

# Submission

to

Senate Employment, Workplace Relations and Education  
Legislation Committee

## **Inquiry into the Commonwealth Radioactive Waste Management Bill 2005**

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**Submission no:** 212

**Received:** 21/11/05

**Submitter:** Ms Jillian Segal AM  
President

**Organisation:** Administrative Review Council

**Address:** Robert Garran Offices  
National Circuit  
BARTON ACT 2600

**Phone:** 02 6250 5801

**Fax:**

**Email:** Margaret.harrison-Smith@ag.gov.au

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## ADMINISTRATIVE REVIEW COUNCIL

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21 November 2005

Committee Secretary  
Senate Employment, Workplace Relations and Education Committee  
Department of the Senate  
Parliament House  
CANBERRA ACT 2600  
Fax: 6277 3521  
Email: [eet.sen@aph.gov.au](mailto:eet.sen@aph.gov.au)

Dear Sir/Madam

The Administrative Review Council welcomes the opportunity to provide a submission to the Senate Employment, Workplace Relations and Education Legislation Committee's Inquiry into the Commonwealth Radioactive Waste Management Bill 2005 (the Bill) and the Commonwealth Radioactive Waste Management (Related Amendment) Bill 2005 (the Related Amendment Bill).

I trust that our comments are of assistance to the Committee.

Should you wish to discuss further any of the issues raised in the course of this letter, please do not hesitate to contact the Council's Executive Director, Margaret Harrison-Smith on telephone (02) 6250 5801 or by email at [margaret.harrison-smith@ag.gov.au](mailto:margaret.harrison-smith@ag.gov.au).

Yours sincerely

*Jillian Segal*

Jillian Segal AM  
President

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Jillian Segal AM  
Professor John McMillan  
Peter Anderson  
Robert Cornall  
Stephen Gageler SC  
Andrew Metcalfe  
Major General Paul Stevens AO (rtd)

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Justice Garry Downes AM  
Professor David Weisbrot  
Ian Carnell  
Professor Robin Creyke  
Richard Humphry AO  
Melanie Sloss SC  
Sue Vardon AO

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## **Inquiry into the Commonwealth Radioactive Waste Management Bill 2005**

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**Submitter:** Jillian Segal AM, President

**Organisation:** Administrative Review Council

**Address:** Robert Garran Offices  
National Circuit  
BARTON ACT 2600

**Phone:** (02) 6250 5800

**Fax:** (02) 6250 5980

**Email:** [arc.can@ag.gov.au](mailto:arc.can@ag.gov.au)

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The Council is a statutory body, established under Part V of the *Administrative Appeals Tribunal Act 1975* to advise the Commonwealth Attorney-General on a broad range of matters relating to the Commonwealth system of administrative law.

In view of its statutory function, there are two elements of the Bills that are of particular interest to the Council:

1. The proposal to amend the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) to ensure that decisions made under the Bill are not subject to ADJR Act judicial review;
2. Clause 3D and 8 of the Bill which state that no person is entitled to procedural fairness in relation to the Minister's approval or a declaration of a site.

### **Overview of comments**

The Council's comments may be summarised as follows:

1. As a general principle judicial review under the ADJR Act should only be excluded in very limited circumstances.
2. Rather than excluding procedural fairness entirely, consideration should be given to extending limited procedural fairness to parties with a specified interest in the decision.
3. Consideration should be given to providing for compulsory mediation where agreement cannot be reached on compensation prior to the institution of Federal Court proceedings.

### **Background**

Three potential sites for the establishment and operation of a radioactive waste management facility are identified in the Bill. The Bill provides that the Minister may declare one, or a specified part of one of the specified sites, as the place selected for a facility for the management of certain radioactive waste materials (s.7).

Alternatively the Minister may approve another site if that site was nominated by the Chief Minister of the Northern Territory or the Land Council, as a potential site (Part 1A). If a site so nominated is approved, the Minister can then choose between the three sites specified in the Bill and the site nominated and declare one of those sites, or part of one of those sites, as a site for a facility.

The effect of such a declaration is to acquire or extinguish all interests in the site, or part of the site, chosen for a facility that the Commonwealth has not already acquired or extinguished (s.9). The Bill provides for any affected party to be compensated (s.15 and s.16). After a site has been selected by the Minister the Commonwealth regulatory processes under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Australian Radiation Protection and Nuclear Safety Act 1998*, and the *Nuclear Non-Proliferation (Safeguards) Act 1987* must be complied with before a facility can actually be constructed on the site.

### **The Council's comments**

The Bill provides at subclause 7(1) that 'the Minister may, in his absolute discretion, declare in writing that one, or a specified part of one of the sites is selected as the site for a facility.' This provides the Minister with a very broad discretionary decision-making power. There are no explicit statutory limits on the Minister's exercise of this power.

While the regulatory processes under the Commonwealth legislation specified above must be complied with before any radioactive waste management facility is constructed on the site, the declaration has the immediate effect of acquiring or extinguishing all rights and interests in the land. The declaration by the Minister may therefore have a substantial effect on a person's rights and interest.<sup>1</sup>

#### *ADJR Act review*

Broadly stated, the Council's position is that where, as here, a decision has or may have a substantial impact on a person's rights and interests, judicial review should generally be available to ensure that the decision is made lawfully.

The Council notes that while the Related Amendment Bill proposes to exclude the Minister's decisions from ADJR Act judicial review, it does not, and cannot, exclude the jurisdiction of the High Court to review the Ministers decisions under s 75(v) of the Constitution. The Bills also do not purport to exclude judicial review under s.39B(1) of the *Judiciary Act 1903*.

However, the Council also notes that judicial review under the ADJR Act for such decisions would be potentially wider than that under the Constitution or the *Judiciary Act 1903* which generally require that an affected party is able to show that the exercise of power amounts to a jurisdictional error, that is, that the decision maker has exceeded the authority or power conferred on them. The grounds of review specified in the ADJR Act cast a broader net than those concerned with excess of jurisdiction.

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<sup>1</sup> It is noted however, that, as stated in the Second Reading Speech, each of the three sites specified are currently Department of Defence sites owned by the Commonwealth.

As the Bill provides the Minister with a very broad decision-making power the Council considers that it would be difficult for an affected party to show that any decision was infected by jurisdictional error. The grounds of review open to the aggrieved person on that basis may only include that the Minister exercised the power for an improper purpose, that the Minister took into account irrelevant considerations, or that the Minister decision was so unreasonable that no reasonable decision maker could have made it.

The Council notes that as the Bill provides that declarations by the Minister are not legislative instruments for the purposes of the *Legislative Instruments Act 2003* a further avenue of accountability is also unavailable (s 7(7)).

The Council notes however, that the Bill provides for the provision of reasonable compensation to those persons whose rights and interests in their land are affected. The Council notes also that the Bill provides for such persons to institute proceedings in the Federal Court to determine reasonable compensation if the Commonwealth and the person are unable to agree on the amount.

Although as a general principle the Council considers that judicial review under the ADJR Act should only be excluded in very limited circumstances, in the time available, it has not been possible for the Council to consult on the proposed exclusion in this Bill.

The Council notes that it is currently finalising a report to the Attorney-General on the scope of judicial review which it hopes will be of assistance in future in the consideration of this sort of issue. The report is expected to be available in the first quarter of next year.

#### *Removal of entitlement to procedural fairness*

The Council is concerned that the purported removal of any entitlement to procedural fairness in relation to the Ministers decisions to authorise a nominated site, or to declare a site as the site for a facility, limits the ability of affected persons to apply for judicial review of the Ministers decision, and limits that ability of affected persons to have any input into the Minister's decision.

The Council considers that the rule of law and the provision of remedies for rectifying unlawful government action or inaction is a paramount value in Australian society and under the Australian Constitution. A strong justification is needed to reduce the scope of judicial review by removing the requirement to afford procedural fairness to those persons who are directly affected by administrative decision making.

There is also an unresolved question as to whether Parliament can enact a law that purports to remove one or more of the grounds of review commonly

associated with the issue of a constitutional writ on the basis of s 75(v) of the Constitution.

The Council suggests that consideration be given to an amendment to the Bill so that procedural fairness is not excluded entirely. The Bill could instead set out a procedure for limited consultation of directly affected parties before the Minister may make any declaration under s.7. Given that the Minister has indicated in the second reading speech that the potential sites are all currently defence sites owned by the Commonwealth, it is unlikely that allowing for such consultation would significantly hinder the Minister's decision making process.

The Council notes that a procedure for compensating persons whose interests or rights in land are acquired or extinguished by virtue of the Minister's declaration has been included in the Bill. However, in the Council's view this is not an appropriate alternative to providing procedural fairness and judicial review to persons whose rights and interests are affected by the decision, as it does not allow for review of the legality of the decision and does not provide the capacity to reverse or modify an unlawful decision.

#### *Compensation*

The Council also suggests that consideration should be given to amending ss 15 and 16 of the Bill to include a specific requirement for the Commonwealth and the person affected to attempt to agree to reasonable compensation, and could provide for compulsory mediation in relation to the amount of reasonable compensation if agreement can not be reached. This is because it may be expensive and impractical for an individual to institute Federal Court proceedings in order to have a reasonable amount for compensation set at the first instance. The Bill could provide that if the parties fail to reach agreement through the mediation, the person affected may then institute Federal Court proceedings.