

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the Commonwealth Radioactive Waste Management Bill 2005

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Submitter: Jessie Borthwick
Group Manager
Science Group

Organisation: Department of Education, Science and Training

Address: GPO Box 9880
CANBERRA ACT 2601

Phone: 02 6240 8991

Fax:

Email: Jessie.Borthwick@dest.gov.au

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Australian Government

Department of Education, Science and Training

Submission to the Senate Employment, Workplace Relations and
Education Legislation Committee

Inquiry into the
Commonwealth Radioactive Waste Management Bill 2005
and the
Commonwealth Radioactive Waste Management (Related
Amendments) Bill 2005

Science Group
16 Mort Street
GPO Box 9880
CANBERRA ACT 2601

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Introduction

1. The purpose of this submission is to provide information about provisions of the *Commonwealth Radioactive Waste Management Bill 2005* (the Bill) and the *Commonwealth Radioactive Waste Management (Related Amendments) Bill 2005* (the Related Bill) that may be of particular interest to Senators.

Background

2. Australia produces two types of radioactive waste, low level radioactive waste and intermediate level radioactive waste. Australia does not generate any high level waste. High level waste is produced by nuclear power reactors.

3. On 14 July 2004, the Prime Minister announced that the Australian Government will construct co-located facilities on Commonwealth land for the management of low and intermediate level radioactive waste produced by Australian Government agencies.

4. Each State and Territory is responsible for the management of radioactive waste generated by government agencies, individuals and organisations within their jurisdiction.

5. On July 15 2005 the Minister for Education, Science and Training, the Hon Dr Brendan Nelson MP, announced three potential locations to be investigated for a Commonwealth radioactive waste management facility. The three locations are Department of Defence properties located near Katherine and Alice Springs in the Northern Territory.

Overview of the Bills

6. The purpose of the Bill is to ensure that the Commonwealth has power to do all things necessary for the selection of a site for, and the establishment and operation of, a radioactive waste management facility, and to transport radioactive material to a site. The facility cannot be used to manage high level radioactive waste or spent nuclear fuel.

7. The Bill specifies three sites owned by the Commonwealth to undergo site investigations, and also provides a process to allow for the nomination of further sites by the Chief Minister of the Northern Territory or an Aboriginal Land Council. The Minister may approve a nominated site to undergo site investigations.

8. Clause 5 of the Bill excludes State and Territory laws from operating where they would "regulate, hinder or prevent" investigation activities allowed under Clause 4 in relation to the sites.

9. Clause 5(4) of the Bill provides that the regulations may prescribe a State or Territory law, or a provision of a law, that is to have effect despite anything in Clause 5. This allows the Commonwealth to limit the exclusions above, in an appropriate case.

10. Clause 6 of the Bill 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” actions taken to conduct investigation works associated with the sites, which are allowed under Clause 4. There is also a power to exclude by regulation other Commonwealth laws, or provisions of laws.

11. The Bill provides that the Minister has the power to declare, at his or her absolute discretion, one, or a specified part of one, of the sites under investigation, as the place where a facility may be established and operated. The Bill also provides that the Minister may declare that land is required to provide for all-weather road access to the selected site or selected part of a site.

12. If the Minister declares one of three sites already identified in the Bill, or a specified part of one of those sites, as the site for a facility, Clause 9 of the Bill effects the acquisition or extinguishment of any rights and interests in the site, or part of the site, that the Commonwealth has not already acquired or extinguished (if any), and provides for any affected parties to be compensated. If the Minister declares an alternative site (that has been nominated by the Chief Minister of the Northern Territory or an Aboriginal Land Council and approved as a site by the Minister) the Bill effects the acquisition or extinguishment of the rights and interests specified in the declaration, and provides for any affected parties to be compensated. The Bill also effects the acquisition or extinguishment of specified rights or interests in any land declared by the Minister as required for all-weather road access to the selected site, or part of the selected site, and provides for any affected parties to be compensated.

13. Clause 10 of the Bill provides that the acquisition or extinguishment provided for has effect despite any law of the Commonwealth or Northern Territory, including the *Lands Acquisition Act 1989* and the *Native Title Act 1993*.

14. Clause 13 of the Bill excludes State and Territory laws from operating where they would “regulate, hinder or prevent” activities in relation to, among other things, the preparation, construction and operation of a facility allowed under Clause 12.

15. Clauses 13(5) of the Bill provides that the regulations may prescribe a State or Territory law, or a provision of a law, that is to have effect despite anything in Clause 13. This allows the Commonwealth to limit the exclusions above, in an appropriate case.

16. 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.

17. The Bill provides that the Commonwealth must indemnify the Northern Territory against any action, claim or demand brought or made against the Northern Territory in certain circumstances in relation to the transport of controlled material to or from, or the management of controlled material at, the facility on the selected site. The amount of the indemnity is reduced to the extent to which any fault of the Northern Territory, its employees, agents or contractors contributed to the liability or damage.

18. The Bill provides that the Commonwealth must not charge the Northern Territory for management of controlled material generated by activities in the Northern Territory.

19. The Related Bill provides that decisions of the Minister to approve nominated land, to declare land as a site for a facility, and to declare land to provide all-weather road access to a site, are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* applies.

20. The Commonwealth has constitutional power to implement the measures covered in the Bills.

Justification for Overriding State and Territory Legislation

21. The Commonwealth and its agencies use radioactive materials for a wide range of purposes associated with Commonwealth functions and the functions for which the agencies were established. These agencies include the Australian Nuclear Science and Technology Organisation, the Commonwealth Scientific and Industrial Research Organisation, and the Department of Defence and the Defence Services. The use of radioactive materials for these purposes necessarily, and lawfully, creates radioactive waste products. The Commonwealth must be in a position where it can responsibly and effectively manage radioactive waste.

22. A number of existing State and Territory laws purport to prohibit or regulate the things the Commonwealth may do to select a site for, and establish and operate a facility, or to transport radioactive material to a site. State and Territory parliaments may introduce further legislation purporting to prohibit or regulate the Commonwealth doing these things.

23. As outlined above, notwithstanding any State or Territory legislation, the Bill provides the Commonwealth with the express authority to do anything necessary for, or incidental to, the selection of a site for, and the establishment and operation of, a Commonwealth radioactive waste management facility, and to transport radioactive material to a site. Provisions overriding State and Territory laws are not uncommon in Commonwealth legislation. Examples of similar provisions are provided at Attachment A.

24. Specific legislation to enable the Commonwealth to responsibly and effectively manage the waste is 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 to such a facility. Further, the Northern Territory Government has made it clear it will do everything possible to halt or frustrate the Commonwealth's actions.

Disapplication of Commonwealth Environmental and Heritage Legislation During the Site Investigations

25. The activities to be conducted during the site investigation phase of the project are purely investigative in nature and are aimed at providing the data necessary for informed decision making about the suitability of sites for a facility, and to allow the preparation of designs for a facility that will take account of site specific characteristics. The most intrusive activities currently envisaged would be drilling bore holes, for example, in order to characterise the geology of the sites.

26. 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. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999* will not apply to the site investigation phase of the project. The Government considers that these Acts, were they not disapplied, would offer an opportunity for persons to unreasonably interfere with the site selection process.

27. There are currently no known significant environmental or heritage issues that would have required action under Commonwealth environment and heritage legislation were the relevant Acts not disapplied.

28. Nevertheless, the Minister may consult informally with the Minister for the Environment and Heritage should any significant environmental issues arise during the site investigations.

Procedural Fairness and Judicial Review

29. The Bill provides that procedural fairness does not have to be accorded to any person in relation to the Minister's decisions to declare a site for the facility, or to declare that land is required for all-weather road access to a site, or to approve a nomination of an alternative site. Also, as outlined above, the Related Bill provides that judicial review under the *Administrative Decisions (Judicial Review) Act 1977* will not be available in relation to those decisions.

30. These measures have been taken in order 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 construction of a national low level repository in South Australia.

Declarations are not legislative instruments

31. 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 a law. Thus, the provision in Clause 7(7) of the Bill, which provides that a declaration is not a legislative instrument, is included for guidance and assistance only, and does not imply that, without that provision, the declaration would be a legislative instrument. This is explained further in the Explanatory Memorandum accompanying the Bill.

Examples of Commonwealth Legislation Overriding State and Territory Legislation

Australian Radiation Protection and Nuclear Safety Act 1998, Section 83

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.

Australian Radiation Protection and Nuclear Safety Regulations 1998

Schedule 6 Non-applicable State and Territory laws

(regulation 65A)

1. *Radiation Control Act 1990* (NSW).
2. *Health Act 1958* (Vic), Part 5, Division 2AA.
3. *Radiation Safety Act 1999* (Qld).
4. *Radiation Safety Act 1975* (WA).
5. *Radiation Protection and Control Act 1982* (SA).
6. *Radiation Control Act 1977* (Tas).
7. *Radiation Act 1983* (ACT).
8. *Radiation (Safety Control) Act* (NT).

Australian Nuclear Science and Technology Organisation Act 1987

7A Immunity of Organisation etc. from certain State and Territory laws

- (1) Subject to subsection (4), a law to which this section applies does not apply, and is taken never to have applied, in relation to:
 - (a) the Organisation; or
 - (b) the Organisation's property or transactions; or
 - (c) anything done by or on behalf of the Organisation.
- (2) Subject to subsections (4) and (5), at all times during which the Organisation holds, or has held, a controlling interest in a particular company, a law to which this section applies does not apply, or is taken not to have applied, as the case requires, in relation to:
 - (a) the company; or
 - (b) the company's property or transactions; or
 - (c) anything done by or on behalf of the company.
- (3) This section applies to a law of a State or Territory so far as the law relates to:
 - (a) the use or proposed use of land or premises; or
 - (b) the environmental consequences of the use of land or premises; or
 - (c) radioactive materials or dangerous goods; or
 - (d) licensing in relation to:
 - (i) employment; or
 - (ii) carrying on a particular kind of business or undertaking; or
 - (iii) conducting a particular kind of operation.

- (4) This section does not apply to a law of a kind referred to in subsection (3) if the law is specified in regulations made for the purposes of this subsection.
- (5) Subsection (2) does not apply in relation to any property or transaction of a company of a kind referred to in that subsection, or to anything done by such a company, if the property, transaction or thing is wholly unconnected with any matter that is within the scope of the Organisation's functions or powers.
- (6) Nothing in this section implies that a law to which this section does not apply, applies in relation to:
 - (a) the Organisation; or
 - (b) the property or transactions of the Organisation; or
 - (c) any act or thing done by or on behalf of the Organisation.
- (7) In this section:

law means a written law, and includes:

 - (a) subordinate legislation; and
 - (b) a provision of a law.