

# PROTECTING AUTHORITY, BURYING DISSENT: AN ANALYSIS OF AUSTRALIAN NUCLEAR WASTE LAW

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*This paper considers the Australian legal framework for a national nuclear waste repository in the context of the Commonwealth government's preference for a controversial site located near Barndioota, in South Australia's Flinders Ranges. Although the environmental, political and economic justifications for a national repository are acknowledged, the article suggests that the Commonwealth's failure, to date, to secure a site for the repository has resulted from its disregard for dissent from State and Territory governments, as well as from communities local to proposed sites. In considering whether the current framework provides for a fairer process with respect to the proposed South Australian site, the author examines the arguments and outcomes of previously litigated actions, the provisions of the National Radioactive Waste Management Act 2012 (Cth) (NRWMA), the assessment and approval process under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBCA), and the constitutionality of the Commonwealth's approach of excluding State and Territory laws from application at the repository site. The paper argues that the current law protects the Commonwealth's decision-making in relation to a repository site, but at the expense of matters important to the public interest, and with the consequence that the siting process is inherently compromised.*

## I INTRODUCTION

The regulation of nuclear waste is necessarily concerned with the imposition of boundaries for the purposes of restricting public access. Subterranean repositories are an internationally recommended solution, accepted by the Australian Radiation Protection and Nuclear Safety Agency ('ARPANSA'), for ensuring the isolation of radioactive material from the biosphere and for thereby limiting the exposure of living organisms to dangerous levels of radiation.<sup>1</sup>

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<sup>1</sup> International Atomic Energy Agency ('IAEA'), *IAEA Safety Standards Series No. SSR-5: Disposal of Radioactive Waste* (2001) 2. In planning for a national repository, the Commonwealth until very recently relied upon the National Health and Medical Research Council's *Code of practice for the near-surface disposal of radioactive waste in Australia* (1992). It has since retracted this Code, relying instead exclusively upon the 'trusted international standard' for radioactive waste disposal established by the IAEA, of which Australia is a member State: Australian Radiation Protection and Nuclear Safety Agency ('ARPANSA'), *Publications: Radiation Health Series* (12 August 2016) <<http://www.arpansa.gov.au/Publications/Codes/rhs.cfm>>.

With Australian waste currently stored in temporary facilities,<sup>2</sup> the Commonwealth has for decades proposed a National Radioactive Waste Management Facility ('NRWMF') for the near-surface disposal of the country's low level waste ('LLW')<sup>3</sup> and for secure storage of its intermediate level waste ('ILW'),<sup>4</sup> the end results of scientific research, industrial applications, and the production and use of radiopharmaceuticals.<sup>5</sup>

However, the ferocity of opposition to a nuclear waste facility – on the part of environmental non-government organisations, communities local to proposed sites, many Traditional Owners and, historically, State governments – has meant that the NRWMF has so far failed to materialise. Concerns that have typically imbued the public response to a waste dump have included 'public fear of radiation, lack of trust in experts and institutions',<sup>6</sup> and the more fundamental 'desire for local autonomy in the use of land, and freedom from outside interference'.<sup>7</sup> In light of this clash of interests between the Commonwealth and those opposed to a national repository, this paper considers how the need to isolate and shield nuclear waste from the public and from the environment has been provided for in the Australian legal framework and gauges the extent to which the Commonwealth's efforts to locate a repository are themselves shielded from challenge and dissent by that very framework. In undertaking such an inquiry, the article acknowledges, from the outset, the justifications for a national nuclear waste repository, but also examines what may be endangered or diminished under the Commonwealth's current approach of limiting or preventing public participation and litigated actions.

The Commonwealth government's recently announced preference for the newly nominated South Australian site at Wallerberdina Station near Barndioota in the Flinders Ranges has returned the search for a suitable repository site to familiar territory. The project has been met with significant local opposition, amid concerns about environmental safety, the impacts on Aboriginal remains, sites and songlines,<sup>8</sup> and the inadequacy of public consultation in the

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<sup>2</sup> Low Level Waste ('LLW') and short-lived Intermediate Level Waste ('ILW') are held in Commonwealth and in State and Territory stores, while long-lived ILW is held by the Commonwealth at the Lucas Heights reactor site: Commonwealth of Australia, *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management National Report* (2011) ('*Joint Convention 2011 Report*') 25–6. Management practices remain unchanged in 2014: Commonwealth of Australia, *Joint Convention on the Safety of Spent Fuel Management and Radioactive Waste Management National Report* (2014) ('*Joint Convention 2014 Report*') 12.

<sup>3</sup> Organisation for Economic Co-operation and Development, *Low-level radioactive waste repositories: An analysis of costs* (1999) 21. LLW, described as encompassing 'a very broad range of waste', may include 'short-lived radionuclides at higher levels of activity concentration and also long-lived radionuclides at relatively low levels of activity concentration', requires 'robust isolation and containment for periods of up to a few hundred years', and is 'suitable for disposal in engineered near-surface disposal facilities': International Atomic Energy Agency, *IAEA Safety Standards No.GSG-1: Classification of Radioactive Waste* (2009) 5.

<sup>4</sup> ILW may contain 'alpha-emitting radionuclides that will not decay to a level of activity concentration acceptable for near surface disposal during the time for which institutional controls can be relied upon' and therefore requires disposal at greater depths than that provided by near-surface disposal, in order to deter access and retrieval: *Ibid* 6.

<sup>5</sup> Gerald Nagtzaam and Andrew Newman, 'Merely Unpicking the Gordian Knot: The Ongoing Quest to Build a Federal Low Level Radioactive Waste Disposal Facility in Australia' (2015) 18(1) *Australasian Journal of Natural Resources Law and Policy* 23, 24; *Joint Convention 2011 Report* 7.

<sup>6</sup> Andrew Newman and Gerry Nagtzaam, *Decision-making and Radioactive Waste Disposal* (Routledge, 2016) 9.

<sup>7</sup> Michael B Gerrard, *Whose Backyard, Whose Risk: Fear and Fairness in Toxic and Nuclear Waste Siting* (MIT Press, 1994) 104.

<sup>8</sup> Friends of the Earth Adelaide, 'Adnyamathanha Traditional Owners Will Fight Nuclear Waste Dump Plan' (Media Release, 29 April 2016) <<http://www.adelaide.foe.org.au/adnyamathanha-traditional-owners-will-fight-nuclear-waste-dump-plan/>>.

lead up to the announced preference for the site.<sup>9</sup> Lending substance to this latter concern, the choice of Barndioota from six nominations was apparently based on ‘unambiguous and broad community support’ for the repository to be located at the site,<sup>10</sup> notwithstanding the Commonwealth’s own evidence to the contrary revealing significant indigenous opposition,<sup>11</sup> and despite South Australian legislation prohibiting any such facility.<sup>12</sup>

In justifying a site nomination, the Commonwealth may rely, as it has always done, on its environmental obligations. For the third-largest producer of uranium,<sup>13</sup> a national repository has long held value in terms of demonstrating Australia’s concrete, ethical commitment to domestic radioactive waste management within a competitive and security-conscious global market.<sup>14</sup> A law that facilitates product stewardship expresses that commitment, serves to shed a more benign light over a nuclear industry prone to attracting environmental and political controversy, and thus assists Australia’s export prospects. The economic and social benefits of supporting Australia’s burgeoning nuclear medicine industry are also persuasive. The NRWMF would allow for increased ILW storage capacity, critical to long-term implementation of the national Nuclear Medicine Project.<sup>15</sup> The Project envisions a tripling of radioisotope production for the supply of 25-30% of the global demand for nuclear medicine and concomitant export income.<sup>16</sup>

Intergenerational equity is a related, and equally compelling reason for advancing a national nuclear waste dump. Informed by the principle of sustainable development, intergenerational equity stipulates that there is a duty on the part of the present generation to manage the environmental risks created by its use of resources, including the long-term risks arising from the production of radioactive material.<sup>17</sup> Accordingly, the significant benefits Australia reaps from the nuclear industry and its contribution to the fuel cycle fosters the need for management of radioactive waste in the present, such that ‘an unfair burden is not placed on future generations’.<sup>18</sup> Further validation for a repository comes from the fact that the burden in question may, from one point of view, be described as

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<sup>9</sup> Natalie Whiting, ‘Hawker Locals Reject Nuclear Dump Proposed for Wallerberdina Station at Packed Public Meeting’, *ABC News* (online), 7 May 2016 <<http://www.abc.net.au/news/2016-05-07/locals-reject-wallerberdina-nuclear-dump-at-hawker-meeting/7393082>>; Calla Wahlquist, ‘Indigenous Owners Outraged at Site Earmarked for Australia’s First Nuclear Waste Dump’, *The Guardian* (online), 29 April 2016 <[https://www.theguardian.com/environment/2016/apr/29/indigenous-elders-outraged-at-site-earmarked-for-australias-first-nuclear-waste-dump?CMP=share\\_btn\\_link](https://www.theguardian.com/environment/2016/apr/29/indigenous-elders-outraged-at-site-earmarked-for-australias-first-nuclear-waste-dump?CMP=share_btn_link)>.

<sup>10</sup> Department of Industry, Innovation and Science, *National Radioactive Waste Management Facility Questions and Answers – Phase 2* (Commonwealth of Australia, 6 May 2016) 1.

<sup>11</sup> Of local indigenous community members surveyed for their views, only 3% supported the NRWMF on the site nominated: Department of Industry, Innovation and Science, *National Radioactive Waste Management Facility Community Sentiment Survey: Wave 2 Report of Findings* (Comm of Australia, April 2016) 10 <<http://www.radioactivewaste.gov.au/sites/prod.radioactivewaste/files/files/NRWMF%20Community%20Sentiment%20Surveys%20Report.pdf>>.

<sup>12</sup> Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA).

<sup>13</sup> World Nuclear Association, *Australia’s Uranium* (July 2016) <<http://www.world-nuclear.org/information-library/country-profiles/countries-a-f/australia.aspx>>.

<sup>14</sup> Clarke and Fruhling argue that Australia’s consideration of nuclear waste disposal needs to be seen through the lens of the philosophy expressed in the 1984 Australian Science and Technology Council (‘ASTEC’) Report commissioned by the Hawke government: Michael Clarke and Stephen Fruhling, *Australia’s Nuclear Policy: Reconciling Strategic, Economic and Normative Interests* (Routledge, 2<sup>nd</sup> ed, 2016) 105. The ASTEC Report recommended that ‘as an exporter of uranium, Australia has a responsibility to participate in and assist the development of all aspects of radioactive waste management’: Australian Science and Technology Council, *Australia’s Role in the Nuclear Fuel Cycle: A Report to the Prime Minister* (1984) 19 (‘ASTEC Report’).

<sup>15</sup> Australian Nuclear Science and Technology Organisation, *What is the ANSTO Nuclear Medicine Project?* <<http://www.ansto.gov.au/BusinessServices/ANMProject/AboutANM/index.htm>>.

<sup>16</sup> Australian Nuclear Science and Technology Organisation, *Going global with nuclear medicine* (26 November 2014) <<http://www.ansto.gov.au/AboutANSTO/MediaCentre/News/ACS056435>>.

<sup>17</sup> International Atomic Energy Agency, *Handbook on Nuclear Law* (IAEA, 2003) 8–9.

<sup>18</sup> South Australia, Nuclear Fuel Cycle Royal Commission, *Nuclear Fuel Cycle Royal Commission Report* (2016) 79 (‘SA Nuclear Fuel Cycle Royal Commission Report’).

environmentally 'insignificant'.<sup>19</sup> Nuclear waste, in general, is more easily contained and controlled than other more diffuse environmental problems, with LLW containing a fraction of the radioactivity of all nuclear waste.<sup>20</sup> Also, domestic volumes are relatively small compared to other hazardous wastes produced, at least based on current outputs.<sup>21</sup> In 2011, for instance, Australia's volume of ILW constituted the equivalent of 'a typical house'.<sup>22</sup> The proposed site for the NRWMF, moreover, would occupy a mere 100 hectares,<sup>23</sup> and employ engineered barriers to prevent the release of radioactive material for the duration of the period necessary for radioactivity to subside.<sup>24</sup>

Notwithstanding these justifications for the NRWMF, any truncation of public participation in the site approval process would have undesirable consequences for the Commonwealth, as well as for the communities affected by the siting. As Holland notes, the danger in limiting the public's say on a repository means opposition is inevitably augmented, leading to the failure of a site to be appropriately located.<sup>25</sup> Newman and Nagtzaam concur, arguing that the lack of an NRWMF to date results from a denial in the past of avenues for environmental justice, a concept they define as 'the fair treatment and meaningful involvement of all people', regardless of racial and socio-economic difference, with regard to decisions affecting their environment.<sup>26</sup>

Attempts, both within Australia and overseas, to site nuclear waste facilities on traditional lands of indigenous peoples or on rural, sparsely populated country, have met with understandable opposition where the communities impacted by proposals have felt deliberately targeted and politically disempowered on the basis of their geographic isolation or socio-economic disadvantage.<sup>27</sup> An environmentally just outcome is certainly more likely to result from a fairer siting procedure that seeks the participation of those likely to be particularly affected by siting decisions. The recent South Australian Nuclear Fuel Cycle Royal Commission condoned the notion of South Australia hosting repositories for both national and imported nuclear waste,<sup>28</sup> but also recognised that the State's Aboriginal peoples have had to endure the negative legacy of nuclear weapons testing at Maralinga during the 1950s.<sup>29</sup> The Royal Commission therefore recommended 'a sustained, respectful and inclusive process' of public consultation for any waste repository proposals on land in which there are Aboriginal rights and interests.<sup>30</sup>

The extent to which the Commonwealth has accommodated these procedural ideals for the NRWMF is, in the discussion that follows, evaluated in terms of the provision for

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<sup>19</sup> Uranium Mining, Processing and Nuclear Energy Review Taskforce, Commonwealth of Australia, *Uranium Mining, Processing and Nuclear Energy – Opportunities for Australia?* (2006) 60 ('UMPNER Report').

<sup>20</sup> *Ibid.*

<sup>21</sup> The total volume of radioactive waste held in Australia was approximately 4000m<sup>3</sup> in 2011, increasing at that time by 'less than one shipping container a year': Australian Nuclear Science and Technology Organisation ('ANSTO'), *Management of Radioactive Waste in Australia* (2011), 4. These figures are confirmed in the *Joint Convention 2011 Report* 96, and are consistent with the updated figures in the *Joint Convention 2014 Report* 66. By comparison, in 2009-2010, a total of 3,500 kilotonnes of hazardous waste was produced in Australia, representing 6% of the total waste nationally generated: Australian Bureau of Statistics, *Hazardous Waste* (19 February 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/4602.0.55.005~2013~Main+Features~Hazardous+Waste?OpenDocument>>.

<sup>22</sup> The total volume of ILW in 2011 was a mere 636m<sup>3</sup>: *Ibid.* 4.

<sup>23</sup> Daniel Keane, 'Proposed Flinders Ranges Nuclear Site Identified as Pastoral Property Belonging to Former Liberal Senator Grant Chapman', *ABC News* (online), 17 November 2015 <http://www.abc.net.au/news/2015-11-16/proposed-nuclear-site-identified-as-wallerberdina-station/6944636>>.

<sup>24</sup> IAEA, above n 1, 24–5; *UMPNER Report* 61.

<sup>25</sup> Ian Holland, 'Consultation, Constraints and Norms: The Case of Nuclear Waste' (2002) 61 *Australian Journal of Public Administration* 76, 77.

<sup>26</sup> Newman and Nagtzaam, above n 6, 13, 261.

<sup>27</sup> *Ibid.*

<sup>28</sup> SA Nuclear Fuel Cycle Commission Report 80, 170.

<sup>29</sup> *Ibid.* 124.

<sup>30</sup> *Ibid.* 125.

consultation, consent or court challenge under the current law pertaining to nuclear waste. Part II examines the issues cast by prior public interest litigation challenging Commonwealth waste storage arrangements, in order to understand the rationale for current legal approaches. The nomination, assessment and approval process under the *NRWMA* and the *EPBCA* is then teased apart in Parts III and IV, respectively, with a view to textually excavating the place given to public participation in each statute. In Part V, the constitutional legality of the *NRWMA*'s preclusion of State and Territory legislation is tested to ascertain whether any limits on the Commonwealth's powers exist to prevent imposition of the *NRWMA* on a potentially unwilling community.

The paper's findings reveal how public participation is positioned at the margins of the *NRWMA* approval process, its statutory minimisation or nullification being enacted in support of the Commonwealth's aspiration for an environmentally sound and efficiently assessed solution. Yet, while public interest considerations of national import – namely environmental protection, international engagement and economic imperatives – may vindicate the Commonwealth's chosen strategy, other legitimate protections also important to the public interest and otherwise safeguarded at law – such as those pertaining to the conservation of Aboriginal heritage, the consideration of environmental impacts, and the place for public participation in the development of land – are, in the process, rendered vulnerable to substantial erosion.

## II THE EVOLVING COMMONWEALTH APPROACH

### A *Cooperative Federalism – Promise and Failure*

The Commonwealth's policy of centralised consolidation of radioactive waste grew out of intergovernmental negotiation and agreement from the States and Territories in the 1970s, commenced with the initiation of a voluntary national collections program, and eventually extended to a commitment to find a repository site.<sup>31</sup> Though the radioactive waste held under State and Territory arrangements is very small by comparison with the Commonwealth's volumes,<sup>32</sup> it is stored at over one hundred disparate locations,<sup>33</sup> at universities, hospitals and institutions, and usually without the knowledge, let alone the informed consent, of the surrounding urban and suburban community.<sup>34</sup> Furthermore, though the States and Territories have long had their own radiation protection legislation in place allowing for the licensing of storage arrangements by each jurisdiction's Environmental Protection Authority ('EPA'),<sup>35</sup> inconsistency in classification of waste under

<sup>31</sup> Matthew James and Ann Rann, 'Radioactive Waste and Spent Fuel Management in Australia' (Background Note, Parliamentary Library, Parliament of Australia, 2011) 11.

<sup>32</sup> In 2011, of the 4000m<sup>3</sup> of radioactive waste accumulated across the nation, the Commonwealth was responsible for 3800m<sup>3</sup>, with the States and Territories together holding a mere 200m<sup>3</sup> of LLW: ANSTO, above n 21, 3. Figures remain consistent with those provided in the *Joint Convention 2014 Report* 66.

<sup>33</sup> The Commonwealth inventory of Australian radioactive waste reveals the number and variety of sources of radioactive waste in storage and disposal facilities: *Joint Convention 2014 Report* 60–6. ANSTO cite a 2003 audit of the South Australian Environmental Protection Authority ('EPA') to state that 80 of these locations are in South Australia alone: ANSTO, above n 21, 8. The South Australian Nuclear Fuel Cycle reported on recent data from the South Australian EPA confirming these approximate numbers: *SA Nuclear Fuel Cycle Royal Commission Report* 75–6. In its 2003 audit, the EPA regarded storage practices at hospitals and laboratories to be 'satisfactory', but noted security and safety issues with regard to sealed sources arising from industrial activity: Environment Protection Authority, South Australia, *Audit of Radioactive Material in South Australia* (2003) 16–24.

<sup>34</sup> Miles Kemp, 'Radioactive Waste Stored Near South Australian Homes', *The Advertiser* (online), 26 June 2013 <<http://www.adelaidenow.com.au/news/south-australia/radioactive-waste-stored-near-south-australian-homes/story-e6frea83-1226664693898>>; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, 670 (Ian Macfarlane).

<sup>35</sup> *Radiation Protection Act 2006* (ACT), *Radiation Control Act 1990* (NSW), *Radiation Protection Act* (NT), *Radiation Safety Act 1999* (Qld), *Radiation Protection and Control Act 1982* (SA), *Radiation Protection Act 2005* (Tas), *Radiation Act 2005* (Vic), *Radiation Safety Act 1975* (WA).

this legislation has been raised by the Commonwealth as an issue of concern.<sup>36</sup> So has the fact that EPA-licensed storage facilities in States and Territories were never purpose-built for LLW storage, and therefore have not been optimally designed with long timeframes and security in mind.<sup>37</sup> Notwithstanding these justifications for centralisation, individual States and Territories, as is well documented,<sup>38</sup> remained resistant to proposals of specific sites for a national repository within their respective jurisdictions.

By the 1990s, with still no repository available for the waste amassed by the Commonwealth from various sources,<sup>39</sup> the Australian Nuclear Science and Technology Organisation ('ANSTO') arranged for its transfer to the Lucas Heights reactor site. Objecting to the prospect of the site becoming the central storage location for the nation's waste, Sutherland Shire Council brought an action against ANSTO in the New South Wales Land and Environment Court ('LEC') in 1991 ('*Sutherland Shire v ANSTO*').<sup>40</sup> Cripps CJ acknowledged the failure of cooperative federalism to find a site for the NRWMF and the environmental basis for preferring alternative storage at Lucas Heights.<sup>41</sup> Nevertheless, in finding that ANSTO's actions were in 'flagrant breach' of the zoning provisions stipulated for the site under the *Environmental Planning and Assessment Act 1979* (NSW) ('EPAA'),<sup>42</sup> which provided that Council's consent would be necessary for any use of the land other than as a research station,<sup>43</sup> Cripps CJ upheld the LEC's power to provide for 'the enforcement of a public duty imposed by or under an act of the New South Wales Parliament', even against a Commonwealth agency, and supported the Council's standing 'as the proper guardian of public rights under that legislation'.<sup>44</sup> ANSTO was thus ordered to move the transferred waste to another suitable location within three years of the judgment.

*Sutherland Shire v ANSTO* became the catalyst for a profound shift in the Commonwealth's legislative and political approach to national radioactive waste management. Now aware of the possibility and implications of intergovernmental court action, the Commonwealth Parliament promptly legislated to ensure ANSTO's immunity from the application of State and Territory environmental legislation. Section 5 of the *ANSTO Amendment Act 1992* (Cth) ('*ANSTO Act*') provided that a law of a State or Territory, so far as the law related to 'the environmental consequences of the use of land or premises' or the proposed use thereof, now does not apply to ANSTO, its property or transactions, or anything done by or on behalf of it, and, moreover, is taken never to have so applied.<sup>45</sup> The amendment deferred to the LEC ruling in *Sutherland Shire v ANSTO* by providing that ANSTO's immunity was not to take effect in relation to Cripps CJ's order that the storage of radioactive waste at Lucas Heights was in breach of the EPAA.<sup>46</sup> Nevertheless, the amendment clearly 'was designed to avoid a repeat' of this case in the future,<sup>47</sup> by rendering impotent the State laws which had served to frustrate the Commonwealth objective of finding a suitable storage place for its waste. In so

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<sup>36</sup> Joint Convention 2011 Report 5.

<sup>37</sup> ANSTO, above n 21, 19; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, 670 (Ian Macfarlane).

<sup>38</sup> See James and Rann's detailed chronology of events, above n 31. See also Nagtzaam and Newman, above n 5, 27–36.

<sup>39</sup> This being waste consolidated under the Commonwealth collections program which came to be stored at the Department of Defence site at St Marys, NSW, along with 10,000 40-gallon drums of contaminated land from a CSIRO site at Fishermen's Bend in Victoria: Nagtzaam and Newman, above n 5, 29.

<sup>40</sup> *Shire of Sutherland v Australian Nuclear Science and Technology Organisation* (Unreported, Land and Environment Court of New South Wales, Cripps CJ, 5 February 1992) ('*Sutherland Shire v ANSTO*').

<sup>41</sup> *Ibid* 6–7.

<sup>42</sup> *Ibid* 10.

<sup>43</sup> Under the Sutherland Planning Scheme Citation Ordinance made on 24 April 1980, the 'deemed local environmental planning instrument' ('LEP') for the purposes of the *Environmental Planning and Assessment Act 1979* (NSW): *Ibid* 3.

<sup>44</sup> *Ibid* 9.

<sup>45</sup> *Australian Nuclear Science and Technology Organisation Amendment Act 1992* (Cth) s 5, now *Australian Nuclear Science and Technology Organisation Act 1987* (Cth) s 7A.

<sup>46</sup> *Australian Nuclear Science and Technology Organisation Amendment Act 1992* (Cth) s 5(2).

<sup>47</sup> James and Rann, above n 31, 17.

doing, the *ANSTO Act* amendment indicated a significant change from an approach cooperative in spirit to a federal preemption coercive in effect, ruling out opportunities for ventilation of concerns where the public interest claimed conflicted with that advanced by the Commonwealth

## B *The Legacy of Intergovernmental Intransigence*

Though unreported, the judgment in *Sutherland Shire v ANSTO* had a pivotal effect on federal law and policy to follow. In compliance with the LEC's ruling, 120 truckloads of radioactive waste were removed from Lucas Heights and taken to the Commonwealth's Department of Defence site at Woomera in South Australia, notwithstanding the South Australian government's vociferous criticism of the move, widespread community outcry and objections by Department of Defence officials.<sup>48</sup> The federal government's subsequent nomination of eighteen nearby possible sites for the national repository was the result, Holland argues, of a deeply flawed public consultation process that was geared toward giving preference to the site at Woomera, where the waste transferred from Lucas Heights was now located.<sup>49</sup> Responding to public opposition at these plans, the South Australian Parliament enacted legislation to prevent such a facility and the transportation of radioactive waste through the State,<sup>50</sup> legislation that remains in place.<sup>51</sup>

Within a month of the Commonwealth's unilateral announcement that one of the eighteen nominated sites would be the preferred location for a repository, South Australia declared that it would make the area a public park under s 42 of the *Lands Acquisition Act 1989* (Cth),<sup>52</sup> thus preventing the Commonwealth from compulsorily acquiring the site without South Australia's consent.<sup>53</sup> The Commonwealth swiftly relied on the urgency provisions in the same Act to overcome this obstacle and force the acquisition,<sup>54</sup> a move which brought both parties to the Federal Court.<sup>55</sup> In *South Australia v Slipper* ('the *Nuclear Waste Dump Case*'),<sup>56</sup> the Full Court of the Federal Court found that the Commonwealth had failed to follow pre-requisite steps for notice of an urgent acquisition explicitly set out in provisions of the *Lands Acquisition Act*,<sup>57</sup> its actions thereby constituting a denial of procedural fairness that compelled the acquisition to be set aside.

Both *Sutherland Shire v ANSTO* and the *Nuclear Waste Dump Case*, the latter arising as a direct consequence of the circumstances resulting from the former, were remarkable, not only for putting local and State interests firmly on the map of the federal government's nuclear waste management plans, but also for holding the Commonwealth to the principles of transparency, accountability and the need for consent set out in both Commonwealth and State legislation. Again, however, litigated challenge prompted a legislative response that sought to protect federal authority by precluding any laws that could interfere with federal objectives. The *Commonwealth Radioactive Waste Management Act 2005* (Cth) ('*CRWMA*')

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<sup>48</sup> *Ibid* 20.

<sup>49</sup> *Ibid* 25–6; Holland, above n 25, 81–2.

<sup>50</sup> James and Rann, above n 31, 30–1, 39.

<sup>51</sup> *Nuclear Waste Storage Facility (Prohibition) Act 2000* (SA).

<sup>52</sup> Section 42 of the *Lands Acquisition Act 1989* (Cth) provides that the Minister may not make a declaration for compulsory acquisition of land that is a public park 'unless the Government of the State or Territory in which the land is situated has consented to the acquisition of the interest.'

<sup>53</sup> James and Rann, above n 31, 40.

<sup>54</sup> Section 24(1) of the *Lands Acquisition Act 1989* (Cth) provides for the acquisition of land where 'there is an urgent necessity for the acquisition and it would be contrary to the public interest for the acquisition to be delayed by the need for the making, and the possible reconsideration and review, of a pre-acquisition declaration'.

<sup>55</sup> *South Australia v Slipper* (2003) 203 ALR 473.

<sup>56</sup> *South Australia v Slipper* (2004) 136 FCR 259 ('the *Nuclear Waste Dump Case*').

<sup>57</sup> Section 24 of the *Lands Acquisition Act 1989* (Cth) mandates that a certificate indicating that the land is to be acquired due to urgent necessity and avoidance of delay must be served 'on each person whom the Minister believes, after diligent inquiry, to be a person affected by the certificate.'

bore the marks of past jurisdictional conflict, its extraordinarily sparse provisions succinctly ruling out the application of State and Territory environmental and heritage laws to the siting, development and operation of the NRWMF, and thus foreclosing the kind of opportunity for challenge which had brought ANSTO to the LEC in 1992.<sup>58</sup> It also nullified any application of the Commonwealth's own *Lands Acquisition Act* which, in the previous year, had afforded South Australia relief in the Federal Court.<sup>59</sup> Section 3D simply stated, 'No person is entitled to procedural fairness in relation to a Minister's approval,' which, in the context of the *Nuclear Waste Dump Case*, was aimed at preventing a recurrence of any similar contestation of the NRWMF siting process. The *CRWMA* clearly reflected the view of the majority of the Commonwealth Parliament that blanket exclusion of legislation was the approach necessary to guarantee certainty in the siting process, even if this meant sacrificing parliamentary will as otherwise expressed in the excluded laws.

### C Seeking and Circumventing Indigenous Consultation

Utilitarian rationalism has typically informed the Commonwealth's nomination of repository sites on remote country with little prospect of development,<sup>60</sup> but with tangible significance for indigenous communities who otherwise suffer endemic socio-economic disadvantage.<sup>61</sup> In order to mitigate this inherent inequity, the *CRWMA* offered one substantial inhibition on the Commonwealth's powers by requiring that the Traditional Owners be consulted in relation to nomination of a repository site by a Land Council and that they give their informed consent for the subject land's future use.<sup>62</sup> This consent was, moreover, to be given in accordance with the Owners' traditional decision-making process, or else under a process agreed to and adopted by them.<sup>63</sup> When the *National Radioactive Waste Management Act 2012* (Cth) ('*NRWMA*') later replaced the *CRWMA*, these provisions were retained for Land Council nominations,<sup>64</sup> and continued to apply to the Muckaty Station nomination by the Northern Land Council ('NLC').<sup>65</sup> By requiring consultation and consent on Traditional Owners' terms, the Commonwealth's law reflected international best practice for the location of hazardous waste repositories on indigenous land,<sup>66</sup> and offered a means of deflecting the criticism that remote locations in areas of significant indigenous disadvantage might be used 'to minimise exposure to consultation and controversy'.<sup>67</sup>

Inclusion of these explicit parameters for consultation and consent, however, did not guarantee that they would be sufficiently complied with and consequently left the nomination of the Muckaty site open to litigated challenge. In the Tennant Creek courthouse in 2014, the Federal Court heard that the NLC had relied on the consent of only one group of Traditional Owners, thus ignoring the complex network of songlines that warranted

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<sup>58</sup> *Commonwealth Radioactive Waste Management Act 2005* (Cth) s 13 ('*CRWMA*').

<sup>59</sup> *CRWMA* ss 9–10.

<sup>60</sup> Newman and Nagtzaam, above n 6, 156.

<sup>61</sup> Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 281.

<sup>62</sup> *CRWMA* s 3B(1)(g).

<sup>63</sup> In accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 77A, under the *CRWMA* s 3B(g)(iii).

<sup>64</sup> *National Radioactive Waste Management Act 2012* (Cth) s 5(2)(f) ('*NRWMA*').

<sup>65</sup> Under the *NRWMA* sch 2 cl 1 'Saving – nomination and approvals'.

<sup>66</sup> Art 29.2 of the *United Nations Declaration on the Rights of Indigenous Peoples* reflected the approach taken in the *CRWMA*, by providing that '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: *United Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

<sup>67</sup> Holland, above n 25, 81–2.

consideration of other groups' interests in the land on which the NRWFM was proposed.<sup>68</sup> Proceedings ceased after two weeks with the withdrawal by the embattled NLC of the Muckaty nomination, leaving the Commonwealth bereft of any other potential site.<sup>69</sup>

If there is a common thread across these three cases – namely, *Sutherland Shire v ANSTO*, the *Nuclear Waste Dump Case* and the Muckaty Federal Court challenge – it is that the written law, even the Commonwealth's own laws, left federal government actions with respect to the NRWFM vulnerable to frustration and ultimately obstruction. In each case, public consultation and consent were found by the courts not to have been adequately sought and obtained, due to the pressure to secure a site. In the wake of these cases, the choices left to the Commonwealth appeared to be, on the one hand, to capitulate to requirements for public participation, and thereby commit to the more time-consuming and rigorous legitimisation of a repository site, or to continue limiting the extent to which any consultative provisions could be exercised. The following analysis of current law suggests it chose the latter approach.

### III THE NATIONAL RADIOACTIVE WASTE MANAGEMENT ACT 2010 (CTH)

#### A The Approval Process

Born out of the context of the Muckaty challenge, the *NRWMA* repealed the short-lived *CRWMA* in accordance with a 2007 Labor election commitment to accord procedural fairness to a 'consensual process of site selection'.<sup>70</sup> Although some view the *NRWMA* as fulfilling these restorative aims,<sup>71</sup> the more recent Act nevertheless deviates little from the path laid by its predecessor, with the federal Minister retaining 'absolute discretion' to approve a nomination and select a site.<sup>72</sup>

In the aftermath of the Muckaty Station withdrawal and in the absence of any other Land Council nomination, the *NRWMA* does carve new territory by opening nominations to private landowners nation-wide, for the purposes of volunteering a site for the NRWFM on their own land.<sup>73</sup> While this change toward voluntarism has been lauded as a shift from the 'top-down path' previously pursued by the Commonwealth in South Australia, 'in which sites were determined in advance and then defended from attack,'<sup>74</sup> and has suggested the possibility of the NRWFM being hosted by a willing community in line with what is regarded as international best practice, 'community' is, legislatively at least, shut out of the

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<sup>68</sup> The applicants were Mark Lane Jangala, an elder of the Ngapa clan, and other elders of Muckaty Station representing four other clans: Newman & Nagtzaam, above n 6, 163-164. The issues specified in the applicants' Statement of Claim were also raised in a number of submissions from other Land Councils and indigenous community members to the Commonwealth Parliament's inquiry into the National Radioactive Waste Management Bill 2010: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *National Radioactive Waste Management Bill 2010 [Provisions]* (2010) ('*Senate Committee Report*') 13-9.

<sup>69</sup> Newman and Nagtzaam, above n 6, 167.

<sup>70</sup> Explanatory Memorandum, *National Radioactive Waste Management Bill 2010* (Cth) 2; Angus Martin, Commonwealth of Australia, *Bills Digest*, No. 52 of 2010, 25 November 2010 <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1011a/11bd052](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd052)>.

<sup>71</sup> Newman & Nagtzaam, above n 6, 165.

<sup>72</sup> *NRWMA* s 9(1).

<sup>73</sup> *Ibid* s 7.

<sup>74</sup> As described by Dr John Loy, the former CEO of ARPANSA: John Loy, 'Community key to nuclear waste site', *The Australian* (online), 6 May 2016 <<http://www.theaustralian.com.au/opinion/community-key-to-nuclear-waste-site/news-story/836a059542e4d952c467127856fd3e77>>.

nomination process.<sup>75</sup> The requirement that a landowner must provide evidence that ‘one or more specified groups of persons’ have been consulted or have consented in relation to the nomination leaves open the possibility of merely selective consultation and consent being sought,<sup>76</sup> and is contingent, moreover, on it being prescribed in regulations which, at the time of writing, were not yet in existence.

The *NRWMA* introduces a list of procedures mandating the giving of notice on decisions and the seeking of written comments in relation to these,<sup>77</sup> and requires the Minister to take ‘any relevant comments’ into account via invitation circulated in national newspapers.<sup>78</sup> However, ‘relevance’ is not anywhere defined under the Act, comments being meanwhile limited to those only with a ‘right or interest in the land’.<sup>79</sup> In the case of the Barndioota nomination, a perpetual pastoral lease prevents a native title claim that might give rise to such an interest.<sup>80</sup> However, in acknowledging the increasingly contested nature of pastoral land,<sup>81</sup> the *Pastoral Land Management and Conservation Act 1989* (SA) nevertheless recognises ‘the right of Aboriginal persons to follow traditional pursuits on pastoral land’, and ‘the interests of the community in enjoying the unique environment of the land’,<sup>82</sup> and thus appears to afford a ‘right’ to the local Adnyamathanha peoples to have their comments considered, along with those of neighbours and locals. Be that as it may, Evans and Cowan of the Northern Territory Environmental Defender’s Office argue that requiring comments on the *NRWMA* to be written denies Traditional Owners the opportunity to be heard in a more culturally appropriate and accessible oral forum.<sup>83</sup>

Consultation with Traditional Owners is, moreover, not mandated under the *NRWMA* in relation to ‘archaeological or heritage investigations’ prior to site selection,<sup>84</sup> which may be conducted by the Commonwealth, a Commonwealth entity, a Commonwealth contractor or an employee.<sup>85</sup> Even if the Commonwealth claims elsewhere to be consulting with

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<sup>75</sup> Niepraschk points out that community consent is not a final precondition for a site to be declared under the *NRWMA* and will not have to be established at any point during the process, aspects which entirely contradict the principles of voluntarism for nuclear waste repositories advanced elsewhere: Anica Niepraschk, ‘Can Australia Learn from International Experience in Managing Radioactive Waste?’ (2015) 124 *Chain Reaction* 39, 39.

<sup>76</sup> *NRWMA* s 8(1)(f)(i)–(ii).

<sup>77</sup> The Minister must, prior to approval, invite comments on the nomination from ‘persons with a right or interest in the land’ via notices published in newspapers in each State and Territory, and in a local newspaper circulating in the area in which the land is situated: *NRWMA* ss 10(4)(b), (5)(c).

<sup>78</sup> *NRWMA* s 10(6).

<sup>79</sup> *Ibid* s 10(5)(c).

<sup>80</sup> Pursuant to section 249C(3) and sch 1 cl 37 of the *Native Title Act 1993* (Cth), under which a perpetual pastoral lease granted in South Australia confers a right of exclusive possession on the lessee that extinguishes all native title rights and interests over the land concerned. Even with this restriction applying to pastoral properties, unbroken interests in a vast 41,000 square kilometres of land in the Flinders and Gammon Ranges have already been granted as native title to the Adnyamathanha people: Government of South Australia, ‘Historic native title determination today’ (Media Release, 30 March 2009) <[http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/News\\_SA\\_NativeTitle.pdf](http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/News_SA_NativeTitle.pdf)>.

<sup>81</sup> See, eg, Nicholas Gill, ‘The Contested Domain of Pastoralism: Landscape, Work and Outsiders in Central Australia’ in D B Rose and A Clarke (eds), *Tracking knowledge – North Australian landscapes: Studies in indigenous and settler knowledge systems* (North Australian Research Unit, 1997), 50–67.

<sup>82</sup> *Pastoral Land Management and Conservation Act 1989* (SA) s 4.

<sup>83</sup> Evans and Cowan suggest that in-person meetings or large consultations would be more appropriate, while putting the notification in the language of local Traditional Owners would enable them to understand it better: Heidi Evans and Mark Cowan, ‘The Disposal of Australia’s Radioactive Waste on Traditional Aboriginal Lands in the Northern Territory’ (2010) 1 *National Environmental Law Review* 26, 34.

<sup>84</sup> *NRWMA* s 11(3)(k).

<sup>85</sup> *Ibid* s 11(1)–(2).

Traditional Owners,<sup>86</sup> excluding a statutory requirement for consultation with Traditional Owners in respect of landowners' nominations means any inadequacy in the conduct of these site investigations is protected from litigated challenge.<sup>87</sup> This exclusion occurs at a critical juncture, the declaration of a selected site being based on these investigations.<sup>88</sup> Upon such declaration, the slate is wiped clear, with 'all or specified rights or interests' thereafter either acquired by the Commonwealth or extinguished,<sup>89</sup> and 'despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten)'.<sup>90</sup>

Though the Senate Legal and Constitutional Affairs Legislation Committee recommended in 2010 that the *NRWMA* not be enacted unless mandatory provision was made for a Regional Consultative Committee ('RCC'),<sup>91</sup> closer analysis of its place within the site selection process reveals that the RCC has no power or influence over a Ministerial declaration of a selected site, its function being merely to 'facilitate communication' between the host community and the Commonwealth throughout the facility's development and operation, once the site selection process has concluded.<sup>92</sup> Consultation may be provided for under the *NRWMA*, but there is no evidence to suggest that it has anything other than a tokenistic place within a legal framework that positions site selection as an almost inevitable outcome of nomination, supported by Ministerial fiat, rather than broadly sought public consent.

## B The Risk of Regulatory Void

Prest has argued that the problem with excluding State and Territory environmental legislation from regulation of all activities associated with the NRWMF is that it could give rise to decisions being made under the *NRWMA* in a 'regulatory void or vacuum' in circumstances where Commonwealth regulatory controls are not as stringent as those at State level.<sup>93</sup> By way of illustration, State and Territory governments are rendered powerless under the *NRWMA* to regulate in the future on transport of radioactive materials through their respective jurisdictions, if these materials are destined for the NRWMF site,<sup>94</sup> and ARPANSA's *Code of Practice for the Safe Transport of Radioactive Materials*, being merely a code of practice and not a statute, is unenforceable.<sup>95</sup> Certainly, the exclusion of environmental legislation is so comprehensively broad, that the *NRWMA* also removes the

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<sup>86</sup> The Commonwealth states 'a comprehensive and independent assessment of heritage will be undertaken in collaboration with the traditional owners': Department of Industry, Innovation and Science, above n 10, 2–3. Notably, however, indigenous participants were not given the option of 'impact on heritage', or similar concepts, to choose from among the various concerns they could nominate from a list provided in the specific 'Indigenous questionnaire' put to them in the Barndioota nomination survey: Department of Industry, Innovation and Science, above n 11, 151.

<sup>87</sup> The *NRWMA*, for instance, does not require the guidance of the Burra Charter, as an agreed standard of practice in investigations and decisions about heritage. The Charter suggests only cautious change to a place of cultural significance (Article 3. Cautious approach), and recommends that conservation, interpretation or management of a place should provide for the participation of people for whom the place has significant associations and meanings (Article 12. Participation): *The Burra Charter: The Australia ICOMOS (International Council on Monuments and Sites) Charter for Places of Cultural Significance* (2013).

<sup>88</sup> *NRWMA* s 14.

<sup>89</sup> *Ibid* s 19(1).

<sup>90</sup> *Ibid* s 20.

<sup>91</sup> Senate Committee Report 40.

<sup>92</sup> *NRWMA* s 22(1)–(2). Evans and Cowan call the establishment of the RCC a 'final deceit', given that 'the community consultation can address little more than the fact of a site already declared in their community without their consent or consultation': Evans and Cowan, above n 83, 34.

<sup>93</sup> James Prest, Submission no 229 quoted in the *Senate Committee Report* 34.

<sup>94</sup> *NRWMA* s 24.

<sup>95</sup> Australian Radiation Protection and Nuclear Safety Agency, *Code for the Safe Transport of Radioactive Material*, Radiation Protection Series No. C-2 (2014).

usual requirement for corresponding State development approval.<sup>96</sup> In the South Australian context,<sup>97</sup> this means omission of the obligation to provide a report as to the extent to which the impacts of the NRWMF proposal would be consistent with the objects of the *Environment Protection Act 1993* (SA)<sup>98</sup> and with ‘the general environmental duty’ under that Act.<sup>99</sup> It also means a civil action brought in the Environment, Resources and Development Court by any person,<sup>100</sup> with the aim of preventing environmental harm or detriment to the public interest at the NRWMF site resulting from a breach of the *Environment Protection Act*,<sup>101</sup> is out of the question.

Containing stronger provisions than the Commonwealth’s *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Aboriginal Heritage Act 1988* (SA) indicates an intention to bind the Commonwealth on land within South Australian boundaries.<sup>102</sup> Exercise of rights available under the South Australian Act could result in prohibitions or restrictions on access or activities at the site,<sup>103</sup> or even the acquisition of a site by the State government for the purposes of protecting or preserving sites of significance, objects or remains.<sup>104</sup> With mandatory consultative requirements,<sup>105</sup> including that the Minister is bound to accept the views of the Traditional Owners as to the land’s significance according to Aboriginal tradition,<sup>106</sup> this Act would allow members of the Adnyamathanha people, who claim the significance of the land at Barndioota,<sup>107</sup> a voice through which to attempt to protect their tangible past. However, that voice is altogether

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<sup>96</sup> Sophie Power and Juli Tomaras, ‘Commonwealth Environmental Regulation’ (Parliamentary Library, Commonwealth of Australia, Briefing Book, 2016) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook45p/EnvironmentalRegulation](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/EnvironmentalRegulation)>.

<sup>97</sup> Under the *Development Act 1993* (SA), the NRWMF would most likely be declared ‘a project of major environmental, social or economic importance’, given its national significance: s 46(1).

<sup>98</sup> *Development Act 1993* (SA) s 46B(c). The objects of the *Environment Protection Act 1993* (SA) promote the principles of ecologically sustainable development, waste minimisation, a precautionary approach to the assessment of risk of environmental harm resulting from pollution and waste and a balanced consideration of economic, environmental, social and equity considerations in deciding all matters relating to environmental protection: s 10.

<sup>99</sup> The ‘general environmental duty’ under the *Environment Protection Act 1993* (SA) mandates the taking of ‘all reasonable and practicable measures to prevent or minimise any resulting environmental harm’ from an activity that might pollute the environment: s 25.

<sup>100</sup> *Environment Protection Act 1993* (SA) s 104(7)(c). The provisions reflect the open standing provided for by section 123 of the *Environment Planning and Assessment Act 1979* (NSW), which enabled the action in *Sutherland Shire v ANSTO*.

<sup>101</sup> *Environment Protection Act 1993* (SA) ss 104(1), (8)(c).

<sup>102</sup> Section 4 of the *Aboriginal Heritage Act 1988* (SA) states simply that ‘The Act binds the Crown.’ Orr notes that such wording in a State law is an indication, though not always conclusive, of an intention to bind the Commonwealth: Robert Orr QC, *Application of State laws to Commonwealth infrastructure projects* (10 June 2005) Australian Government Solicitor Commercial Notes No. 16 <<http://www.ags.gov.au/publications/commercial-notes/CN16.pdf>>.

<sup>103</sup> *Aboriginal Heritage Act 1988* (SA) s 25.

<sup>104</sup> *Ibid* s 30.

<sup>105</sup> The Minister must take all reasonable steps to consult with any Traditional Owners and Aboriginal persons ‘who, in the opinion of the Minister, have a particular interest in the matter’: *Ibid* 13(1)(f).

<sup>106</sup> *Ibid* s 13(2).

<sup>107</sup> Adnyamathanha Traditional Owner Regina Mackenzie has said the land at the site (known to her people as Arngurla Yarta or ‘spiritual land’), which lies adjacent to the Yappala Indigenous Protected Area, holds the remains of her ancestors, as well as ‘countless thousands of Aboriginal artifacts’, and that her people had been working with the South Australian government for many years to have heritage sites registered there: ‘Adnyamathanha to Fight Nuclear Dump Plan’, *The Flinders News* (Online), 29 April 2016 <<http://www.theflindersnews.com.au/story/3879299/adnyamathanha-to-fight-nuclear-dump-plan/>>. See also Laura Murphy-Oates, ‘Ancient Aboriginal Skull Bone Found at Proposed Nuclear Waste Site’, *NITV* (online), 1 June 2016 <<http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/05/10/ancient-aboriginal-skull-bone-found-proposed-nuclear-waste-site>>.

denied by the *NRWMA*'s exclusion of both State and Commonwealth Aboriginal heritage legislation.<sup>108</sup>

Analysis of the South Australian environmental and heritage statutes demonstrates that none open the floodgates to public interest litigation, being substantially restricted in terms of any opportunities for public participation offered under their provisions.<sup>109</sup> The *NRWMA*'s exclusionary clauses are therefore arguably disproportionate. By suppressing the opportunities for public challenge under State environmental and heritage laws, in circumstances where the possibility of litigated action is already quite constrained, the Commonwealth attempts to stem any frustration of the *NRWMA*'s objectives, but in the process denies the place for legitimate concerns and the protections afforded to these by the excluded legislation.

### C *Judicial Review's Limits under the NRWMA*

The prevalence of privative clauses in the *NRWMA* – in 'no validity' clauses,<sup>110</sup> and in the attempt to cut off application of the *Administrative Decisions (Judicial Review) Act 1979* (Cth) to nominations, approvals and declarations<sup>111</sup> – renders what little consultation is mandated potentially redundant. Should non-compliance with the *NRWMA*'s procedural requirements ever be challenged, the courts would therefore face 'the necessity of resolving and reconciling two expressions of intention which appear inconsistent'.<sup>112</sup> This would entail establishing whether decisions made in the absence of genuine consultation and consent were 'bona fide' attempts to exercise the power granted under the *NRWMA*,<sup>113</sup> or exceeded limitations on that power or authority provided elsewhere in the statute.<sup>114</sup>

The *NRWMA* preempts any such challenge by providing that its procedural fairness clauses are 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule'.<sup>115</sup> However, High Court authority suggests that the Federal Court would retain the power to determine whether the hearing rule had been adequately satisfied, by gauging what is fair in all the circumstances of a particular case.<sup>116</sup> With respect to statutory power, this

<sup>108</sup> The Adnyamathanha Camp Law Mob confirm that although a native title claim to the Barndioota property is excluded due to the perpetual pastoral lease arrangement, South Australian Aboriginal heritage legislation would, but for the *NRWMA*, continue to apply to the area: Bryan Littlely, Paul Starick and Meagon Dillon, 'Nuclear Waste Repository in SA: What Do the Locals Think?' *The Advertiser* (online), 22 November 2015 <<http://www.adelaidenow.com.au/news/south-australia/nuclear-waste-repository-in-sa-what-do-the-locals-think/news-story/960edbc24bc8e2285a5e67be5cb033df>>.

<sup>109</sup> The Minister's powers under the *Aboriginal Heritage Act 1988* (SA), for instance, are contingent on the owner or occupier, or a project proponent, being forthcoming about the potential impact on or discovery of Aboriginal sites, objects or remains: ss 12(1), 20. No appeals are allowed against decisions on development of declared to be of major social, environmental or economic importance: *Development Act 1993* (SA) s 48(12). Proceedings for judicial review, declaration and injunction are also ruled out for such development decisions: *Ibid* s 48E. The open standing provisions in section 104(7) of the *Environment Protection Act 1993* (SA) are limited by various qualifications to prevent an abuse of process: s 104(8).

<sup>110</sup> Failure by the Minister to consult, as provided for under the *NRWMA* ss 8(1)(f), does not invalidate site nomination, approval or selection: *NRWMA* ss 8(4), 9(6), 15(2).

<sup>111</sup> Under s 3 of the *Administrative Decision (Judicial Review) Act 1979* (Cth) (*ADJRA*), a 'decision' to which the *ADJRA* applies is defined as a decision made under an 'enactment', which in turn is defined to include 'an instrument' made under an Act. However, the *NRWMA* provides that nominations, approvals and declarations of sites are not 'legislative instruments': *NRWMA* ss 7(5), 8(7), 14(7).

<sup>112</sup> Report of the Commonwealth Administrative Review Committee ('the Kerr Committee'), cited by Robin Creyke and John McMillan, *Control of Government Action: Texts, Cases & Commentary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009) 1041.

<sup>113</sup> *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614–5 (Dixon J).

<sup>114</sup> *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 486 (Gleeson CJ).

<sup>115</sup> *NRWMA* ss 10(7), 18(5).

<sup>116</sup> *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ), a statement endorsed by the High Court in a number of subsequent cases: Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 519–20.

would involve giving full effect to ‘the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject-matter.’<sup>117</sup> Given their place, albeit tenuous, within the requirements for site nomination, public consultation and consent were likely intended by the *NRWMA*. Nevertheless, the seriousness of the consequences of a siting decision for those with interests ‘apart from legal “rights” in the strict sense’,<sup>118</sup> would need to be balanced against other factors, such as any urgency in the need for a repository, or the avoidance of cost to the public purse by prolonging the already protracted search for a national site.<sup>119</sup> For public interest litigants, there is no certainty in this balancing process, a fact bound to discourage them.

There is likewise no stable ground on questions of standing.<sup>120</sup> Judicial review is only open to a person ‘aggrieved’ or negatively affected by a decision made by the Commonwealth under the *NRWMA*,<sup>121</sup> an objective test to establish an applicant’s special interest in a decision.<sup>122</sup> The test has been criticised for lacking sufficient clarity, being too restrictive and producing inconsistent results when applied in public interest environmental cases.<sup>123</sup> In this instance, it would require the Court to work out where the ‘ripples of affection’ across the ‘pool of sundry interest’ become ‘indistinguishable from the normal seascape’ of opposition to nuclear waste and all its negative connotations and possibilities.<sup>124</sup> For Traditional Owners with heritage concerns, this might be more easily established,<sup>125</sup> but it becomes more challenging the further out, geographically, an applicant is from the site and its operations, notwithstanding any longstanding ‘intellectual or emotional concern’ many have with regard to nuclear waste policy.<sup>126</sup> Standing is of course an intentional ‘filter’,<sup>127</sup> preventing frivolous application to courts by those with only a relatively remote interest in a matter. However, the restrictions it imposes mean, paradoxically, that in order to speak for the public interest, an applicant needs to have some private ‘self-concern’.<sup>128</sup> While this reflects the law’s historical roots, in which the primacy of individual rights is privileged,<sup>129</sup> it barricades the *NRWMA* from the judicial scrutiny its reliance on privative clauses should attract, especially given the *NRWMA*’s express and implicit intention to provide for ‘fairness’.

Perhaps the *NRWMA* demonstrates the typical clash of values at the heart of any consideration of land use for a nuclear waste repository – between a utilitarian concept of fairness, which would seek to expedite the *NRWMA* on public safety and economic grounds, and a Rawlsian conception of justice,<sup>130</sup> one that would grant more weight to the inviolable freedom of the individual to choose whether or not to have a facility imposed on their land,

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<sup>117</sup> *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475, 503–4 (Kitto J), approved unanimously in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161.

<sup>118</sup> Such as, not only Traditional Owners, but also those at increased risk of exposure to radiation from accidents in disposal or transport, or affected by any anticipated impact on local agricultural industry and property values.

<sup>119</sup> Aronson, Dyer and Groves, above n 116, 534–5.

<sup>120</sup> *Ibid* 751–2. Aronson, Dyer and Groves note that determining standing will always ultimately depend on looking at the scope, objects and purposes of the Act, in other words, considering its context.

<sup>121</sup> *ADJRA* ss 3, 5.

<sup>122</sup> Commonwealth of Australia, Federal Judicial Review in Australia – Report of the Administrative Review Council (2012) 147.

<sup>123</sup> *Ibid*, citing Matthew Groves, ‘Standing and Related Matters’ (2010) 59 *Admin Review* 62, 62.

<sup>124</sup> *Re McHattan and Collector of Customs (NSW)* (1977) 1 ALD 67, 70 (Brennan J), cited with approval in *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, 174, 187–8: Aronson, Dyer and Groves, above n 116, 745.

<sup>125</sup> As it was in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, in which Aboriginal applicants were granted standing to challenge the criminal interference with Aboriginal relics on private property.

<sup>126</sup> As Gibbs CJ made clear in *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 530–1, standing entails ‘more than a mere intellectual or emotional concern’.

<sup>127</sup> Aronson, Dyer and Groves, above n 116, 746.

<sup>128</sup> *Ibid* 748.

<sup>129</sup> *Ibid* 751.

<sup>130</sup> Gerrard, above n 7, 83.

over and above ‘the calculus of social interests’.<sup>131</sup> That aside, without sufficient mechanism for the breadth of public interests to be heard, the *NRWMA* merely clothes a business transaction between private landowner and the Commonwealth in the apparel of natural justice, leaving its procedural fairness provisions with negligible substance with which to shape the approval process, and with dubious prospect of restoration via the courts.

#### IV THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

##### A Assessment Approaches

The Commonwealth’s *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBCA*) becomes the primary vehicle for assessment of the broader environmental impacts of the *NRWMA* following acquisition of a site and prior to licensing of the facility’s construction and operation.<sup>132</sup> Therefore, to be properly informed, an evaluation of the *NRWMA* approval process must investigate whether the *EPBCA* has the inherent capacity to rescue the siting process from the problems betrayed by the *NRWMA*’s constraints on public consultation and review.

As a designated matter of national environmental significance (‘MNES’), a ‘nuclear action’, undertaken by the Commonwealth for the purposes of establishing ‘a large-scale disposal facility for radioactive waste’,<sup>133</sup> unambiguously requires Commonwealth oversight via the *EPBCA* and referral for assessment by the Commonwealth Minister for the Environment.<sup>134</sup> Where ‘a Commonwealth agency’ is the proponent, the Commonwealth Environment Minister must invite, from the Environment Minister of the State or Territory in which a nuclear action is proposed to be established, information ‘relevant’ to deciding which approach would be appropriate to assess the ‘relevant’ impacts of the action,<sup>135</sup> and must take this information into account in making a decision as to the choice of assessment approach.<sup>136</sup> This requirement to consult promises at least some opportunity for correcting the blanket exclusion of State and Territory environmental laws under the *NRWMA*, by allowing State and Territory governments to comment on the *NRWMA*’s impacts.

The implications of the Commonwealth Minister’s decision on assessment approach are certainly critical, as far as the space accorded to consultation and public participation is concerned. Of the various assessment approaches provided for by the *EPBCA* – namely, referral information, preliminary documentation, public environment report, environmental impact statement, or inquiry<sup>137</sup> – the ‘flexible’, inquisitorial methods of assessment allowed for under inquiries,<sup>138</sup> along with a conditional requirement that these be conducted in public,<sup>139</sup> most increase the capacity for accountability and transparency in the decision-making process. Under the four other assessment approaches, written comment on the

<sup>131</sup> ‘Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override’: John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, 6<sup>th</sup> ed, 2003), 3–4.

<sup>132</sup> Department of Industry, Innovation and Science, above n 10, 4; *NRWMA* s 25(2)(b).

<sup>133</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 22(1)(e) (*EPBCA*).

<sup>134</sup> *Ibid* s 21(1).

<sup>135</sup> *Ibid* s 74(2)(b)(ii).

<sup>136</sup> *Ibid* s 87(3)(a). If the activity levels of the radioactive material to be stored or disposed of at the *NRWMA* site are high enough to be ‘excessive’, as provided by *EPBCA* s 22(2), by the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs 2.02 and 2.03, and by the *Australian Radiation Protection and Nuclear Safety Regulations 1999* (Cth) sch 2, pt 2, the *NRWMA* proposal becomes a ‘controlled action’ under section 67, which means it is not necessary to seek public comment on the choice of assessment method, as otherwise provided for under *EPBCA* s 74(3)(b).

<sup>137</sup> *Ibid* pt 8 divs 3A, 4, 5, 6, 7.

<sup>138</sup> *Ibid* s 106.

<sup>139</sup> *Ibid* s 110.

proposed action must be invited from the public prior to the action's Ministerial approval,<sup>140</sup> and, crucially, evidence must be provided within any final report that the proponent has taken these comments into account and addressed them.<sup>141</sup> Time frames for such comment – twenty business days for assessment by environmental impact statement ('EIS')<sup>142</sup> – are arguably too restrictive for the general public.<sup>143</sup> If information from locals and Traditional Owners about the social and heritage impacts of the NRWMA does not reach the Minister within the given time frame, the methodological approach to any EIS may elude criticism.<sup>144</sup> In this way, rather than cure the problems pertaining to the site investigations conducted under the NRWMA, the EPBCA effectively insulates fact-finding under the NRWMA from greater scrutiny by imposing conditions for public comment that are unrealistic and disadvantageous to those in remote locations who are likely to be the most affected by the siting.

'Relevance' is crucial to establishing whether a matter is protected by a controlling provision of the EPBCA and thus must be considered by the Minister in approving an action.<sup>145</sup> The measure for relevance with regard to nuclear actions is 'significant impact on the environment'.<sup>146</sup> However, 'relevance' remains, as it does under the NRWMA, nebulous and discretionary, its meaning unassisted by the circular definition for 'relevant impacts' given within the EPBCA.<sup>147</sup> While social interests and Aboriginal heritage are values whose materiality may be easily ascribed to the EPBCA's definition of 'the environment',<sup>148</sup> 'significance' remains undefined and ambiguous.<sup>149</sup> This uncertainty has meant that cultural and spiritual values tend to be gauged quantitatively. In the 2002 draft EIS for the national repository that was to be located at Billa Kalina in South Australia, for instance, the scope of the EIS was directed at mitigation of interference with indigenous heritage, such that physical artefacts were not 'adversely impacted to an unacceptable degree',<sup>150</sup> rather than at consultation and consent to these impacts occurring in the first place. The inherent problem with this quantitative approach is that cultural and spiritual values of a site – intangible qualities – may be dismissed as irrelevant where tangible manifestations of these, such as 'background scatters of stone artefacts', albeit detectable, are described as having an 'archaeological potential' that is 'low to negligible'.<sup>151</sup> This type of outcome has prompted

<sup>140</sup> Ibid ss 93(3)(b), 95(2)(c), 95A(3)(d), 98(1)(c)(ii), 103(1)(c)(ii).

<sup>141</sup> Ibid ss 99(2), 104(2).

<sup>142</sup> Ibid s 103(3).

<sup>143</sup> As submitted by The Wilderness Society: Commonwealth of Australia, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth): Interim Report* (1999) ('*Hawke Review Interim*') 314.

<sup>144</sup> Elliott points out that 'If engagement with the community occurs too late in the environmental assessment process, the wider community will suspect that the outcome has already been determined and that the project approval is a *fait accompli*.' Mandy Elliott, 'Understanding Environmental Impact Assessment: Law, Science or Politics?' (2012) 113, *Precedent* 32, 34.

<sup>145</sup> EPBCA s 136(1)(a) 'Mandatory considerations'.

<sup>146</sup> Ibid s 21(1). This is the 'controlling provision' for nuclear actions.

<sup>147</sup> Ibid s 82. Even within the 'Definitions' provision in section 598, the meaning of 'relevant impacts' defers to section 82, without further explication.

<sup>148</sup> Section 528 defines 'the environment' holistically, as: '(a) ecosystems and their constituent parts, including people and communities; (b) natural and physical resources; (c) the qualities and characteristics of locations and areas; (d) heritage values of places; and (e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).'

<sup>149</sup> Although Peel and Godden reason that this uncertainty 'leaves substantial scope for interpretation by the courts on a case-by-case basis', and note that the test for 'significant impact' proposed by Branson J in *Booth v Bosworth* (2001) 114 FCR 39 established that 'significant impacts' may extend to activities outside an area within Commonwealth protection, Elliott views the *Booth v Bosworth* test as more clearly denoting 'an impact that is important, notable or of consequence having regard to its context or intensity', suggesting a definition consistent with the plain meaning, case law, extrinsic material and the objects of the EPBCA: Jacqueline Peel and Lee Godden, 'Australian Environmental Management: A "Dams" Story' (2005) 28(3) *UNSW Law Journal* 668, 680–1, 683; Elliott, above n 144, 34.

<sup>150</sup> Department of Education, Science & Training, *National Radioactive Waste Repository Draft EIS: Summary* (Commonwealth of Australia, 2002) 19–20. The Billa Kalina site became the subject of the *Nuclear Waste Dump Case*.

<sup>151</sup> Ibid 19.

some to call for increased provision for consultation and consent from indigenous peoples under the *EPBCA* for any action directly or indirectly impacting them.<sup>152</sup> In having the power to grant approval for the *NRWMF*, consent becomes the Commonwealth's exclusive prerogative, rather than that of the people most affected by its construction and operation. Indeed, public comment will not necessarily be sought on the taking of an action, or what conditions, if any, to attach to an approval, this being, after all, merely a discretionary requirement.<sup>153</sup>

The *EPBCA* assessment calculus 'involves balancing incommensurable values',<sup>154</sup> with 'economic and social matters'<sup>155</sup> and 'the principles of ecologically sustainable development'.<sup>156</sup> In the case of Wallaberdina Station, or Arngula Yarta ('spiritual land'), impacts affecting a relatively small group of indigenous people, who lack economic clout, but whose interests are bound up with tens of thousands of years of care for the spiritual values of the land in question, are, in the absence of mandatory consent provisions, unlikely to hold much weight against the broad range of interests espoused by the Commonwealth, these being concerned with intergenerational equity for the management of current volumes of radioactive waste, the economic benefits of increasing storage capacity, and the utilitarian benefits of a remotely located site. The inequity this creates has led some to suggest that the *EPBCA*'s mandatory considerations betray inherent structural bias by requiring an arbitrarily determined standard of 'significance' that results in substantial local impacts being diminished within the 'environmental equation'.<sup>157</sup>

The *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) ('the *ARPANS Act*') may correct some failings in assessment under the *EPBCA*, with the CEO of ARPANSA, an independent regulatory body, required to widely publish an invitation to the public to provide submissions on any application for a facility licence.<sup>158</sup> The content of these submissions is required to be taken into account by the CEO in deciding to issue a licence, along with information provided by the Commonwealth in relation to the mitigated risk of radiation, 'having regard to economic and social factors'.<sup>159</sup> Though 'undue risk to the health and safety of people, and to the environment' falls within the matters to be considered,<sup>160</sup> this risk is elsewhere referred to as risk 'from the harmful effects of radiation',<sup>161</sup> while 'environment' remains undefined in the Act. Therefore, while the *ARPANS Act* provides a further opportunity for public participation, the factors considered by the CEO would not appear to address such critical issues as the social and cultural appropriateness of a selected site,<sup>162</sup> this being left to the Minister under the *EPBCA* to evaluate within a context favourable to the economic rationale for brevity in the assessment process.

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<sup>152</sup> Australian Human Rights Commission, Submission to Commonwealth of Australia, *Independent Review of the Environment Protection and Biodiversity Conservation Act* (1999), 30 January 2009, 4.

<sup>153</sup> *EPBCA* s 131A.

<sup>154</sup> Susan Tridgell, 'Evaluating the Effectiveness of the Environment Protection and Biodiversity Conservation Act 1999 (Cth): 2008-2012' (2013) 30 *Environment and Planning Law Journal* 245, 248.

<sup>155</sup> *EPBCA* s 136(1)(b).

<sup>156</sup> *Ibid* s 136(2)(a). Section 3A of the *EPBCA* defines 'the principles of ecologically sustainable development' as including decision-making processes which 'effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'.

<sup>157</sup> Andrew Macintosh, 'The Commonwealth' in Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) 229-30.

<sup>158</sup> *Australian Radiation Protection and Nuclear Safety Regulations 1999* (Cth) ('*ARPANS Regulations*') reg 40. A 'controlled facility' under the *ARPANS Act* includes 'a radioactive waste storage or disposal facility': *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) ('*ARPANS Act*') s 13.

<sup>159</sup> *ARPANS Act* s 32(3); *ARPANS Regulations* reg 41.

<sup>160</sup> *ARPANS Regulations* reg 41(b).

<sup>161</sup> *ARPANS Act* s 3.

<sup>162</sup> In its submission to the Senate Committee on the *NRWMA* Bill, the Northern Territory Environmental Defenders Office noted that both the *EPBCA* and the *ARPANS Act* were not adequate for addressing the types of environmental, economic and social risks posed by a radioactive waste facility and its associated activities: *Senate Committee Report* 56.

## B *The Time Factor*

The ‘urgency’ narrative adopted by the Commonwealth is likely to have some influence over the choice of assessment approach and the way in which the time devoted to consultation might be truncated throughout the *EPBCA* process. Urgency for a national repository was argued in the *Nuclear Waste Dump Case*,<sup>163</sup> and the timeframes for the exhaustion of current storage capacities is raised as justification for the NRWMA. The repatriation of Australian-produced ILW re-processed overseas under agreements concluded with France and the United Kingdom,<sup>164</sup> for instance, has been used in arguments concerning the pressure to be placed on current storage arrangements.<sup>165</sup> Capacity issues are however perhaps not as immediately pressing as Commonwealth arguments tend to make out. The World Nuclear Association suggests that the volumes of lightly-contaminated soil stored at Woomera, constituting half of all current Australian waste,<sup>166</sup> could feasibly now be reclassified,<sup>167</sup> such that the waste would then be disposed of ‘in near-surface landfill-type facilities with limited control’, or even as regular waste.<sup>168</sup> Nevertheless, the Commonwealth links the imminent exhaustion of its storage capacities not only to the environmental risks posed by current arrangements, but also to the existential threat facing the nuclear medical and research industry in Australia should a site not be found for the waste produced at Lucas Heights and the corresponding loss of jobs and economic opportunity resulting from any such eventuality.<sup>169</sup> The environmental problem of managing the waste thus continues to be yoked together with the economic and social utility of not only preserving but also expanding the industry that produces the waste,<sup>170</sup> without any attendant suggestion as to whether the demands of waste management might warrant temporary limitations on industrial expansion, while thorough public consultation and site review are allowed to take their course.

Justice Finn in the *Nuclear Waste Dump Case* relied on established authority to conclude that ‘urgency cannot generally be allowed to exclude the right to natural justice’, noting, however, that ‘it may in the circumstances reduce its content’.<sup>171</sup> An *EPBCA* approval process

<sup>163</sup> The Commonwealth argued that the lengthy time spent identifying the sites in question for the national repository and the unsatisfactory nature of current arrangements warranted its reliance on the urgency provisions in the *Lands Acquisition Act* to prevent South Australia’s frustration of the acquisition of the site: *Nuclear Waste Dump Case* 270 [40].

<sup>164</sup> Australia and France exchanged letters under their Bilateral Nuclear Safeguards Agreement in 1999 for the transfer to France of spent fuel from the Lucas Heights reactor for reprocessing at its La Hague facility and for its subsequent return to Australia: Department of Foreign Affairs and Trade (Cth), ‘Australia and France Sign an Implementing Arrangement’ (Media Release, 15 November 1999) <<http://dfat.gov.au/news/media-releases/Pages/australia-and-france-sign-an-implementing-arrangement.aspx>>. The waste from France was returned in 2015, amid some controversy: Emily Laurence and staff, ‘Greenpeace Campaigners Descend on Port Kembla for Arrival of Nuclear Waste Ship BBC Shanghai’, *ABC News* (online), 5 December 2015 <<http://www.abc.net.au/news/2015-12-05/activists-descend-on-port-ahead-of-nuclear-waste-ship-s-arrival/7004088>>. Waste from the UK will be returned in 2019: *Joint Convention 2014 Report* 12.

<sup>165</sup> Dr John Loy, the former CEO of ARPANSA, argues that ‘extending and extending again’ waste storage capacity at Lucas Heights is ‘no longer an option’, because ‘ANSTO is fast filling with science infrastructure, and the developable areas around it are filling even quicker (sic) with homes’: Loy, above n 74.

<sup>166</sup> *Joint Convention 2011 Report* 25.

<sup>167</sup> The World Nuclear Association argues for reclassification on the basis that the amassed soil is now ‘no more radioactive than many rocks and sands’: World Nuclear Association, above n 13.

<sup>168</sup> International best practice procedures for the disposal of Very Low Level Waste (VLLW) and Very Short Lived Waste (VSLW), respectively: ANSTO, above n 21, 5.

<sup>169</sup> Department of Industry (Cth), *Long Term Management of Australia’s Radioactive Waste: Initial Business Case* (April 2014) 3.

<sup>170</sup> In support of the *NRWMA* Bill, The Hon Josh Frydenberg, now federal Minister for the Environment and Energy, argued: ‘Critically, passage of this bill is urgent and the Greens tactics to delay it should not be supported because Australian spent fuel waste, which was transported to France and Scotland, will be transported back to Australia in 2015-2016 and will need to be immediately and safely stored.’ Frydenberg then went on to argue that the debate about the bill ‘provides an important opportunity for...a comprehensive and immediate debate about pursuing the benefits of a civilian nuclear power industry’: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, 687–8 (Josh Frydenberg).

<sup>171</sup> *Nuclear Waste Dump Case* 280 (Finn J).

that is largely intended to be supportive of ‘efficiency and timeliness’, and ‘the use of tight statutory timeframes at all stages of the process’,<sup>172</sup> from the outset favours curtailment of access to natural justice, more so if ‘urgency’ is to be argued. In upholding the approval process for the proposed Gunns pulp mill in Tasmania, a project which had also been delayed amidst controversy and where the Commonwealth’s preference for an accelerated method of approval was justified by the imminent loss of jobs dependent on the Tasmanian timber industry, the Full Court of the Federal Court confirmed that the *EPBCA*’s approach is inherently one of ‘studied haste’.<sup>173</sup> Although the Court acknowledged the *EPBCA*’s intention to provide ‘a high level of public participation and transparency’,<sup>174</sup> it also conceded that information gathering is costly and time-consuming, necessarily rendering public comment subordinate to the *EPBCA*’s twin objective of timeliness.<sup>175</sup> In this vein, Branson and Finn JJ reaffirmed the Commonwealth’s direction to restrict timeframes for public comment where a project is highly controversial and has been, like the NRWMF, in the public arena for a number of years,<sup>176</sup> even though this seems somewhat antithetical to the aims of public participation for projects of such public import. While restricted timeframes reduce the time in which a public interest litigant may verify information or obtain independent reports,<sup>177</sup> and may moreover affect ‘the level of public confidence’ in the *EPBCA*’s provision for public participation, Branson and Finn JJ found that this did not affect the legality of the opportunity for comment, where it is given.<sup>178</sup> With the fast-tracking aspect of its approval process thus validated, the marginal place afforded to expressions of dissent under the *EPBCA* appears beyond challenge for those projects, such as the NRWMF, that typically attract the most public opposition.

### C The Subjective Decision

Tridgell observes that under the *EPBCA*, ‘much of the decision-making process remains obscure’, resulting in outcomes plagued by ‘lack of transparency’,<sup>179</sup> and in circumstances where a proposed action has already been substantially negotiated with the Commonwealth bureaucracy by the time it comes to be assessed by the Minister.<sup>180</sup> Where the Commonwealth is proponent, the investment of public resources in site investigations would further drive the financial impetus for a stream-lined approval process. This, of course, raises the problem of ‘trusting the Commonwealth to regulate itself’ under the NRWMF approval process.<sup>181</sup> In the Gunns litigation, where the withdrawal of the State from the assessment process left the Commonwealth with the exclusive mandate for approval of a project whose development it had partially funded and politically defended, Justice Marshall dismissed the question of apprehended bias and relied on High Court authority to find that, as long as the Minister had taken the steps required by the *EPBCA*, the Commonwealth was not prevented from having a policy position on the project it was tasked with also approving.<sup>182</sup>

Notwithstanding the extended standing afforded to those seeking judicial review of a decision made under the *EPBCA*,<sup>183</sup> Keim notes that challenging Ministerial approval is

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<sup>172</sup> *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154, 171–2 (Branson and Finn JJ), citing the Senate debates on the *EPBCA Bill* and the *EPBCA Explanatory Memorandum’s Regulatory Impact Statement*.

<sup>173</sup> *Ibid* 176.

<sup>174</sup> *Ibid* 172, citing the *EPBCA’s Regulatory Impact Statement*.

<sup>175</sup> *Ibid* 177.

<sup>176</sup> *Ibid* 173.

<sup>177</sup> *Ibid* 174.

<sup>178</sup> *Ibid* 177.

<sup>179</sup> Tridgell, above n 154, 246–7.

<sup>180</sup> *Ibid* 249.

<sup>181</sup> Prest, above n 93, 35.

<sup>182</sup> *Wilderness Society Inc v Turnbull* (2007) 158 LGERA 134, 163 [147], citing *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 [50].

<sup>183</sup> *EPBCA* s 487.

notoriously difficult.<sup>184</sup> The Hawke Review of the *EPBCA*,<sup>185</sup> in considering judicial review as ‘an avenue for independent scrutiny of decisions made under the *EPBC Act*’, noted its inadequacy in light of the small proportion of successfully litigated challenges.<sup>186</sup> Even if judicial review were successful in referring a decision back to the Minister for reconsideration, frustrated public interest litigants note that as long as a decision is ‘formally and procedurally correct’,<sup>187</sup> its reasons having been ‘carefully written so that they tick all the boxes and are not irrational’,<sup>188</sup> the *EPBCA*’s reliance on the subjective belief of the Minister that the information before him or her is sufficient, is likely to be enough to inoculate that decision from further challenge.

#### D *The Limits to a Co-operative Approach*

In light of the constraints placed on public participation under the *EPBCA*, the question arises as to how these can marry with the Act’s own Objects, which include, in particular, promoting ‘a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples’,<sup>189</sup> as well as ‘the involvement of the community in management planning.’<sup>190</sup> With public participation pushed to the statutory sidelines in the approval of nuclear actions under the *EPBCA*, these particular Objects seem at best merely hortatory statements with little practical enforceable power.

Before this can be considered a fair evaluation of the *EPBCA*, however, the possibility of bilateral agreements, provided for under that statute, warrants examination. A ‘relatively novel arrangement’,<sup>191</sup> these allow a State or Territory government’s assessment and approval processes to be accredited by the Commonwealth and to be substituted for the Commonwealth’s own, for the purposes of either assessing or approving controlled actions.<sup>192</sup> The rationale for bilateral agreements is to avoid the duplication that arises from both levels of government being required to conduct EIA of proposed projects.<sup>193</sup> However, in the case of radioactive waste, the *NRWMA* takes care of this problem by exempting the requirement for any such assessment by a State government. Under the *NRWMA*, as discussed, State and Territory environmental laws and the assessment processes provided under them are expressly excluded from application at the proposed repository site. Furthermore, actions taken by the Commonwealth government or a Commonwealth agency preclude a bilateral agreement, unless the agreement expressly overrode the assumption that the Commonwealth would retain exclusive control over assessment and approval for its own actions.<sup>194</sup>

<sup>184</sup> Stephen Keim SC, ‘The EPBC Act Ten Years on: Lessons from the Gunns Pulp Mill Litigation’ (2009) 3 *National Environmental Law Review* 27, 33.

<sup>185</sup> Undertaken by Dr Allan Hawke, pursuant to s 522A of the *EPBCA*, which requires that the *EPBCA* be reviewed every ten years from its commencement: Commonwealth of Australia, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) (‘*Hawke Review*’). The review itself involved an extensive consultation process entailing the invitation to the public for submissions (220 being received), 140 face-to-face consultations with stakeholders in each capital city and a further invitation for public comment following release of the Interim Report (119 written comments being received): Department of Environment and Energy, ‘Independent Review of the Environment Protection and Biodiversity Conservation Act 1999’ (Commonwealth of Australia) <<https://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>>.

<sup>186</sup> *Hawke Review Interim Report* 314.

<sup>187</sup> According to the Lawyers for Forests submission to the *Hawke Review Interim Report*: *Ibid* 314.

<sup>188</sup> According to the Wilderness Society submission to the *Hawke Review Interim Report*: *Ibid*.

<sup>189</sup> *EPBCA* s 3(1)(d).

<sup>190</sup> *Ibid* s3(2)(g)(iv).

<sup>191</sup> Chris McGrath, ‘Bilateral Agreements – Are They Enforceable?’ (2000) 17(6) *Environmental and Planning Law Journal* 485, 485.

<sup>192</sup> *EPBCA* ss 46(1), 46(2A).

<sup>193</sup> McGrath, above n 191, 485.

<sup>194</sup> *EPBCA* s 49(1).

In the unlikely event that a bilateral agreement were proposed for the NRWMF – presumably as a gesture of political appeasement offered to a hostile State government – public participation in the negotiation of any such agreement is not mandated under the *EPBCA*, which means that ‘the bilateral agreement can be negotiated behind closed doors by Commonwealth and State public servants together with their political superiors, with no opportunity for public input’.<sup>195</sup> Furthermore, the legal status of such agreements is disputable. Citing Justice Windeyer in *South Australia v The Commonwealth*,<sup>196</sup> McGrath notes that ‘there is a line of High Court authority that political agreements between governments are not generally enforceable in a court’ and are therefore beyond the scope of judicial review.<sup>197</sup> So, while a State government may be afforded more regulatory authority under a bilateral agreement for assessment of the NRWMF site, the public interest litigant would likely be prevented from challenging any decision made under its terms.

## V THE CONSTITUTIONAL QUESTION

### A *The External Affairs Power*

In deference to the cooperative federalism on which its origins and legitimacy ostensibly rest,<sup>198</sup> the *EPBCA* itself provides that it is not intended to exclude or limit the concurrent operation of any law of a State or Territory.<sup>199</sup> This is a principle which the *NRWMA* explicitly rejects through its extraordinarily broad exclusion of any such law. Considering whether this approach is open to challenge through the avenue of public interest litigation, necessarily involves questioning the constitutional basis for the validity or otherwise of the exclusion of State and Territory laws. In the South Australian context, the constitutional question is particularly pertinent, given the State prohibits the construction of any nuclear waste facility within its borders with the object of protecting ‘the health, safety and welfare of the people of South Australia’ and ‘the environment in which they live’.<sup>200</sup> As Carney reasons, the obvious head of power the Commonwealth would seek to rely on to validate exclusion of competing State environmental laws would be external affairs,<sup>201</sup> in order to implement its international obligations under the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (‘RADWASTE’).<sup>202</sup>

RADWASTE requires that the legislative and regulatory framework of a contracting party must provide for national regulations for radiation safety, for a system of ‘appropriate institutional control’ and ‘a clear allocation of responsibilities of the bodies involved’,<sup>203</sup> with the objective of ensuring that ‘individuals, society and the environment are protected from the harmful effects of ionising radiation, now and in the future’.<sup>204</sup> Though the apportionment of national control over regulation seems implied by RADWASTE, Rothwell notes that the question at the heart of the constitutional debate in the seminal case of

<sup>195</sup> Laura Hughes, ‘Environmental Impact Assessment in the Environment Protection and Biodiversity Conservation Act 1999 (Cth)’ (1999) 16(4) *Environmental and Planning Law Journal* 304, 314.

<sup>196</sup> *South Australia v The Commonwealth* (1962) 108 CLR 130, 154 (Windeyer J). The case concerned an agreement between the South Australian and Commonwealth governments for the construction of railways under legislation passed at both State and Federal level.

<sup>197</sup> McGrath, above n 191, 485-486.

<sup>198</sup> Peel and Godden, above n 149, 669.

<sup>199</sup> *EPBCA* s 10.

<sup>200</sup> Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA) s 3.

<sup>201</sup> *Constitution* s 51(xxix).

<sup>202</sup> *Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management*, opened for signature 29 September 1997, 2153 UNTS 303 (entered into force 18 June 2001) (‘RADWASTE’). Gerard Carney, ‘Constitutional Framework for Regulation of the Australian Uranium Industry’ (2007) 26 *Australian Resources and Energy Law Journal* 235, 247.

<sup>203</sup> RADWASTE arts 18.2.i, 18.2.iv, 18.2.vi. The Commonwealth government notes that although Australian States and Territories ‘fully supported’ ratification of RADWASTE, the compliance of these jurisdictions is not subject to separate Commonwealth legislation: *Joint Convention 2011 Report*, above n 2, 6.

<sup>204</sup> RADWASTE art 1.1.

*Commonwealth v Tasmania*<sup>205</sup> ('*Tasmanian Dams*') concerning the use of the external affairs power was ultimately one of proportionality.<sup>206</sup> Despite apparently irreconcilable differences in the approach to environmental federalism – with the minority of the 4-3 judgment arguing for preservation of the States' law-making prerogatives,<sup>207</sup> and its opponents arguing for a more progressive and evolving view of the Constitution which prioritised the role of the federal government in an increasingly globalised world<sup>208</sup> – the Court was united over the need for Commonwealth legislative provisions to be 'appropriate and adapted' to implementing a treaty or convention.<sup>209</sup> Deane J argued that in order to prevent the arbitrary arrogation to the Commonwealth of control over property or endeavour situated within a State, reliance on the external affairs power necessarily entailed the need for there to be 'a reasonable proportionality between the designated purpose or object' of a treaty and 'the means which the law embodies for achieving or procuring it'.<sup>210</sup>

Safety being among the primary foci of its Objectives,<sup>211</sup> RADWASTE also seeks to ensure that 'effective defenses' are employed with the principle of intergenerational equity in mind, 'in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations'.<sup>212</sup> If the needs and aspirations, whether of present or future generations, of communities adjacent or connected to the NRWMF site, are seen as contingent on laws that increase standards of environmental protection or are intrinsically tied to laws that safeguard indigenous heritage and access to the NRWMF site where it is located on land of continuing cultural and spiritual significance, then excluding the operation of these laws, as the *NRWMA* does, may be disproportionate to the safety objectives promoted by RADWASTE and inconsistent with its foundational principle of intergenerational equity. However, countering this argument would be the internationally supported principle that securing a disposal site ensures generations of the future are protected from the burden of environmental risk that long-lived radioactivity poses,<sup>213</sup> thus justifying the assumption of plenary federal measures.

Regardless of any doubt that might be cast on the Commonwealth's reliance on 'external affairs', the so-called 'race power'<sup>214</sup> would likely authorise the *NRWMA*'s revocation of State

<sup>205</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams*').

<sup>206</sup> Donald R Rothwell, 'The High Court and the External Affairs power: A Consideration of its Inner and Outer Limits' (1993) 15 *Adelaide Law Review* 209, 220; Peel and Godden, above n 149, 673.

<sup>207</sup> While Murphy J was particularly damning of the doctrine of the 'federal balance' in *Tasmanian Dams*, arguing that the concept of reserved powers was thrown out with the *Engineers' Case* as being a fallacy, Wilson J viewed preservation of 'the basic federal polity of the Constitution' - which is a 'Federal Constitution, not a unitary Constitution' – as fundamental to 'the survival of the indissoluble federal Commonwealth': *Tasmanian Dams* 168 (Murphy J), 197 (Wilson J).

<sup>208</sup> Mason J argued for a flexible, progressive interpretation of the Constitution on the basis that its enduring power was contingent on its capacity to evolve with the national government's increasing participation in international affairs: *Tasmanian Dams* 127 (Mason J). Murphy J predicted that the external affairs power will increasingly come to be the means by which 'Australia will harmonize its internal order with the world order' and will no longer be an 'exceptional or extraordinary' use of Commonwealth power: *Tasmanian Dams* 170 (Murphy J). Similarly, Brennan J, in interpreting the Constitution as having a 'dynamic force which is incompatible with a static constitutional balance', envisaged that 'an expanding range' of modern commercial, economic, social and political activities would be brought within 'the sphere of Commonwealth legislative competence' through the field of external affairs: *Tasmanian Dams* 221 (Brennan J).

<sup>209</sup> *Tasmanian Dams* 104 (Gibbs J), 130–13 (Mason J), citing Barwick CJ in *Airlines of NSW Pty Ltd v NSW* (No. 2) (1965) 113 CLR 54.

<sup>210</sup> *Tasmanian Dams* 253, 260 (Deane J).

<sup>211</sup> One of the Objectives of RADWASTE is 'to achieve and maintain a high level of safety worldwide in spent fuel and radioactive waste management, through the enhancement of national measures and international co-operation': RADWASTE art 1.1.

<sup>212</sup> RADWASTE art 1.2.

<sup>213</sup> IAEA, above n 1, 2; International Atomic Energy Agency, IAEA Safety Fundamentals Series No. SF-1: Fundamental Safety Principles (2006) 12.

<sup>214</sup> Section 51(xxvi) of the Constitution provides that the Commonwealth Parliament may make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

indigenous heritage and access provisions.<sup>215</sup> For local indigenous litigants, then, the Constitution itself appears to pose the greatest barrier to any challenge they may seek to the extinguishment by the Commonwealth of their interests in the NRWMA site.

## B *The Manufacturing of Inconsistency*

As Carney points out,<sup>216</sup> by virtue of inconsistency,<sup>217</sup> any State law purporting to prevent the transport of radioactive waste within and from outside a State,<sup>218</sup> would be invalidated by a Commonwealth law that sought to allow this activity, should it be supported by a head of power.<sup>219</sup> Less clear is the question of how State environmental legislation can be inconsistent with the *NRWMA* and validly excluded if environmental protection is intended to be a goal of both the *NRWMA* and State environmental laws. An exception to the operation of section 109, which might place the validity of the *NRWMA*'s exclusion of State environmental legislation in doubt,<sup>220</sup> lies potentially in the argument that the Commonwealth, through the *NRWMA*, attempts to 'manufacture inconsistency' in its blanket exclusion of all State environmental legislation that would otherwise apply to operations and activities connected to the NRWMA.<sup>221</sup> Crucial to establishing a challenge in this respect would be proving that the intention of these provisions of the *NRWMA* was merely to prevent State legislative action.<sup>222</sup>

In refuting such a claim, the Commonwealth would need to argue that the *NRWMA*'s exclusion of State environmental legislation 'arose from a legitimate policy choice'.<sup>223</sup> The merits of that policy would be irrelevant, for 'whether we might find the policy rationale of the law praiseworthy has nothing to do with the case; it is merely necessary that there should be such a substantive policy'.<sup>224</sup> In light of its long-standing concern about the inadequacy of State and Territory arrangements for waste storage, the Commonwealth could argue, as it did in ratifying RADWASTE, that national security concerns about the accessibility of radioactive material for use in acts of terrorism,<sup>225</sup> along with its status as an actor in

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<sup>215</sup> Gibb CJ considered it settled, in *Tasmanian Dams* [120], that section 51(xxvi) did not necessarily mean a law made in reliance on the power should confer a benefit on indigenous peoples.

<sup>216</sup> Carney, above n 202, 247.

<sup>217</sup> Section 109 of the *Constitution* provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

<sup>218</sup> For instance, under section 9 of the Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA).

<sup>219</sup> Such as section 23(5) of *NRWMA* which allows transport of waste through a State or Territory to the NRWMA and the use of transport infrastructure for that purpose.

<sup>220</sup> Nicolas Dour and Greg Taylor, 'Manufactured Inconsistency' (2013) 39(1) *Monash University Law Review* 131, 135.

<sup>221</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5<sup>th</sup> ed, 2010) 347, quoting Evatt J in *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 686: "it is not possible for the Commonwealth to force its...legislation into direct conflict with the...laws of a State without destroying the validity of its own legislation". *Contra* Rumble, who argues that there is 'nothing in the terms of section 109 which prevents the Commonwealth from enacting such a law': Gary A Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38 *Federal Law Review* 445, 451.

<sup>222</sup> Peter Hanks, 'Inconsistent' Commonwealth and State laws: Centralising Government Power in the Australian Federation' (1986) 16 *Federal Law Review* 107, 123, citing Dixon J in *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84. Dour and Taylor describe 'manufactured inconsistency' as an 'offence of intention', above n 220, 136.

<sup>223</sup> Dour and Taylor, above n 220, 137.

<sup>224</sup> *Ibid* 138.

<sup>225</sup> National Interest Analysis, Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Parliament of Australia, 3 December 2002) 6.

international forums on nuclear non-proliferation safeguards,<sup>226</sup> warrant an exclusively federal legislative control over domestic nuclear waste management.

Though the Commonwealth's policy rationale might preserve the *NRWMA*'s exclusionary provisions and legitimise the coercive approach adopted in the aftermath of *Sutherland Shire v ANSTO*, a further indicator of bad faith on the part of the Commonwealth would be an apparent intention to 'cover the field' by an exclusion of State environmental laws, while meanwhile providing very few substantive provisions of its own to demonstrate fulfilment of this intention.<sup>227</sup> In this respect, the Commonwealth may rely on the breadth of environmental and heritage investigations it proposes to conduct under the *NRWMA* in relation to the site nomination in order to claim coverage. Even though the *ARPANS Act* stipulates very little about 'social' considerations, and the *EPBCA*, as demonstrated, contains more ambiguity than clarity with respect to the regulation of nuclear actions and their impacts on 'the environment', the Commonwealth can point to provisions in these statutes and in the *NRWMA* which indicate 'some', albeit unsatisfactory, regulation of environmental and heritage consequences.<sup>228</sup>

As discussed in Parts II and III of this paper, the coercion implicit in the *NRWMA* has clearly evolved in response to actual or possible frustration by the States of the Commonwealth's objectives.<sup>229</sup> However, a public interest challenge on the basis of manufactured inconsistency, citing a Commonwealth attempt to 'kneecap the states',<sup>230</sup> would be very difficult to mount. Any indication of bad faith is offset by the Commonwealth's commitment to RADWASTE's principles and objectives, and reliance on its own regulatory framework, however inadequate that appears to be.

### C Unlawful Incursions and Excisions

An alternative basis, one with 'a more obvious and convincing rationale',<sup>231</sup> for bringing an action arguing the Commonwealth's manufacturing of inconsistency in provisions such as the *NRWMA*'s section 24, is an application of the *Melbourne Corporation* principle,<sup>232</sup> 'which guarantees the continued existence of the States and their capacity to function as such'.<sup>233</sup> As Dour and Taylor note, 'the capacity to legislate is the most distinctive and most important function of any governmental unit',<sup>234</sup> and nowhere is this importance more pronounced geographically and territorially than in the area of environmental and planning law.

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<sup>226</sup> Australia is a participant country member of the International Framework for Nuclear Energy Cooperation (IFNEC), formerly the US-led Global Nuclear Energy Partnership ('GNEP'), which formed in 2006. The Statement of Mission of the IFNEC is to 'ensure the use of nuclear energy for peaceful purposes proceeds in a manner that is efficient and meets the highest standards of safety, security and non-proliferation': International Framework for Nuclear Energy Cooperation, *Statement of Mission* (adopted 16 June 2010) <[www.ifnec.org](http://www.ifnec.org)>.

<sup>227</sup> *Contra* Rumble, who argues that there is nothing to prevent the Commonwealth from legislating to exclude State law, even if does not make any positive provision for the subject matter: Rumble, above n 221, 453.

<sup>228</sup> Dour and Taylor, above n 220, 144.

<sup>229</sup> Dour and Taylor point out, citing *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, that this history, though dealing with political rather than legal considerations, would be admissible in a challenge on the grounds of manufactured inconsistency: *Ibid* 150.

<sup>230</sup> *Ibid* 142.

<sup>231</sup> *Ibid* 153.

<sup>232</sup> The High Court elucidated the principle in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*'Melbourne Corporation'*). Of the Australian federal system, Dixon J said, 'unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority': *Ibid* 82.

<sup>233</sup> Carney, above n 202, 238.

<sup>234</sup> Dour and Taylor, above n 220, 153.

Nevertheless, there is considerable uncertainty as to the parameters of such a principle. In *Melbourne Corporation*, Dixon J said that a Commonwealth law cannot have the validity of its enactment under a constitutional head of power, such as external affairs, undermined by any intergovernmental immunity which protected the States from any particular disability or burden wrought by that law. Conversely, Latham CJ and Williams J argued that validity could be in question if a law was characterised as restricting the power of the State.<sup>235</sup> The prospect of success in such a challenge, as yet untested in respect to the States' capacities to legislate,<sup>236</sup> would therefore be highly uncertain, dependent again on submitting the dubious contention, given the multi-faceted motivations for the *NRWMA*, that its overall purpose or intention was to negate any challenge from the States that may arise in the manner of *Sutherland Shire v ANSTO* or the *Nuclear Waste Dump case*.<sup>237</sup>

In *Tasmanian Dams*, the *Melbourne Corporation* principle was applied very narrowly by Brennan J, who determined that 'a restriction on the use of land which is not devoted to the functioning of an organ of government' cannot possibly be found to result in an impairment of the State's exercise of its executive powers and invalid trespass by the Commonwealth.<sup>238</sup> Mason J also preferred an application of the principle in rather prosaic terms applied to surface area, finding that it may be 'perhaps possible' for the *Melbourne Corporation* principle to be attracted if the land that is the subject of the disputed Commonwealth law 'forms a very large proportion of the State', but not where the parcel of affected land in that case constituted a mere 14,125 hectares.<sup>239</sup> As the *NRWMA* would likely occupy 100 hectares of the 25,000-hectare *Barndioota* property,<sup>240</sup> the principle would certainly not be engaged if Mason J's reasoning on its defined, physical limits were to be accepted.<sup>241</sup>

Brown, who perceives constitutional conflict as 'embedded', though not discussed, in the *Nuclear Waste Dump Case*, questions the validity of the Commonwealth acquisition on more radical grounds. The exclusion of State laws to a Commonwealth-acquired site in circumstances where there may be no actual inconsistency with the Commonwealth law,<sup>242</sup> results, Brown argues, in the 'transfer of political dominion' over that land and, effectively, in excision of State 'territory'.<sup>243</sup> Brown notes that sections 111 and 124 of the Constitution adopt the word 'surrender',<sup>244</sup> indicating that 'the only means by which the founders

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<sup>235</sup> Blackshield and Williams, above n 221, 1107.

<sup>236</sup> Dour and Taylor, above n 220, 153.

<sup>237</sup> Dour and Taylor point out that the aim, intent or purpose of the legislation, as relied upon by Dixon J in *Melbourne Corporation*, was critical to the High Court's later application of the principle in *Austin v Commonwealth* (2003) 215 CLR 185: Ibid 154.

<sup>238</sup> *Tasmanian Dams* 214 (Brennan J).

<sup>239</sup> Ibid 141 (Mason J).

<sup>240</sup> Keane, above n 23.

<sup>241</sup> Brown suggests the Commonwealth government's 1986 decision to drop a proposal to acquire 20,000 square kilometres of land around Cobar in NSW, following an intense debate about the impact on the State, indicates the constitutionality of the proposal 'would have been a ripe issue for litigation' using the *Melbourne Corporation* principle: A J Brown, 'When Does Property Become Territory? Nuclear Waste, Federal Land Acquisition and Constitutional Requirements for State Consent' (2007) 28 *Adelaide Law Review* 113, 122. However, the area of the land in Brown's example equates to an area 80 times the size of Wallerberdina Station.

<sup>242</sup> Such as occurred in the controversial 1970 decision of the High Court in *Worthing v Rowell* (1970) 123 CLR 89, which applied a literalist reading of section 52(i) of the Constitution so as to liberate Commonwealth activities on the Richmond RAAF Base from simultaneous application of NSW building regulations, notwithstanding any actual inconsistency between the two laws: Ibid 128. Section 52(i) provides that the Commonwealth Parliament 'shall, subject to this Constitution have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to...the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes'.

<sup>243</sup> Brown, above n 241, 130-131.

<sup>244</sup> Section 111 provides that 'The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.' Under Section 124, '[a] new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof'.

contemplated the vacation of State legislative jurisdiction in favour of Commonwealth control, was voluntarily'.<sup>245</sup> Section 123, as Brown points out, provides the means by which consent should be given to the surrender of State territory, requiring the consent of the State's government and, moreover, its people, via 'the majority of the electors of the State voting upon the question', to a Commonwealth action which will 'increase, diminish, or otherwise alter the limits of the State'.<sup>246</sup>

Noted by Brown as the deal-breaker condition which ultimately determined the participation of New South Wales in the formation of the Federation,<sup>247</sup> section 123 certainly suggests the availability of an unconventional and, as yet, untested valve for public participation in circumstances where State environmental laws are excluded. However, as Brown himself acknowledges, this would be an 'archaic' protection, at odds with the evolution of federalism to date,<sup>248</sup> a doubt confirmed by the High Court's gradual shift away from an intransigent conception of the 'federal balance'.<sup>249</sup>

#### IV CONCLUSION

Defying balance, the Commonwealth's legal framework for the NRWMF is heavily weighted toward protection of the national interest. The broad ambit of concerns which inform this preference – these being environmental, economic and internationally legal and political in nature – are relied upon as justification for a regime tightly shut against public participation, such that there remains little opportunity for expressions of local dissent and the testing of regionally important interests that conflict with those endorsed by the Commonwealth. The *NRWMA*, with its erasure of the matrix of State and Territory environmental and heritage legislation and the opportunities for ventilation of the public interest that these afford, seals the siting process from any statutory impediment, but thereby reduces the protection available to environmental and heritage matters. The *EPBCA*, by obfuscating the considerations going toward Commonwealth decisions and by sacrificing public participation to an efficiency imperative, provides an effective shield for the *NRWMA*'s assessment processes, while the *ARPANS Act* does little to expose social and heritage concerns. A bilateral agreement under the *EPBCA* for assessment of the *NRWMF*'s environmental impacts also seems out of the question. With the High Court's conception of environmental federalism now consonant with the Commonwealth's increasing involvement in international forums on national responsibilities for the nuclear fuel cycle, the success of any constitutional challenge to the *NRWMA* seems, at best, tenuous.<sup>250</sup> The safest conclusion that can be drawn is that this is a legal framework which will very likely work to overcome the setbacks thrown up by prior litigation in order to ultimately secure a site for the NRWMF, but at the cost of other legitimate interests and with potentially self-defeating consequences.

The most obvious of these negative outcomes is political fallout, as loss of leverage in the decision-making process inevitably takes hold and results in entrenched and sustained public opposition.<sup>251</sup> Distrust of both the institution and the consultative process were central to the recent majority decision of the South Australian 'citizen juries' to reject the

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<sup>245</sup> Brown, above n 241, 133.

<sup>246</sup> Constitution s 123.

<sup>247</sup> Brown, above n 241, 134.

<sup>248</sup> *Ibid* 138.

<sup>249</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 333 (Callinan J).

<sup>250</sup> McGrath asserts that 'the Commonwealth now has virtually a plenary power to make laws with respect to the environment': Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 *Environmental and Planning Law Journal* 165, 166.

<sup>251</sup> As in the case of the proposed Yucca Mountain repository in Nevada: Richard B Stewart, 'U.S. Nuclear Waste Law and Policy: Fixing a Bankrupt System' (2008) 17 *NYU Environmental Law Journal* 783, 797, 805.

State government's proposal for an international repository.<sup>252</sup> Indeed, where rights are impacted or removed by the over-riding of the laws under which they would otherwise be protected, and consultation is co-opted to 'manufacture consent',<sup>253</sup> public interest litigation may seem the only remaining option for communities disproportionately affected by radioactive waste disposal, a possibility certainly ignited with respect to Barndioota.<sup>254</sup> The apparently insurmountable barriers inhibiting the success of any such action are certainly justifiable on the grounds of the national interest, but are also, this paper concludes, inherently and problematically unjust.

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<sup>252</sup> Claire Campbell, 'Nuclear Fuel Cycle Royal Commission: SA Citizens' Jury Votes Against Storing Nuclear Waste', *ABC News* (online), 7 November 2016 <<http://www.abc.net.au/news/2016-11-06/sa-citizens-jury-vote-against-storing-nuclear-waste/7999262>>. The South Australian government commissioned Democracy Co, a private consultancy run by Emma Lawson and Emily Jenke, to implement 'citizen juries' on the question of an international repository: Andrew Spence, 'Citizen Driven Governing to Shape Nuclear Waste Future', *The Lead South Australia* (online), 22 June 2016 <<http://www.theleadsouthaustralia.com.au/industries/mining-resources/citizen-driven-governing-to-shape-nuclear-waste-future/>>.

<sup>253</sup> In circumstances where 'dissent and inconvenient information are kept within bounds and at the margins, so that while their presence shows that the system is not monolithic, they are not large enough to interfere unduly with the domination of the official agenda': Edward S Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Bodley Head, 3<sup>rd</sup> ed, 2008) xii.

<sup>254</sup> Meredith Booth and Verity Edwards, 'Plan for Flinders Ranges Nuclear Waste Dump Faces Legal Battle', *The Australian* (online), 5 May 2016 <<http://www.theaustralian.com.au/national-affairs/state-politics/plan-for-flinders-ranges-nuclear-waste-dump-faces-legal-battle/news-story/f6e95412f8c8d132f153676cf2bc8940>>.