



Additional Comments—The Hon Melissa Parke MP and Senator Sue Lines.

As members of the Joint Standing Committee on Treaties (JSCOT), we endorse the cautious approach adopted by the majority of the committee in its report on the *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy (New Delhi, 5 September 2014)*. However we consider that the Committee's major concerns, including the full separation of India's civil and military nuclear facilities and the establishment of an independent nuclear regulatory authority, are best addressed prior to ratification. The majority Committee view that these matters be addressed after ratification but prior to sale is positive in that it acknowledges the importance of this action before any future transfer of Australian uranium but this position is at risk of being overtaken by more narrow political and commercial priorities. The current Agreement is deficient and requires further attention to be strengthened to a standard consistent with both Australia's other nuclear safeguards mechanisms and community expectations. With regard to other matters about which the majority Committee has expressed its satisfaction, such as the requirement for India to track and account for Australian nuclear material, we are not prepared to simply accept ASNO's assurances; we would actually need to see the confidential administrative arrangement that it is claimed provides for such tracking and accounting.

These Additional Comments thus reflect the deep unease we feel at the Agreement's departure from the strong safeguards arrangements Australia has with many other countries.

Summary Overview

Australia's uranium export policy dates back to the 1970s. The principal objective of this policy is to ensure that Australian uranium and nuclear material derived from Australian uranium (known as Australian Obligated Nuclear Material -

AONM) is not used for nuclear weapons or any other military purpose and cannot contribute to any military purpose. Until the proposed nuclear cooperation agreement with India ("the NCA"), this policy has been applied by successive governments on a bipartisan basis. Australia's nuclear supply conditions have been accepted by 41 countries, and are given effect through 23 nuclear cooperation agreements (the difference in these numbers is due mainly to the agreement with the European Union which covers 28 countries).

Nuclear cooperation with India raises a number of major issues, including:

1. India is not a party to the Nuclear Non-Proliferation Treaty (NPT). Australia's policy has been to require NPT membership for nuclear supply to non-nuclear-weapon states. Under the terms of the NPT India does not qualify as a "nuclear-weapon state", and therefore is classed legally as a "non-nuclear-weapon state". India's non-NPT status is also an issue under the South Pacific Nuclear Weapons Free Zone Treaty, which in the case of non-nuclear-weapon states limits nuclear supply to NPT parties. Since India has nuclear weapons, to regard it as a non-nuclear-weapon state is a legal fiction. Serious questions about the legality of the proposed sales action were raised during the Committee's investigations and we are concerned that the proposed India NCA is in conflict with Australia's obligations under the SPNWFZ Treaty.
2. India is one of only three countries (the others are Pakistan and North Korea) which are still producing nuclear material for nuclear weapons. The NPT nuclear-weapon states ceased production of nuclear material for nuclear weapons many years ago.
3. Directly relevant to the preceding point, the Committee received expert testimony that India has not fully separated its military and civilian nuclear programs, and has not placed all civilian facilities under IAEA (International Atomic Energy Agency) safeguards. According to such eminent experts as Mr John Carlson AM and Mr Ronald Walker, some civilian facilities outside India's safeguarded program appear to be linked to its military program.
4. Also directly relevant to points 2) and 3), the Committee heard that India's safeguards agreement with the IAEA gives India the right to use safeguarded nuclear material in facilities that are outside the safeguarded program (and also to use unsafeguarded material in safeguarded facilities). This flexibility to use safeguarded material outside the safeguarded program is not available to NPT nuclear-weapon states; it is peculiar to India.

5. It cannot be overlooked that in the past India has disregarded peaceful use agreements. The plutonium for its first nuclear test, in 1974, came from the misuse of a reactor supplied by Canada (and using US-supplied heavy water) under peaceful use agreements, and India continued to use this reactor for its nuclear weapon program until the reactor was closed in 2010.
6. The long standing nuclear rivalry between India and Pakistan continues to directly threaten regional security and peace. A new report by the US based Carnegie Endowment for International Peace and the Stimson Centre concludes that Pakistan is currently rapidly expanding its nuclear capabilities because of its fear of India. In such a volatile context it is imperative that the highest levels of scrutiny, assurance and transparency apply to any Australian fissile materials.

Both Labor and the Coalition are committed to strengthening Australia's bilateral relationship with India. In 2012 it was the Labor Gillard government that commenced the negotiation of a bilateral nuclear cooperation agreement (NCA) with India. In this context, it is recognised that access to low carbon energy resources can make an important contribution to India's economic and social development. However, having regard to the circumstances outlined above, we consider it essential that any nuclear agreement with India should be at least as rigorous as all the agreements Australia has concluded with other countries. There is no justification for Australia to require less of India than of all our other agreement partners. The Australian Labor Party Platform states:

In relation to India, an important strategic partner for Australia, commitments and responsible actions in support of nuclear non-proliferation, consistent with international guidelines on nuclear supply, will provide an acceptable basis for peaceful nuclear cooperation, including the export of uranium, subject to the application of strong safeguards. (*underlining added*)

The proposed NCA does not provide "strong safeguards" and undermines a bi-partisan safeguards policy that has operated successfully for almost forty years. We are particularly concerned that the NCA in its present form fails to provide adequate assurance against the possible use of AONM to contribute to a military purpose.

Specific areas of concern

There were 23 submissions sent to the committee, or a total of 39 including supplementary submissions. The great majority of submissions were critical of the proposed NCA, in particular about safeguards and legal aspects. Especially

noteworthy were submissions critical of the details of the NCA from former senior safeguards, diplomatic and legal officials with unparalleled expertise in the issues involved.

1 The NCA does not include right of return provisions if AONM is diverted for military purposes, or if the NCA is breached in some other way

In every other NCA to which Australia is a party, successive governments have insisted on being able to demand the return of AONM that has been supplied under the agreement, should the recipient be found in breach of safeguards. This critical provision ensures that those who illegally seek to proliferate nuclear weapons with the benefit of Australian-supplied material are not able to bank the gains already received once the illegal activity is discovered. This treaty provision helps persuade recipient countries not to use AONM material to rush for nuclear weapons, since the benefits obtained through nuclear cooperation with Australia would be at risk.

This NCA provides no right of return of supplied material in event of a breach of the NCA. India has given a right of return to the US under the US-India agreement, however the Abbott government has failed to obtain this standard condition for Australia.

Under this NCA, the testing of nuclear weapons by India does not violate the NCA. Accordingly, it remains unclear what the Australian Government's response would be to a resumption by India of nuclear weapons testing, and what legal basis Australia might have for suspending uranium supply in that circumstance.

We feel that this could have grave consequences. Under this NCA India could stockpile substantial quantities of AONM. The failure to obtain a right of return means that if the NCA is suspended by Australia (following, for example, a resumption by India of nuclear weapons testing) that material would remain available for India's use.

The committee received testimony from the Australian Safeguards and Non-Proliferation Office (ASNO). ASNO did not provide any technical reason as to why this NCA does not include right of return provisions.

We are not suggesting that India has any intention to use AONM in violation of the NCA, and we support in-principle the supply of uranium to India in accordance with our policy platform. But a failure to obtain from India this completely standard provision means that a major disincentive to conduct further nuclear testing is lost as a direct result of the Government's failure to insist on standard NCA provisions.

Recommendation:

- 1. That the NCA not be ratified in its present form, but be amended, either directly or through an exchange of letters, to expressly state that Australia may require the return of AONM supplied under the NCA should India be found in-breach of the NCA or its broader non-proliferation undertakings with respect to India's Nuclear Suppliers Group exemption.**

2 The NCA does not limit AONM to facilities under permanent IAEA safeguards

India possesses a growing nuclear arsenal. India is also producing fissile material for nuclear weapons. To that end, some of India's nuclear reactors are designated for civilian power production under safeguards, while others are for military purposes to produce bombs, and some may serve both purposes. The committee heard that India has a "separation plan" under which it has designated 14 out of its current 22 power reactors, and some associated facilities, as "civilian" and placed them under permanent IAEA safeguards. For the future, India reserves the right to decide which additional facilities, if any, it will place under safeguards. However, major parts of India's civilian program - various power reactors, fast breeder reactors, enrichment facilities and reprocessing facilities - have not been designated as civilian. These remain outside IAEA safeguards and evidently will remain so in the future. Thus India operates a number of unsafeguarded facilities, some of which are civilian, some military, and some that appear to be both.

According to eminent experts, this incomplete separation of India's civilian and military programs is problematic because India's safeguards agreement with the IAEA ("the IAEA agreement") allows India to move nuclear material that is subject to safeguards requirements (such as AONM) between its safeguarded and unsafeguarded programs, and vice versa. The IAEA agreement sets out two different safeguards regimes within India:

1. Permanent safeguards for facilities that have been designated as "civilian" under India's separation plan. These facilities are listed in the Annex to the IAEA agreement.
2. All other nuclear facilities in India are normally outside IAEA safeguards. Such a facility will become subject to safeguards on a temporary basis if India decides to use safeguarded material in that facility. The facility will be subject to safeguards while nuclear material subject to safeguards requirements remains there.
3. In the case of facilities safeguarded on a temporary basis, the IAEA agreement has special provisions, for example allowing India to use safeguarded and unsafeguarded material together, and in particular circumstances to remove from safeguards nuclear material that has

been produced using safeguarded material. For instance, India can use safeguarded uranium to produce plutonium which it can then remove from safeguards.

The NCA provides that IAEA safeguards apply to AONM in accordance with the IAEA agreement. As just discussed, the IAEA agreement allows India to use safeguarded material in facilities that are outside India's safeguarded program. It follows that AONM could be so used to contribute to the production of unsafeguarded nuclear material – the NCA does not exclude this.

ASNO noted that both the IAEA agreement and the NCA proscribe use of safeguarded material to further any military purpose. However ASNO was unable to explain how, once India exercises its right to remove material from safeguards, either the IAEA or Australia would be in a position to verify whether that material ends up being used for a military purpose.

ASNO's evidence on this point was inconsistent. ASNO's submission of 2 March 2015 stated that AONM cannot be used in India's unsafeguarded reactors. At the Committee's hearing on 15 June 2015 ASNO was asked to substantiate this statement but did not do so. When asked whether Australia specifically asked India for AONM to be used only in facilities that are part of India's safeguarded program, ASNO said only that "AONM will only ever be used in facilities that are safeguarded."

This response is ambiguous, and avoids addressing the concerns raised by experts such as Mr Carlson. ASNO's use of the term "safeguarded" in this way confuses the issue by failing to distinguish between (a) facilities that are subject to permanent safeguards because they are designated as "civilian", and (b) facilities that are only temporarily safeguarded because India has transferred safeguarded material to them

Accordingly, we conclude that in its present form the NCA fails to ensure that AONM cannot be used to further any military purpose.

This issue should be rectified by expressly providing that AONM can be used only in facilities that are under permanent IAEA safeguards, namely, facilities that are listed in the Annex to the IAEA agreement. If India's intention is to use AONM only in facilities that are under permanent IAEA safeguards, it should have no objection to confirming this. On the other hand, if India's intention is to be able to use AONM in facilities that are not under permanent safeguards, we consider that the NCA is fatally flawed and should not proceed.

If the NCA proceeds without being amended to limit AONM to permanently safeguarded facilities, we consider that supply of AONM for India should be approved only for uranium that is enriched and fabricated into fuel assemblies in the United States and is transferred to India under the US-India nuclear cooperation agreement. The US, by supplying India only with fuel assemblies for specific reactors, should be able to ensure that US-obligated nuclear material (which would include AONM supplied to India after enrichment and fabrication

in the US) is limited to facilities that are permanently safeguarded. Australian uranium should not be supplied directly to India.

Recommendations:

- 2. That the NCA not be ratified in its present form, but be amended, either directly or through an exchange of letters, to expressly state that AONM can be used only in facilities that are under permanent IAEA safeguards, that is, facilities that are listed in the Annex to the IAEA agreement.**
- 3. If the NCA is not amended in accordance with Recommendation 1, that supply of AONM for India be approved only for uranium that is enriched and fabricated into fuel assemblies in the United States and transferred to India under the US-India nuclear cooperation agreement.**

3 The NCA's consent provisions for reprocessing and high enrichment are ambiguous

Retention of consent rights over reprocessing and high enrichment are essential elements in Australia's nuclear export policy. The NCA's provisions on consent rights, in their present form, are at best ambiguous. Mr Ernst Willheim, formerly one of the Commonwealth's most senior law officers, made a submission to the committee in which he stated that as currently drafted these provisions are legally unacceptable.

In evidence to the committee, officials did not specifically address Mr Willheim's submission, saying only that there is no difference between Australia and India about the meaning of the provisions. In view of Mr Willheim's legal eminence, we consider his opinion should be taken very seriously. The committee might reasonably have expected officials to refer Mr Willheim's opinion to senior legal advisers, and to confirm, or otherwise, to the committee that after specifically considering Mr Willheim's opinion the Commonwealth's legal view remains that the drafting of the NCA is satisfactory.

Recommendation:

- 4. That the NCA not be ratified in its present form without addressing concerns about the ambiguity of the consent provisions. Preferably this would be through amending the text, but at the least India should be asked to join in a clarifying statement to put beyond doubt that the two parties do share a common understanding of the meaning of the text.**

4 The NCA does not give Australia programmatic consent rights for reprocessing

Nuclear weapons require Uranium-235 or Plutonium-239. To produce these isotopes in the necessary purity for a nuclear bomb a would-be proliferator must either 'enrich' natural uranium by separating out the fissile isotope Uranium-235 from the Uranium-238 that is predominant in natural uranium, or breed plutonium by adding neutrons to Uranium-238 through irradiation of fuel in a reactor and then chemically separating the fissile Plutonium-239 from the spent fuel. The separation of plutonium from spent fuel is known as 'reprocessing'. Reprocessing enables the recycling of plutonium for use in another reactor but it can also serve as a pathway to a bomb. Obviously, reprocessing is a highly sensitive stage of the nuclear fuel cycle owing to the risk of diverting plutonium for nuclear weapons.

An essential aspect of Australian policy on reprocessing is that hitherto consent has been given only on a "programmatic" basis. This means that reprocessing and use of plutonium can take place only under a fuel cycle program agreed by both parties – Australian approval is required for the specific facilities using, handling or storing plutonium, and the purposes involved. To date Australia has given consent to reprocess only to Japan and the European Union (the latter covering reprocessing facilities in UK and France), and only for a mutually determined program.

The NCA however gives reprocessing consent without Australia having any say about the facilities that will use the plutonium. Effectively the NCA outsources Australia's consent to the US – India can reprocess AONM and use the recovered plutonium provided this is in accordance with the US-India reprocessing arrangements. The US does not have an equivalent to programmatic consent – so in this NCA Australia relinquishes any say in how India can use Australian-obligated plutonium; the only requirement is that the plutonium must be under IAEA safeguards (which in itself is not sufficient, given the flexibility available to India under the IAEA agreement, as discussed above).

To be consistent with established Australian policy, the consent provisions in the NCA should provide for programmatic consent.

Recommendation:

- 5. That the NCA be amended, directly or through an exchange of letters, to provide for Australian-obligated plutonium to be used only in accordance with a fuel cycle program mutually determined by India and Australia.**

5 It appears India is not prepared to undertake accounting for and tracking of AONM in accordance with international practice

Accounting for and tracking of AONM are fundamental requirements of Australian policy and legislation (*Nuclear Non-Proliferation (Safeguards) Act 1987*). The NCA cannot be implemented if AONM cannot be identified and quantified. The NCA requires each party to establish an accounting system for nuclear material subject to the agreement. Details are to be in an administrative arrangement concluded by ASNO and its Indian counterpart. The administrative arrangement is confidential, so the text is not available to the committee or the public.

Evidence to the committee, not disputed by officials, suggested that Indian officials have had difficulties in agreeing to provide accounting and tracking information for AONM. The committee was informed that Indian officials had similarly refused to provide accounting and tracking information to the US – as a consequence, the US-India nuclear cooperation agreement, which was concluded in 2007, has still not become operational. The committee was further informed that earlier in 2015 Indian and US officials had finally reached a pragmatic solution.

Critically, the US would provide nuclear material in the form of fuel assemblies for US-supplied reactors – the material would stay in a self-contained US fuel cycle within the overall Indian fuel cycle. India would provide detailed operational information on the reactors to enable US officials to calculate plutonium production (which would be subject to the US-India agreement). Australia does not produce fuel assemblies, so cannot export AONM to India in that form, and the operational information that India chooses to provide to Australia has not been publicly disclosed.

The committee was informed in evidence that the established international practice, applied by every country that receives nuclear material under bilateral agreements except India, is to add a bilateral accounting function to the nuclear accounting system that the country operates under its IAEA safeguards agreement. Individual batches of nuclear material are linked to the relevant bilateral agreement through inclusion of a country code on IAEA accounting forms. The committee was informed that with modern nuclear accounting software it is very straightforward to track the batches of material that are subject to each agreement.

The committee was further informed that the attitude of Indian officials towards accounting and tracking may be due in part to India currently having only a simplified form of safeguards accounting, based on its old IAEA agreement. It is understood the IAEA is currently working with India to introduce a modern accounting system, to ensure that the IAEA can identify material required by bilateral agreements to be safeguarded. The committee was informed that the new accounting system could be used to identify the material that is subject to each

particular agreement. It is to be hoped that as Indian officials gain proficiency with the new system they will reconsider their opposition to tracking bilaterally obligated material.

Meanwhile, it remains to be seen whether the administrative arrangement will meet Australian requirements. Since the administrative arrangement is confidential it is difficult for the Parliament and the public to have confidence in the outcome, although we note the assurance of Dr Robert Floyd in a committee hearing on 15 June 2015 that he is satisfied he will be able to comply with his reporting requirements as per the *Safeguards Act*.

We do not consider it satisfactory that a matter of such importance to Australia's safeguards policy is contained solely in an administrative arrangement that neither the public nor the committee is allowed to see.

Evidence to the committee was that the pragmatic approach reached between the US and India is workable because of the limited scope of the nuclear material involved – fuel assemblies for US-supplied reactors are readily identifiable and tracked. It is difficult to see how the same approach could work if Australian uranium was supplied directly to India as bulk material.

Recommendations:

- 6. That AONM not be supplied directly to India until Indian officials are following established international practice with regard to accounting for and tracking AONM.**
- 7. Meanwhile, until Indian officials are following established international practice with regard to accounting for and tracking AONM, that supply of AONM for India be approved only for uranium that is enriched and fabricated into fuel assemblies in the US in accordance with Recommendation 2.**
- 8. That JSCOT Committee members be provided with access to the administrative arrangements in order to satisfy the legitimate public interest concerns around the adequacy of the accounting and monitoring mechanisms prior to any Treaty ratification.**

6 The NCA does not give Australia the right to the IAEA's safeguards findings with respect to AONM

A standard provision in Australia's other nuclear cooperation agreements is for Australia to have access to the IAEA's safeguards conclusions with respect to material subject to the particular agreement. This NCA has no such provision. The committee heard that in the absence of such a provision, the IAEA is required to treat all country-specific safeguards information as confidential to India. Australia has no right to IAEA reports relating to AONM in India, nor even to ascertain whether India is meeting IAEA accounting requirements.

India's agreements with the US and Canada do provide access to IAEA reports on the status of their material. It is not clear why this has been omitted from this NCA.

Recommendation:

- 9. That the NCA be amended, directly or through an exchange of letters, to give Australia the right to request the IAEA's safeguards findings or conclusions for India as they relate to AONM.**

7 This NCA undermines nuclear arms control and weakens Australia's non-proliferation credentials.

India has not signed the Comprehensive Nuclear-Test-Ban Treaty (CTBT). India maintains a unilateral moratorium against nuclear testing, but is free to change this position at any time. By contrast, China and the United States have signed the CTBT, and pending ratification are legally obligated not to act inconsistently with the Treaty; that is, not to test. India has no such obligation. India's refusal to sign the CTBT makes it unique among Australia's current nuclear cooperation partners, and this must be interpreted as an intention by India to maintain the option to recommence nuclear weapons testing in the future.

The committee heard that of these three nations (China, the United States and India), India has the strongest incentive to abrogate its moratorium and resume nuclear testing. This is because India has not successfully detonated a thermonuclear (hydrogen) bomb, and because of the ongoing and intensifying strategic competition in the Indo-Pacific region. Accordingly, concerns remain within India as to the reliability of its strategic deterrent relative to potential rivals. Without further nuclear testing by India, some feel these security concerns will not be resolved.

Australia's long-standing policy has been that since nuclear material can be used to create weapons of indiscriminate horror, the export of such material can be justified only where doing so helps to restrict the spread of such weapons. This NCA remains completely silent on India's future nuclear restraint or willingness to join the CTBT. There is no evidence that India intends to curtail or restrict the expansion of its nuclear weapons program in any way.

One of the strongest arguments in favour of concluding a nuclear cooperation agreement with India is that it brings India 'into the tent' with regard to international nuclear non-proliferation rules and norms. Far from achieving this outcome, this NCA entrenches India's nuclear deviance and privileges it ahead of Australia's other nuclear cooperation partners, thereby undermining the non-proliferation regime as a whole. We strongly believe that an undertaking by India to act in accordance with accepted non-proliferation norms comparable to other nuclear-armed states is an essential criterion for Australian nuclear supply.

Recommendation:

10. That prior to effect being given to the NCA, clarification is received from India as to its willingness to comply with non-proliferation norms and the exercising of nuclear restraint. A positive example would be for India to sign the Comprehensive Nuclear-Test-Ban Treaty, with confirmation it will ratify soon after the United States and/or China. This does not place restrictions on India's nuclear weapons program unilaterally, while still providing assurance to Australia and the world that India will respond reciprocally to steps taken by other nuclear-armed states.

The NCA contains other problem areas.

These include:

1. While the NCA states that AONM is to be subject to India's safeguards additional protocol with the IAEA, in fact India's additional protocol does not apply to any nuclear material in India. The IAEA's additional protocol was introduced to strengthen safeguards. Australia's policy makes the conclusion of an additional protocol a condition for uranium supply. However, according to experts, India has concluded a very limited additional protocol – by far the most restrictive of any country. This is an additional protocol in name but does not meet the intent of Australia's policy.
2. The NCA's fallback safeguards provisions fall well short of Australia's other agreements. Australia's standard condition is that, if for any reason IAEA safeguards cease to apply, the parties are to establish safeguards arrangements that conform to IAEA safeguards principles and procedures and provide equivalent assurance. This NCA requires only that the parties consult and agree on "appropriate verification measures", a vague term open to differing interpretations.
3. The NCA has no mandatory dispute settlement provision. Australia's standard condition is for disputes to be settled by negotiation, but with an arbitration process in case negotiations fail. This NCA provides only for negotiation. This leaves Australia potentially in a weak position, especially as the shortcomings in the NCA, together with the problem areas in India's IAEA agreement, create ample possibilities for dispute.

Conclusion

As members of the Joint Standing Committee on Treaties (JSCOT), we cannot support the Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy (New Delhi, 5 September 2014) in its present form.

We view the current NCA as a flawed instrument that fails to either provide industry certainty or advance non-proliferation.

We believe renegotiation is required to resolve the issues we have raised in these Additional Comments - issues that have all been identified as unresolved concerns by the majority Committee. This strengthening could be realised either through amending the text or through an exchange of letters clarifying the text and the shared understanding and intent of the Parties.

These are all serious issues that if not resolved could have adverse consequences for Australia's ability to ensure that Australian Obligated Nuclear Material cannot contribute to any military purpose. If not resolved there could be adverse consequences for public confidence in the NCA and for the preparedness of future governments to approve supply of nuclear material under the NCA. There is also the potential for damage to Australia's international reputation and credibility as a proponent of nuclear non-proliferation and a strong upholder of nuclear safeguards.

The Hon Melissa Parke MP

Senator Sue Lines

