

Chapter 2

Background

2.1 This chapter gives an overview of Australia's nuclear non-proliferation obligations under international treaties and outlines its current non-proliferation legislation. It then details the July 2005 amendments to the international Convention on the Physical Protection of Nuclear Material to which the bill is a response.

The Treaty on the Non-Proliferation of Nuclear Weapons

2.2 The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was negotiated in the mid-1960s between the United States, the Soviet Union and the Eighteen Nation Committee on Disarmament. The NPT came into force in 1970 and currently has 189 States Parties. The Treaty sets down the obligation of nuclear weapons states 'not to transfer' nuclear weapons and not to assist any non-nuclear weapon state 'to manufacture or acquire such weapons or devices' (Article 1). It also defines the responsibilities of non-nuclear weapons states not to receive or manufacture nuclear weapons (Article II) and to apply International Atomic Energy Agency (IAEA) safeguards to all nuclear activities carried out within their territories (Article III).¹ Australia became a Party to the NPT in January 1973 and signed a Safeguards Agreement with the IAEA in July 1974.²

The Convention on the Physical Protection of Nuclear Material

2.3 Australia also has international obligations to safeguard nuclear material under the Convention on the Physical Protection of Nuclear Material. The Convention sets standards for the international transport of nuclear material used for peaceful purposes. It defines serious offences involving nuclear materials which parties to the Convention must make punishable. This includes 'the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material' without lawful authority (Article 7(1a)) and a threat 'to use nuclear material to cause death or serious injury to any person or substantial property damage' (Article 7(1e)). The Convention also specifies certain levels of physical protection needed during international transport of nuclear material (Articles 3 and 4 and Annex 1).³ This requires Australia and the other signatories to the Convention to 'take appropriate steps within the framework of its

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- 1 Treaty on Non-Proliferation of Nuclear Weapons, <http://www.nawcwpns.navy.mil/~treaty/NPT.html> (accessed 21 December 2006).
 - 2 Nuclear Non-Proliferation (Safeguards) Bill 1986, Bills Digest 86/94, Legislative Research Service, Department of the Parliamentary Library, <http://www.aph.gov.au/library/pubs/bd/1986/1986bd094.pdf> (accessed 21 December 2006).
 - 3 Nuclear Non-Proliferation (Safeguards) Bill 1986, Bills Digest 86/94, Legislative Research Service, Department of the Parliamentary Library, p. 2. <http://www.aph.gov.au/library/pubs/bd/1986/1986bd094.pdf> (accessed 21 December 2006).

national law and consistent with international law'.⁴ The Convention was opened for signature in 1980 and entered into force on 8 February 1987. Notably, the original document did not address the protection of nuclear facilities and deals only in a limited way with the domestic use, storage or transportation of nuclear material.⁵

Nuclear Non-Proliferation (Safeguards) Act 1987

2.4 The *Nuclear Non-Proliferation (Safeguards) Act 1987* gives legislative effect to Australia's non-proliferation obligations under the NPT, under the Safeguards Agreement with the IAEA and under the Physical Protection Convention.⁶ Part II of the Act provides for a system of permits for the possession and transport of nuclear material (section 16), the establishment of a facility (section 16A) and the authority to communicate information relating to nuclear technology (section 18). Section 13 allows the Minister for Foreign Affairs to grant a permit for a person to possess nuclear material. Section 14 makes Ministerial approval for a permit contingent on the Director General of Safeguards in the Australian Safeguards and Non-Proliferation Office (ASNO) being satisfied that 'appropriate procedures' and 'adequate physical security' can be applied to the nuclear material.⁷

2.5 Part III of the Act deals with offences and corresponding punishments. Division 1 of Part III lists general offences. These include:

- the possession of nuclear material without a permit (section 23);
- a breach of duty to ensure the security of nuclear technology (section 25A);
- unauthorised communication of information (section 26);
- communication of information that prejudices the security of nuclear material (section 26A)
- establishment of a facility without a permit (section 28A);
- false or misleading statements to a Minister, Director or Agency inspector (section 30);
- obstruction of an Agency inspector (section 31); and
- unauthorised access to areas where access is restricted under permit (Section 31A).

Division 2 of Part III lists offences relating to the Physical Protection Convention. These include:

4 Article 3, Convention on the Physical Protection of Nuclear Material.

5 Department of Foreign Affairs and Trade, *Submission 1*, pp. 1–2.

6 See Christine Gallus MP, Second Reading Speech, *House Hansard*, 26 June 2003, p. 16 467.

7 *Nuclear Non-Proliferation (Safeguards) Act 2006*, pp. 20–21.

[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/EDC54558C2461D27CA256F71004C2A49/\\$file/NuclearNonProSaf1987.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/EDC54558C2461D27CA256F71004C2A49/$file/NuclearNonProSaf1987.pdf)

- stealing nuclear material (section 33);
- demanding nuclear material by threats (section 34);
- use of nuclear material causing injury to persons or damage to property (section 35);
- threat to use nuclear material (section 36); and
- threat to commit an offence under Section 33 (section 37).

2.6 Under the *Australian Protective Services Act 1987*, protective service officers can arrest without warrant people whom they suspect on reasonable grounds of committing offences under the Safeguards Act.⁸

Non-Proliferation Legislation Amendment Bill 2003

2.7 A number of provisions in this bill relate directly to legislation introduced with the passing of the Non-Proliferation Legislation Amendment Bill 2003 (sections 25A, 26A, 28A and 31A). The bill was introduced into the House of Representatives on 26 June 2003 and assented to on 12 December 2003. The purpose of the bill was to strengthen the Safeguards Act and amend the *Comprehensive Nuclear Test-Ban Treaty Act 1998* (CTBT Act) in anticipation of the enforcement of the Comprehensive Nuclear Test Ban Treaty's (CTBT) ban on nuclear weapons tests. Australia's CTBT Act makes it an offence punishable with life imprisonment to cause a nuclear weapon test explosion or any other nuclear explosion.⁹

2.8 The bill made several amendments to the Safeguards Act. It inserted Section 16A allowing the Minister to grant a permit for a nuclear facility, Section 28A making it an offence to establish a nuclear facility without a permit and the offences under Sections 25A, 26A and 31A (see paragraph 2.4). The Bill also amended the CTBT Act to enable key provisions of the Act to be proclaimed prior to the entry into force of the CTBT.¹⁰

2.9 In 2003, the Senate Foreign Affairs, Defence and Trade Legislation Committee inquired into the Non-Proliferation Legislation Amendment Bill 2003. In

8 Peter Prince, *Non-Proliferation Legislation Amendment Bill 2003*, Bills Digest No. 35, 2003–04, Parliamentary Library, p. 4
<http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Billsdgs/WPFA60.pdf> (accessed 3 January 2007).

9 Peter Prince, *Non-Proliferation Legislation Amendment Bill 2003*, Bills Digest No. 35, 2003–04, Parliamentary Library, p. 7
<http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Billsdgs/WPFA60.pdf> (accessed 3 January 2007).

10 Peter Prince, *Non-Proliferation Legislation Amendment Bill 2003*, Bills Digest No. 35, 2003–04, Parliamentary Library, p. 2
<http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Billsdgs/WPFA60.pdf> (accessed 3 January 2007).

its report on the bill, the committee noted concerns that the insertion of section 26A could prevent information about nuclear activities being released in the public interest. It also cited concerns that the provision could be made 'to restrict information flows and intimidate potential whistle blowers'.¹¹ In response, Dr Andrew Leask of the Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade emphasised that the amendment was designed to protect only information which could prejudice the physical security of a nuclear facility. He argued that whistleblowers retained the avenues of an internal complaint or either of Australia's two nuclear regulators. Dr Leask also argued that the amended section 31A relating to unauthorised access would not make 'any impact at all on lawful, legitimate protest'.¹² As Chapter 4 notes, the Committee's majority report cited Dr Leask's arguments. However, separate dissenting reports from Labor Party and Democrat Senators held strong reservations about the provisions' potential to limit the right to protest and the role of whistleblowers. An amendment to the Explanatory Memorandum satisfied Labor Senators' concerns on this matter (see Chapter 4).

Amendments to the Physical Protection Convention—8 July 2005

2.10 On 8 July 2005, delegates from 89 countries agreed on changes to strengthen the Physical Protection Convention. The amended Convention makes it legally binding for States to protect nuclear facilities and material on peaceful domestic use, storage and transport. The amendments strengthen requirements for the protection of nuclear material and nuclear facilities against criminal or terrorist attack.¹³ There were four main amendments to the Convention:

- a new Article 2A established a series of fundamental principles to be applied to protect nuclear material against theft and sabotage and to rapidly recover any missing or stolen nuclear material;
- an amendment to Article 5 strengthen cooperation among States in the event of actual or threatened theft of nuclear material or sabotage of nuclear material;
- the creation of new offences under Article 7 of the Convention relating to the trafficking of nuclear material and the sabotage of nuclear facilities with the intent to cause death, injury or damage by exposure to radiation;

11 Provisions of the Non-Proliferation Legislation Amendment Bill 2003, Senate Foreign Affairs, Defence and Trade Legislation Committee, September 2003, pp. 3–4.

12 Provisions of the Non-Proliferation Legislation Amendment Bill 2003, Senate Foreign Affairs, Defence and Trade Legislation Committee, September 2003, pp. 5–6.

13 Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade, 'Amendments to the Convention on the Physical Protection of Nuclear Material, National Interest Analysis' http://www.aph.gov.au/house/committee/jsct/20june2006/treaties/cppnm_nia.pdf (accessed 3 January 2007).

- new Articles 11A and 11B dealing with extradition and mutual legal assistance in relation to offences under Article 7 of the Convention that stipulate states cannot refuse to extradite or provide mutual legal assistance for an offence under Article 7 on the sole ground that it is a political offence under domestic law.¹⁴

2.11 In a statement to the Convention, the Australian Safeguards Non-Proliferation Office supported the proposed amendments:

The Australian Government is committed to addressing international concerns about nuclear terrorism, smuggling and sabotage, and to protecting people and the environment from any impacts associated with such activities. The amended Physical Protection Convention aims to address these issues more comprehensively than the existing convention. Australia has played a leading role in developing these changes, and to encourage universal adherence should be among the first to ratify and implement them.¹⁵

2.12 In its submission to this inquiry, DFAT highlighted that 'Australia has always taken a broad view of its obligation under the Treaty on the Non-Proliferation of Nuclear Weapons...[and] many of the provisions of the amended Convention already apply...through the Safeguards Act'.¹⁶ DFAT also noted that in order to fully implement the amendments and ratify the Convention, 'further requirements strengthening domestic security and counterterrorism arrangements' are necessary. The Non-Proliferation Legislation Amendment Bill was drafted for this purpose.

2.13 In its report of 9 October 2006, the Joint Standing Committee on Treaties supported the amendments to the Convention 'as a framework to facilitate the increased cooperation between States in the protection of nuclear materials'. The Committee recommended that binding treaty action be taken.¹⁷

14 Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade, 'Amendments to the Convention on the Physical Protection of Nuclear Material, National Interest Analysis'
http://www.aph.gov.au/house/committee/jsct/20june2006/treaties/cppnm_nia.pdf (accessed 3 January 2007).

15 Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade, 'Amendments to the Convention on the Physical Protection of Nuclear Material, National Interest Analysis'
http://www.aph.gov.au/house/committee/jsct/20june2006/treaties/cppnm_nia.pdf (accessed 3 January 2007).

16 Department of Foreign Affairs and Trade, *Submission 1*, p. 2.

17 Joint Standing Committee on Treaties, 'Amendments to the Convention on the Physical Protection of Nuclear Material', 9 October 2006,
<http://www.aph.gov.au/house/committee/jsct/20june2006/report/chapter3.pdf> (accessed 17 January 2007).

