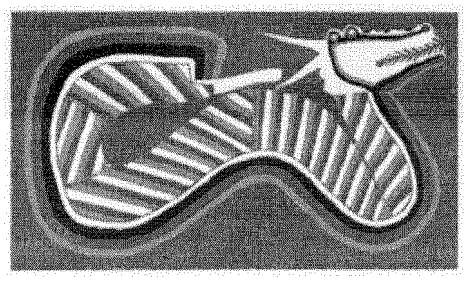

Parliament of Australia

Senate

Employment, Workplace Relations and Education Legislation Committee

Commonwealth Radioactive Waste Management Bill 2005

Northern Land Council Submission

22 November 2005

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

COMMONWEALTH RADIOACTIVE WASTE MANAGEMENT BILL 2005

1. Opening statement

The Northern Land Council (NLC) welcomes the opportunity to provide a submission regarding the *Commonwealth Radioactive Waste Management Bill 2005*.

The storage of radioactive waste from medical treatment and industrial use is clearly a matter of national importance.

Presently waste is stored in over 100 different locations in Australia, particularly in hospitals including Darwin hospital.

Although presently safe this is not ideal, and does not accord with international best practice.

All Australians, including Territorians and Aboriginal people, greatly benefit from medical treatment based on radiological material - much of which derives from the Lucas Heights reactor.

Each year 400,000 Australians receive radiological medical treatment, and each Australian will likely receive such treatment in his or her lifetime.

The key concept is "responsibility".

The Commonwealth Government, on behalf of all Australians, is responsible for producing radiological isotopes - and for ensuring that waste is safely stored in a secure repository. This includes reprocessed fuel rods which will return from France in 2011.

Access to land is required for long term, safe and secure waste storage.

State and Territory Governments however are responsible for almost all land in Australia. Although supportive of a national repository certain Governments have objected to it being located in their jurisdictions – so as to avoid political outcry.

Indeed the NT, WA and SA Governments have passed legislation prohibiting a waste facility.

Specifically the *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2004* (NT) was enacted for the purpose of preventing a Commonwealth waste facility in the Northern Territory.

Although expressed to be for safety and environment protection, the prohibition only applies to some waste. Other radioactive waste is already stored in two locations in the Northern Territory (Darwin hospital and near Katherine), a major uranium mine operates at Ranger, and radioactive material is regularly transported by rail, road and ship.

The Act was passed without any consultation with the NLC or traditional owners.

This was the case notwithstanding that the Act prevents traditional owners from developing their country for a waste facility should they wish.

The Bill, by overriding this Act, restores this capacity to traditional owners.

The Chief Minister, in attempted justification, has depicted the issue as only being about Statehood (NT Parliament 13 October 2005):

> "This is not a debate about a nuclear facility. This is a debate about our rights."

The Chief Minister was referring to the "rights" of Territorians about Statehood, but said nothing about the rights of traditional owners to benefit from development on their land.

Nor was anything said about the national interest or the fact that a facility can be safely built.

In these circumstances the Commonwealth Government has been placed in an invidious position.

On behalf of all Australians it has responsibly produced radiological material for medical and industrial use.

On the other hand it cannot also exercise its responsibility, again on behalf of all Australians, to safely store waste in a secure, long term location – because certain State and Territory Governments will not cooperate - and will not cooperate even though they are more than happy to use Commonwealth radiological material in their hospitals.

Against this background it was always inevitable that the Commonwealth Government would consider exercising its power, on behalf of all Australians, to locate a waste facility in the Northern Territory - which is not a State.

The NLC is a Commonwealth statutory authority which is responsible for facilitating development on Aboriginal land and on native title land or claims in its region.

Aboriginal land is freehold and presently comprises 44% of the Northern Territory. Almost all of the remaining land, mainly pastoral leases but also land vested in the NT Land Corporation (a statutory body controlled by the NT Government but immune to claims under the *Land Rights Act*), is subject to land or native title claim. Native title is likely to coexist over this land.

The first responsibility of a Land Council is to ensure that traditional owners are fully informed regarding any proposed development on Aboriginal land or regarding native title.

All scientific advice is that a low and intermediate waste facility can be safely built in some parts of the Northern Territory, and that a national repository is international best practice.

The second responsibility of a Land Council is to represent the informed position of particular groups of traditional owners, who may support or reject a specific development.

Accordingly on 20 October 2005 the NLC Full Council called for an amendment to the Bill to enable a Land Council, if traditional owners of Aboriginal or native title land agree and provided

sacred site and environmental issues are resolved (and native title is not extinguished unless by consent), to nominate a site in the Northern Territory for a radioactive waste facility.

Relevantly the NLC's proposal provides the only practical means whereby the position of traditional owners at Mt Everard and Harts Range may be achieved – namely by consensually locating the waste facility in an alternative location.

Moreover the NLC's proposal is consistent with both Federal Coalition and Labor policy, which favour a national repository.

On 19 November 2005 the NT News reported that the Chief Minister "recognised the need for a national [repository]" provided located "on a site selected on the best possible scientific advice", a position supportive of Federal Labor policy. However the NT Government website inconsistently states that it "has not been demonstrated" that a national repository is necessary, since allegedly a "general principle of good waste management is that it should be managed as close as possible to its source to avoid transportation risks."[1]

On 2 November 2005 the Bill was amended so that either a Land Council regarding Aboriginal land, or the Chief Minister regarding non-Aboriginal land, may nominate one or more alternative sites for a waste facility.

In relation to Aboriginal land the amendment substantially implements the NLC Full Council's resolution (note the sacred site issue referred to below).

In relation to non-Aboriginal land the amendment has serious drafting deficiencies in that the Chief Minister, by nominating a site, may override:

- the right of veto under the *Land Rights Act* regarding proposed development on land subject to claim (eg the Kenbi land claim; the Alcoota land claim);
- the 'right to negotiate' under the *Native Title Act 1993* (NTA) regarding proposed development on land where native title exists or is subject to registered claim;
- standard procedural protection possessed by all property owners against the compulsory acquisition of property under Commonwealth and NT statutes (including notification, objection, and arbitration by an independent tribunal).

These deficiencies appear inadvertent, are not justifiable on policy grounds, and should be remedied.

The NLC also considers that the *Northern Territory Aboriginal Sacred Sites Act* (NT), which is administered by a body which is independent of the NT Government, should continue to apply particularly regarding sites which may be nominated by a Land Council or the Chief Minister.

This continued application would not interfere with Commonwealth objectives, and would be positively appreciated by traditional owners when considering whether to consent to a facility.

If so remedied, the NLC would support the Bill.

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[1] NT Government "nuclear waste dump" website, FAQ's factsheet: http://www.nt.gov.au/nonukedump/pdf/200509Radioactive.pdf

2. Commonwealth Radioactive Waste Management Bill 2005 (original form)

The *Commonwealth Radioactive Waste Management Bill 2005* was introduced on 14 October 2005.

The Bill, in its original form, applied only to three sites in the Northern Territory: Fishers Ridge (near Katherine), Mt Everard and Harts Range (both near Alice Springs). These three sites are freehold land owned by the Commonwealth Department of Defence.

The Bill ensures that a person may do anything required for the purpose of selecting one of the three sites, including accessing land, clearing vegetation and conducting geological investigations.

The Minister is empowered (with "absolute discretion") to "declare", on a one-off basis:
- that one of the three sites shall be a radioactive waste facility;
- that any land (including Aboriginal land and native title) be automatically acquired to provide "all-weather road access" to the site.

The Minister's declaration cannot be challenged in the courts.

The Commonwealth must pay "reasonable" compensation should acquisition occur.[2]

The Bill overrides all State/Territory legislation, and also Commonwealth environmental and heritage protection legislation,[3] which may affect the selection of a waste facility. This includes environmental or heritage laws (eg sacred site and archaeological).

In relation to the construction and operation of a waste facility, and transport to the facility:
- the Bill overrides all State/Territory legislation (eg sacred site and environmental);
- Commonwealth legislation remains in force, however the Minister is generally empowered to override Commonwealth legislation should in future that be deemed necessary (including Aboriginal heritage laws) - with the exception of environmental, nuclear safety and nuclear non-proliferation protection which cannot be overridden.

3. Northern Land Council resolution 20 October 2005

On 20 October 2005, at its meeting conducted at Crab Claw Island to the west of Darwin, the Full Council of the Northern Land Council (NLC) passed the following resolution:

> The Northern Land Council supports an amendment to the *Commonwealth Radioactive Waste Management Bill 2005* to enable a Land Council to nominate a site in the Northern Territory as a radioactive waste facility, provided that:
> (i) the traditional owners of the site agree;

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[2] Ascertained by agreement or Federal Court determination (cl 15). Presumably "reasonable" compensation is equivalent to "just terms" as required by the Commonwealth Constitution, although to avoid doubt it would be preferable that the term "reasonable" be replaced with the term "just terms".

[3] The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environmental Protection and Biodiversity Conservation Act 1999*.

(ii) sacred sites and heritage are protected (including under current Commonwealth and NT legislation);
(iii) environment protection requirements are met (including under current Commonwealth and NT legislation);
(iv) Aboriginal land is not acquired or native title extinguished (unless with the traditional owners' consent).

The purpose of the resolution is to ensure that traditional owners have the final say as to the location of a waste facility on the basis of sacred site and environmental protection. This position accords with that which previously has always been taken by Land Councils.

Specifically, the NLC's proposal provides the only practical means whereby the objections of traditional owners at Mt Everard and Harts Range may be achieved – namely by consensually locating the waste facility in an alternative location.

4. Amendment Bill 2 November 2005

On 2 November 2005 the member for Solomon, David Tollner, introduced amendments into the House of Representatives. The amendment Bill was passed on that date.

On 9 November 2005 the Bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee for consideration. The Committee must report by Tuesday 29 November 2005, with a hearing in Canberra on 22 November 2005.

The amended Bill empowers:
- a Land Council, with the consent of traditional owners, to nominate one or more areas of Aboriginal land in its region as an alternative site for a waste facility;
- the Chief Minister to nominate one or more areas of non-Aboriginal land as an alternative site for a waste facility.

The Commonwealth Minister may "approve" a nomination, which then may be considered with the three defence sites to be declared as a waste facility.

In relation to Aboriginal land the amendment substantially implements the NLC Full Council's resolution (subject to the sacred site concern below).

In relation to non-Aboriginal land the amendment has serious drafting deficiencies in that the Chief Minister, by nominating a site, may override:
- the right of veto under the *Land Rights Act* regarding proposed development on land subject to claim (eg Kenbi, Alcoota);
- the 'right to negotiate' under the NTA regarding proposed development on land where native title exists or is subject to registered claim;
- standard procedural protection possessed by all property owners against the compulsory acquisition of property under Commonwealth and NT statutes (including notification, objection, and arbitration by an independent tribunal).

These deficiencies appear inadvertent, are not justifiable on policy grounds, and should be remedied.

4.1 Aboriginal land

The amendment Bill empowers a Land Council, with the consent of traditional owners, to nominate an area of Aboriginal land in its area as a potential site for a waste facility. The Commonwealth Minister is empowered to approve such a nomination. There is no limit on the number of nominations which may be made.

Subsequently, when choosing a site for a waste facility, the Minister on a one-off basis may make a declaration from either the three defence sites specified in the original Bill or from any approved nominated sites (sites, not on Aboriginal land, may also be nominated by the Chief Minister).

Once declared the same overriding of NT legislation, and limiting of Commonwealth legislation, referred to above would apply insofar as the construction and operation of a waste facility (and transport to the facility) is concerned.

In other words in relation to the construction and operation of a waste facility on a nominated site (and transport to the facility):

- the Bill overrides all State/Territory legislation (eg sacred site and environmental);
- the Bill enables future regulations to override any Commonwealth legislation except in relation to environmental, nuclear safety and nuclear non-proliferation protection (ie Aboriginal heritage protection laws may be overridden).

Specific information regarding the overriding of sacred site and environmental legislation is contained under separate headings below.

4.2 Land subject to claim under the Land Rights Act

Under the *Land Rights Act* traditional owners have a statutory right of veto regarding proposed development not only in relation to Aboriginal land, but also in relation to land subject to claim. While most claims have been processed, it remains the case that some significant areas have not (eg the Kenbi land claim which has been recommended for grant, but not yet granted; the Alcoota land claim which has been heard, with findings by the Land Commissioner expected in 2006).

Under the amended Bill the consent of a Land Council is only required regarding the nomination of Aboriginal land as a waste facility (a position consistent with the veto). In relation to all other land the NT Chief Minister is responsible for making a nomination.

The result is that the Chief Minister is entitled to nominate land subject to claim as a waste facility, and the Commonwealth Minister may then approve the nomination and make a declaration. This process overrides the veto currently possessed by traditional owners under the *Land Rights Act* regarding land subject to claim.

This result appears inadvertent. In any event this result is inappropriate, especially given that the aim of the amended Bill is to obtain a consensual alternative to the three defence sites without interfering with existing rights.

The result can be remedied by an amendment so that the consent of a Land Council is required regarding the nomination of land subject to claim under the *Land Rights Act.*

4.3 Native title

Under the NTA traditional owners (ie determined native title holders or registered claimants) have a statutory right to negotiate regarding proposed development on land where native title has been judicially determined to exist and on land where a registered claim has been lodged.

Under the amended Bill the consent of a Land Council is only required regarding the nomination of Aboriginal land as a waste facility (a position consistent with the veto). In relation to all other land the NT Chief Minister is responsible for making a nomination.

The result is that the Chief Minister is entitled to nominate land on which native title has been determined to exist, or which is or may be subject to a registered native title claim, as a waste facility, and the Commonwealth Minister may then approve the nomination and make a declaration. This process overrides the statutory right to negotiate currently possessed by traditional owners under the NTA.

This result appears inadvertent. In any event this result is inappropriate, especially given that the aim of the amended Bill is to obtain a consensual alternative to the three defence sites without interfering with existing rights.

The result can be remedied by an amendment so that, in relation to the nomination of land as a waste facility:

- the consent of the native title holders is required where native title has been determined to exist;
- the consent of the registered native title claimants (or alternatively a Land Council) is required where native title may exist.[4]

4.4 Other land - removal of protection against compulsory acquisition

Under Northern Territory (and Australian) law all owners of property are entitled to procedural protection against the acquisition of property pursuant to legislative schemes. The procedural protection includes as to notification, objection, and arbitration by an independent tribunal.

The original Bill contemplates that, if agreement cannot be reached regarding an all-weather transport corridor to a waste facility site (ie one of the three defence sites), the Minister may make a declaration which results in automatic acquisition of a transport corridor without procedural protection.

From the Commonwealth perspective this exception to the ordinary rule is justified on the basis that it is relatively minor and is required to preclude spurious litigation or objection.

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[4] A precedent for this legislative approach is contained in the NTA in relation to Indigenous land use agreements (area agreements) from ss 24CA to 24CL.

However the amended Bill also removes the procedural protection against compulsory acquisition ordinarily enjoyed by property owners (other than in relation to Aboriginal land) in a much more substantial way.

The Chief Minister is entitled to nominate (non-Aboriginal) land, including for example NT freehold owned for horticulture or even residential purposes (or a pastoral lease), as a waste facility. The Commonwealth Minister may then approve the nomination and make a declaration. This process overrides the procedural protection against compulsory acquisition ordinarily enjoyed by property owners.

The fact that the Chief Minister, when making a nomination, must provide evidence of consent from all persons holding interests in the land does not overcome this difficulty.

This result appears inadvertent. In any event this result is unlikely to be accepted by property owners - especially bearing in mind that in relation to Aboriginal land the deficiency does not exist (because a Land Council, being the traditional owners' representative, is responsible for making a nomination rather than the Chief Minister).

The result can be remedied by an amendment so that the sworn written consent of a property owner is required before the Chief Minister may nominate land as a waste facility.

5. Environmental legislation

The Bill overrides NT environmental legislation, including the *Environment Assessment Act*, *Environmental Offences and Penalties Act 1996*, *Nuclear Waste Act*, *Radiation (Safety Control) Act*, *Radioactive Ores and Concentrates (Packaging and Transport) Act*, *Waste Management and Pollution Control Act*, *Planning Act*, and the *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2004*.

Excepting the latter, which is considered separately, these statutes impose a regulatory regime whereby certain activities may only occur on the basis of assessment and a permit or licence from the Minister or other authority.

The NT regulatory regime is essentially covered by comprehensive Commonwealth environmental legislation regarding nuclear waste and transport, namely the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), *Australian Radiation Protection and Nuclear Safety Act 1998*, and the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

The Bill expressly provides that this Commonwealth legislation remains in force regarding the construction and operation of (and transport to) a waste facility. The Commonwealth Minister cannot, by regulation, override these laws.

From the Commonwealth perspective this overriding of Northern Territory environmental laws is justified on the basis that the latter duplicate Commonwealth laws, and is required to preclude the prospect that the NT Government may stymie the establishment of a waste facility by refusing to grant necessary permits or licences.

Commonwealth environmental statutes are however overridden in relation to the process of selecting a site. From the Commonwealth perspective this is justified on the basis that detrimental environmental impacts are unlikely or will be minimal at the selection phase, and to preclude spurious litigation or objection.

The *Nuclear Waste Transport, Storage and Disposal (Prohibition) Act 2004* (NT) requires separate consideration. This statute was enacted in 2004 by the NT Parliament for the purpose of preventing the location of a Commonwealth waste facility in the Northern Territory – ostensibly "to protect the safety, health and welfare of the people of the Territory and the environment in which they live" (s 3).

The statute is not regulatory, rather it prohibits the transport, storage and disposal of specified radioactive waste.

This prohibition is imposed in circumstances where other radioactive waste (not covered by the Act) is already stored in two locations in the Northern Territory (Darwin hospital and near Katherine), a major uranium mine operates at Ranger, and radioactive material is regularly transported by rail, road and ship.

The Act was passed without any consultation with the NLC or traditional owners.

From a Commonwealth perspective it is necessary to override the Act because it prohibits a Commonwealth waste facility in the Northern Territory.

The Bill, by overriding the Act, restores to traditional owners the capacity to consent to a facility on their country should they wish.

6. Sacred site and heritage legislation

The effect of a declaration of a waste facility site under the Bill is that all NT legislation, including the *Northern Territory Aboriginal Sacred Sites Act* is overridden. This is the case notwithstanding that a site nominated under the Bill respectively will or may be with the consent of the traditional owners or property owner, and at the basis of lease conditions which may provide for site protection (as occurred, for example, regarding the Alice Springs to Darwin railway).

There are important differences between the *Sacred Sites Act* and other NT legislation (regarding the environment) which are overridden by the Bill. The former is administered by an independent statutory body, the Aboriginal Areas Protection Authority, in accordance with the position of traditional owners or custodians of sacred sites. The latter is administered by the Minister, whose decisions may involve consideration of additional factors.

In these circumstances the NLC considers that no sound policy basis exists for overriding the *Sacred Sites Act*, particularly regarding sites which may be nominated by a Land Council or the Chief Minister.

The continued application of the *Sacred Sites Act* would not interfere with Commonwealth objectives, and would be positively appreciated by traditional owners when considering whether to consent to a facility.

7. Other points

7.1 Consultations by a Land Council

Proposed clause 3B(1)(g) in the amendment Bill is based on s 19(5) of the *Land Rights Act* which refers to obtaining the consent of the "traditional Aboriginal owners" and consulting with affected communities or groups. Section 19(5) applies specifically regarding the grant of a lease or licence.

However under s 23(3) of the *Land Rights Act* a Land Council must also consult with "other interested Aboriginals", being persons who have traditional interests in Aboriginal land but are not "traditional Aboriginal owners" of that land. Sometimes these other persons will have great authority and influence under Aboriginal tradition in the region, particularly where they are ceremonial elders or sacred site custodians.

This deficiency can be avoided by adopting the wording of s 23(3).

Alternatively, as a matter of drafting, a better course may be:

- simply to rely on the applicability of existing provisions in the *Land Rights Act* without endeavouring to repeat those provisions in the amendment Bill;
- simply referring to the existing provisions (in which regard I note that the amendment Bill is content to simply refer to s 77A in the *Land Rights Act* rather than repeating the wording).

7.2 Clause 16A indemnity

There may be an issue as to whether the proposed indemnity regarding transportation, which presently is proposed to apply only to the Northern Territory, should be extended to the States (and the ACT).

7.3 Express reference to an agreement between the Commonwealth and a property owner

From a drafting perspective it may be appropriate, to avoid doubt, to consider explicitly referring to the fact that a Land Trust or other property owner, by agreement with the Commonwealth, may facilitate a nomination.