on agricultural land at Kimba, and where transportation routes for nuclear waste have not been settled (e.g. ports, road networks). There are plenty of properties in either NSW or Queensland that would qualify.
The question remains - were any of these properties one of the original 28? This needs to be known.

10. The laws of South Australia must be upheld and observed by all its citizens and organisations that operate in the state. The Australian Constitution clearly supports this premise. Both District Council of Kimba and The Flinders Ranges Council have conducted unlawful activities with respect to Section 13 of the state's ***NWSP Act***, and such activities have been supported by the federal government. Leaving aside the matter of "… maintenance or sharing of information …", these Councils have gone beyond what the law allows and have been actively involved in conducting polls in their respective communities. Polls cost money to run. The federal government has been involved in an unlawful activity in South Australia. $55 million has been spent on the site selection process thus far. This large amount of money could have been used to select a site at a drought-ravaged station somewhere in NSW, and much closer to the majority source of nuclear wastes. The Amendment Bill should not proceed until any potential legal action against the commonwealth has been clarified.

What has attempted to be conveyed in this submission are a series of actions and decisions that have ultimately impacted, or could impact, on every Australian citizen. The crucial test is about the constitutional validity of the commonwealth ***National Radioactive Waste Management Act 2012.*** At this time, there appears to be inadequate clarity, as articulated by Anne Twomey and other constitutional law experts, about the inconsistency issue between state and federal laws.

Other tests include whether the South Australian government is prepared to protect its citizens under its own laws. Until these vital and essential legal aspects are clarified, then no further progression of the Amendment Bill should proceed.

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