

# Submission

to

Senate Employment, Workplace Relations and Education Committee

## **Inquiry into the Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006**

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**Australian Government**

**Department of Education, Science and Training**

Submission to the Senate Employment, Workplace Relations and  
Education Committee

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Commonwealth Radioactive Waste Management Legislation Amendment  
Bill 2006

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## **Introduction**

The purpose of this submission is to provide information about provisions of the *Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006* ('the Bill') that may be of particular interest to Senators.

## **Background**

The Bill amends the *Commonwealth Radioactive Waste Management Act 2005* ('the Act'). The Act received Royal Assent on 14 December 2005.

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

On 15 July 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 (now specified in Schedule 1 of the Act) are Department of Defence properties located near Katherine and Alice Springs in the Northern Territory. Part 1A was also included in the Act to enable the nomination of an alternative site.

## **Provisions of the Act relevant to the Bill**

Section 3 of the Act defines 'site' as:

- a site specified in Schedule 1 (that is, the Defence properties at Mt Everard, Harts Range and Fishers Ridge); or
- a site approved by the Minister under Part 1A (that is, a nominated site).

Part 1A allows a Land Council<sup>1</sup> to nominate Aboriginal land within its area or the Northern Territory Chief Minister to nominate land in the Northern Territory other than Aboriginal land as a potential site for a radioactive waste management facility. The Part sets out rules for nominations and provides that the Minister may, at his or her absolute discretion, approve nominated land as a site.

Subsection 7(1) of the Act confers a discretionary power on the Minister to declare that one, or a specified part of one, site is selected as the site for a facility. The Act provides that only one/part of one site may ever be selected as a site. If the site is a Schedule 1 site, all rights and interests not already owned by the Commonwealth, or extinguished, are acquired by the Commonwealth, or extinguished, and are freed and discharged from all other rights and interests etc. (subsection 9(1)). If the site is a nominated site, the rights and interests specified in the Minister's declaration are acquired by the Commonwealth, or extinguished, and are freed and discharged from all other rights and interests etc. (subsection 9(2)).

Subsection 7(2) confers a discretionary power on the Minister to declare in writing that all or specified rights or interests in land are necessary to provide road access to the selected site (or the selected part of the site). The rights and interests specified

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<sup>1</sup> Within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

in the declaration are acquired by the Commonwealth, or extinguished, and freed and discharged from all other rights and interests etc. (subsection 9(3)).

Part 4 of the Act explicitly confers power on the Commonwealth to, among other things, construct and operate a radioactive waste management facility at the selected site.

### **Overview of the Bill**

The Bill has two purposes:

1. To provide for the return of nominated Aboriginal land to a Land Trust or its successors from which it was acquired if such land is nominated and selected as the site for the facility, when that land is no longer required for the facility. It also provides for the return of rights and interests in Aboriginal land that were acquired for providing all-weather access to the site for the facility;
2. To remove doubt that certain rights to procedural fairness and/or judicial review relating to the nomination process are excluded, so as to ensure that there is consistency throughout the Act and also to prevent politically motivated challenges to nominations.

### **Return of land to traditional owners**

Clause 6 of the Bill inserts a new Part 4A in the Act, the purpose of which is to provide for the return of nominated Aboriginal land to the Land Trust from which it was acquired, should such land be selected as the site for the facility.

Part 1A of the Act that allows land to be nominated as a potential site for a facility has been supported by the Northern Land Council (NLC). Since introduction of the Act in 2005, discussions with the NLC have shown there is interest amongst Aboriginal groups within its area in nominating land.<sup>2</sup> The NLC has indicated that these groups do not wish to permanently give up their freehold title granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* ('ALRA').

Proposed Part 4A will apply when the following conditions are satisfied:

- as a result of a subsection 7(1) declaration, the Commonwealth acquired, under subsection 9(2), a freehold interest in the relevant land;
- the land was Aboriginal land immediately before that declaration;
- a facility on the land has been abandoned in accordance with the *Australian Radiation Protection and Nuclear Safety Act 1998* ('ARPANS Act');<sup>3</sup> and
- the Commonwealth holds a freehold interest in the land (proposed subsection 14A(1)).

Proposed Part 4A also applies when the following conditions are satisfied:

- as a result of a subsection 7(2) declaration, the Commonwealth acquired, under subsection 9(3), rights or interests in the relevant land;

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<sup>2</sup> The NLC has requested that, where DEST is aware of the identity of these groups, their identity be kept confidential. If a nomination is made, and the nomination is accepted by the Minister, the Minister must publicise this acceptance in the *Gazette*.

<sup>3</sup> 'Abandoning' a facility means releasing it from regulatory control.

- all or part of the land was Aboriginal land immediately before that declaration
- the facility mentioned in proposed subsection 14A(1) has been abandoned in accordance with the ARPANS Act; and
- the Commonwealth holds all or some of those rights or interests in the relevant land (proposed subsection 14A(2)).

The Commonwealth may not have obtained a freehold interest in land the subject of a subsection 7(2) declaration. For example, the Minister may decide that it is sufficient to only specify that an easement is required for providing all-weather road access to the selected site.

Proposed Part 4A does not apply in respect of land that was not Aboriginal land immediately before a subsection 7(1) or 7(2) declaration. Aboriginal land is a special land title granted under ALRA. Explicit legislative provisions are necessary to ensure that any land that is returned will have the same status as land originally granted under ALRA. The Commonwealth may deal with post-facility issues for non-Aboriginal land under existing provisions of the *Lands Acquisition Act 1989*.

Proposed section 14B allows the Minister to make a declaration stating that a nominated site (or a specified part of a nominated site) is no longer required for the facility, and stating that the Minister intends to make a declaration under proposed section 14C to return the land to the Land Trust specified in the declaration.

A Land Trust may only be specified if it held title to the land immediately before the subsection 7(1) or (2) declaration (as the case may be) took effect, or if it has succeeded to the functions of the Land Trust that held that title at that time. All of the land must be the subject of the Minister's declaration, although different Land Trusts may be specified in respect of different parts of the land, and only one Land Trust may be specified in respect of one specified part of the land.

The declaration must be published in the *Gazette* and the Minister must notify a specified Land Trust in writing that the Minister intends to make a declaration under proposed section 14C. A proposed section 14B declaration is not valid unless these actions occur; this is to ensure the Land Trust is aware of the proposed return of land and is able to consent to the return.

Proposed sections 14C and 14D effect the return of land. A declaration may be made under either proposed subsection 14C(1) or 14C(2). A declaration under 14C(1) applies to land in which the Commonwealth acquired a freehold interest, whether under a subsection 7(1) or 7(2) declaration. A subsection 14C(2) declaration applies to land in which the Commonwealth did not acquire a freehold interest.

Section 14C(1) requires the Minister to make a declaration granting freehold interests in specified land to a specified Land Trust if the Commonwealth holds the freehold interests and the Land Trust has consented to the grant. Section 14C(2) requires the Minister to make a declaration granting rights and interests specified in proposed subsection 14D(3) in specified land to a specified Land Trust if the Commonwealth holds rights and interests (other than the freehold rights and interests) in the land and the Land Trust has consented to the grant.

Where a declaration is made under subsection 14C(1), freehold title in the specified land is granted to the Land Trust(s) and the land is taken, for all purposes, to be

Aboriginal land as if it had been granted under the ALRA. This Aboriginal freehold title is subject to the same reservations as applied by subsection 12(2) of the ALRA.

Where a declaration is made under subsection 14C(2), the rights and interests acquired from the Land Trust(s) and held by the Commonwealth are granted to the Land Trust(s) that originally held title to the land. Freehold title in this land is not returned if it was not acquired by the Commonwealth. It is likely that this land will have remained Aboriginal land.

### **Indemnity**

Proposed section 14H indemnifies the Land Trust(s) to whom land has been granted against any claims for damages arising from the prior construction, operation, decommissioning and closure of the facility. It is identical in effect to the indemnity granted to the Northern Territory under section 16A.

### **Regulation making power**

Clause 6 of the Bill also inserts a new section 14J in the Act to allow regulations to be made that may “prescribe any modifications of the Act that are necessary or convenient to deal with transitional matters arising from the making of a declaration under section 14B or 14C.”

Given that such matters will only arise a long time in the future, it is not possible to predict now exactly what provisions will be required then.

Any amendments to ALRA may affect the operation of proposed sections 14B and 14C. It is assumed that consequential amendments to the Act would be made at the time of any relevant amendments to ALRA.

### **Procedural fairness and judicial review**

Clause 1 of Schedule 1 to the Bill adds a site nomination under section 3A of the Act to the classes of decisions to which the *Administrative Decisions (Judicial Review) Act 1977* does not apply.

Clause 4 amends section 3D to provide that no person is entitled to procedural fairness in relation to a site nomination under section 3A.

Clauses 3 and 5 insert provisions in the Act to provide that failure to comply with subsection 3B(1) (the site nomination rules) does not affect the validity of a nomination or the Minister’s subsequent declaration of a nominated site.

These provisions will apply equally to land nominated by either a Land Council or the Chief Minister.

The Minister has given a commitment in Parliament that she will not accept a nomination unless she is satisfied that the site nomination rules have been followed.<sup>4</sup> The Minister also stated the importance of informing the traditional owners whose land has been nominated of the nature of the facility, and obtaining

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<sup>4</sup> House of Representatives *Proof Hansard*, 2/11/2006, p.1.

their consent to the nomination, as well as the importance of consulting Aboriginal communities with an interest in the land.

These measures have been included to ensure that:

- technical breaches of the site nomination rules do not affect a nomination or the acceptance of a nomination or a subsequent declaration in respect of a nominated site;
- politically motivated challenges to a nomination do not delay the acceptance of an otherwise acceptable nomination and the subsequent inclusion of a nominated site in the technical evaluation programme.

A technical breach may occur, for example, where a nomination inadvertently failed to mention a minor interest in the land as required under paragraph 3B(1)(d). Such minor interests might be in relation to, for example, rights of way. As DEST would make its own land title checks upon receipt of a nomination, this would not impact on DEST's consideration of the nomination and subsequent advice to the Minister. It is highly possible, however, that such a minor breach would be used by opponents of the facility to challenge the validity of the nomination, and any subsequent decisions by the Minister.

Of more concern to the Government is the mounting of a spurious challenge to the consultation processes required under subparagraph 3B(1)(g)(iv) or paragraph 3B(1B)(d). Such a challenge may occur when a person or a group with no genuine interest in the land, but opposed to the facility, claims not to have been consulted by the Land Council.

While DEST is confident that a Land Council would properly perform the necessary consultation functions under those provisions so that a court would ultimately reject such challenges, they have the potential to delay acceptance of a nomination with the flow-on effect that the overall facility project is delayed or the nominated site is not considered at all.

### **Declarations are not legislative instruments**

The Government does not believe that declarations by the Minister under proposed subsections 14B(1), 14C(1) or 14C(2) fall within the definition of "legislative instrument" in section 5 of the *Legislative Instruments Act 2003* as none of these declarations would constitute an "instrument of a legislative character". Such declarations by the Minister will apply the law in particular cases rather than determine the law or alter the content of a law. Thus, the provisions in proposed subsections 14B(8) and 14C(4), which provide that declarations under proposed subsections 14B(1) and 14C(1) and (2) are not a legislative instruments, are included for guidance and assistance only, and do not imply that, without that provision, the declaration would be a legislative instrument. This is explained further in the Explanatory Memorandum accompanying the Bill.