



The Secretary
Joint Standing Committee on Treaties
House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

**SUBMISSION No 8
TT on 14 May 2008**

11 June 2008

Dear Secretary

Re: ACF submission on the proposed *Agreement between the Government of Australia and the Government of the Russian Federation on Cooperation in the Use of Nuclear Energy for Peaceful Purposes*

The Australian Conservation Foundation (ACF) welcomes the opportunity to participate in this Inquiry by the Joint Standing Committee on Treaties (JSCT) into whether the proposed treaty for uranium export to Russia, signed by then Prime Minister Howard and Russian President Putin at APEC in Sydney in 2007, is in Australia's national interest.

ACF considers that this treaty will compromise Prime Minister Kevin Rudd's "*International Commission on Nuclear Non Proliferation and Disarmament*" and unacceptably weaken, rather than strengthen, Australia's policy and practice on nuclear safeguards and nuclear non-proliferation. Australia should not export uranium to nuclear weapon states - like Russia - that fail to comply with their nuclear disarmament obligations under the Nuclear Non-Proliferation Treaty (NPT).

A number of fundamental flaws in the proposed treaty conflict with the intent of a number of Federal Government policy commitments (in the ALP National Platform, April 2007, Chapters 5 and 14) to strengthen nuclear safeguards and Australia's place in the world, including to restore integrity to the fracturing NPT regime.

For these reasons ACF finds the proposed treaty is not in Australia's national interest and urges JSCT to act in accordance with its mandate and recommend that Australia does not ratify this flawed treaty signed by the previous government.

ACF submits legal opinion from Professor Donald Rothwell, Professor of International Law, College of Law, Australian National University, for consideration by JSCT (see the Executive Summary on proposed nuclear safeguards in this treaty: "*Australian Safeguards Agreements with China and Russia*", 11 Oct 2007, and the Executive Summary on Australia's obligations to nuclear disarmament and implications for this treaty "*Nuclear Disarmament and the Non-Proliferation Treaty. Implications for the 2007 Australian Russian Nuclear Agreement*", 23 May 2008).

Professor Rothwell concludes that Australia cannot assume the International Atomic Energy Association (IAEA) regime will provide assurance that the highest possible nuclear safeguards standards are being met and recommends the treaty not be ratified as it fails to adopt the IAEA Additional Protocol, measures that were introduced in 1997 to strengthen IAEA inspection capabilities.

In addition, Australia should seek to renegotiate the treaty to allow for higher monitoring, verification and safeguards standards than is currently envisaged under either the proposed treaty or the IAEA Additional Protocol. He says Australia should require that Russia adopts the recent amendments to the Convention on the Physical Protection of Nuclear Material to raise the standards for security of nuclear materials in Russia.

On nuclear disarmament, Professor Rothwell advises that Australia is under an international obligation to pursue work in good faith toward the objective of nuclear disarmament consistent with the Nuclear Non-Proliferation Treaty (NPT) and that this obligation is particularly heightened in the case of Australia's interaction with a nuclear state party to the NPT such as Russia and in relationships where they are mutually engaged in matters related to nuclear disarmament, including nuclear energy and nuclear proliferation.

In regard to Australia's nuclear disarmament obligations Professor Rothwell advises that:

9. Australia has a number of options open to it with respect to the Agreement. They are as follows:

A. That Australia elect to not ratify the Agreement on the basis that it poses too great a risk for Australia being held to have acted in non-compliance with its NPT, Article VI, obligation to in good faith undertake measures directed towards nuclear disarmament;

B. That Australia defer ratification of the Agreement until such time as completion of the 2010 NPT Review so as to provide the Russian Federation with an opportunity to demonstrate that it is in good faith constructively working both individually, bilaterally and multilaterally towards nuclear disarmament consistent with their NPT obligations including the 13 Practical Steps;

C. That Australia seek to renegotiate the Agreement and insert a 'termination clause' giving to Australia the capacity to withdraw from the Agreement if at any time Australia considers Russia to not in good faith be working towards nuclear disarmament consistent with its NPT obligations and the 13 Practical Steps;

ACF submits to JSCT that Australia's good faith NPT obligations warrant that the Australian Government elects to not ratify this treaty. It is unacceptable and contrary to our international responsibilities for Australia to propose to export uranium to a country that is not acting in full compliance with its NPT nuclear disarmament obligations, including the reinforcement of the NPT principle of good faith contained in the "13 Practical Steps" for "systematic and progressive efforts to implement Article IV of the Treaty" as adopted by the NPT Review Conference in 2000.

In light of our NPT obligations ACF submits that, at a minimum, Australia should defer any potential treaty ratification until after the 2010 NPT review to allow for Russia to demonstrate that it is acting in full NPT compliance on nuclear disarmament obligations and

require treaty renegotiation for a range of strengthened safeguards and required insertion of a 'termination clause' on nuclear disarmament.

ACF further submits to JSCT that Australia should not proceed with ratification of this treaty for the following reasons:

- The rule of law, democracy and human rights are not being observed in Russia;
- The IAEA has only a very limited role in Russia and its so-called civilian nuclear industry is still inextricably linked with the military;
- Proposed treaty safeguards are inadequate in a number of key areas;
- Russia has not effectively secured its fissile material and radioactive waste;
- Russia lacks credibility on nuclear safety and on environment protection;
- Nuclear waste management is unresolved in Russia and Australia should stop contributing to this intractable problem.

Australia cannot have confidence in Russian compliance to this proposed nuclear treaty due to the current status of governance standards in that country. For instance, in 2007 Russia abrogated its international responsibilities and unilaterally suspended a major treaty: the *Conventional Forces in Europe (CFE) Treaty* (1990 and 1999 amendments), referred to by the US Arms Control Association as the 'cornerstone of European security', downgrading compliance to a discretionary decision for Russian leaders.

Negotiation of conditionality clauses on the rule of law, human rights and democracy should be pre-requisite conditions to any credible consideration to confidence, assurance or transparency on nuclear issues in Russia. ACF urges JSCT to endorse this approach in any consideration by the Committee of this treaty.

This proposed Russian treaty is founded on the limitations of the IAEA regime and on the shortcomings of Australia's uranium export safeguards, characterised by the previous government's terms of nuclear trade in the flawed China uranium export agreement. The IAEA safeguards regime is failing and cannot effectively safeguard nuclear fuel cycle bulk handling facilities, such as the uranium enrichment and spent nuclear fuel reprocessing plants in Russia, and cannot assure detection of possible military diversion of fissile materials into weapons programs in a timely fashion.

This proposed Russian treaty is to replace the existing 1990 treaty and provide – for the first time – for Australian uranium to be exported for use in Russian nuclear reactors.

Russia itself is a long term uranium exporter. A new agreement with the United States permits Russia to supply 20 per cent of US reactor fuel from 2014 until 2020, with all limits to be phased out after 2021. However, the DFAT "National Interest Case" on this treaty unacceptably fails to quantify any proposed Australian uranium exports, with the Australian Safeguards and Non-Proliferation Office (ASNO) "Trade Impact Assessment" (April 2008), stating only that:

The impact of the introduction of Russia into Australia's network of bilateral safeguards partners is a possible increase in demand for Australian uranium over the medium term. However, quantifying this impact would be speculative.

A 'possible increase' in demand and speculation on uranium export is not in Australia's national interest given the level of risks inherent in this treaty action.

This proposed treaty may compromise international safeguards and non-proliferation policy and practice and unacceptably elevate commercial and state nuclear interests over safeguards under the new Federal Government's watch. The treaty's safeguards and arrangements for enrichment and reprocessing are neither acceptable nor in line with the intent of Government policy.

The treaty allows for the "substitution" of Australian Obligated Nuclear Materials (AONM) by other materials from other sources held at other locations and provides for management of AONM in non-IAEA safeguarded and military run facilities.

In addition, the proposed Russian treaty unacceptably provides Australian consent to reprocessing, the separation and stockpiling of weapons usable plutonium from spent nuclear fuel directly derived from use of Australian uranium in Russian nuclear reactors.

Prime Minister Kevin Rudd, in a Lowy Institute speech in July 2007, stated that:

"The nuclear non-proliferation treaty continues to fracture. And there has been little if any progress on nuclear arms reduction – let alone nuclear disarmament."

Australia has an opportunity, as an influential middle power, to apply this influence internationally by requiring the highest possible level of nuclear safeguards and to require nuclear weapon states to fully meet their disarmament obligations under the NPT. ACF accordingly concludes that Australia should elect to not ratify this proposed treaty with Russia.

For any further information on issues raised in this submission please contact David Noonan, ACF Nuclear Free Campaigner, by telephone on 08 8211 6838 or 0408 821 058, or by email: d.noonan@acfonline.org.au.

ACF would welcome an opportunity to discuss these issues with the Committee, and to appear before a public hearing of the JSCT Inquiry.

Thank you for your consideration to these matters.

Yours sincerely

Denise Boyd
Campaigns Director
Australian Conservation Foundation

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1. The mandate of JSCT in this Russia nuclear treaty Inquiry

In this Inquiry JSCT has a mandate and a proper option open to it to recommend that Australia decide not to ratify this proposed treaty, or to recommend that the treaty be subject to renegotiation including deferral of the treaty until relevant matters may be satisfied. Professor Rothwell's advice of 23 May 2008 includes that:

1. ...The (JSCT) Committee's mandate is to review Treaties and make recommendations to the Executive on treaty-action. It is within the mandate of JSCOT to recommend that a treaty which is before it be accepted, rejected, or be subject to renegotiation. ...

10. As the Agreement has to date only been signed, there are no obligations presently upon either Australia or Russia to act other than in good faith with respect to the 'object and purpose' of the Agreement. Importantly, there are no direct obligations upon Australia under international law to proceed to immediate or even timely ratification. There is also nothing under treaty law which would prevent Australia seeking to renegotiate part of the Agreement.

(Professor Donald Rothwell, Prof of International Law, ANU College of Law, ANU)

2. Australia's obligations to nuclear disarmament in relationships with Russia

Professor Rothwell advises that Australia is under an international obligation to pursue work in good faith toward the objective of nuclear disarmament consistent with the Nuclear Non-Proliferation Treaty (NPT) and that this obligation is particularly heightened in the case of Australia's interaction with a nuclear state party to the NPT such as Russia, and in relationships where they are mutually engaged in matters related to nuclear disarmament, including nuclear energy and nuclear proliferation.

ACF submits to JSCT that Australia's good faith NPT obligations warrant that Australia elect to not ratify this treaty.

It is unacceptable and contrary to our international responsibilities for Australia to propose to export uranium to a country that is not acting in full compliance with its NPT nuclear disarmament obligations.

These obligations include the reinforcement of the NPT principle of good faith contained in the "13 Practical Steps" for "systematic and progressive efforts to implement Article IV of the Treaty", adopted by the NPT Review Conference in 2000, which can be strongly argued constitutes "subsequent practice" on the part of the parties in the application of the NPT treaty and which "establishes an agreement of the parties".

At a minimum, Australia should defer any potential ratification until after the 2010 NPT Review to allow for Russia to demonstrate that it is acting in full NPT compliance on nuclear disarmament obligations including the 13 Practical Steps, and should require treaty renegotiation for a range of strengthened safeguards, including the required insertion of a 'termination clause' on nuclear disarmament.

The Executive Summary of legal advice on “*Nuclear Disarmament and the Non-Proliferation Treaty. Implications for the 2007 Australian Russian Nuclear Agreement*” (23 May 2008), includes that:

4. *The NPT principal of good faith was reinforced in 2000 when the NPT Review Conference adopted the so-called 13 Practical Steps for “systematic and progressive efforts to implement Article VI of the Treaty”. The 13 Practical Steps outlined the very particular obligations the nuclear weapon states were under to achieve disarmament in addition to the general obligations upon all NPT State parties to work towards nuclear disarmament. ...*

6. *Australia and Russia as parties to the NPT accordingly bear an international obligation to work towards nuclear disarmament consistently with Article VI of the NPT in good faith. This is an obligation that arises not only in the context of their being parties to the NPT, but also in their other relationships where they are mutually engaged in matters related to nuclear disarmament, including nuclear energy and nuclear proliferation. While Australia and Russia have a distinctive status under the NPT as a non-nuclear weapon state (Australia) and a nuclear weapon state (Russia) and accordingly bear differential obligations, they are both bound by this common good faith obligation.*

7. *...Australia is under an obligation to pursue in good faith with other NPT state parties an obligation to work towards the objective of nuclear disarmament. This obligation is particularly heightened in the case of Australia’s interaction with a nuclear state party to the NPT such as Russia. ...*

9. *Australia has a number of options open to it with respect to the Agreement. They are as follows:*

A. *That Australia elect to not ratify the Agreement on the basis that it poses too great a risk for Australia being held to have acted in non-compliance with its NPT, Article VI, obligation to in good faith undertake measures directed towards nuclear disarmament*

B. *That Australia defer ratification of the Agreement until such time as completion of the 2010 NPT Review so as to provide the Russian Federation with an opportunity to demonstrate that it is in good faith constructively working both individually, bilaterally and multilaterally towards nuclear disarmament consistent with their NPT obligations including the 13 Practical Steps;*

C. *That Australia seek to renegotiate the Agreement and insert a ‘termination clause’ giving to Australia the capacity to withdraw from the Agreement if at any time Australia considers Russia to not in good faith be working towards nuclear disarmament consistent with its NPT obligations and the 13 Practical Steps;*

(Professor Donald Rothwell, Prof of International Law, ANU College of Law, ANU)

It is a fundamental legal requirement for Russia and Australia to fully meet their NPT nuclear disarmament obligations. Observing NPT obligations is set out as a condition of uranium supply in the new Federal Government’s uranium policy, see:

In relation to exports, Labor will allow the export of uranium only to those countries which observe the Nuclear Non-Proliferation Treaty, (Paragraph 95)

In addition, Labor will: ...

- *fully meet all our obligations as a party to the NPT; (Paragraph 97)*

(ALP National Platform, Chapter 5, Uranium, April 2007)

3. Inadequate safeguards to provide assurance of standards or to satisfy policy

In regard to safeguards in this proposed treaty Professor Rothwell concluded that Australia can not assume that the IAEA regime will provide assurance that the highest possible nuclear safeguards standards are being met and recommends that the treaty should not be ratified as it fails to adopt the IAEA Additional Protocol.

Further concluding that in addition Australia seek to renegotiate the treaty to allow for higher monitoring, verification and safeguards standards than is currently envisaged under either the proposed treaty or the IAEA Additional Protocol; and to require that Russia adopt the recent amendments to the Convention on the Physical Protection of Nuclear Material to raise the standards for security of nuclear materials in Russia.

The Executive Summary of legal advice on safeguards in this proposed treaty "*Australian Safeguards Agreements with China and Russia*" (11 Oct 2007) concluded that:

Following a review of these Agreements, the relevant international law, and contemporary international practice in the field it is concluded as follows:

- 1. That Australia cannot assume that adoption by nuclear cooperation partner States of IAEA Safeguards Additional Protocols will provide reassurance that the highest possible nuclear safeguards standards are being met. ...*
- 7. That the 2007 Russia Agreement makes no attempt to adopt the second generation safeguards standards found in the IAEA Additional Protocol to the Safeguards Agreement.*
- 8. That Australia decline to ratify the Russia Agreement until such time as Russia has ratified an IAEA Additional Protocol to the Safeguards Agreement.*
- 9. That in addition, Australia seek to renegotiate aspects of the Russia Agreement to allow for higher monitoring, verification and safeguards standards than is currently envisaged under both the existing Agreement or the Additional Protocol. ...*
- 12. That Australia immediately adopt the recent amendments to the Convention on the Physical Protection of Nuclear Material.*
- 13. That following Australian adoption of the recent amendments to the Convention on the Physical Protection of Nuclear Material, Australia urge China and Russia to also adopt those amendments.*

(Professor Donald Rothwell, Prof of International Law, ANU College of Law, ANU)

The set of shortcomings in proposed treaty safeguards as identified in legal advice by Professor Donald Rothwell and as presented by ACF in this submission are contrary to a

range of clear policy commitments on nuclear safeguards and on uranium exports by this Federal Government.

The ALP National Platform states that Labor will only allow the export of uranium to those countries that have ratified international nuclear safeguards agreements and that the IAEA Additional Protocol will be universalised and made mandatory for all states as a condition of supply. In contrast Russia has not ratified and brought the IAEA Additional Protocol into force and this treaty will not require minimum safeguard standards.

This treaty effectively weakens safeguards in a number of key respects, in contradiction of Federal Government policy commitments to maintain, strengthen and tighten strict safeguards and security controls and export control regimes:

Labor recognises that the production of uranium and its use in the nuclear fuel cycle present unique and unprecedented hazards and risks, including: ...

- *the generation of products which are usable as the raw materials for nuclear weapons manufacture, which demands the enforcement of effective controls against diversion; and*
- *the generation of highly toxic radioactive waste by-products, which demands permanently safe disposal methods not currently available.*

Labor, accordingly will only allow the mining and export of uranium under the most stringent conditions, as described below.

In relation to exports, Labor will allow the export of uranium only to those countries which observe the Nuclear Non-Proliferation Treaty (NPT), are committed to non-proliferation policies, have ratified international and bilateral nuclear safeguards agreements and maintain strict safeguards and security controls over their nuclear power industries. In addition, Labor will work towards:

- *strengthening export control regimes and the rights and authority of the International Atomic Energy Agency (IAEA);*
- *limiting the processing of weapon usable material (separation of plutonium and high enriched uranium in civilian programs);*
- *tightening controls over the export of nuclear material and technology;*
- *universalising of the IAEA additional protocol making it mandatory for all states and members of the Nuclear Suppliers Group to make adherence to the additional protocol a condition of supply to all their transfers;*

(ALP National Platform, Chapter 5, Uranium, Paragraphs 92-95, April 2007)

4. Unacceptable limitations of the IAEA regime apply to the treaty

The IAEA safeguards regime is failing and can not safeguard nuclear fuel cycle facilities. A major international review of the nuclear industry has found the IAEA cannot effectively safeguard nuclear fuel cycle bulk handling facilities, such as uranium enrichment and spent

nuclear fuel reprocessing plants, and cannot assure detection of possible military diversion of fissile materials into weapons programs in a timely fashion.¹

This proposed Russian treaty is based on the limitations of the IAEA regime and on the shortcomings of Australia's uranium export safeguards - as characterised by the flawed China uranium export agreement. We refer you to a review of safeguards "*An Illusion of Protection. The unavoidable limitations of Safeguards and the Export of Uranium to China.*" (October 2006) by ACF and the Medical Association for the Prevention of War.²

ACF commends the recommendations of this joint report to you, in particular:

4. IAEA safeguards should be strengthened through universal, mandatory and permanent application, including the full application of Additional Protocols, to Nuclear Weapon States including China in the same degree as to Non-Nuclear Weapon States.

Australia should end practices of discriminatory rules in safeguards agreements across states and the 'favoured' status and limited application of voluntary IAEA safeguards to nuclear weapon states including Russia. In addition, the IAEA Additional Protocol has only very limited application in nuclear weapon states and should have binding application geographically across Russia and to any facility, declared or undeclared, in equal effect to how it would be applied in a non-nuclear weapon state.

The Canberra Commission (1996) called for the progressive application of safeguards to nuclear weapon states toward all states being under the same universal, mandatory, permanent and non discriminatory rules.

11. Australia should withdraw uranium sales from all Nuclear Weapon States that have breached their non-proliferation obligations, or continue to fail to comply with their nuclear disarmament obligations under the Non-Proliferation Treaty, and that fail to ratify and abide by the Comprehensive Test Ban Treaty including verifiable closure of nuclear weapons testing facilities.

Australia has an opportunity, as an influential middle power, to apply this influence internationally, including any influence that may follow from being the second largest uranium export nation, to require nuclear weapon states to meet their nuclear disarmament obligations under the NPT.

The initiatives set out in the recommendations of "*An Illusion of Protection*" would strengthen and renew the Non-Proliferation Treaty, reduce the likelihood of other countries seeking to develop nuclear weapons for strategic military advantage, and may make a strong contribution to a lessening of tensions in a number of potential regional nuclear insecurities around the world.

¹ "*Falling Behind: International Scrutiny of the Peaceful Atom*" (Feb 2008) by the (US) Non-Proliferation Policy Education Centre, available at: <http://www.npec-web.org/>

² Report available at http://www.acfonline.org.au/uploads/res/res_fullreport_print.pdf

5. Australia must not consent to the production of weapons usable plutonium

It is not acceptable for the proposed Russian treaty to provide Australian consent to reprocessing, the separation and stockpiling of weapons-usable plutonium from spent nuclear fuel directly derived in use of Australian uranium in Russian nuclear reactors.

The Federal Government has a policy commitment against processing of weapons-usable fissile material and can deliver this by withdrawing consent in our bilateral uranium export agreements for reprocessing of Australian Obligated Nuclear Materials (AONM), or for any use of Australian materials in mixed oxide (MOX) or other plutonium-based fuels.

“Labor will work towards: ... limiting the processing of weapons usable material (separation of plutonium and high enriched uranium in civil programs);

(ALP National Platform, Chapter 5, Uranium, April 2007)

6. Substitution of Australian uranium and processing in non IAEA facilities

This proposed treaty action may compromise Australia’s international safeguards and non-proliferation policy and practice and unacceptably elevate commercial and state nuclear interests over safeguards under this Federal Government’s watch.

Australia should not allow or countenance “substitution” of Australian Obligated Nuclear Materials (AONM), by other materials from other sources held at other locations, and management of AONM in non-IAEA safeguarded, military-run facilities in Russia. However this is the express intent of the proposed Russia nuclear treaty so as to comply with commercial and state nuclear interests, expressed in *“Frequently Asked Questions. Australia-Russia Nuclear Cooperation Agreement (Nov 2007)”* ³

19. Why is there provision in the Agreement for the use of conversion and enrichment facilities outside of IAEA safeguards?

...The new Agreement strengthens considerably safeguards provisions contained in the existing agreement by providing for a direct substitution approach (see following question for more details) similar to that contained in the Australia-China Nuclear Transfer Agreement.

...

In the case of enrichment facilities, there is a unique circumstance that applies to Russia related to longstanding contracts. Russia wished to retain in the new Agreement its right to re-enrich Australian obligated depleted uranium tails on behalf of third countries in facilities outside of safeguards, due to longstanding contracts with European enrichment companies that hold this material. Russia cannot re-enrich depleted uranium tails at its showcase international nuclear fuel cycle centre at Angarsk (which will be placed under IAEA safeguards) due to the presence of undesirable uranium isotopes in depleted uranium that would complicate the operation of this facility. However, Russia proposes that Australian

³ available at: <http://www.dfat.gov.au/geo/russia/treaties/faq.html>

uranium for use in Russian nuclear power plants would be enriched at the international fuel cycle centre at Angarsk, which will be under IAEA safeguards.

20. What is “direct substitution”?

... Under the new Agreement, in the case of conversion or enrichment facilities outside of IAEA safeguards, a direct substitution approach would be used. Under this approach, on receipt of AONM at such a facility, by applying the principle of equivalence an equivalent quantity of processed uranium and processed tails or waste will be added to the inventory of a facility (or facilities) designated for safeguards.

7. Secrecy on proposed Administrative Arrangements for safeguards in Russia

It is contrary to the proper exercise of public and Parliamentary scrutiny of nuclear treaties, and an unacceptable practice of secrecy by the Australian Safeguards and Non-Proliferation Office (ASNO), to fail to make public the key “Administrative Arrangements” to enact this proposed bilateral safeguards agreement in Russia. Without this transparency and public access it is not possible to independently assess if the proposed practice of safeguards can match the claims.

ASNO stated in JSCT public hearings on the proposed China nuclear cooperation treaty that certain governments prefer that Australian “Administrative Arrangements” applying to bilateral uranium export treaties should not be made public and that ASNO had in effect deferred to this request. ACF urges JSCT to explore this and release a full account of the countries involved and the reasons ASNO believed it was appropriate to compromise domestic due process and transparency.

8. JSCT Inquiry Report 81 - Recommendation on nuclear conversion facilities

ACF recommends JSCT use this Inquiry to seek implementation of Recommendation 3 from the JSCT Report 81 (August 2006) on the China nuclear treaty, that:

The Committee recommends that the Australian government lobbies the IAEA and the five declared nuclear weapon states under the NPT to make the safeguarding of all conversion facilities mandatory.

ACF further recommends that this JSCT Inquiry make a recommendation for treaty renegotiation to provide for mandatory full scope IAEA safeguarding of all uranium conversion facilities in Russia.

This measure would prevent Australian uranium effectively disappearing off the safeguards radar soon after its arrival in Russia as it enters a uranium conversion facility that is outside of IAEA safeguards and inspections.

9. Conditionality Clauses on the Rule of Law, Democracy and Human Rights

Key checks and balances that may be present on the nuclear industry in democratic states – independent regulators, independent and rigorous media, free environment and community groups, free labour organisations and proper protection for whistleblowers – do not effectively exist in Russia.

There would need to be fundamental changes to the rule of law, judicial practice, democracy and human rights, labour rights and freedom of the press before JSCT and Australia in general could have any confidence in transparency or in accountability on nuclear issues in Russia. This would specifically protect nuclear whistle blowers from imprisonment or suppression.

In the Executive Summary of legal advice on “*Australian Safeguards Agreements with China and Russia*” (11 Oct 2007) Professor Rothwell concluded:

10. *That Australia should seek the inclusion of ‘human rights and democracy clauses’ into the Russian Agreement which could take the following form:*

- *The aims of this Agreement include the promotion of and protection of respect for human rights and democratic values;*
- *The parties shall respect legally binding democratic principles and human rights as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in their internal and external policies.*

11. *That Australia should seek that the human rights and democracy clauses be made a condition of the Russian Agreement, thereby giving to Australia the potential to suspend the Agreement if a breach of the relevant conditions takes place. The effect of such a ‘human rights and democracy clause’ would be to reinforce the importance Australia attaches to respect for the rule of law in Russia during the term of the Agreement.*

(Professor Donald Rothwell, Prof of International Law, ANU College of Law, ANU)

These recommendations are pre-requisite conditions to any proposed credible consideration to confidence, assurance or transparency on nuclear issues in Russia.

ACF recommends JSCT endorses this approach in any consideration to the treaty.

10. Australia should take up a leadership role for nuclear disarmament

Prime Minister Kevin Rudd, in a Lowy Institute speech in July 2007, stated that:

“The nuclear non-proliferation treaty continues to fracture. And there has been little if any progress on nuclear arms reduction – let alone nuclear disarmament.”

On 9 June 2008, the Prime Minister announced an “*International Commission on Nuclear Non Proliferation and Disarmament*” that will report to an international conference, sponsored by Australia, in late 2009.

Australia has an opportunity, as an influential middle power, to apply this influence internationally to require the highest possible level of nuclear safeguards and to require nuclear weapon states to fully meet their nuclear disarmament obligations under the NPT.

There is increasing recognition to the critical task to restore integrity to the fundamentally fracturing Nuclear Non Proliferation Treaty (NPT) and that this can not be achieved by addressing proliferation issues alone – without parallel and commensurate address to nuclear disarmament issues.

“Australia should establish a national diplomatic initiative aimed at restoring the integrity of the nuclear non-proliferation regime...the current non-proliferation regime is fundamentally fracturing. The consequences of the collapse of this regime for Australia are acute, including the outbreak of regional nuclear arms races... The impact on Australia’s long-term national security interests is immense.”

(Kevin Rudd *“Leading, Not Following: The Renewal of Australian Middle Power Diplomacy”*, Sydney Institute address, Sept 2006)

This has also been highlighted by the IAEA Director General Mohamed El Baradei:

“In five years, the world has changed. Our fears of a deadly nuclear detonation – whatever the cause – have been reawakened. In part, these fears are driven by new realities. The rise in terrorism. The discovery of clandestine nuclear programs. The emergence of a nuclear black market. But these realities have also heightened our awareness of vulnerabilities in the Non Proliferation Treaty regime.”

(Address to the May 2005 Non-Proliferation Treaty Conference)

Support for nuclear disarmament is growing across the world, including from Australian Prime Minister Kevin Rudd:

“I want us to re-establish the Canberra Commission on the Elimination of Nuclear Weapons set up in 1995. But we should expand it to include all forms of weapons of mass destruction – chemical and biological – and give it a policy making, advocacy and diplomatic role. It could also help rebuild the collapsing consensus around the Nuclear Non-Proliferation Treaty (NPT). The Canberra Commission can be a vehicle for real progress on these issues and it will be our gift to the world.”

(Kevin Rudd *“Leading, Not Following: Australia’s Place In The Emerging International Order”*, Global Foundation speech, March 2007)

In December 2006 at the UN General Assembly, 125 governments called upon states to immediately fulfil their nuclear disarmament obligations under the NPT Article VI:

“by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.”

The UN-based International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) unanimously held that: *“there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”*

The new Federal Government has made a range of key policy commitments toward nuclear disarmament which ACF commend, including that:

71. With regard to nuclear disarmament and non-proliferation, Labor will energetically support and pursue appropriate initiatives, such as those recommended by the Canberra Commission on the Elimination of Nuclear Weapons, the Tokyo Forum for Nuclear Non-Proliferation and Disarmament, and the New Agenda Coalition, to achieve further significant reductions in nuclear armament and strengthen non-proliferation regimes as steps toward the ultimate objective of a nuclear weapon free world.

74. In the longer-term, achievement and maintenance of a nuclear weapon free world will require an enduring legal framework, linked to the Charter of the United Nations. Labor supports exploration of potential legal frameworks for the abolition of nuclear weapons, including negotiation of a Nuclear Weapons Convention that would ban nuclear weapons and provide a global framework for the elimination of existing arsenals.

(ALP National Platform, Chapter 14, Strengthening Australia’s Place in the World: Australia’s Role in Arms Control and Disarmament, April 2007)

And:

96. Labor will progress these commitments through diplomatic means including the re-establishment of the Canberra Commission to re-invigorate Australia’s tradition of middle power, multilateral diplomacy. In doing so, Labor, as a non nuclear armed nation and a good international citizen, can wield considerable influence and credibility in promoting disarmament, the reduction of nuclear stockpiles, and the responsible use of nuclear technology.

(ALP National Platform, Chapter 5, Uranium, April 2007)

ACF considers that this treaty will compromise Prime Minister Kevin Rudd’s *“International Commission on Nuclear Non Proliferation and Disarmament”* and unacceptably weaken, rather than strengthen, Australia’s policy and practice on nuclear safeguards and nuclear non-proliferation.

ACF concludes that Australia should elect to not ratify this proposed treaty with Russia and urges JSCT to make this recommendation.

APPENDIX I: Australian safeguards agreements with China and Russia

EXECUTIVE SUMMARY

Between 2006-2007 Australia concluded three new international instruments for the export of Australian uranium to both China and Russia. These Agreements reflect a renewed initiative by the current Australian government to export Australian uranium for peaceful purposes to partner States. The Agreements comprise:

- 2006 Agreement between Australia and the Government of the People's Republic of China on the Transfer of Nuclear Material;
- 2006 Agreement between Australia and the Government of the People's Republic of China for Cooperation on the Peaceful Uses of Nuclear Energy Agreement;
- 2007 Agreement between the Government of Australia and the Russian Federation on Cooperation in the Use of Nuclear Energy for Peaceful Purposes (concluded in Sydney on 7 September 2007; not yet in force).

Following a review of these Agreements, the relevant international law, and contemporary international practice in the field it is concluded as follows:

1. That Australia cannot assume that adoption by nuclear cooperation partner States of IAEA Safeguards Additional Protocols will provide reassurance that the highest possible nuclear safeguards standards are being met.
2. That if Australia was in possession of knowledge of China's proliferation of nuclear materials, or aware of credible reports to that effect, and failed to raise its concerns to China about such a matter, then Australia's actions may be contrary to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).
3. That China's lack of transparency with respect to the conduct of its nuclear activities makes it difficult for both the IAEA and Australia to determine China's compliance with IAEA safeguards standards and the NPT.
4. That Australia seek to renegotiate the China Agreements to provide for enhanced safeguards and verification standards to therefore provide Australia with greater levels of assurance that China is strictly meeting its international nuclear safeguards obligations.
5. That Australia seek to independently monitor the ongoing operation of the China Agreements in order to ascertain whether China is acting in breach of those Agreements.
6. That Australia urge China to adopt the Comprehensive Test Ban Treaty.
7. That the 2007 Russia Agreement makes no attempt to adopt the second generation safeguards standards found in the IAEA Additional Protocol to the Safeguards Agreement.
8. That Australia decline to ratify the Russia Agreement until such time as Russia has ratified an IAEA Additional Protocol to the Safeguards Agreement.
9. That in addition, Australia seek to renegotiate aspects of the Russia Agreement to allow for higher monitoring, verification and safeguards standards than is currently envisaged under both the existing Agreement or the Additional Protocol.

10. That Australia should seek the inclusion of 'human rights and democracy clauses' into the Russian Agreement which could take the following form:
 - The aims of this Agreement include the promotion of and protection of respect for human rights and democratic values;
 - The parties shall respect legally binding democratic principles and human rights as set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in their internal and external policies.
11. That Australia should seek that the human rights and democracy clauses be made a condition of the Russian Agreement, thereby giving to Australia the potential to suspend the Agreement if a breach of the relevant conditions takes place. The effect of such a 'human rights and democracy clause' would be to reinforce the importance Australia attaches to respect for the rule of law in Russia during the term of the Agreement.
12. That Australia immediately adopt the recent amendments to the Convention on the Physical Protection of Nuclear Material.
13. That following Australian adoption of the recent amendments to the Convention on the Physical Protection of Nuclear Material, Australia urge China and Russia to also adopt those amendments.

11 October 2007

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APPENDIX II: Nuclear Disarmament and the Non-Proliferation Treaty - Implications for the 2007 Australian Russian Nuclear Agreement

EXECUTIVE SUMMARY

1. In 2007 Australia concluded a bi-lateral treaty instrument titled an 'Agreement between the Government of Australia and the Russian Federation on Cooperation in the Use of Nuclear Energy for Peaceful Purposes' (the Agreement). On 14 May 2008 the Agreement was referred to the 'Joint Standing Committee on Treaties' (JSCOT) for its consideration. The Committee's mandate is to review Treaties and make recommendations to the Executive on treaty-action. It is within the mandate of JSCOT to recommend that a treaty which is before it be accepted, rejected, or be subject to renegotiation.
2. Within the post World War II international security framework, the most significant treaty addressing nuclear non-proliferation and nuclear disarmament is the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Nuclear disarmament is specifically addressed in Article VI of the NPT, relevantly providing that:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament....

Both Australia (23 January 1973) and the former USSR (5 March 1970) have ratified the NPT; with the Russian Federation considered for the purposes of treaty law to be the successor state to the USSR.

3. In the 1994 *Nuclear Weapons Advisory Opinion* the International Court of Justice in an Advisory Opinion reviewed the significance of Article VI of the NPT and noted the significance "of an obligation to negotiate in good faith a nuclear disarmament". The ICJ noted that

The legal import of that obligation goes beyond that of mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

4. The NPT principle of good faith was reinforced in 2000 when the NPT Review Conference adopted the so-called *13 Practical Steps* for "systematic and progressive efforts to implement Article VI of the Treaty". The *13 Practical Steps* outlined the very particular obligations the nuclear weapon states were under to achieve disarmament in addition to the general obligations upon all NPT State parties to work towards nuclear disarmament.
5. The principles associated with the interpretation of the NPT are reinforced by the rules of treaty law found in the 1969 Vienna Convention on the Law of Treaties which emphasises the principle of *pacta sunt servanda*, which is that treaties are to be performed in good faith.

6. Australia and Russia as parties to the NPT accordingly bear an international obligation to work towards nuclear disarmament consistently with Article VI of the NPT in good faith. This is an obligation that arises not only in the context of their being parties to the NPT, but also in their other relationships where they are mutually engaged in matters related to nuclear disarmament, including nuclear energy and nuclear proliferation. While Australia and Russia have a distinctive status under the NPT as a non-nuclear weapon state (Australia) and a nuclear weapon state (Russia) and accordingly bear differential obligations, they are both bound by this common good faith obligation.
7. Whilst Australia is under no direct obligation to engage in nuclear disarmament of its own indigenous nuclear weapons program as it presently has no such capability, Australia is under an obligation to pursue in good faith with other NPT state parties an obligation to work towards the objective of nuclear disarmament. This obligation is particularly heightened in the case of Australia's interaction with a nuclear state party to the NPT such as Russia.
8. Whilst the 2007 Agreement may include provisions which make clear that the intent is for Australia to supply Russia with nuclear material that shall only be used for peaceful purposes, there is the potential that as a result of Australia's supply of nuclear material that Russia will be able to divert indigenous or other forms of nuclear material into a nuclear weapons program and thereby directly subvert its obligations of disarmament under the NPT.
9. Australia has a number of options open to it with respect to the Agreement. They are as follows:
 - A. That Australia elect to not ratify the Agreement on the basis that it poses too great a risk for Australia being held to have acted in non-compliance with its NPT, Article VI, obligation to in good faith undertake measures directed towards nuclear disarmament
 - B. That Australia defer ratification of the Agreement until such time as completion of the 2010 NPT Review so as to provide the Russian Federation with an opportunity to demonstrate that it is in good faith constructively working both individually, bilaterally and multilaterally towards nuclear disarmament consistent with their NPT obligations including the *13 Practical Steps*;
 - C. That Australia seek to renegotiate the Agreement and insert a 'termination clause' giving to Australia the capacity to withdraw from the Agreement if at any time Australia considers Russia to not in good faith be working towards nuclear disarmament consistent with its NPT obligations and the *13 Practical Steps*;
10. As the Agreement has to date only been signed, there are no obligations presently upon either Australia or Russia to act other than in good faith with respect to the 'object and purpose' of the Agreement. Importantly, there are no direct obligations upon Australia under international law to proceed to immediate or even timely ratification. There is also nothing under treaty law which would prevent Australia seeking to renegotiate part of the Agreement. This could be achieved by either renegotiation of the main text, or, through the negotiation of an Additional Protocol; the entry into force of which could be made contingent upon Australia's eventual ratification of the Agreement.

11. Australia needs to be mindful of the international obligations that it owes to other State Parties to the NPT to act in good faith in interpreting its obligations under Article VI and that it bears international legal responsibility for any failures to act in good faith consistent with the NPT which could be the subject of dispute resolution before the International Court of Justice.

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