R A Walker, submission in response to DFAT submission No 22 and submissions Nos 9,17,18,19,20 and 21 by Australian mining companies and representative bodies of the industry

***Executive summary**:*

As will be evident to JSCOT, DFAT's response to Mr. Carlson's 'nine points' and some of mine confirms what Mr. Carlson, I and other expert witnesses have said to the Committee, namely that the proposed Australia India Nuclear Cooperation Agreement does not conform in many respects to established and declared Australian policy on nuclear safeguards agreements[i] and therefore to the terms Australia has insisted on in the negotiation of its other safeguards agreements. The proposed agreement may superficially look like a standard Australian safeguards agreement but functionally it cannot deliver the same results as our other agreements.

The DFAT statement is thus supportive of the concerns I and other witnesses have expressed for Australia's nuclear safeguards, national security and for other aspects of our international relations. It also has important consequences for the main interests identified in the mining industry submissions to JSCOT and for the ostensible central concern of the Indian government, namely that this agreement, if ratified, should permit the export of Australian uranium to India.

But the DFAT submission also contains a number of indications as to the intentions and understanding of the Australian government, which if given legal form in relation to the proposed agreement, might go part of way towards mitigating some of the deficiencies of the proposed text.

<u>Safeguards against uranium supplied by Australia contributing to a nuclear weapons program</u>.

The DFAT submission confirms that several aspects of Australia's traditional uranium exports policy are not met by this proposed agreement – including among others the dispute settlement provisions, those relating to the right to require the return of nuclear material if the treaty were breached[ii] and access to IAEA reports.

The DFAT response also repeats the assertion that the use of the word "consent "in two paragraphs of Article VI means that the activities (reprocessing and high enrichment) can "only" take place subject to Australia's consent. The word "only" does not appear in either paragraph and on a plain reading, nowhere does the treaty state that India accepts that Australian consent is a precondition for these activities or that Australia has a right to determine the conditions under which they could take place[iii]. DFAT's reading of article VI may be shared by India but it is so far from the general view of international lawyers and foreign governments that it needs to be made legally explicit in terms they would understand.

It is noteworthy that the DFAT submission reports that Australia sought greater conformity with our traditional policy (presumably because it thought this desirable) but acquiesced in derogations when faced with Indian objections.

In addition to these derogations from the standard established by our safeguards agreements with other countries, Mr Carlson's submissions point up several "loopholes" that arise from the particular situation in India and the terms of the India - IAEA Agreement (which differ markedly from those applicable in other countries with which Australia has safeguards agreements). The DFAT submission does not reveal convincingly blocks to these loopholes.

Cumulatively all this adds up to the proposed agreement not providing the level of assurance provided by our other safeguards agreements that Australian uranium and material derived from it will only be used for peaceful, non-explosive uses

The DFAT submission also confirms a radical innovation in the way Australian nuclear safeguards agreements are drafted. DFAT's response to several scenarios suggested by Mr. Carlson as ways whereby nuclear material originated in Australia could contribute to the manufacture of nuclear weapons by India is that "ASNO's understanding is that these provisions …[are?] unlikely to be used in India" or words to that effect. The traditional approach adopted in all our previous safeguards agreements (and those of other responsible governments) was to explicitly preclude any such scenarios, whether or not they were considered unlikely at that time (the more so because these agreements and the materials governed by them have a life of many decades).

The traditional touchstone of security policy is not assessment of the intentions of other countries but of their capabilities – which is why Australia's traditional nuclear safeguards policy insists on water-tight legal obligations.

International relations

Governments, through their foreign ministries and intelligence agencies, monitor each other's actions, notably in the field of nuclear non-proliferation controls and related treaties. All but the few "nuclear rogues" see that regime as important to their own security and the current situations regarding Iran and North Korea are reminders of the importance of maintaining the highest global standards in this field. It would be surprising if other countries did not notice the technical deficiencies of the proposed Australia-India nuclear cooperation agreement and the extent to which it is less than we have required of other countries. It would be surprising if they did not develop a perception that in the face of Indian intransigence Australia has been prepared to capitulate on matters which we have said for the past 40 years were important national security and commercial interests.

As explained in previous submissions, such perceptions would be harmful to the nuclear non-proliferation regime, to Australia's reputation as a strong supporter of that regime and to our nuclear agreements with third countries. Countries with which we may in future negotiate nuclear safeguards agreements will expect us to be more flexible than hitherto[iv].

Of wider practical effect is that other countries are also likely to take all this as indicating that in the face of intransigence Australia will capitulate on whatever is under negotiation. The first country likely to make such an inference is of course India, with whom we are negotiating a Free Trade Agreement.

Prospects for the treaty to facilitate sales of Australian uranium to India

The submissions by the mining industry all make clear that the industry values the robust and credible nuclear non-proliferation framework of nuclear safeguards and related treaties within which the export of uranium can take place with long term confidence for both industry and the public. They also make clear that the industry relies on the government to provide safeguards of this standard.

Australia's traditional nuclear non-proliferation and safeguards policies were informed by close consultation with the uranium miners and based on appreciation that, in addition to the importance of the non-proliferation regime for national security, it also provides an essential pre-condition for the peaceful trade in uranium.

To the extent that the proposed Australia-India agreement undermines the regime and Australia's reputation as a strong supporter, it is contrary to the interests of Australian uranium miners and exporters.

But the proposed treaty and the associated Administrative Arrangement have another, more specific impact on the interests of the uranium industry.

The DFAT submission refers to the fact that the Nuclear Non-Proliferation (Safeguards) Act 1987 requires the Director General of ASNO to report in specified detail to the Parliament on the disposition of AONM in bilateral partner countries.

The Director General's ability to discharge his or her responsibilities under the Act in the case of Australian uranium covered solely by the proposed Australia-India agreement, depends, as the DFAT submission makes clear, on ASNO's ability to negotiate an Administrative Arrangement with India providing arrangements to track supplied uranium and the nuclear material derived from it to the same standards as in Australia's other safeguards agreements. All indications are that India is unwilling to do this[v] and DFAT gives no indication that it expects the Indian attitude to change.

Should it not prove possible for ASNO to secure an Administrative Arrangement providing the same standard of information as it gathers under our existing treaties, either:

- there would be no Administrative Arrangement and it would not be the possible to implement the treaty, or
- there would be an Administrative Arrangement but not one which enabled the Director General to meet the requirements of the Safeguards Act.

This places JSCOT in a difficult situation because it is asked to recommend ratification of the proposed agreement before the Administrative Arrangement is negotiated. Moreover, the Administrative Arrangement will not have treaty status.

The DFAT submission makes the point that Australian uranium processed and fabricated into fuel assemblies in the United States and exported in this form to India can be tracked to the requisite standard in India thanks to the United States - India agreement. As Mr Carlson has explained, this provides a workable way of circumventing India's unwillingness to account for Australian material. It also avoids several of problems identified by Mr Carlson as deriving from the specifics of the India-IAEA Safeguards Agreement. This "piggy back" arrangement would have a further advantage, to which I attach great importance: if any problems develop, India would have to deal with the United States, not Australia alone.

But Australian uranium could not be exported to India under the proposed Australia-India Nuclear Cooperation Agreement, either directly or, under existing agreements, via any country other than the United States. In other words, the proposed Australia-India agreement may look superficially like our other agreements but (absent an unexpected reversal of Indian policy on tracking and other issues) it does not do what those agreements do: namely make it possible to export Australian uranium to the country concerned in compliance with the Safeguards Act (other than via the United States).

Whether this limitation suits the Australian uranium industry or the Indian government, submissions to JSCOT do not say.

Important policy statements

The DFAT submission contains number of statements as to Australian policy which have not previously been expressed[vi] by the government and which are relevant to several of the problems to which I and other witnesses have been drawing attention.

Notably these four:

"Indian and Australian perspectives and aims for the treaty differ [in some respects]".

> This is apparent from the refusal of India to accept many of Australia's standard requirements which have been accepted by all other countries with which we have negotiated. It reinforces the importance of making the Australian perspective and goals clear and prominent.

"The proposed agreement departs from the text of Australia's other nuclear cooperation agreements but not the intent."

> The intent of those agreements was set out in tabling statements at the time. Those tabling statements emphasised three aims:
>
> > To provide the highest possible standard of assurance that nuclear material exported from Australia (and material produced from it) would be used only for peaceful, non-explosive purposes.
> >
> > To contribute to strengthening the international nuclear non-proliferation regime, and
> >
> > To provide the effective and credible non-proliferation environment in which international trade in nuclear material for peaceful purposes can take place.
>
> Another intent was to ensure that ANSO received the information it needs to enable the Director General to comply with the Safeguards Act.

"Each nuclear cooperation agreement is different… the proposed agreement does not become a new standard to be applied to other countries."

> > It is always difficult to maintain that one action is an exception, not a precedent; but it can be of some help to say at the time of the action that it is not intended to set a precedent.

"The requirements of the [Safeguards] Act are key considerations in ASNO's negotiation of the Administrative Arrangement with India to track supplied nuclear material and the nuclear material derived from it."

> > It is important that India and other stakeholders be aware that the degree to which the Administrative Arrangement makes it possible for ASNO to meet its statutory obligations will determine the extent to which the proposed treaty will make possible the export of Australian uranium to India. In other words, if the options are limited to transfers of fuel assemblies manufactured in the United States, that will be India's choice.

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[i] These requirements are not some Australian quirk: they have over the decades contributed to establishing an international standard for high-quality nuclear safeguards. That, as DFAT says, the Canadian government has relaxed this standard in the case of India and we found one of our conditions dispensable in one other

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agreement, does not reduce the significance of the multiple derogations from the standard in the proposed Australia-India agreement.

[ii] The prospect of physically returning nuclear material to Australia is problematic; but in practice the provision, if invoked, would means return to Australian control and the most plausible scenario is that the material would be transferred to another Australian agreement partner (e.g. the US). In any case, in none of our other agreements did either party expect circumstances to arise in which this provision would be implemented. The Australian purpose of the clause was to cover all conceivable scenarios, as our traditional policy requires. The effect in practice of this in our existing agreements is more a demonstration of the strength of Australia's commitment to effective safeguarding and the equally strong determination of the importing country that there never would be grounds for invoking the provision. India's refusal to accept such a clause is further evidence of the gap between Indian and Australian perspectives and goals for the proposed agreement to which the DFAT submission refers.

[iii] As Dr Floyd [Director General of ASNO] said at the JSCOT hearing on 12 February, traditional Australian safeguards policy is to require our prior consent before our uranium or its derivatives are permitted to be:

1.Reprocessed (that is to say extract plutonium and reusable uranium from spent fuel),
2. highly enriched (that is to say to or over 20% U235) or
3. re-transferred (that is to say re-exported).

The reason is to make legally binding the requirement of the Australian government to be satisfied as to the conditions and controls that will apply. We would have to know in advance what the conditions and controls will be and retain the right to withdraw the consent if they changed or were implemented in ways unacceptable to us. In other words the importing country has to accept an obligation to obtain and retain our assent.

All our other safeguards agreements make clear that our informed prior written consent is a precondition. The treaty words we have traditionally used to ensure this are: "[the activity] **shall not be** [undertaken] **without Australia's prior written consent**". Sometimes we have accepted an equivalent variant "shall be… only with Australia's prior written consent".

In the case of the proposed agreement with India, taking these three points in the reverse order:

3. <u>Re-transfers</u>. The text of article IX.1 reads: "**shall not be** [retransferred] **without [Australia's] prior written consent**". Apparently Indian negotiators accept these words when they are willing to take on a legal obligation. They would not accept them for the other two "consent" provisions. This raises the question as to whether the alternative wording insisted on by India is only a matter of form or whether it affects the substantive meaning of the paragraphs.

2. <u>High enrichment</u>. The text of article VI.5 reads: "**shall be** [enriched to high levels] **with [Australia's] consent**."

a. Dr Floyd said on 12 February that this means "only with Australia's consent". That is one possible interpretation of the text. But another is that Australia gives its consent in advance and unconditionally, confident that future Australian governments will be satisfied with whatever India does in this regard in the next 40, 80 or more years. By analogy, if in every day speech you say "I will go into my neighbour's yard with his consent", that could mean either 'provided he gives it' or 'he has already given it'.

b. Moreover, international treaties are normally drafted meticulously to say precisely what they mean, with no room for doubt. By this standard and on a literal reading, the text places no legal obligation on India, in which case, Australia's consent, whether given or not, has no legal or operational significance.

1. <u>Reprocessing.</u> The text of article VI.1 reads: "**Australia consents** [to reprocessing under the conditions specified in the U.S. India agreement]". That has two problems:

a. On a literal reading, the text places no legal obligation on India and Australia's consent is therefore inconsequential.

b. The text does not preclude reprocessing of our material under different conditions than those in the U.S. agreement. Dr Floyd said that the word "only" invalidates this interpretation-but the word "only" is not in the text of Article VI.1. It does appear in Art VI.2, but not in a way makes the terms of Art VI.1 a legal obligation on India restricting its freedom of action.

[iv] The DFAT response is that India's situation is specific; other countries are not likely to have the same demands. This is true. Outside Pakistan, Israel or North Korea, no other country is like India continuing to make fissile (i.e. bomb-suitable) material, nor is so resistant to the applicable international norms. But all countries with which we have or may in future wish safeguards agreements would have grounds to expect that if we were willing to make these extensive and sensitive derogations from our stated policy in the case of India, Australia is not likely to insist in their case on any of its proclaimed safeguards requirements that they may wish to soften.

[v] It has refused requests from Canada to set up a system for tracking nuclear material by country of origin and the terms of its agreement with the IAEA, unlike the corresponding agreements between the IAEA and other countries, do not provide the necessary information –and in any case Australia accepts in the proposed agreement that India does not have to share the IAEA reports with us (as all our existing agreements stipulate).

[vi] Or, if expressed, given prominence.