

National Radioactive Waste Management Act 2012

AMANDA NGO

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The National Radioactive Waste Management Act can be found at:

<https://www.legislation.gov.au/Details/C2012A00029>

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SUMMARY OF THE LAW

| STEP 1: NOMINATION | |
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| OPTION A: BY A LAND COUNCIL | |
| There are 2 options for nomination. This is the first option. | |
| POWER | Section 5(1): Land Council may nominate Aboriginal land within their area as a potential site. |
| EFFECTS ON INDIGENOUS RIGHTS | <p>Section 5(2):</p> <ul style="list-style-type: none"> (e) If there is a sacred site on or near the land, must contain evidence that the persons for whom the site is sacred are satisfied that there is no substantial risk of damage to or interference with the sacred site as a result of the nomination or subsequent action under this Act; and (f) Contain evidence that: <ul style="list-style-type: none"> (i) The Land Council has consulted with the traditional Aboriginal owners of the land; and (ii) The traditional Aboriginal owners understand the nature and effect of the proposed nomination and the things that might be done on or in relation to the land under this Act if the Minister approves the nomination; and (iii) The traditional Aboriginal owners as a group have consented to the proposed nomination being made (that consent as a group (iv) 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. |
| CONSEQUENCES | Section 5(4) states that a failure to comply with the requirements listed above do not invalidate a nomination. This means that a nomination is not ineffective even if the Aboriginal people are not consulted/consent – this effectively removes their power in relation to the nomination. |

| OPTION B: GENERAL (BY A MINISTER) | |
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| For this route, a Minister must first declare nominations can be made. | |
| POWER | Section 6: Minister can make a written declaration that sites may also be nominated under section 7. |
| EXPLANATION | This cannot concern the same piece of land subject to a section 5 nomination by a Land Council, and this cannot be used to approve a section 5 nomination. |
| EFFECTS ON INDIGENOUS RIGHTS | 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 under section 5. |
| CONSEQUENCES | If land is nominated section 5, the Minister must consider whether that application is unlikely to be successful. However, the Act does not require that the Minister only engage section 6 when it is unlikely – it merely needs to be considered. Difficult to prove it wasn't considered. |
| Once the declaration has been made, the public may submit nominations. | |
| POWER | Section 7: A person or persons can nominate land in a State, ACT or NT. |

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| EFFECTS ON INDIGENOUS RIGHTS | <p>Section 7(4): allows nomination of ‘native title’ land where:</p> <ul style="list-style-type: none"> (a) An approved determination has been made; and (b) The determination holds that the native title holders have a right to possession, occupation, use and enjoyment of the land; and (c) The nominator is authorised to act as an agent for the native title holders, or holds the rights on trust for them. <p>Section 8(1)(e): there must be evidence that s 7(4) requirements were satisfied.</p> |
| CONSEQUENCES | <p>Section 8(4) states that a failure to comply with section 8(1) does not invalidate a nomination. This means a nomination can still be valid even if there is no evidence the nominator had a right to act for the native title holders.</p> |

| STEP 2: APPROVAL | |
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| POWER | Minister may approve, in his or her absolute discretion, a nomination whether in whole or part. |
| EFFECTS ON INDIGENOUS RIGHTS | Section 10(6): in deciding whether to approve land, the Minister must take into account any relevant comments by a nominator of the land, or a person with a right or interest in the land. |
| CONSEQUENCES | The obligation is merely to take these comments into account. |

| STEP 3: SELECTION OF A SITE | | | |
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| POWER | <p>Section 11(2): a person may do anything necessary or incidental to the purposes of selecting a site on which to construct and operate a facility.</p> <p>Section 11(3) gives a non-exhaustive list of the activities a person may undertake.</p> | | |
| EXPLANATION | <p>Section 11(2) grants the power to “do anything necessary” to select a site for the waste management facility. An example could be extracting water from the land (section 11(3)(e)). The addition of the word “incidental” broadens the power – the action need not be ‘necessary’ but can simply be ‘incidental’, or related, to the selection of a site.</p> | | |
| REQUIREMENTS | <p>Section 11(4): the person must:</p> <ul style="list-style-type: none"> (a) Take all reasonable steps to ensure that they cause as little detriment, damage and inconvenience as is practicable, to the land and anything growing or living on the land; and (b) Remain only on the land for a period that is reasonably necessary; and (c) Leave the land, as nearly as practicable, in the condition in which it was immediately before the activity. | | |
| EFFECTS ON INDIGENOUS RIGHTS | <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>Section 12(1): any <i>State/Territory law</i> that relates to:</p> <ul style="list-style-type: none"> (a) The use or proposed use of the land (b) The environmental consequences of the use of land (c) The archaeological or heritage values of the land or objects (including the significance of land, premises or objects in the </td> <td style="width: 50%; vertical-align: top;"> <p>Section 13(1): Of the <i>Commonwealth laws</i>, the:</p> <ul style="list-style-type: none"> (a) <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>; (b) <i>Environment Protection and Biodiversity Conservation Act 1999</i> <p>have no effect to the extent that it would regulate, hinder or prevent activities authorised under section 11 (i.e. site selection activities).</p> </td> </tr> </table> | <p>Section 12(1): any <i>State/Territory law</i> that relates to:</p> <ul style="list-style-type: none"> (a) The use or proposed use of the land (b) The environmental consequences of the use of land (c) The archaeological or heritage values of the land or objects (including the significance of land, premises or objects in the | <p>Section 13(1): Of the <i>Commonwealth laws</i>, the:</p> <ul style="list-style-type: none"> (a) <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>; (b) <i>Environment Protection and Biodiversity Conservation Act 1999</i> <p>have no effect to the extent that it would regulate, hinder or prevent activities authorised under section 11 (i.e. site selection activities).</p> |
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| | <p>tradition of Indigenous people)</p> <p>(d) Controlled material, radioactive material or dangerous goods</p> <p>(e) Licensing</p> <p>has no effect to the extent that it would regulate, hinder or prevent activities authorised under section 11.</p> | |
| CONSEQUENCES | <p>If a site is subject to section 11(2), these provisions under sections 12 and 13 can remove the operation of laws that would “regulate, hinder or prevent” the selection process. The government therefore is unconstrained by State/Territory and Commonwealth laws that would affect their ability to assess the site.</p> | |

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| STEP 4: ACQUISITION OR EXTINGUISHMENT OF RIGHTS AND INTERESTS | |
| STEP A: Specifying the rights and interests | |
| <p>In order to acquire or extinguish rights, the Minister must first declare them, through ‘specifying’ the particular ones that are relevant.</p> | |
| POWER | <p>Section 14(2): Minister may, in his or her absolute discretion, declare that that a site has been selected for a facility, and may specify some or all of the rights or interests in that site.</p> |
| EFFECT ON INDIGENOUS RIGHTS | <p>Section 14(5): ‘rights and interests’ may include:</p> <p>(a) Rights to minerals</p> <p>(b) Native title rights and interests</p> <p>(c) Interest in the land, being an interest that did not previously exist.</p> |
| CONSEQUENCES | <p>However, section 14(6) holds that section 9 of the <i>Racial Discrimination Act</i> applies.</p> <p>This section says that it is unlawful for a person to do any act which involves a distinction/exclusion/restriction <u>based on</u> race/colour/descent/national or ethnic origin <u>with the purpose of</u> nullifying/impairing any human rights, including in political/economic/social or cultural respects.</p> <p>‘With the purpose’ means that an act will be lawful even if it curtails these human rights, as long as the act was not done with that as the purpose. Additionally, if the act was not <i>based on</i> race/colour etc. then this is also valid.</p> <p>Therefore, as long as the Indigenous group was not targeted, the <i>Racial Discrimination Act</i> will not apply.</p> |
| STEP B: Acquiring or extinguishing the rights and interests | |
| POWER | <p>Section 19(1): any rights and interests in the site that have been specified are:</p> <p>(a) Either acquired by the Commonwealth, or extinguished; and</p> <p>(b) Freed and discharged from all other rights and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates</p> |

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| EFFECT ON INDIGENOUS RIGHTS | <p>Section 20:</p> <p>(1) S 19 has effect despite any other law of the Commonwealth, State or Territory</p> <p>(2) The following laws also do not affect section 19:</p> <p>(a) The <i>Lands Acquisition Act 1989</i></p> <p>(b) The <i>Native Title Act 1993</i></p> |
| CONSEQUENCES | <p>This gives the government power to obtain the rights of other parties purely through the operation of this section, and to disregard Indigenous rights under the <i>Native Title Act 1993</i>.</p> |

| STEP 5: CONDUCTING ACTIVITIES | | | |
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| POWER | <p>Section 23: a person under this section may do anything necessary or incidental to any of the activities listed in this section.</p> | | |
| EFFECTS ON INDIGENOUS RIGHTS | <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>Section 24(1): any <i>State/Territory law</i> that relates to:</p> <p>(a) The use or proposed use of the land</p> <p>(b) The environmental consequences of the use of land</p> <p>(c) The archaeological or heritage values of the land or objects (including the significance of land, premises or objects in the tradition of Indigenous people)</p> <p>(d) Controlled material, radioactive material or dangerous goods</p> <p>(e) Licensing</p> <p>has no effect to the extent that it would regulate, hinder or prevent activities authorised under section 23.</p> </td> <td style="width: 50%; vertical-align: top;"> <p>Section 25:</p> <p>(1) Any <i>Commonwealth law</i> prescribed by the regulations has no effect to the extent that it would regulate, hinder or prevent activities authorised under section 23.</p> <p>(2) The regulations must not prescribe any of the following laws:</p> <p>(a) <i>Australian Radiation Protection and Nuclear Safety Act 1998</i>;</p> <p>(b) <i>Environment Protection and Biodiversity Conservation Act 1999</i>;</p> <p>(c) <i>Nuclear Non-Proliferation (Safeguards) Act 1987</i></p> </td> </tr> </table> | <p>Section 24(1): any <i>State/Territory law</i> that relates to:</p> <p>(a) The use or proposed use of the land</p> <p>(b) The environmental consequences of the use of land</p> <p>(c) The archaeological or heritage values of the land or objects (including the significance of land, premises or objects in the tradition of Indigenous people)</p> <p>(d) Controlled material, radioactive material or dangerous goods</p> <p>(e) Licensing</p> <p>has no effect to the extent that it would regulate, hinder or prevent activities authorised under section 23.</p> | <p>Section 25:</p> <p>(1) Any <i>Commonwealth law</i> prescribed by the regulations has no effect to the extent that it would regulate, hinder or prevent activities authorised under section 23.</p> <p>(2) The regulations must not prescribe any of the following laws:</p> <p>(a) <i>Australian Radiation Protection and Nuclear Safety Act 1998</i>;</p> <p>(b) <i>Environment Protection and Biodiversity Conservation Act 1999</i>;</p> <p>(c) <i>Nuclear Non-Proliferation (Safeguards) Act 1987</i></p> |
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| CONSEQUENCES | <p>Section 24 removes the effect of laws that would protect Indigenous land and heritage rights (as well as other protective laws). Section 25(1) holds that any regulations that affect activities will not be valid to the extent that they “regulate, hinder or prevent” the activities. Section 25(2) states that the regulations cannot “prescribe” the laws listed – this prohibits the laws above being written into any regulations attached to the NRWMA, and hence prohibits their enforcement through this channel.</p> | | |

PROBLEMS WITH THE ACT

VIOLATIONS OF INDIGENOUS RIGHTS

False power provisions

The Act gives several powers to Indigenous groups, but these provisions do not need to be followed for the government to act. This is due to several clauses which strip the rights of their effect. These include:

- Section 5(4) which does not invalidate a nomination even if there is no proof that Aboriginal owners were consulted, advised, given the opportunity to express their view or consent
- Section 8(4) which does not invalidate a nomination even if there is no proof that the nominator had the authority to act on behalf of the native title holders

This is contrary to the UN Declaration on the Rights of Indigenous Peoples, which Australia endorsed in 2009. The Declaration has a specific provision promoting effective measures to be taken by the State, in regards to hazardous materials on Indigenous land. The Declaration reads: "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent."¹ The emphasis on the consent of Indigenous peoples is clear.

Invalidation of other laws

The Act has sections which remove the effect of State, Territory and Commonwealth laws that protect Indigenous rights.

- Section 12(1) and section 24(1) which nullify State or Territory laws that protect the archaeological or heritage values of land or objects (including those which relate to Indigenous traditions) to ensure that they cannot hinder activities the government seeks to undertake in respect of the land
- Section 13(2) and section 25(1) apply generally to any Commonwealth laws that would regulate, hinder or prevent activities on the land
- Specific laws are also identified, including: the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (section 13) and the *Native Title Act 1993* (section 20)

Disregard of native title

The Minister may extinguish or acquire rights and interests in the land (section 19), including native title rights (section 14(5)(b)). The Minister must take into account any relevant comments by persons "with a right or interest in the land" (section 18(3)) but the obligation is merely to take them into account. The Minister is not required to respect native title, and can decide against making a decision in their favour. Further, the *Native Title Act 1993* is expressly stated to not have effect on acquisition or extinguishment of rights.

Limited granting of rights and interests to original owners

The Minister can return land that has been used if the land is no longer required (section 27(1)). The result of this decision can either be to grant the Land Trust the land itself (section 29(1)), or the rights and interests in the land (section 29(3)). The land is no longer required if the facility on which it was built has been abandoned (section 26).

However, these provisions are very limited. The land or rights and interests can only be returned when the facility is abandoned, and per section 26(3), does not apply to land that was nominated under section 7 (i.e. by a person rather than a Land Council). From the 2015 call for

¹ UN Declaration on the Rights of Indigenous Peoples, art. 29(2): http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

nominations, all 28 applications were made pursuant to section 7² – this means that the rights and interests cannot be returned under this Act even if the facility is eventually abandoned.

Moreover, even if the land is returned, the Crown retains rights to the minerals in the land and the right to explore for them, including leases and licences to do so (section 29(2)).

VIOLATION OF HEARING RULE/APPEAL RIGHTS

The Act also has two provisions which try to remove the right to the natural justice hearing rule. These are:

- Section 10(7)
- Section 18(5)

If valid, these would mean that a person would not be able to bring the Minister’s decision to court, to be reviewed by a judge. Whether these two clauses are valid is extremely complex – the law is not yet settled on whether these types of clauses, called ‘ouster clauses’, conflict with the courts’ power. At current law, the court must decide on a case-by-case basis if the specified clause is invalid.³ It cannot be said that these two clauses infringe appeal rights until this Act is brought before the court, and a determination specific to this Act is made.

VIOLATION OF OTHER LAWS

The Act empowers the government to disregard certain State, Territory or Commonwealth laws that would restrict, hinder or prevent activities they seek to undertake. The laws they can disregard are laws that relate to:

- The use of the land, or how they propose to use it
 - The environmental consequences of the use of the land
 - The archaeological or heritage values of land or objects (including those which relate to the significance of the land or objects for Indigenous traditions)
 - Controlled, radioactive or dangerous goods
 - Licensing (including employment and the conducting of kinds of businesses)
- (Found in sections 12(1), 13(2), 24(1) and 25(1))

This effectively gives the government the power to act on the land with free reign. It also removes the effect of specified laws, being: the *Australian Radiation Protection and Nuclear Safety Act 1998*; *Environment Protection and Biodiversity Conservation Act 1999* and *Nuclear Non-Proliferation (Safeguards) Act 1987* (all section 25).

It should be noted that while the *Environment Protection and Biodiversity Conservation Act 1999* can be disregarded during the site selection process (section 13(2)), section 25(2) seeks to prevent the *Environment Protection and Biodiversity Conservation Act 1999* from applying to the activities conducted in the facility.

However, the Environmental Protection Authority (EPA) states that: “the EPA is responsible for regulating the generation, treatment, storage and disposal of waste. Therefore, once a material becomes a waste, it falls under EPA regulatory control.”⁴ It is unclear as of yet whether the government will need to abide by EPA regulations, as the time of writing, a site had not successfully progressed to this stage under the NRWMA.⁵

² National Radioactive Waste Management Facility (NRWMA) Phase 1 Summary Report, April 2016, page 6.

³ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; *Hockey v Yelland* (1984) 157 CLR 124.

⁴ “Waste Management”, EPA South Australia, http://www.epa.sa.gov.au/environmental_info/waste_management. Accessed 16 December 2016.

⁵ Time of writing: December 2016.