The Environment Centre of the NT – Since 1983

A submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the

Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006

Environment Centre of the Northern Territory
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Background

The Howard governments attempts to impose a radioactive waste facility on the NT have seen planning and processes which lack scientific, procedural and community credibility and consent, conflict with international best practice and directly undermine indigenous decision making and rights.

Before the 2004 federal election the Howard government gave an "absolute categorical assurance" that a radioactive waste dump would not be sited in the NT. In December 2005, despite opposition from the Northern Territory Government, Territory residents and traditional owners, the Commonwealth Radioactive Waste Management Act (CRWMA) was passed, overriding NT legislation and effectively forcing a Commonwealth radioactive waste facility on the Territory. Three Commonwealth Department of Defence sites were then earmarked for assessment for suitability to host the facilility.

The selection of these sites had nothing to do with objective, scientific assessment. None of the sites under consideration was short-listed when scientific and environmental criteria were used by the federal Bureau of Resource Sciences to assess alternative sites around in Australia for a repository for low-level waste and short-lived intermediate-level waste in the 1990s.

The Commonwealth Radioactive Waste Management Act 2005 (CRWMA) undermines environmental, public safety and Aboriginal heritage protections. It prevents the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 from having effect during site investigation and excludes the operation of the Native Title Act 1993.

An amendment to the CRWMA was also passed at this time, allowing for land to be nominated for assessment by the Chief Minister or a Land Council. This amendment included provisions that the process of nomination by a Land Council demonstrated evidence of:

- consultation with traditional owners
- that the traditional owners understand the nomination
- that they have consented as a group
- that any community or group that may be affected has been consulted and had adequate opportunity to express its view

Now the federal government has moved to further remove Indigenous community rights with a series of amendments to the CRWMA. These seek to remove the need for community consultation, informed traditional owner consent, procedural fairness and administrative review from any potential dump site that might be nominated by an NT Land Council, particularly the Northern Land Council.

Land Nomination

Less than one year after the CRWMA was passed, the Government is attempting to further weaken community input into radioactive waste management, with proposed amendments clearly stating that if the above conditions are not met this **does not affect the validity of a nomination.** The implications of this are extraordinary, as it reduces the former rules of nomination to guidelines, allowing Land Councils to nominate land for a Commonwealth dump irrespective of traditional owners' opposition and concerns, contrary to their usual, statutory obligations under the Land Rights Act.

This is a profound change to the intention of the current legislation as it reduces the status of the current requirements for a nomination to a set of voluntary guidelines. This approach would allow a Land Council to nominate land for a Commonwealth dump without the need for community consultation and the informed consent of traditional owners. Such an approach would be inconsistent with both international best practise in relation to the management of radioactive waste and the statutory obligations of a Land Council under the Land Rights Act.

This amendment removes the right for traditional owners to decide what activities occur on their homelands. Many groups have been involved in long and complicated processes to have their land returned, a fact acknowledged by the Minister in the second reading speech. It is shameful that this legislation would immediately remove these long fought for rights.

It is significant to explicitly note the implications for these amendments to the landmark Aboriginal Land Rights (NT) Act, which describes the functions of Land Councils. This Act requires Land Councils to act on behalf of Traditional Owners, however the CRWM Amendment Bill denies all parties procedural fairness and administrative review in relation to the nomination of Aboriginal land as the site for a nuclear dump.

Indeed, the CRWM Amendment Bill explicitly states that failure to meet the statutory obligations that exist under the current ALR Act would not affect the validity of any site nomination.

Land Councils obligations to consult under the ALRA are clear:

> Part III – 23.(1)(c) to consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land;
> Part III – 23.(3) In carrying out its functions with respect to any Aboriginal land in its area, a Land Council shall have regard to the interests of, and shall consult with, the traditional Aboriginal owners (if any) of the land and any other Aboriginals interested in the land and, in particular, shall not take any action, including, but not limited to, the giving of consent or the withholding of consent, in any matter in connexion with land held by a Land Trust , unless the Land Council is satisfied that:
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> (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it and (b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view to the Land Council .

Clearly section 3B (1)(g) of the CRWM (2005) Act was intended to reinforce these rights already present in the NT Land Rights Act.

The new provisions in the CRWM Amendment (2006) Bill which specify that failure to comply with 3B(1) would not invalidate a nomination by a Land Council - or declaration by the Minister - just as clearly are intended to revoke Traditional Owners existing rights.

It is extraordinary and profoundly shameful that in a matter as controversial and contested as the siting of a nuclear waste dump such long held and procedurally proper processes are being circumvented.

This approach is also in conflict with the NLC Full Council resolution of October 2005 which provided a mandate for the NLC's further dialogue on this issue:

"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
(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 traditional owners' consent)."

The current amendments before the Parliament directly negate this conditional approval.

Procedural fairness

Under section 3D of the CRWMA, "no person is entitled to procedural fairness in relation to the Minister's approval of nomination". The proposed amendment extends this provision to include the nomination process for waste dump sites, thus preventing any legal claims and challenges from traditional owners or other interested parties. The Amendments also apply to the Administrative Decisions (Judicial Review) Act 1977, for the Minister's stated purpose of "preventing politically motivated challenges to a land council nomination". Placing this process outside of the ambit of judicial review is demonstrative of the bullying tactics being employed by the Federal Government to secure a site for its radioactive waste by any means possible, with blatant disregard for the opinions of affected communities.

It is arguable that the provisions removing a right to judicial review of a decision by a Commonwealth officer, including a Minister, is unconstitutional. Legislative clauses which attempt to exclude all judicial review of certain decisions (privative clauses) appear to contradict the rule of law, an assumption lying behind the Constitution which seeks to ensure that decision-makers are accountable for their actions and act within the the limits imposed by the Constitution and statutes. There is an inherant difficulty in dealing with legislation setting out the rules by which officials must act, yet also containing a provision excluding all review of such actions. In the Commonwealth context, there is a struggle between the stated intention of parliament and the entrenched jurisdiction of the High Court to review actions of Commonwealth officers, given in s75(v) of the Constitution. This section provides that the High Court shall have original jurisdiction in all matters "in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

Recent attempts by the Howard Government to insert privative clauses into the Migration Act, for example, have been disapproved by the High Court, with the court finding that such clauses can only be given the narrowest of readings to remain valid, essentially making the privative clause useless (see *Plaintiff s157 of 2002 v The Commonwealth* (2003) 199 ALR 24).

Return of nominated land

The stated purpose of the bill is to allow for the eventual return of nominated land if the Commonwealth radioactive waste facility was built there as a result of the nomination. Given that there is no plan for the storage of Commonwealth waste beyond the "temporary" site being proposed, and that the return of land would be at the discretion or ARPANSA, the relevant Minister and the land council that nominated the site, there is no guarantee that land acquired for the facility would ever be returned. Further, given the nature of the facility being proposed, there is question as to what condition the land would be in. The Minister states in her speech for the second reading of the Bill that the Commonwealth "will not be returning a dirty or polluted site". This essentially means that if there is contamination of the environment

from the facility, the land will remain under the regulatory control of ARPANSA (Australian Radiation Protection and Nuclear Safety Agency) and will not be released back to traditional owners. As the dump will be used for storage of long lived isotopes, it will likely the site will never be completely decontaminated.

While the principle of returning land acquired for a nuclear dump to Traditional Owners seems to be generally agreeable, the processes outlined in the Bill once again describe something being done to, rather than with, Traditional Owners. Experience with the contaminated site at Maralinga show that Traditional Owners need to have a say in whether they believe a contaminated site is in an appropriate condition to be relinquished by the Commonwealth. Otherwise we risk a situation where regulators can seek to wash their hands of unresolved issues which they must bear responsibility for. On these grounds alone, the current framework for return of the site must be rejected.

The importance of community consent

The current federal government approach to radioactive waste management in general – and these amendments in particular – is clearly inconsistent with best industry practise and standards.

There is a growing international consensus within the UN's International Atomic Energy Agency (IAEA) and other bodies over the importance of non-radiological factors and issues and transparent and inclusive community consultation processes. An effective and credible national radioactive waste management framework requires a high degree of community confidence and license, as the IAEA states:

Recent experience suggests that broad public acceptance will enhance the likelihood of project approval. An important element in creating public acceptance is the perceived trust and credibility of the responsible organisation and the reviewing agency or agencies.

Establishing trust can be enhanced when an inclusive approach to public involvement is adopted from the beginning of the planning process to help ensure that all those who wish to take part in the process have an opportunity to express their views, and have access to information on how public comments have been considered and addressed.

Experience further suggests that trust is promoted by providing open access to accurate and understandable information about the development programme, conceptual design and the siting process at different levels of detail suitable for a broad range of interested parties.

In addition to the perceived credibility of the responsible organisation, other aspects of public acceptability can be location-specific, based on local requirements and cultural context.
(Socio-economic and other non-radiological impacts of the near surface disposal of radioactive waste, IAEA technical document, September 2002)

The current federal government approach to radioactive waste management is profoundly deficient in this area and the proposed amendments are in direct conflict with the approach recommended by the IAEA.

There are significant issues associated with the siting and operation of any proposed radioactive waste dump and the transport of waste to any such dump. The IAEA further notes that that nature of the facility 'may cause anxieties and fears in some individuals and groups that may result in potential human health impacts, especially during the early phases of the repository development process'.

There is broad ranging and considered opposition and concern over the federal government's radioactive waste dump plans for the Northern Territory. Failing to genuinely address these

unresolved issues undermines the projects credibility, alienates key and continuing stakeholders and is in direct conflict with best industry practice and standards.

Conclusion

While the provision to return land to traditional owners is to be encouraged, the fact that this process is not guaranteed and subject to conditions, including potentially forced acquisition of land, these amendments set a dangerous precursor for further undermining of indigenous rights and self determination and should be strongly opposed by the Committee.

ECNT urges the Committee and the Senate to oppose the Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006.