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Submission to Senate Employment, Workplace Relations and Education Committee Inquiry

Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006

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On 30 May 2005 the Prime Minister stated in his address at the National Reconciliation Planning Workshop that the Government “does not seek to wind back or undermine native title or land rights”.

The original *Commonwealth Radioactive Waste Management Amendment Act 2005* (**Waste Law 1**) wound back the *Native Title Act 1993* (**Native Title Act**) expressly in relation to site selection.

The new *Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006* (**Waste Law 2**) seeks to wind back the *Aboriginal Land Rights (Northern Territory) Act 1976* (**Land Rights Act**) in relation to site nomination.

Both measures are an affront to proper process and are repudiated in the strongest terms.

No Legal Challenge for Site Nominations

The main purpose of Waste Law 2 is to prevent legal challenges in relation to **site nominations** on Aboriginal land. This would subvert having a proper process with appropriate checks and balances of legal redress.

Waste Law 1 was effective at preventing legal challenge to **site selection** by:

- preventing application of the *Administrative Decisions (Judicial Review) Act 1977*
- providing for “absolute discretion” by the Minister to select a site
- removing any entitlement to procedural fairness, and
- removing the need to comply with procedure.

and in relation to **site nomination** by:

- providing for “absolute discretion” by the Minister to approve a nomination.

Waste Law 2 goes further seeking to fortify prevention of legal challenge in relation to any **site nomination** on Aboriginal land by:

- preventing application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) [Item 1]
- removing any entitlement to procedural fairness [Item 4], and
- removing the need for compliance with procedure [Item 5].

The Waste Law 2 measures would complete a similar suite of legal invulnerability for site nomination as for site declaration.

Providing for “absolute discretion” attempts to free the Minister from any fetter on his power. This alone does not take away proper avenues of redress, but it does serve to reinforce and emphasise the Minister’s power.

Preventing application of the ADJR Act means that a nomination decision could not be challenged under that Act according to any of the administrative law grounds noted; for example breach of natural justice, improper exercise of power or fraud – see [section 5](#) of the Act. The ADJR Act is the main check and balance on government decision making and few laws are listed in the exemption schedule. However, if Waste Law 2 is passed, it will sit alongside a select group of laws including the Proceeds of Crime Act, the Intelligence Services Act, and Waste Law 1. No other planning laws are there.

Removing entitlement to procedural fairness means any common law administrative challenge outside the ADJR Act could not rely on this ground. Other administrative law grounds do exist (as noted in the ADJR Act) but procedural fairness is the main ground any aggrieved person could use to seek redress in relation to a consultation process.

Removing the need to comply with the procedures for consultation laid down in Waste Law 1 is the most problematic for traditional owners because it is these procedures for consultation which allow them to have their say. Not having to comply with them would necessarily *repeal* the consultation provisions under sections 23 and 77A of the Land Rights Act and sections 203BC and 251B of the Native Title Act to the extent they apply to site nomination.

Specifically, land councils are required to:

- consult with traditional owners
- have regard to the interests of traditional owners
- not take action without the consent of traditional owners
- ensure that traditional owners understand any proposal
- ensure any affected Aboriginal community has expressed its views, and
- comply with traditional decision making processes.

These are serious protections that traditional owners deserve and expect. Land councils have an equally serious obligation to consistently attain this high standard. CLC takes this responsibility extremely seriously.

These protections are currently mirrored in Waste Law 1. Waste Law 2 would relegate these protections to mere guidelines because Item 5 would make their application unnecessary.

No reason is provided in the explanatory memorandum for the removal of these protections by Waste Law 2.

Only the land councils and the Northern Territory Government have the power to nominate a site. Neither the CLC nor the NT Government has called for the removal of these protections. The NLC is bound by the October 2005 Full Council resolution stating that “The NLC supports an amendment to... enable a Land Council to nominate a site... provided that the traditional owners of the site agree”.

There is *no need* for the Australian Parliament to remove these important protections.

The only reason that has been provided by the Minister is a need to prevent “politically motivated challenges”.

So a Minister may act capriciously, a Land Council may fail to consult properly, or a contractor may report incompetently, but none of these lapses will be easily reviewable by a court if the Waste Law 2 measures are enacted.

Why are Australia’s most disadvantaged group being denied a basic entitlement to accountable and transparent process merely because of the possibility of “politically motivated challenges”?

Return of Land

A related purpose is the return of waste facility land. Land may be returned at the Minister’s “absolute discretion” only once abandoned by ARPANSA so the land may in fact never be returned [Item 6].

Our consultations reflect that traditional owners do not *ever* want the return of land after it has been used for a radioactive waste facility.

Consultation process

The CLC has made a considerable effort to consult effectively and according to its obligations under the Land Rights Act and Native Title Act. In particular, the following CLC meetings have specifically considered the waste facility proposal and Waste Laws 1 and 2:

16 August 2005	CLC Full Council meeting, Desert Camp
26 August 2005	Alcoota meeting, Engawala
13 September 2005	CLC Executive meeting, Alice Springs
20 October 2006	Alcoota and Mt Everard combined meeting with ANSTO and DEST officials, Mt Everard (Australian

	Government officials made no complaint about the way the meeting was conducted)
28 October 2005	Alcoota meeting, Utopia
2 November 2005	Mt Everard meeting, Alice Springs
14 December 2005	Mt Everard meeting, Alice Springs
6 February 2006	Mt Everard meeting, Alice Springs
17 February 2006	Mt Everard meeting, Alice Springs
27 March 2006	Mt Everard meeting, Alice Springs
30 March 2006	Alcoota meeting, Engawala
7 November 2006	Mt Everard meeting, Alice Springs (invitation issued to DEST but they did not attend)
9 November 2006	Alcoota meeting, Mulga Bore (invitation issued to DEST but they did not attend)

At all meetings, CLC staff have faithfully executed their obligations by:

- consulting widely with traditional owners and affected Aboriginal communities
- facilitating presentations by ANSTO and DEST officials
- showing DEST maps and schematic posters
- inviting DEST officials to further discuss the issue and update traditional owners
- explaining the legislative processes and meaning of the proposed laws
- providing information in translated audio and video format and newsletters
- complying with traditional decision making processes, and
- speaking up for the interests of traditional owners at their request.

In addition, the CLC facilitated an unsuccessful attempt to meet with relevant Ministers in Canberra, and subsequently wrote various letters requesting that the Minister meet traditional owners on this issue.

The fact is, after all these consultation efforts, traditional owners for Mt Everard and Alcoota remain steadfastly opposed to a radioactive waste facility on their land.

On the Government side, the CLC is disappointed the previous and current Ministers have refused to meet with traditional owners and that DEST officials have not returned at this point to speak further with traditional owners since the initial consultation meeting of 20 October 2005.

Equally disappointing are DEST responses at Senate Estimates which confirm that the CLC has not been privy to any discussions forming the basis of this legislation:

“I believe we have had conversations with the NLC, but certainly not on the issue of nominations and, as I think we have raised at the last hearings, the NLC has actually asked us to keep confidential our discussions with them.”

Finally, concerns have been expressed directly to CLC by traditional owners in the Muckaty area who live in the CLC area. This has occurred *without any formal consultation process undertaken by CLC*.

The Government appears unconcerned at the lack of consultation on its part. The Government appears to see no responsibility to consult with a major stakeholder who will be affected by Waste Law 2, nor does it see any responsibility to inform the CLC or traditional owners about consultations it has had. Rather, the Government seems to be suggesting that the CLC should work to change people's minds according to the Government's agenda, contrary to the CLC's statutory obligations.

Why are Australia's most disadvantaged group being denied a fair and informed process from Government on an issue of national importance?

Legislative Process

Waste Law 1 was introduced into Parliament without warning and pushed through Parliament without consultation or consent. Waste Law 2 is no different.

Waste Law 2 was introduced into Parliament on 2 November 2006 (the day *after* Senate Estimates) and referred to this Senate Committee on 8 November 2006 who must report by 30 November 2006 following a two hour hearing in Canberra.

This legislative process is not democratic.

Conclusion

Despite over 10 years of rigorous scientific process to establish a national radioactive waste facility in Australia, Waste Law 1 provided for Aboriginal people to select a waste site, not according to science, but according to any criteria they might like.

Waste Law 2 fortifies that flight of fancy but:

- does not result from consultation with all key stakeholders (including CLC)
- repeals the Land Rights Act to the extent it requires consultation regarding site nominations (against the claims of the Prime Minister), and
- seeks to subvert proper process and prevent legal challenge in relation to any site nominations without any good reason.

In the process, the Minister has abrogated any responsibility for overseeing a fair and informed process.

Marion Scrymgour noted in a speech to the Northern Territory Parliament in October 2006 that reprocessed waste is not required to return to Australia until 2015 under its contract with France. Why such a rush to implement bad process?

All in all, Waste Law 2 **diminishes the rights of traditional owners**, is a **gross abuse of process** and must be **rejected in its entirety**.