CHAPTER 3

KEY ISSUES

3.1 The committee notes that other Senate committees have previously conducted inquiries into radioactive waste management legislation (most recently in 2008). The reports of these committees covered a wide range of issues relating to the establishment of a national waste facility and to radioactive waste more generally.

3.2 In light of these previous opportunities for consideration of environmental and other issues relating to radioactive waste management in Australia, the focus of this report is on legal and constitutional matters, including issues relating to procedural fairness and the Bill's impacts on, and interaction with, state and territory legislation.

3.3 The key issues discussed below are:

- the preservation of the Muckaty Station site nomination;
- the Bill's preferencing of a Northern Territory site;
- consultation on the Bill and site selection;
- procedural fairness and judicial review; and
- other legal issues.

Preservation of the Muckaty Station site nomination

Introduction

3.4 As noted in Chapter 2, Schedule 2 of the Bill contains a saving provision which provides that, despite the repeal of the current Act, the site at Muckaty Station will remain a nominated site for a radioactive waste management facility (this site was nominated under the current Act in 2007).

3.5 The committee heard that, in its supplementary submission to the Senate Environment, Communications and the Arts Committee (ECA Committee) 2008 inquiry into the *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, the Northern Land Council (NLC) had requested that the Muckaty Station nomination be preserved if the *Commonwealth Radioactive Waste Management Act 2005* (the current Act) was repealed.[1]

3.6 Much of the evidence presented to the inquiry addressed this aspect of the Bill, raising issues that were also central to the 2008 ECA Committee inquiry. In particular, submitters and witnesses questioned the adequacy of consultations over the

1 Mr Kim Hill, Northern Land Council, *Proof Committee Hansard*, 30 March 2010, p. 15.

nomination of the Muckaty Station site, and whether or not the agreement underlying the nomination was supported by all relevant traditional owners.

3.7 As noted in the 2008 report, this issue goes to the question of who 'speaks for', or has the authority to make decisions concerning, the country on which it is proposed to site the facility. This is a matter of Indigenous rights and traditional law, as expressed by traditional owners.[2] Anthropological evidence is also relevant to identifying and determining the relationships of traditional owners to particular areas of land, particularly for the purposes of relevant Aboriginal land rights legislation.

3.8 The 2008 report cited the 1997 report of the Aboriginal Land Commissioner, which stated that, in terms of traditional ownership, it is usual or common for a number of Indigenous groups to possess certain rights and/or interests in a given area of land (although not necessarily having the ultimate authority or right to 'speak for' that country).[3] The report cited the following general description of the affiliations and responsibilities which pertain to Indigenous lands generally, and the Muckaty site in particular:

> The areas on which the separate groups focus are not necessarily completely separate. As is the case with Aboriginal land tenure systems in semi-arid areas, there tends to be a focus on sites of significance, which are often sites associated with the practicalities of survival in a dry environment. Sharply defined boundaries between the estates of different groups are unusual in such circumstances. There is a tendency for different groups to share some sites, with a consequential overlap between the areas claimed by those groups. There is also a tendency for land between sites to be the subject of overlapping claims, or for it to be unclear into the estate of which group it falls…
>
> The major dreamings involved in the present claim are travelling dreamings, some of which travel over quite long distances. Different parts of the tracks followed by dreamings belong to different people. A group will have responsibility for a defined part of dreaming track. The sites along that part of the track and the country surrounding them will belong to that group.[4]

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2 Senate Environment, Communications and the Arts Committee, *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, December 2008, p. 19. The Bill considered in this report was a private senator's Bill, introduced by Senator Scott Ludlam (the Australian Greens). The purpose of the Bill was to repeal the current Act and a related Act, the *Commonwealth Radioactive Waste Management Legislation Amendment Act 2006* (introduced to facilitate site nominations by a Northern Territory Land Council).

3 Senate Environment, Communications and the Arts Committee, *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, December 2008, p. 21.

4 Office of the Aboriginal Land Commissioner, *Report of Aboriginal Land Commissioner*, 1997, p. 38.

Consultation and agreement with relevant traditional owners

3.9 The related questions of whether all relevant traditional owners of the Muckaty Station site have been consulted over, and given their approval to, the Muckaty Station nomination were a highly contested feature of submissions to the inquiry.

Consultation

3.10 Some submitters were concerned that there had been inadequate consultation in relation to the proposal to locate a radioactive waste management facility at Muckaty Station. The Central Land Council (CLC), for example, submitted:

> The CLC has…had representations from traditional owners and affected Aboriginal people living in the Tennant Creek region within the boundary of the CLC area, regarding their opposition to the proposed site at Muckaty Station and their dissatisfaction with consultation processes undertaken under the current Act. The CLC is disappointed that this Bill validates the Muckaty nomination without acknowledging the dissent and conflict amongst the broader traditional owner group about the process and the agreement.[5]

3.11 Ms Natalie Wasley, from the Arid Lands Environment Centre (ALEC), also pointed to the apparent dissatisfaction of a number of traditional owners as an indication that there had been insufficient consultation on the nomination. In her view, the Commonwealth had failed to meet its obligations under the United Nations Declaration on the Rights of Indigenous Peoples, which states that:

> …no storage or disposal of hazardous materials shall take place in the lands…of indigenous peoples without free, prior and informed consent.[6]

3.12 Ms Diane Stokes, a traditional owner, submitted that the consultations conducted by the NLC had been inadequate and selective. She stated:

> About the NLC: we never, ever…have had a letter sent to us with maybe three weeks or two weeks notice. When we used to go to some of the NLC meetings, we used to have the list of names of all the members of the land trust. These days, they never use the names of those in the land trust. They just get a few people, whoever they trust, to go along for their meetings.[7]

3.13 However, Mr Ron Levy from the NLC asserted that 'as far as the consultations go, they were scrupulous and comprehensive'.[8] The NLC explained:

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5 *Submission 227*, p. 2.

6 *Proof Committee Hansard*, 12 April 2010, p. 21.

7 *Proof Committee Hansard*, 12 April 2010, p. 17.

8 *Proof Committee Hansard*, 30 March 2010, p. 17.

> The NLC's 2007 nomination was subject to a statutory requirement that there had been comprehensive consultations with the traditional Aboriginal owners and any Aboriginal community or group that may be affected, and that the traditional Aboriginal owners (as a group) had consented to the nomination. This requirement duplicated the same requirement as contained in various provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976*.[9]

3.14 The committee notes that the NLC was equally emphatic on this point in its evidence to the 2008 inquiry, where it said that it had followed its 'usual procedures' and undertaken consultation with the relevant traditional owners—those with the right to 'speak for' the land concerned—and with a 'range of other people'.[10] The NLC was satisfied that there was 'overwhelming support for a [Muckaty Station] nomination after doing the comprehensive consultations'.[11]

3.15 The committee notes also that the NLC provided a supplementary submission to the 2008 inquiry in response to the claims that insufficient consultation had occurred. That submission provided significant detail on the history of the Muckaty nomination, meetings between the NLC and various groups of traditional owners, meetings between the Muckaty traditional owners and Commonwealth officers, and visits to the Lucas Heights reactor facility by traditional owners.[12]

Agreement with relevant traditional owners

3.16 At its Canberra hearing, the committee heard from Ms Amy Lauder, a representative of the Ngapa group which has entered into a deed of agreement concerning the Muckaty nomination with the NLC and the Commonwealth Government. Ms Lauder acknowledged that a number of groups had an interest or rights in relation to Muckaty lands, but asserted that the Ngapa group that she represented was entitled to 'speak for' the nominated site at Muckaty Station. Specifically, Ms Lauder stated:

> I am a Ngapa traditional owner of Muckaty Station and I represent them today; I have got other traditional owners behind me. We have got custodians: our children, their children and their grandchildren and so on. We nominated our land in 2007. There are other groups in the land. We have five clan groups on Muckaty land itself, but at this time as Ngapa traditional owners we are just concentrating on our Ngapa site on Muckaty. Yes, the other clan groups have got rights to make a proposal, but it is our

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9 *Answer to question on notice*, received 28 April, 2010, p. 3.

10 Senate Environment, Communications and the Arts Committee, *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, December 2008, p. 24.

11 Senate Environment, Communications and the Arts Committee, *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, December 2008, p. 24.

12 Senate Environment, Communications and the Arts Committee, *Commonwealth Radioactive Waste Management (Repeal and Consequential Amendment) Bill 2008*, December 2008, p. 24.

> decision; it is our land. Ngapa is the main dreaming site on Muckaty itself. It is our decision and it is our land, so we nominated our land for the government's consideration.[13]

3.17 Ms Lauder's claims were acknowledged and strongly endorsed by the NLC. Mr Kim Hill commented:

> To my knowledge, at this stage, not one traditional owner group is opposing the nomination for the NLC in support of the traditional owners—not one person is disputing that the area in question belongs to the Lauder clan.[14]

3.18 Similarly, Mr Levy advised:

> The reason there has not been a [legal] challenge is that there is no Aboriginal person or any other person disputing that this Ngapa group are the owners of that country.[15]

3.19 In contrast to these views, a number of submitters claimed that the Muckaty Station nomination was contested. A number of Indigenous people representing various family groups or clans either asserted their own right to be consulted over the nomination, or else disputed the right of Ms Lauder and the group she represents to 'speak for' the country relating to the site nomination. Ms Diane Stokes, a traditional owner, stated:

> …the Ngapa clan, the Amy Lauder mob, are not the only people for that Ngapa area there [at Muckaty Station]. That is not their land, but we are all connected to the land trust, the whole different group here today. There are five groups: Ngapa, Wirntiku, Milwayi, Yapa Yapa, all of us mob are connected to that area, so we all belong to the land trust. Amy is saying that she is only one who is the representative of the Ngapa. Her Ngapa is on the western side, so I do not believe that she has got land in there. I know that NLC is saying that she has got land in there, but she has not got any land.[16]

3.20 A submission prepared on behalf of a number of traditional owners explained:

> …the traditional owners of the site that we have taken evidence from, have never given their consent to…[the nomination]. They have continuously denied that the Lauder family has exclusive rights to say yes or no to the nomination of the site.
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> This position is supported by the determination of the 1997 Land Commissioner's Report prepared for the original hand back of the Muckaty Land, as well as previous anthropological reports and of course their own detailed knowledge passed down to them by their ancestors.[17]

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13 *Proof Committee Hansard,* 30 March 2010, p. 15.

14 *Proof Committee Hansard,* 30 March 2010, p. 13.

15 *Proof Committee Hansard,* 30 March 2010, p. 17.

16 *Proof Committee Hansard,* 12 April 2010, p. 13.

17 *Submission 235*, p. 1.

3.21 Mr David Ross, from the CLC, emphasised the importance of Aboriginal custom in resolving disputes over traditional land rights:

> Until all the Aboriginal people are given that opportunity to meet together and sort out responsibilities within Aboriginal law, then you are never going to resolve this issue between Aboriginal people. You might resolve it at law under the land rights act and the Australian legal terms, but in terms of Aboriginal people sorting out their differences and resolving who has rights and responsibilities to the country, then Aboriginal people need to do that themselves.[18]

3.22 The questions around whether the consultations with, and consent of, traditional owners have been adequately achieved were complicated by claims relating to payments made to various Indigenous groups from monies received in relation to the Muckaty Station site nomination. Such payments may provide some evidence of both consultation with, and consent of, relevant groups of traditional owners.

3.23 Mr Levy from the NLC advised that 'no funds were retained, or used, by the NLC in relation to its administrative or other costs' from the monies paid on acceptance of the nomination of the Muckaty Station site. These funds had been distributed in compliance with the standard practices of the NLC. He explained:

> The way the [Muckaty nomination] agreement works is the way any major development works—a mining agreement, for example—in that there is usually a payment at the time of execution. In relation to this matter…[the] first trigger for payment was when the then minister, Julie Bishop, approved the nomination, and that occurred in 2007. That led to a $200,000 payment in 2008…to the Northern Land Council. The Northern Land Council's job under statute is to distribute those funds to or for the benefit of the traditional Aboriginal owners of the land. The way that that always proceeds…is by means of consultation—not only with the traditional owners of the relevant land but also, for a major matter of this nature, with other groups who are involved and other senior people. Those consultations were held in 2008 and the money was distributed.[19]

3.24 The NLC noted that the $200,000 represented the 'total amount of funds paid to the NLC under the [Muckaty Station] site nomination deed'. It noted that:

> Further payments will only occur if the nominated site is both approved by the Environment Minister after a comprehensive environmental impact process, and is declared as the facility site by the Resources Minister. Those further payments, if they occur, will be to a charitable trust fund.[20]

3.25 The committee heard that the $200,000 paid to date had been distributed amongst 'a number of other clan groups' through 'twenty-five senior persons'. The

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18 *Proof Committee Hansard*, 12 April 2010, p. 29.

19 *Proof Committee Hansard*, 30 March 2010, p. 16.

20 *Answer to question on notice*, received 28 April 2010, p. 5.

majority of the payees were in the Ngapa group (from both the Muckaty and other areas), but members of the Yapa Yapa and Milwayi groups also received payments.[21] Mr Levy advised that, in some cases, recipients of payments from the Muckaty nomination fund were identified in various petitions or letters as objectors to the proposal:[22]

> …a number of those signatories first attended NLC meetings in 2007 and expressly stated—they did not consent, because it was not their country—'We support the Ngapa traditional owners regarding their decision.' Those persons also, given their seniority, support and cultural connections, received a portion of that $200,000 and accepted it.[23]

3.26 However, this claim was disputed by some of the traditional owners opposed to the Muckaty Station nomination. Ms Stokes and a number of other Indigenous family representatives denied that their groups had received payments from the $200,000.[24]

Preferencing of a Northern Territory site

3.27 As noted above, the Bill preserves the Muckaty Station nomination under the current Act. In addition, Part 2 (proposed subsection 4(1)) of the Bill allows for a land council in the Northern Territory to nominate land as a potential site for a radioactive waste management facility. The Explanatory Memorandum (EM) notes that this provision enables the NLC to nominate other sites on Ngapa land (as it is entitled to do under the current site nomination deed).

3.28 Part 2 (proposed section 6) also allows the Minister to open a nation-wide volunteer site-nomination process. However, in making this decision, the Minister must have regard to 'whether it is unlikely that a facility will be able to be constructed and operated on Aboriginal land that has been nominated as a potential site under [section 4]' (whether or not that land has in fact been approved as a site).[25] A representative from the Department of Resources, Energy and Tourism (the Department) advised that the Bill was designed to allow the nomination of other sites in Australia, once the option of a 'volunteer site on Aboriginal land at Muckaty Station has become exhausted'.[26]

3.29 A number of submitters and witnesses noted that the Bill was, in effect, designed to favour or 'single out' Muckaty Station, or the Northern Territory more generally, as the site for the national radioactive waste facility. In particular, the

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21 *Proof Committee Hansard*, 30 March 2010, p. 16.

22 *Proof Committee Hansard*, 30 March 2010, p. 16.

23 *Proof Committee Hansard*, 30 March 2010, p. 16.

24 *Proof Committee Hansard*, 12 April 2010, p. 16.

25 *National Radioactive Waste Management Bill 2010*, proposed subsection 5(2).

26 *Proof Committee Hansard*, 30 March 2010, p. 10.

Northern Territory Government voiced strong concerns at the proposed site-selection process. The Northern Territory Chief Minister, the Hon. Paul Henderson, commented:

> We are opposed to this legislation and the process for the selection of the site, which singles out the Territory for differential treatment because its constitutional status is seen to minimise the risk of legal challenges to the selection of the site. Fundamentally, this bill does single out the Northern Territory fairly and squarely, to the exclusion of any other decision, unless the federal minister rules it out.[27]

3.30 Accordingly, the Northern Territory Government called for the Bill to be:

> …redrafted to allow the nomination of land in any State or Territory from the outset, and to remove the legislative bias towards the selection of a site in the Northern Territory.[28]

3.31 Ms Wasley from the ALEC also commented on the Bill's apparent targeting of the Northern Territory as the site for the proposed facility:

> What we see with this bill is not only the Northern Territory still targeted, but the Muckaty nomination the only area which will still be studied initially under the legislation. It is clearly the minister's intention to push through and carry on with Muckaty as the site for the radioactive facility.[29]

3.32 More generally, the CLC was critical of the principles underlying the site-selection process in the Bill:

> Choosing a waste site from one that is simply nominated by a landowner is a fundamentally flawed approach to the siting of a long term facility which houses significant amounts of short lived and long lived radioactive waste.[30]

3.33 The CLC concluded:

> It is simply not credible to pretend that a voluntary nomination process, presumably with considerable financial enticements, can replace a process that actually evaluates regions based on accepted scientific criteria.[31]

3.34 The Northern Territory Chief Minister shared this view:

> I find it incomprehensible that the Commonwealth…would choose to make this type of decision by asking a land council in the Northern Territory: 'Is there any part of your land on which you would accept a radioactive waste repository facility?'…If that process is [not successful]…the

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27 *Proof Committee Hansard,* 12 April 2010, p. 2.

28 *Submission 147*, p. 11.

29 *Proof Committee Hansard,* 12 April 2010, p. 20.

30 *Submission 227*, p. 4.

31 *Submission 227*, p. 5.

> Commonwealth is to then open up a process of asking other Australians to nominate their land…That is not the way to make a decision about where this facility should go…[32]

3.35 However, the Department disputed these perspectives. It submitted that the Bill 'does not single out the Northern Territory', and noted:[33]

> Under the Bill, if the Minister decides to open up the nation-wide volunteer site nomination process, any person with a sufficient interest in land in a State or Territory (not just land in the Northern Territory) may nominate that land as a site.
>
> Under the 2005 legislation, a facility can only be located in the Northern Territory.[34]

3.36 Further, the Department emphasised that the Bill involved a 'major change' from the current Act in respect of its emphasis on 'volunteerism'. A representative of the Department stated:

> …there is a major change in that there is an emphasis on volunteerism in terms of nomination or selection of sites or identification of sites, so all sites must be voluntarily nominated…[35]

3.37 The Department submitted that, unlike the position under the current Act, the Bill does not allow sites for the waste management facility to be imposed on a community. The Department observed:

> Under the Bill, a site must be voluntarily nominated by a person with a sufficient interest in that land.[36]

Transportation of waste

3.38 A number of submitters and witnesses raised concerns about the potential risks of transportation of waste to the Muckaty Station site in particular, and to the Northern Territory more generally (in the event that another site in the Northern Territory is nominated or selected as the site for the national radioactive waste facility).

3.39 The Northern Territory Government submission commented:

> The transport of radioactive waste by road…raises concerns relating to the security of the waste whilst in transit to the facility and the potential for a significant impact on transport routes as a result of an accident.[37]

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32 *Proof Committee Hansard*, 12 April 2010, pp 9-10.

33 *Submission 226*, p. 5.

34 *Submission 226*, pp 5-6.

35 *Proof Committee Hansard*, 30 March 2010, p. 2.

36 *Submission 226*, p. 5.

37 *Submission 147*, p. 18.

3.40 Ms Wasley from the ALEC observed that the Northern Territory posed particular risks by virtue of its remoteness and infrastructure:

> I would like to ask: what are the risks of transporting these materials thousands of kilometres through hundreds of communities? Territorians know very well the risks of transporting hazardous substances through remote areas. The Northern Territory government itself has said it has insufficient capacity to cope if a waste dump were built.[38]

3.41 A view shared by many submitters was that radioactive waste should be stored close to the point of its production, in order to minimise the risk of accidents while transporting waste materials. For example, a form letter received from 13 individuals commented that:

> Nuclear waste should be moved as little as possible, and should be stored above ground close to the point of production, close to centres of nuclear expertise and infrastructure.[39]

3.42 On this issue of waste transportation, the Department advised that the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA), as the regulator, would be responsible for the safe transport of radioactive material, as governed by the *Australian Radiation Protection and Nuclear Safety Act 1998*.[40]

3.43 Dr Adrian Paterson, the Chief Executive Officer of the Australian Nuclear Science and Technology Organisation, observed that:

> Many…[radioactive waste management facilities] exist overseas, and the operation and transport of waste to them has an exemplary safety record.[41]

3.44 In terms of the particular risks associated with transportation of waste to a national facility in the Northern Territory, Dr Paterson commented:

> …the transport risk is low to very low. These industrial and medical sources in any event are transported every day for their normal use, for example, so they are by their nature transportable devices with the suitable protection added to them. In terms of waste shipments globally, there are probably now in the order of millions of shipments that have taken place of nuclear waste in different forms. Compared to other hazardous material shipments and transport, the levels of control, the strong role of the regulator, the arrangements and logistical infrastructure that is in place make the risk of shipments, and the risk to the public during those shipments, absolutely mitigatable to the highest level.[42]

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38 *Proof Committee Hansard,* 12 April 2010, p. 22.

39 *Form letter 1*, p. 2.

40 *Answer to question on notice*, received 12 April 2010, p. 9.

41 *Proof Committee Hansard,* 30 March 2010, p. 23.

42 *Proof Committee Hansard,* 30 March 2010, p. 28.

Consultation on the Bill and site selection

3.45 Separate to issues around consultation with traditional owners in relation to Muckaty Station, some submitters and witnesses criticised what they felt was a lack of consultation on the Bill with affected communities and the Australian people more broadly.

3.46 The Northern Territory Chief Minister argued that there had not been 'open and transparent consultation' with Territorians, and Australians, about the location of a radioactive waste management facility.[43] He criticised the approach taken as one based around a 'decide, announce, defend' strategy:

> The Commonwealth has decided it is going to go to Muckaty Station, it has announced it is going to go to Muckaty Station and we have a bill here to defend that position.[44]

3.47 The Northern Territory Government characterised this lack of consultation as being out of conformity with international best practice and the Commonwealth Government's own relevant code of practice. The Chief Minister stated:

> Full and proper consultation and communication with affected people is integral to the process and can result in a successful siting of the facility.
>
> Now, the Commonwealth government's own *Code of practice for the near-surface disposal of radioactive waste in Australia* sets out, under 'Public consultation'…[that site] selection shall include a suitable consultative process to establish public consent to the location of a disposal facility at the particular site.[45]

3.48 In contrast to the concerns outlined above, a representative of the Department advised that there are 'extensive opportunities for consultation' arising from the regulatory processes that will apply to the selection and operation of a radioactive waste facility:

> The first part of that consultation process takes place under the *Environment Protection and Biodiversity Conservation Act*, where there are opportunities for public input and public meetings.
>
> There are also public forums at all stages of the ARPANSA licensing process. That is a fairly intricate process. We have to get a site licence from ARPANSA. That will involve a public process. It may even involve an international expert forum. The same applies also for the construction and operating licence stages under the ARPANS Act. Of course, we are also subject, given the cost of the facility, to processes under the *Public Works Committee Act 1969*.[46]

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43 *Proof Committee Hansard*, 12 April 2010, p. 2.

44 *Proof Committee Hansard*, 12 April 2010, p. 2.

45 *Proof Committee Hansard*, 12 April 2010, p. 2.

46 *Proof Committee Hansard*, 30 March 2010, p. 4.

Ability to establish a regional consultative committee

3.49 The committee notes that the Bill also provides a discretion for the Minister to establish a regional consultative committee, following the selection of a site for the radioactive waste facility.[47] A departmental representative explained that the purpose of any regional consultative committee would be to allow for ongoing consultation with relevant local communities:

> The idea of this is that once a site is selected a committee of regional interests will be established so that the establishment of the facility and subsequently its operation will be a matter of consultation with regional interests. Obviously, any problems that arise as far as the local community are concerned can be addressed. There is a parallel to this established with the site selection process in South Australia for the Woomera site. There was a regional consultative committee involved there.[48]

3.50 The committee heard that, once a site is selected, the membership and structure of a regional consultative committee will be prescribed by regulation, taking into account the interests involved. A Department representative advised that any such committee would be a 'representative group of interests from the region in which the facility is sited'.[49]

Procedural fairness and judicial review

3.51 Much of the evidence received during the course of this inquiry focussed on procedural fairness. Submitters and witnesses discussed the issue of procedural fairness in relation to the preserved Muckaty Station site nomination and, more generally, in relation to the nomination and selection of other potential sites. The availability of judicial review for decisions under the Bill was also a prominent issue.

3.52 The submission from the Department advised that one of the main differences between the Bill and the current Act is that, under the latter, procedural fairness will apply to 'key decisions'. The Department noted also that decisions made under the proposed scheme will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).[50]

3.53 The EM explains that the Bill provides a right to procedural fairness and review under the ADJR Act in relation to:

- a decision to approve the nomination of a site;
- a decision to open up a nation-wide voluntary site nomination process; and

47 Explanatory Memorandum, p. 3.

48 *Proof Committee Hansard*, 30 March 2010, p. 2.

49 *Proof Committee Hansard*, 30 March 2010, p. 8.

50 *Submission 226*, p. 5.

- a decision to select a site as the site for a facility.[51]

3.54 In relation to the Muckaty Station nomination, procedural fairness and the potential for review under the ADJR Act will apply to a decision to select the site as the site for the radioactive waste facility.[52] However, the EM notes that the Bill does not introduce procedural fairness requirements in relation to the existing nomination and approval of the Muckaty Station site.[53]

Muckaty Station nomination

3.55 A number of stakeholders expressed concern that the Bill does not institute procedural fairness and ADJR Act review rights in relation to the preserved nomination of the Muckaty Station site. For example, as Ms Wasley from ALEC commented:

> There is no credibility…[to] this bill when…the Muckaty nomination will not be subject to any of the provisions or measures that the minister is going to great pains to say are being reinstated—in particular, procedural fairness and access to judicial review. If the minister is so confident that this site selection process was done honestly, properly and fairly, then there should be no hesitation for this nomination of Muckaty to be subject to the standards which any further nomination would be subject to.[54]

3.56 The CLC stated that it was 'not acceptable' that access to procedural fairness continues to be excluded in relation to the Muckaty Station site nomination. The CLC submission commented:

> This confirms the CLC's view, put clearly in our submission to the senate inquiry into the current Act (2005) that better protection would be afforded to traditional landowners who chose to nominate a site in accordance with the operations of the Land Rights Act. The CLC believes that the processes for obtaining a nomination from a Land Council under the current Act are so flawed that the existing Muckaty station nomination and approval should not be preserved in the Bill.[55]

3.57 The Northern Territory Environment Centre (ECNT) submitted that, by not subjecting the Muckaty nomination to procedural fairness and judicial review, the Bill would perpetuate the uncertainties around the extent and adequacy of consultations with, and agreement of, traditional owners:

> …the nomination of the Muckaty site by the Northern Land Council …[which] sits at the heart of the development of the…Bill, occurred by

51 *Submission 226*, p. 6.

52 *Submission 226*, p. 6.

53 EM, p. 2.

54 *Proof Committee Hansard*, 12 April 2010, p. 20.

55 *Submission 227*, p. 2.

> way of a contentious agreement between the NLC and the former Federal government. The NLC/Federal government agreement was able to avoid public scrutiny due to special provisions in the [current Act] which explicitly denied procedural fairness and judicial review. Consequently, the Muckaty nomination is now strongly contested by many Muckaty Land Trust Traditional Owners who were not part of the agreement process.[56]

3.58 The ECNT was concerned that, because the Bill does not provide for procedural fairness or judicial review regarding Muckaty, 'there exists no legitimate means for resolving the contest [and] the nomination continues to be afforded protection from public scrutiny'.[57]

3.59 However, the NLC submitted that the retrospective application of procedural fairness provisions to the decisions relating to the existing nomination of the Muckaty Station site (and the acceptance of that nomination) would involve substantial unfairness:

> No basis exists for retrospectively applying, three years after the nomination, unspecified additional requirements (for example, as to notification of non-Aboriginal third parties), whereby the nomination and completed consultations may be challenged by reference to obligations and requirements which did not then exist. Such retrospectivity would give rise to substantive unfairness, particularly to the Ngapa traditional Aboriginal owners and other Aboriginal persons and groups supportive of the nomination.[58]

Nomination, acceptance and selection of other potential sites

3.60 As noted above, procedural fairness requirements will apply to all other 'key decisions' relating to the processes set out in the Bill for the nomination and selection of other potential sites for the radioactive waste facility.

Scope of procedural fairness requirements

3.61 Procedural fairness requirements will apply to any decision to approve a potential site and to any decision to open the nation-wide site nomination process. The procedural requirements that apply to these decisions are an 'exhaustive statement' of the requirements of the natural justice hearing rule in relation to the relevant decisions.[59] Before making any such decision, the Minister must satisfy certain notice requirements, and invite comments from relevant stakeholders. The Minister must then 'take into account any relevant comments' received in response to an invitation to comment. A representative from the Department explained that, in summary:

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56 *Submission 145*, p. 1.

57 *Submission 145*, p. 1.

58 *Answer to question on notice*, received 28 April 2010, p. 3.

59 See for example proposed section 9(7).

> When the minister is about to make a decision he must advertise that and people have the opportunity to make submissions to him and he will consider those submissions in reaching his decision.[60]

3.62 At the hearing in Canberra, the Department confirmed that the requirement for the Minister to receive and take into account submissions from interested parties is the only procedural fairness requirement included in the Bill:

> **Senator TROOD**—So the essence of the case for procedural fairness in relation to what is the preferred site is that the minister is required to receive submissions. Is that it?
>
> **Mr Davoren**—That is what I understand.
>
> **Mr Vazenios**—And take those comments into account.[61]

3.63 A number of submissions were critical of the limited scope of the procedural fairness requirements set out in the Bill. Dr James Prest, from the Australian Centre for Environmental Law at the Australian National University (ACEL), submitted:

> …the re-instatement of procedural fairness and judicial review rights proposed by the Bill is so very tightly constrained and limited by other provisions to the extent that the re-instatement exercise threatens to become largely symbolic and illusory, if not misleading and deceptive.[62]

3.64 Dr Prest stated that the procedural fairness provisions of the Bill offer only 'a very limited right of hearing in relation to particular ministerial declarations and approvals'.[63] He observed that, although the Minister would be required to invite comments from 'each nominator [of a site] and, via public notices in the *Gazette* and newspapers, from persons with a right or interest in the relevant land', any such comments would 'need only be taken into account by the Minister'. There would be no obligation on the Minister 'to respond to comments, or to publish a report containing the comments received'.[64]

3.65 The CLC also observed that the requirement for the Minister to 'take any relevant comments into account' was a 'very limited' requirement in terms of procedural fairness.[65]

3.66 Further, Dr Prest noted that the procedural fairness provisions would apply only to those with a right or interest in the land, which meant that:

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60 *Proof Committee Hansard*, 30 March 2010, p. 2.

61 *Proof Committee Hansard*, 30 March 2010, p. 10.

62 *Submission 229*, p. 2.

63 *Submission 229*, p. 9.

64 *Submission 229*, p. 9.

65 *Submission 227*, p. 3.

> …neighbours, those living in a community nearby, or the relevant State or Territory government do not have an opportunity to comment.[66]

3.67 The ECNT submission also criticised the limited scope of the procedural fairness provisions in the Bill:

> …[We express] strong disappointment in the limited opportunity for procedural fairness that the…Bill affords, particularly given the nature of the issue at hand…
>
> We question why the…Bill fails to align with the general progression and development of environment-related legislation here in Australia and around the world, which involves a widening of the scope for procedural fairness, particularly with respect to third parties.[67]

3.68 Responding to such concerns, the Department submitted:

> The purpose of the ADJR Act is to provide a form of judicial review that would be accessible to members of the public whose interests are affected by administrative decisions.
>
> A person aggrieved by a decision to which the Act applies is entitled to make an application under the ADJR Act. The Federal Court has held that the expression 'a person aggrieved by a decision' should not be construed narrowly; a person will be aggrieved by a decision if they have a 'special interest in the subject matter of the action'.[68]

3.69 In addition, the NLC observed that, as with the current Act, the Bill does not exclude rights to judicial review under section 75 of the Constitution and section 39B of the *Judiciary Act 1903*. It explained:

> …the current legislation (and the Bill) does not, and cannot, exclude review under s 75(v) of the Constitution, and also does not exclude review under s 39B(1) of the Judiciary Act 1903. These remedies concern where the exercise of a power is invalid due to a jurisdictional error, being where a decision maker has exceeded the authority or power conferred on them.[69]

Effect of ministerial discretion on judicial review

3.70 In relation to the application of the ADJR Act to decisions made under the Bill, Dr Prest noted that this would be of 'limited practical effect because the provisions empowering the minister to make a declaration of land as a selected site express the exercise of that power to be in the Minister's 'absolute discretion''.[70] As a

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66 *Submission 229*, p. 9.

67 *Submission 145*, p. 2.

68 Department of Resources, Energy and Tourism, *Answer to question on notice*, received 12 April 2010, p. 5.

69 *Answer to question on notice*, received 28 April 2010, p. 7.

70 *Submission 229*, p. 10.

result, there would be no obligation on the Minister 'to consider objective criteria such as the suitability of the site for a repository in terms of geology, geography [and] environmental protection'.[71] Dr Prest concluded:

> …[Because the] requirements set out by the Bill are not very onerous…in practical effect it will be very unlikely that the Minister might fail to comply.[72]

3.71 The ACF was also concerned about the lack of criteria for decision making under the Bill:

> The final key limitation from a procedural fairness perspective is the complete lack of matters prescribed in the bill that the minister must take into account when making a decision…[There] is absolutely no mention of a requirement to take into account what we have referred to in our submission as essential criteria, and they would be scientific, environmental, health, social, cultural and economic matters.[73]

3.72 However, a Departmental representative advised that the lack of criteria or benchmarks for the Minister in deciding whether to select Muckaty Station (or indeed any other site) as the site for the waste facility was because the considerations to which they might relate 'would be covered' by the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) as well as regulatory processes governed by the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA).[74] That is:

> [These] comments fail to separate the voluntary site selection process and the separate regulatory approval process for the establishment and operation of a facility on the selected site.
>
> Once a site has been selected as a site for the facility, regulatory approval under the *Environment Protection and Biodiversity Conservation Act 1999* and the *Australian Radiation Protection and Nuclear Safety Act 1998* must then be obtained.
>
> If regulatory approval cannot be obtained, a facility cannot be constructed or operated on the site.
>
> It is the Minister for the Environment, Water, Heritage and the Arts, rather than the Minister for Resources and Energy, who will consider the suitability of the site in terms of geology, geography and environment protection. These matters will also be considered by the Chief Executive of ARPANSA in deciding whether to issue a siting licence for the facility.[75]

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71 *Submission 229*, p. 10.

72 *Submission 229*, p. 10.

73 *Proof Committee Hansard,* 30 March 2010, p. 43.

74 *Proof Committee Hansard,* 30 March 2010, p. 7.

75 Department of Resources, Energy and Tourism, *Answer to question on notice*, received 12 April 2010 p. 5.

'No invalidity' clauses

3.73 Dr Prest also identified the inclusion of 'no invalidity' clauses in the Bill as reducing the opportunity for effective review of decisions under the ADJR Act. Such clauses, he explained:

> …are provisions of the Bill specifying that a failure to comply with its procedural and due process provisions does not invalidate decisions taken by the Minister [in proposed subsections 4(4), 5(5), 7(4), 8(6), 14(2) and 16(6)].[76]

3.74 The ACF also commented on this aspect of the Bill:

> …the bill does not require that the procedural fairness processes that have been applied for those decisions actually have to be complied with in order to maintain their validity. These invalidity provisions…are really problematic in terms of the due process provisions that have been introduced applying as conditions to validity of the minister's decisions.[77]

3.75 Dr Prest noted that, as a result of the elements of the Bill outlined above, 'the scope of review of the Minister's decision at general law or under the…ADJR Act is limited'.[78] He suggested that:

> …the available grounds of review 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's decision was so unreasonable that no reasonable decision maker could have made it.[79]

3.76 In response, the Department submitted:

> Parliament is the supreme branch of Government in the Australian constitutional system. Judicial review ensures that the power is exercised according to law with due attention to procedural fairness, rationally, and without bias. Administrative decisions are rarely reviewed on their merits, and only where power is given to the courts by legislation. Executive accountability through Parliament is a more appropriate means of ensuring that Ministers are making the best decisions on the merits.[80]

3.77 The NLC noted that the inclusion of 'no invalidity' clauses in the Bill was consistent with the scheme employed by the *Aboriginal Land Rights (Northern Territory) Act 1976*, which provides that a land council's 'nomination of a site for a

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76 *Submission 229*, p. 12.

77 *Proof Committee Hansard*, 30 March 2010, p. 43.

78 *Submission 229*, p. 10.

79 *Submission 229*, p. 13.

80 *Answer to question on notice*, received 12 April 2010, p. 4.

facility (and indirectly also the Minister's declaration) will be protected from challenge on certain procedural grounds'.[81] It explained:

> …for over 30 years the Land Rights Act has provided that a lease of Aboriginal land or certain mining leases cannot be invalidated on the basis of lack of compliance by a Land Council with consultation requirements.
>
> The purpose of the provision… is to provide certainty in land transactions and security in financing of developments, by ensuring that a lease of Aboriginal land cannot be invalidated years after the event due to an omission to comply with formal requirements.[82]

Other legal issues

Overriding of state and territory legislation

3.78 As noted in Chapter 2, proposed section 10 of the Bill allows relevant persons (such as Commonwealth employees or contractors) to conduct activities for the purpose of selecting a site for the radioactive waste management site. The section authorises such persons to 'do anything necessary for, or incidental to, the purposes of selecting a site on which to construct and operate a facility'.[83]

3.79 Proposed section 11 provides that that 'certain state and territory laws will not apply to activities' authorised under the Bill.[84] Any such law will be of no effect to the extent that it would otherwise 'regulate, hinder, or prevent' the doing of activities relating to the selection of a site for the radioactive waste management facility. Relevant state and territory laws include laws relating to:

- the use or proposed use of land or premises, or the environmental consequences of any such use;
- the archaeological or heritage values of land or premises;
- controlled material, radioactive material or dangerous goods; and
- licensing in relation to employment or carrying on a particular business or undertaking.[85]

3.80 Similarly, proposed section 12 of the Bill provides that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the EPBC Act will have no effect to the extent that they would otherwise 'regulate, hinder, or prevent' the doing of something authorised by proposed section 10.

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81 *Answer to question on notice*, received 28 April 2010, p.8.

82 *Answer to question on notice*, received 28 April 2010 p.8.

83 A non-exhaustive list of such activities is provided in proposed subsection 10(3). This includes, for example, operation of drilling equipment, water extraction, flora and fauna collection and clearing of vegetation.

84 National Radioactive Waste Management Bill 2010, proposed sections 10 and 12.

85 EM, p. 15.

3.81 The Bill employs essentially the same approach in relation to the conduct of activities relating to a selected site (that is, once a site has been selected). These activities include, for example:

- gathering or preparing information for a Commonwealth regulatory scheme relating to the construction or operation of a facility;
- preparing the selected site for a facility; and
- constructing, operating and maintaining a facility.[86]

3.82 The EM notes that certain state, territory and Commonwealth laws will not apply to activities under Part 5 to the extent that they would regulate, hinder or prevent those activities. However, the *Australian Radiation Protection and Nuclear Safety Act 1998*, the EPBC Act and the *Nuclear Non-Proliferation (Safeguards) Act 1987* must be complied with at all times after a site has been selected.[87]

3.83 The Department's submission noted that, before a site is selected, 'certain activities need to take place to ensure land is suitable for a radioactive waste management facility'. These may include:

- geological and geotechnical investigations;
- hydro-geological and hydrological evaluations;
- mineral prospectivity investigations;
- biological and environmental studies;
- meteorological analysis; and
- an evaluation of transportation capabilities to the site.[88]

3.84 The Department's submission states that, as a result of the potential for certain pieces of Commonwealth and state and territory legislation to regulate, hinder or prevent such activities, the approach taken in the Bill is necessary.[89] A representative from the Department explained:

> …when the Commonwealth government enacted the ARPANS Act in 1998, it had the power to establish facilities or to license facilities such as the one that we are contemplating here. A number of the states subsequently enacted legislation prohibiting the establishment of radioactive waste management facilities within their jurisdictions, so I think it was necessary for the Commonwealth to make certain of its powers to operate a facility in

86 EM, p. 14.

87 EM, p. 3.

88 *Submission 226*, p. 6.

89 *Submission 226*, pp 6-7.

> accordance with its international treaty obligations and also in accordance with existing legislation.[90]

Constitutional basis of the Bill

3.85 In relation to the legality of the Bill, the committee heard that the Department believes there are no concerns or issues in relation to the constitutional basis of the Bill:

> The Department has sought legal advice on constitutional issues regarding the National Radioactive Waste Management Bill 2010.
>
> The Department is confident that relevant heads of power under the Constitution have been taken into account in drafting the Bill.[91]

3.86 For example, the Department pointed to the external affairs power as a basis for Commonwealth legislative authority. It noted that such a power arises 'where international documents are ratified by Australia'.[92] In relation to the subject matter of the Bill, Australia has ratified the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management (which entered into force on 3 November 2003).

3.87 The committee notes also Dr Prest's view that there is 'little doubt' that the Commonwealth has the constitutional power to enact laws to displace the operation of both state and territory laws to establish a radioactive waste facility (in either a state or territory).[93] According to Dr Prest, any legislation would 'most likely' be based on the external affairs power, the corporations power, and the implied nationhood power.[94]

Creation of regulatory gaps

3.88 A number of submitters were concerned that the Bill's overriding of Commonwealth and state and territory legislation would create regulatory gaps in the areas covered by the displaced legislation.

3.89 In its submission, the Northern Territory Government listed 27 pieces of Northern Territory legislation which, in its view, would have no application to activities in relation to the selection of a site or to a selected site. The Northern Territory Government was concerned that ARPANSA, as the regulatory authority, would not have the necessary experience or expertise to regulate the areas covered by the displaced legislation.

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90 *Proof Committee Hansard*, 30 March 2010, p. 2.

91 *Answer to question on notice*, received 12 April 2010 p. 8.

92 *Answer to question on notice*, received 12 April 2010 p. 8.

93 *Submission 229*, p. 3; see also Northern Territory Government, *Submission 147*, p. 10.

94 *Submission 229*, p. 3.

3.90 Similarly, Dr Prest submitted that:

> …if State and Territory laws are excluded, and there are insufficient Commonwealth regulatory controls on the proposed activity, a regulatory void or vacuum is created.[95]

3.91 The ACF was also concerned about this aspect of the Bill:

> We have fundamental concerns that insufficient analysis might have been done in connection with the full implications of the exclusion by the bill of all state and territory laws that might otherwise apply.[96]

3.92 To address these perceived regulatory gaps, Dr Prest called for the Commonwealth to 'audit the proposed regulatory and risk management framework to ensure that important environmental protection aspects of state and territory laws are replaced'.[97] The Northern Territory Government called for the Commonwealth to:

> …identify the legislative or other means by which it proposes filling this substantial regulatory gap, so that State and Territory residents can feel assured that activities that are inherently hazardous are conducted according to appropriate standards.[98]

3.93 The Department, however, rejected the view that the overriding of state and territory legislation would create regulatory gaps:

> There is no regulatory void. [This view] has not taken into account the central role of ARPANSA as the Commonwealth's nuclear regulatory agency.[99]

3.94 The Department observed that the proposed facility 'will be subject to regulatory controls under the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act), and that 'separate licenses will need to be obtained…in order to site, construct, operate and close a facility'. Further, it noted that:

> ARPANSA is guided by the principles of best practice set out in documents such as the Australian National Audit Office Better Practice Guide for Administering Regulation, March 2007 as well as guidance from international regulatory approaches set out in key documents of organisations such as the International Atomic Energy Agency.[100]

3.95 ARPANSA advised the committee that, in addition to acting in conformity with international best practice—as established by international conventions and the

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95 *Submission 229*, p. 4.

96 *Proof Committee Hansard*, 30 March 2010, p. 44.

97 *Submission 229*, p. 4.

98 *Submission 147*, p. 12.

99 *Answer to question on notice*, received 12 April 2010 p. 2.

100 *Answer to question on notice*, received 12 April 2010 p. 3.

International Atomic Energy Agency (IAEA), the Organisation for Economic Co-operation and Development (OECD) Nuclear Energy Agency and the International Commission on Radiological Protection—it would undertake additional steps in its approach to regulating the construction and operation of the proposed facility. This will include public consultation and international peer review processes. With particular reference to public consultation processes, ARPANSA submitted:

> …there is significant information and literature in relation to best practice by regulatory bodies for involving and engaging stakeholders in the assessment and decision making process. This literature recognises that stakeholders have a key contribution to make to the decision making process…ARPANSA will work with stakeholders to arrive at the most informed decision. Stakeholder engagement will be facilitated by the provision of information to the public about…[an] application through electronic and other means; the conduct of public information and awareness campaigns and the convening of relevant fora, including public hearings.[101]

3.96 The Department also submitted that, despite the Bill's impact on state and territory legislation, it will nevertheless 'ensure that responsible measures are followed when undertaking these activities', insofar as it will provide that persons must:

- take all reasonable steps to ensure that the activities cause as little detriment and inconvenience, and do as little damage, as is practicable to the land and to anything on, or growing or living on the land;
- remain on the land only for such period as is reasonably necessary; and
- leave the land, as nearly as practicable, in the condition in which it was immediately before conducting the activities.[102]

Role of ARPANSA

3.97 Dr Prest submitted that a consequence of the Bill would be that ARPANSA would be both the regulator and the operator of the proposed national radioactive waste facility:

> ARPANSA will be the regulator of the facility if constructed. Licences for siting, construction and operation of the facility will need to be obtained from ARPANSA.
>
> However, ARPANSA is also likely to be the manager and operator of the facility. This potentially places ARPANSA in a conflict of roles position where it may be tempted to avoid difficult issues in the interests of smooth and uninterrupted day-to-day operation of the facility.[103]

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101 *Answer to question on notice*, received 30 March 2010, p. 2.

102 *Submission 226*, p. 7.

103 *Submission 229*, p. 6.

3.98 However, the Department strongly rejected this assertion:

> Under no circumstances can ARPANSA be the operator of the facility. ARPANSA has no authority under its legislation to manage and operate a facility, nor does the Bill create that authority.[104]

3.99 The committee notes that it is clear that ARPANSA will have regulatory oversight of the proposed national radioactive waste facility, and will not be the operator. The ARPANSA submission sets out the scope of its regulatory oversight of the facility, which will cover:

- preparation of a site for the facility;
- construction of the facility;
- operation, possession or control of the facility (ie licensing and regulating the operator); and
- decommissioning the facility.[105]

3.100 In relation to the operation and control of the facility, ARPANSA submitted:

> One key function…is to receive and consider applications for facility licence under the [ARPANS] Act…In particular, the [ARPANSA] CEO may receive an application for licence to prepare a site for, construct and operate a facility.[106]

Ongoing regulatory oversight of waste facility

3.101 The committee notes that ARPANSA's role as the regulator will extend for the entire life of the radioactive waste facility.

3.102 The Committee heard that the expected life of the waste facility would be approximately '300 or 200 years', based on the rate at which low-level radioactive waste returns to normal background radiation levels.[107]

3.103 ARPANSA advised the committee that its regulatory oversight function will be informed by its obligations under the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management, and by its commitment to 'keeping abreast of international best practice in radiation protection and nuclear safety'.[108] Further, the committee notes that ARPANSA's ongoing oversight of the operations of the radioactive waste facility will also be guided by the

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104 *Answer to question on notice*, received 12 April 2010, p. 3.

105 *Submission 175*, p. 1.

106 *Answer to question on notice*, received 30 March 2010, p. 1.

107 Department of Resources, Energy and Tourism, *Proof Committee Hansard*, 30 March 2010, p. 9.

108 *Answer to question on notice*, received 30 March 2010, p. 2.

various relevant international and national codes and guidelines, such as the Australian Code of Practice for the Safe Transport of Radioactive Material (2008).[109]

3.104 ARPANSA advised that, in 2006, it published a regulatory guidance document. This document outlines the broad principles – drawn from international guidance and national codes of practice – that would inform ARPANSA's regulatory functions at each stage of the development and in relation to ongoing operation of a national radioactive waste facility.[110]

Lack of an objects clause

3.105 The committee heard evidence from a range of submitters and witnesses in relation to the lack of an objects clause in the Bill. Dr Prest submitted:

> Surprisingly, the Bill does not contain any statutory objectives.
>
> At a minimum, the bill could include a statement similar to the objects of s.3 of the ARPANS Act: 'to protect the health and safety of people, and to protect the environment, from the harmful effects of radiation'.[111]

3.106 In particular, Dr Prest felt it was 'remarkable' that the Bill did not contain a statutory objective of 'selection of the most suitable site on the Australian continent having regard to environmental, geological, geographical, and other scientific considerations, as well as infrastructure considerations'.[112] In his view, such an objective could be relevantly framed by Australia's obligations under the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Nuclear Waste Management, and by common principles in other environmental laws, notably ecologically sustainable development (ESD) and inter-generational equity.[113]

3.107 However, the Department expressed the view that the omission of an objects clause is not significant:

> Objects clauses are not necessary and are not routinely included in legislation – the majority of Acts do not have an objects clause.
>
> Objects clauses are sometimes included in legislation where the sponsors of the legislation consider that they may be useful to clarify the purpose of the legislation.

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109 ARPANSA website, Code of Practice for the Safe Transport of Radioactive Material (2008), http://www.arpansa.gov.au/Publications/codes/rps2.cfm, accessed 4/05/2010.

110 *Regulatory guidance for radioactive waste management facilities: near surface disposal facilities; and storage facilities*, December 2006, available at http://www.arpansa.gov.au/pubs/waste/rwmfacilities_reg_guid.pdf

111 *Submission 229*, p. 2.

112 *Submission 229*, p. 3.

113 *Submission 229*, p. 3.

> A decision to include an objects clause would be a drafting matter. Its presence (or absence) does not affect the scope of an Act.[114]

3.108 In relation to the lack of a statutory objective relating to site selection, the Department stated:

> …the Bill proposes that its purpose be achieved by selecting a site based on volunteerism by landowners, an approach which is fully in accordance with international best practice.[115]

3.109 Further, the Department noted that, according to the IAEA safety guide, *Siting of near-surface disposal facilities*:

> …it is not essential to locate the best possible site for a disposal facility. Rather, a proponent must demonstrate that the disposal system (site, facility design, waste packages, and institutional controls) complies with safety, technical and environmental requirements. Shortcomings in some site characteristics may be compensated for by engineered barriers, taking into consideration the entire disposal system's confinement and isolation capabilities.[116]

3.110 Similarly, the Department noted that the National Health and Medical Research Council code of practice for the near surface disposal of radioactive waste recognises that site selection involves a balancing of selection criteria and design factors:

> A potential site may not necessarily comply with all of these criteria. However, there should be compensating factors in the design of the facility to overcome any deficiency in the physical characteristics of the site.[117]

3.111 The Department also informed the committee that the Bill would ensure that the 'selected site will go through full environmental, heritage and nuclear regulatory processes'.[118]

Committee view

3.112 The committee notes that the history of attempts to establish a national radioactive waste management facility in Australia has been a difficult one. This is understandable, particularly given its often complex nature and the lack of understanding in relation to the issues involved. However, it must be recognised that the need for a national facility of this type in Australia is primarily driven by the

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114 *Answer to question on notice*, received 12 April 2010, p. 1.

115 *Answer to question on notice*, received 12 April 2010, p. 2.

116 *Answer to question on notice*, received 12 April 2010, p. 2.

117 *Answer to question on notice*, received 12 April 2010, p. 2.

118 *Answer to question on notice*, received 12 April 2010, p. 2.

production of low level and intermediate level wastes from beneficial sources, such as industrial applications and nuclear medicine.

3.113 The committee notes advice from the Department and ARPANSA that the establishment of a dedicated national facility for the management of radioactive waste will be in accordance with international best practice in relation to the management of such materials. While Australia produces relatively small amounts of low level and intermediate level radioactive waste annually, the storage of such materials in multiple sites is recognised as increasing potential risks, such as radioactive materials becoming 'orphaned'.

3.114 The committee is confident that a purpose-built facility, subject to appropriate regulation and oversight in relation to all facets of its operation, will represent a significantly better and safer approach to the current arrangements for the management of radioactive waste in Australia.

3.115 The committee acknowledges submissions from the Northern Territory Government and others on the extent to which the Bill preferences the Northern Territory as the location for a national radioactive waste facility. The Northern Territory Government, in particular, voiced its strong opposition to the preservation of the Muckaty Station nomination, and the restriction on the Commonwealth considering other sites in Australia unless and until it appears unlikely that a facility will be established on land nominated by a land council in the Northern Territory.

3.116 However, the committee notes that the Muckaty Station nomination, notwithstanding the issues in dispute, is a voluntary nomination. Its preservation was specifically requested by traditional owners through the relevant representative body, the NLC. In these respects, the preservation of the 2007 nomination is in keeping with the Bill's focus on voluntary processes, and with what might be called the legitimate or good faith expectations of the parties to the Muckaty Station nomination. The committee notes that the Bill's emphasis on volunteerism distinguishes it from the approach taken in the current Act, but acknowledges that appropriate consultative and regulatory processes will be needed to engender broader community understanding and acceptance of the facility, when a site is finally selected.

3.117 A major area of contention in the present inquiry, and in the inquiry by the ECA committee in 2008, is the extent to which all relevant traditional owners have been consulted over the nomination of Muckaty Station as a potential site for the waste facility. This issue also goes to the question of whether the consent to the Muckaty Station nomination was granted by traditional owners with the relevant authority to make decisions affecting, or to 'speak for', the land in question. The committee acknowledges the importance of these questions, and notes that the inquiry provided an opportunity for all stakeholders to put forward their views on these issues.

3.118 Despite this, the evidence received by the inquiry was not sufficient to allow the committee to reach a conclusion on these matters, which, fundamentally, must be determined by information which the committee does not have access to or is not

competent to assess. In particular, the committee did not have access to the deed of agreement relating to the Muckaty Station nomination, or to anthropological reports relating to the question of traditional ownership of that country.

3.119 Further, the committee does not consider that it is its role to determine whether the consultative processes around the Muckaty Station nomination were adequate or whether the approval of traditional land owners has been adequately sought according to legal and traditional requirements. These disputes revolve around issues to do with Indigenous cultural practice and its interaction with the *Aboriginal Land Rights (Northern Territory) Act 1976*. The committee believes that ultimately these matters must be resolved in a legal forum or through a mechanism that is competent to resolve such disputes between groups of traditional owners.

3.120 The committee notes that affected parties will have access to procedural fairness processes and to judicial review under the Bill, and there is provision for the establishment of regional consultative committees. Beyond the site at Muckaty Station, the committee notes that the Bill will remove from consideration as potential sites for the radioactive waste facility the three Defence sites, which are identified as potential sites in the current Act.

3.121 The committee acknowledges that the Bill proposes to introduce a discretion for the Minister to establish a regional consultative committee of relevant stakeholders following the selection of a site. The committee acknowledges the importance of ensuring that relevant stakeholders are given the opportunity to participate in consultative processes around decisions that affect their interests, particularly in relation to an issue as emotive as radioactive waste. Further, the committee considers that there would be few compelling reasons or circumstances not to establish such a committee, and that any decision not to establish a committee could create perceptions of a lack of transparency around the selection of a site. Given this, the committee's view is that the Minister should provide the opportunity for early consultations, and that the establishment of a regional consultative committee should be a mandatory requirement.

Recommendation 1

3.122 The committee recommends that, as soon as possible, the Minister for Resources, Energy and Tourism undertake consultations with all parties with an interest in, or who would be affected by, a decision to select the Muckaty Station site as the location for the national radioactive waste facility.

Recommendation 2

3.123 The committee recommends that proposed section 21 of the Bill be amended to make the establishment of a regional consultative committee mandatory, immediately following the selection of a site for the radioactive waste facility.

3.124 The committee also received a substantial amount of evidence relating to the issues of procedural fairness and judicial review, in relation to the preserved Muckaty Station nomination and to decisions to be made under the Bill more generally.

3.125 In relation to procedural fairness provisions applying to decisions to be made under the Bill, the committee heard significant criticisms that these requirements were insubstantial and likely to be ineffectual. While the committee accepts that the Bill introduces important procedural fairness requirements that are absent from the current Act, the committee notes concerns relating to the extent to which the Minister is required to consider comments received from interested or relevant parties in declaring a site, or in making a declaration to open the Australia-wide nomination process. Accordingly, the committee's view is that the Minister should be required to respond in writing to comments or submissions received as part of the procedural fairness processes proposed in the Bill. The committee considers that it is important that the Minister is required to demonstrate the extent to which he has taken into account the comments received under the Bill's procedural fairness provisions.

Recommendation 3

3.126 The committee recommends that proposed sections 9 and 17 of the Bill be amended to require the Minister to respond in writing to comments received in accordance with the Bill's procedural fairness requirements.

3.127 The committee also heard that the procedural fairness provisions of the Bill would be undermined by its 'no invalidity' clauses, which provide that a failure to comply with procedural requirements will not invalidate a decision. The committee notes that, given the highly contested and emotive nature of issues involving nuclear or radioactive materials, the Bill has sought to balance the introduction of procedural fairness against the need to have a process that is not able to be unduly frustrated by strategic or unmeritorious litigation. In this respect, it is important to note that 'no invalidity' clauses can ensure that major undertakings are not undone by a failure to adhere to mere formalities or minor aspects of process. Further, the committee notes that the approach taken in the Bill reflects the scheme of the *Aboriginal Land Rights (Northern Territory) Act 1976*. On the basis of these considerations, the committee agrees that the 'no invalidity' clauses are appropriate, taking into account the purpose and context of the Bill.

3.128 In relation to the issue of the application of the ADJR Act to the preserved Muckaty Station nomination and to decisions made under the Bill, the committee heard calls for the former to be made subject to the ADJR Act. However, as noted above, the committee is not convinced that the Government's undertaking, and the legitimate expectations of stakeholders in respect of the Muckaty nomination, should be frustrated by requiring the nomination to be accepted afresh, and/or retrospectively subject to review under the ADJR Act. The committee notes that, importantly, a decision to select Muckaty Station as the site for the facility will be subject to ADJR Act review according to the current terms of the Bill.

3.129 The committee notes the views of the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny Committee) on the absolute discretion of the Minister in relation to the making of decisions under the Bill. The Scrutiny Committee expressed concern that this, in conjunction with the relatively limited requirements for procedural fairness, 'appears to make rights, liberties or obligations effectively dependant on non-reviewable decisions'.[119]

3.130 In addition, the Scrutiny Committee noted that the Explanatory Memorandum to the Bill is inadequate insofar as it 'fails to set out any justification for these measures'.[120] The committee agrees that the inclusion of a detailed justification for the approach taken in the Bill would inform and facilitate the Senate's deliberations on the Bill, as well as any future interpretation and application of its provisions.

Recommendation 4

3.131 The committee recommends that the Explanatory Memorandum be amended to include a detailed rationale for, and explanation of, the Minister's absolute discretion in relation to decision making under the Bill.

3.132 The committee considered numerous submissions on a range of legal issues. Many submitters and witnesses expressed concern about the consequences of the Bill overriding certain Commonwealth and state and territory legislation, insofar as this would result in regulatory gaps around the construction and operation of the proposed facility. However, the committee notes that the Bill only purports to override legislation that would otherwise regulate, hinder or prevent activities in relation to site selection, and to the construction and operation of the facility. Further, specified Commonwealth Acts will also apply to activities in relation to the selected site, notably the ARPANS Act and the EPBC Act. The committee also received substantial evidence on the regulatory role and processes of ARPANSA in relation to the proposed facility. The committee notes that these will be governed by relevant international and national codes, and based around substantial commitments to public consultation and international peer review.

3.133 Finally, the committee considered evidence concerning the lack of an objects clause in the Bill, particularly concerning specific objects going to the selection of a suitable site for the national radioactive waste facility. While the committee acknowledges the view of the Department that the inclusion of an objects clause is not strictly necessary, the committee notes that such clauses are relevant to judicial interpretation of legislation, insofar as an interpretation that would promote the purpose or object of an Act must be preferred to one that would not.[121] The committee

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119 Senate Standing Committee on the Scrutiny of Bills, *Alert Digest* (No. 3 of 2010), 10 March 2010, p. 10.

120 Senate Standing Committee on the Scrutiny of Bills, *Alert Digest* (No. 3 of 2010), 10 March 2010, p. 10.

121 *Acts Interpretation Act 1901* (Cth), section 15AA.

considers that the inclusion of objects clauses is a common feature of modern legislation, and that the inclusion of such a clause in the Bill could clarify the purposes underpinning the legislation. In stating this, however, the committee accepts that the particular form of an objects clause for the Bill involves drafting and policy considerations that are best addressed by the Government, and for this reason makes no comment on the specific form that such a clause should take.

Recommendation 5

3.134 The committee recommends that the Bill be amended to include an objects clause.

Recommendation 6

3.135 The committee recommends that, subject to consideration of the preceding recommendations, the Senate pass the Bill.

Senator Trish Crossin

Chair