6

Specific provisions

6.1 In Chapter Three, the Committee noted the Australian Safeguards and Non-Proliferation Office's (ASNO's) assertion that, while particular provisions of the *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy* (the proposed Agreement) differ from those contained in other Australian nuclear cooperation agreements, the actual outcome will be the same.

6.2 This assertion is extensively contested by participants in the inquiry.

6.3 Debate about the proposed Agreement itself revolves around a number of specific issues:

- accounting for Australian nuclear materials;
- the mixing of safeguarded and unsafeguarded materials in Indian nuclear facilities;
- reprocessing Australian nuclear materials;
- enrichment of Australian nuclear materials;
- the Additional Protocol to the *Agreement between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities;*
- conflict resolution and
- the legality of the proposed Agreement.

6.4 These matters will now be considered individually.

Accounting for Australian nuclear material

6.5 Article III of the proposed Agreement requires each party to maintain a system of accounting for and control of items subject to the Agreement.[1]

6.6 John Carlson provides the following background to this provision:

> This terminology relates to the mechanisms for identifying which specific batches of nuclear material are subject to the agreement. Accounting and tracking are essential on legal grounds—otherwise, the agreement will have no practical effect. They are also needed to meet the requirements of our Safeguards Act. The agreement expressly requires each party to maintain an accounting system for materials subject to the agreement.

6.7 The requirement on countries that receive Australian uranium to track and account for that uranium and its by-products is a cornerstone of Australian nuclear cooperation agreements. It permits Australia to be satisfied that the non-proliferation and safety aspects of Australia's nuclear cooperation agreements are being adhered to.

6.8 Australian tracking and accounting provisions exceed those required by the International Atomic Energy Agency (IAEA) in its safeguards agreements. The IAEA safeguards agreements only require that all uranium and its by-products be accounted for. Tracking on the basis of the source country of the uranium is not required by the IAEA.[2]

6.9 Nevertheless, a number of jurisdictions, including the United States and Europe, do as a matter of course track and account for nuclear material by source country for all imported nuclear materials.[3]

6.10 The specifics of the accounting system for each nuclear cooperation agreement are developed as part of the Administrative Arrangement related to the agreement. The Administrative Arrangement is an unpublished document.[4]

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1 *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy*, [2014] ATNIF26 (hereafter referred to as the proposed Agreement), Article III.

2 Mr John Carlson, *Submission 1.2*, p. 3.

3 See for example Article 9 of the *Agreement between the Government of Australia and the Government of The United States of America Concerning Peaceful Uses of Nuclear Energy*; and Article 79 of the EURATOM Treaty and EURATOM Commission Regulation 302/2005.

4 See for example the proposed Agreement, Article II.

6.11 The wording of Article III has been understood by a number of witnesses, including John Carlson[5] and Ronald Walker[6] as permitting India to establish its own system of accounting and control that may not meet Australian standards but will meet International Atomic Energy Agency (IAEA) standards.

6.12 The Indian Government appears to have had some difficulties agreeing to an accounting system that could track nuclear material by source country. John Carlson, writing in early November 2014, cited stalled negotiations between the United States and India over an administrative agreement made under their nuclear cooperation agreement because of an apparent refusal by India to account for United States nuclear materials.[7]

6.13 Further, during negotiations for the proposed Agreement in 2013, the ABC reported that Indian negotiators were concerned about this aspect of Australia's policy because Indian nuclear regulators did not have the capacity to undertake such accounting.[8]

6.14 According to Mr Carlson:

> … if [Australian nuclear material] is not identified and accounted for as such, the conditions of the agreement will be readily evaded...[9]

6.15 The Committee considered for some time how it could satisfy itself that such a critical matter as the specifics of the tracking and accounting arrangements would be in Australia's national interest.

6.16 The method arrived at was to assess, by way of a private briefing from the Director-General of ASNO, Dr Robert Floyd, and through questioning at the final hearing, whether negotiations over the Administrative Arrangement had reached a point where Dr Floyd was satisfied that he could comply with his obligations under section 51 of the *Nuclear Non-Proliferation (Safeguards) Act of 1987* (the Act).[10]

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5 Mr Carlson, *Submission 1*, p. 16.

6 Mr Ronald Walker, *Submission 6.4*, p. 2.

7 Mr Carlson, *Submission 1*, p. 11. The United States has subsequently announced that it has completed negotiations on an Administrative Arrangement with India.

8 Ms Stephanie March, 'Nuclear deal: Australia's uranium deal with India may include weaker monitoring safeguards,' ABC, 19 November 2013, <http://www.abc.net.au/news/2013-11-19/australia27s-nuclear-deal-with-india/5101030>, viewed 3 February 2015.

9 Mr Carlson, *Submission 1*, p. 12.

10 The private briefing and the final hearing took place on the same day, Monday 15 June 2015.

6.17 Dr Floyd summarised his obligations under the Act in the following terms:

> …the Act goes to the specificity of the reporting that I have to provide the parliament on an annual basis. The specificity is quite detailed: I have to go to the total quantities of Australian obligated nuclear material in each stage of the nuclear fuel cycle; I have to go to the intended end use of that material and, furthermore, I have to report any unreconciled differences in those quantities of nuclear material wherever they might arise. [11]

6.18 On 12 February 2015, the Director-General of ASNO advised the Committee that:

> The administrative arrangement is obviously under negotiation, but what we need to deliver is clear in the Safeguards Act. One of those aspects is my reporting requirements, which are clearly outlined in the Safeguards Act. So we are negotiating to be able to deliver an administrative arrangement that sits with the nuclear cooperation agreement that would meet those requirements. [12]

6.19 By 15 June 2015, he was able to advise:

> I am very confident that the mechanism we have developed will allow me to determine the disposition of Australian obligated nuclear material in India and fulfil my reporting obligations under the Safeguards Act. Because the content of such instruments is confidential to the parties, I will not be able to make the Australia-India administrative arrangement public. However, my obligation to report each year to the parliament on the disposition of Australian obligated nuclear material means that a key product of the administrative arrangement will, in fact, be public.[13]

6.20 Based on these statements, the Committee trusts that the tracking and accounting mechanism in the Administrative Arrangement will ensure that Australian nuclear material can be tracked and accounted for.

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11 Dr Robert Floyd, Director General, Australian Safeguards and Non-Proliferation Office (ASNO), Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 15 June 2015, p. 3.

12 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 12 February 2015, p. 2.

13 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 15 June 2015, p. 3.

Mixing of safeguarded and unsafeguarded materials

6.21 According to Professor Lawrence Scheinman, under *the Agreement between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities* (the IAEA Agreement), safeguarded and unsafeguarded nuclear material can be used together and unsafeguarded nuclear material can be substituted one for the other causing safeguarded material to end up in a military program.[14]

6.22 John Carlson also makes this point:

> The IAEA agreement gives India a number of options for moving nuclear material between its safeguarded and its unsafeguarded programs.[15]

6.23 John Carlson argues that Australia's standard safeguards agreements, such as those with Russia and China, close off any such options. The proposed Agreement with India does not. As a consequence, according to Mr Carlson, Australian material could be used to produce unsafeguarded plutonium that ends up in India's nuclear weapon program.[16]

6.24 This is also the interpretation of Kalman Robertson, of the Strategic and Defence Studies Centre, School of Politics and International Relations at the Australian National University.

6.25 He argues that the proposed Agreement appears to hypothetically permit India to fission a mix of 75 per cent unsafeguarded nuclear material and 25 per cent Australian nuclear material in a reactor for a short period of time in order to produce irradiated fuel of weapons grade. The 75 per cent of the fuel that is unsafeguarded can then be taken to an unsafeguarded facility for reprocessing into weapons material.[17]

6.26 ASNO concedes that such a hypothetical situation could occur, but provides an extensive explanation as to how, in practice, the proposed Agreement will prevent this from happening.

6.27 Firstly, Dr Robert Floyd makes it clear that India's obligations prohibit Australian nuclear material from being used for military purposes at all times:

> … India's fundamental undertaking, which is set out in paragraph 1, Article I of their agreement with the International Atomic Energy Agency, what is called INFCIRC/754, states:

14 Professor Lawrence Scheinman, *Submission 13*, p. 1.

15 Mr Carlson, *Committee Hansard*, Canberra, 9 February 2015, p. 2.

16 Mr Carlson, *Committee Hansard*, Canberra, 9 February 2015, p. 2.

17 Mr Kalman Robertson, *Submission 11*, p. 12.

> India undertakes that none of the items subject to this Agreement … shall be used for the manufacture of any nuclear weapon or to further any other military purpose …
>
> … this undertaking goes beyond a commitment not to divert safeguarded material. It also prohibits any use by India of safeguarded material, or a safeguarded facility, in a way which would assist its nuclear weapons program.
>
> … The peaceful use undertaking in paragraph 1 of Article VII of the proposed Australia-India NCA achieves a very similar result, and the culmination of that paragraph, combined with the definition of 'peaceful purpose' in Article I, excludes the use of Australian obligated material for any military purpose. [18]

6.28 In relation to the specific example given by Lawrence Scheinman, John Carlson and Kalman Robertson, Dr Floyd states:

> … as soon as it [Australian nuclear material] is mixed, the whole lot becomes safeguarded and so in one sense you can never have our material mixed with unsafeguarded material because as soon as such a scenario occurs, the whole thing is safeguarded.[19]

6.29 The Committee is satisfied that the mixing of Australian nuclear material with unsafeguarded material would be contrary to India's obligations both to Australia and the IAEA.

Reprocessing

6.30 Reprocessing of spent nuclear fuel is a process by which nuclear fuel that has already been used is refined to extract any remaining usable nuclear fuel. This is a highly regulated process because the products extracted from the spent fuel include materials essential to weapons manufacture, such as plutonium.

6.31 To highlight how sensitive reprocessing is, Crispin Rovere cites the example of the cooperation agreement between the United States and South Korea. Despite being close allies, and South Korea having a large and well organised nuclear power program, South Korea was not permitted to reprocess United States nuclear materials.[20]

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18 Dr Floyd, ASNO, *Committee Hansard*, 15 June 2015, p. 7.

19 Dr Floyd, ASNO, *Committee Hansard*, 15 June 2015, p. 8.

20 Mr Crispin Rovere, *Submission 2*, p. 9.

6.32 Reprocessing of Australian nuclear material has only been permitted in Australian nuclear cooperation agreements with Japan and the EU. In these cases, the reprocessing, use and storage of reprocessed material can only take place in Australian approved facilities. This is called programmatic consent.[21]

6.33 Programmatic consent is not possible with India because it does not yet have reprocessing facilities that Australia can approve. However:

> India has indicated that consent for reprocessing of Australian obligated nuclear material is very important to it. Although actual reprocessing of Australian obligated nuclear material would be more than a decade away, this process plays a significant role in India's plan for further development of its civil nuclear power, including recycling of nuclear fuel. India wants assurance that Australian obligated nuclear material will be able to be used in accordance with those plans.[22]

6.34 Consequently, Article VI of the proposed Agreement grants consent to the Indian Government to reprocess nuclear materials in facilities dedicated to reprocessing in accordance with the *Arrangements and Procedures Agreed between the Government of the United States of America and the Government of India pursuant to Article 6(iii) of their Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy*, done at Washington D.C. on 30 July 2010.

6.35 This reprocessing agreement permits India to reprocess nuclear materials of United States origin at two reprocessing facilities yet to be constructed.[23]

6.36 The change in approach from Australia's usual programmatic consent to consent based on an agreement between the United States and India is at the heart of concerns about reprocessing in the proposed Agreement. These concerns are expressed by, for example, John Carlson.[24]

6.37 From the Committee's point of view, the critical issue is whether the safeguards applying to the reprocessing plants and any resulting reprocessed Australian nuclear material under the proposed Agreement are as strong as they would be if programmatic consent was used.

6.38 John Carlson points out that the agreement between the United States and India applies safeguards only to the proposed reprocessing plants themselves, and not to other facilities at which the reprocessed material

21 Mr Carlson, *Submission 1*, p. 20.

22 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 15 June 2015, p 2.

23 United States State Department, *Arrangements and Procedures Agreed between the Government of the United States of America and the Government of India pursuant to Article 6(iii) of their Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy*, done at Washington D.C. on 30 July 2010, <http://www.state.gov/p/sca/rls/139194.htm>, viewed on 5 June 2015.

24 Mr Carlson, *Submission 1*, p. 20.

may be used. It also applies accounting standards to United States nuclear materials only, so it is not clear that it will apply to Australian materials reprocessed at these plants.[25]

6.39 According to ASNO:

> … For India, the proposed Agreement invokes detailed best-practice conditions from the US-India agreement, designed to ensure that IAEA safeguards can be implemented in an effective and efficient matter. The advantage is that this represents greater prescription in terms of safeguards than Australia has sought for reprocessing when compared to other cases.[26]

6.40 Reprocessed Australian nuclear materials used in Indian nuclear facilities will, according to ASNO, continue to be covered by the peaceful use only undertaking in the proposed Agreement.[27]

6.41 This is not the same as the programmatic approach, which would list specific facilities at which the material could be used, but it does apply a de facto limitation on the sites at which reprocessed material can be used because reprocessed material will only be able to be used in IAEA safeguarded facilities.

6.42 On this basis, the Committee is satisfied that, while the proposed Agreement takes a new approach to reprocessing, it seeks to achieve the same safeguards standards as the previous programmatic approach.

Enrichment

6.43 Article VI of the proposed Agreement permits the enrichment of Australian nuclear material to a level of less than 20 per cent in the isotope 235 of uranium. Enrichment above this level can be undertaken with Australia's prior consent.[28] The purpose of this Article is to prevent the enrichment of Australian nuclear material to a concentration that could be used in nuclear weapons.

6.44 This Article has proven contentious because of the interpretation of the wording in the second sentence of Article VI (5), which states:

> Enrichment of twenty percent and above in the isotope of uranium 235 shall be undertaken with prior consent of the Supplier Party.

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25 Mr Carlson, *Submission 1*, p. 21.

26 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 15 June 2015, p. 2.

27 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 15 June 2015, p. 2.

28 The proposed Agreement, Article VI.

6.45 Ronald Walker, former Australian Representative to the IAEA, argues that:

> According to those words, Australia does not claim and India does not acknowledge a right to withhold consent, to be satisfied as to the purpose of the enrichment and as to the applicable controls, and to withdraw the consent if we are dissatisfied. The text is open to the interpretation that Australia has given its consent in advance to high-level enrichment, unconditionally. Worse, on a strict reading, as a lawyer would, Australia's consent, given or not, has no legal or operational significance.[29]

6.46 This view is supported by Ernst Willheim, Visiting Fellow at the ANU College of Law, and previous head of the Australian Government Office of General Counsel. According to Mr Willheim, a comparison with another article in the proposed Agreement, Article IX, shows that Australian prior consent to enrichment to 20 per cent or more may not be required.[30]

6.47 Article IX of the Treaty deals with retransfers of nuclear materials. It provides, in part, that items subject to the Agreement shall not be transferred without the **prior written consent** of Australia (emphasis added). According to Dr Willheim, the language is clear and unambiguous.[31]

6.48 Dr Willheim argues that:

> … If the intention of Article VI were similar, that is, to require prior Australian consent to reprocessing, one would naturally have expected similar language. So there are two very different consent provisions in the same treaty document. The inclusion of such a clear and unambiguous requirement for prior consent in Article IX and the very different language in Article VI requires the obvious inference that the intention was different.[32]

6.49 According to ASNO, the second sentence of Article VI (5) should not be read without reference to the first sentence, which is clear that consent has only been given to enrich Australian nuclear material to less than 20 per cent in the isotope 235 of uranium.[33]

6.50 Read together, ASNO claims that the meaning of the article is unambiguous.[34]

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29 Mr Walker, *Committee Hansard*, Canberra, 9 February 2015, p. 9.

30 Mr Ernst Willheim, *Submission 23*, p. 2.

31 Mr Willheim, *Submission 23*, p. 2.

32 Mr Willheim, *Submission 23*, p. 2.

33 Australian Safeguards and Non-Proliferation Office (ASNO), *Submission 22*, p. 3.

34 ASNO, *Submission 22*, p. 3.

6.51 ASNO points out that this form of words is also used in the United States nuclear cooperation agreement with India, and the United States Government is equally satisfied as to the meaning of the article.[35]

6.52 Further, ASNO indicates that in discussions with Indian officials, it is clear that they understand that consent is required for enrichment of 20 per cent or more. [36]

6.53 The Committee is not in a position to make an informed decision as to which of the advice provided by Mr Willheim or the advice provided by ASNO is the more accurate. Accordingly, the Committee recommends that the Australian Government outline the legal advice it has received on this matter.

Recommendation 4

6.54 **The Committee recommends that the Australian Government outline the legal advice it has received regarding the consent to reprocessing provisions in Article VI of the proposed *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy*.**

The additional protocol

6.55 The NIA indicates that Australian nuclear material will be subject to the safeguards under the Additional Protocol to the *Agreement between the Government of India and the International Atomic Energy Agency for the Application of Safeguards to Civilian Nuclear Facilities* (the Additional Protocol).[37]

6.56 This statement has caused a degree of confusion, because the Additional Protocol applies only to nuclear exports from India, and does not apply to nuclear facilities in India. In other words, it may have no application to Australian nuclear material.[38]

35 ASNO, *Submission 22*, p. 3.

36 ASNO, *Submission 22*, p. 3.

37 National Interest Analysis, [2014] ATNIA 22, *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy*, [2014] ATNIF 26, hereafter referred to as the NIA, para 11.

38 Mr Carlson, *Submission 1.2*, p. 4; and Mr Robertson, *Submission 11*, p. 7.

6.57 At the public hearing on 15 June 2015, Dr Robert Floyd clarified precisely how the Additional Protocol applies to Australian nuclear material:

> The additional protocol has two key important areas that do apply to facilities that Australian material would be found in. One is the right for inspectors to obtain long-term, multi-entry visas, which adds to the IAEA's ability to carry out short-notice inspections; the second is new rights on the use of communications systems, including facilitating of remote monitoring of those nuclear facilities. That allows for technical measures to be put in place to strengthen safeguards at facilities where Australian obligated nuclear material could be found. [39]

6.58 In other words, the application of the Additional Protocol will have a peripheral advantage to Australia in that it will permit the IAEA to better perform its monitoring functions at safeguarded Indian nuclear facilities.

Enforcement and Conflict resolution

6.59 A number of participants have identified the lack of a conflict resolution provision in the proposed Agreement as a significant flaw. All other Australian nuclear cooperation agreements, with the exception of the agreement with the United States, contain conflict resolution provisions.[40]

6.60 ASNO points out that, while the proposed Agreement contains no specific conflict resolution provision, there are a number of mechanisms for dealing with a dispute. For example, mechanisms for dealing with disputes can be found in Articles XI and XII of the Agreement.[41]

6.61 Australia may also, ASNO argues, make use of customary international law as reflected in the Vienna Convention on the Law of Treaties. This provision has recently been used in relation to the suspension of supply of nuclear materials to Russia.[42]

6.62 Finally, Article XIV provides for the termination of the proposed Agreement at 12 months' notice, along with the potential to cease cooperation at an earlier date if this is deemed necessary.[43] As discussed in a previous Chapter, ASNO raised the possibility of invoking Article XIV in the event that India resumed nuclear testing.

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39 Dr Floyd, DFAT, *Committee Hansard*, Canberra, 15 June 2015, p. 2.

40 Mr Carlson, *Submission 1*, p. 23.

41 ASNO, *Submission 22*, p. 5.

42 ASNO, *Submission 22*, p. 5.

43 ASNO, *Submission 22*, p. 5.

6.63 Another matter raised by participants to the inquiry was the lack of a provision permitting Australia to demand the return of its nuclear materials. This is called a 'right of return' provision, and is common to most Australian nuclear cooperation agreements.

6.64 The legality of right of return provisions was discussed at some length in the Committee's Report on the *Agreement between the Government of Australia and the Government of the United Arab Emirates on Cooperation in the Peaceful Uses of Nuclear Energy*.[44]

6.65 John Carlson, one of a number of participants who expresses some concern over this issue,[45] advises that:

> All our other agreements provide that, if there is a violation, we have the right to take back what we have supplied. How that would work in practice is another story, of course. I do not think we would be keen to take back spent fuel.[46]

6.66 According to ASNO, energy security is at the heart of the reason a right of return is not included in the proposed Agreement. The Indian Government is very concerned not to expose the country to a situation in which its electricity supply could be threatened by an exporting nation requiring the return of fuel.[47]

6.67 India has only consented to a right of return in a single nuclear cooperation agreement – with the United States - and then only if the United States agreed to include substantial financial compensation provisions should the right of return be exercised.[48]

6.68 Taking account of these considerations as well as the practical challenges if Australia had to accept the return of nuclear material, ASNO is not concerned that a right of return provision is not part of the proposed agreement.[49]

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44 Parliament of Australia, Joint Standing Committee on Treaties (JSCOT), *Report 137*, tabled 18 March 2014.

45 See also for example Dr Jim Green, National Nuclear Campaigner, Friends of the Earth, *Committee Hansard*, Melbourne, 18 May 2015, p. 25.

46 Mr Carlson, *Committee Hansard*, Canberra, 9 February 2015, p. 6.

47 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 12 February 2015, p. 2.

48 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 12 February 2015, p. 2.

49 Dr Floyd, ASNO, *Committee Hansard*, Canberra, 12 February 2015, p. 2.

Conflict with the Treaty of Rarotonga

6.69 According to the Uniting Church of Australia Justice and International Commission, Synod of Victoria and Tasmania, the proposed Agreement places Australia in possible breach of the *South Pacific Nuclear Weapons Free Zone Treaty* (the Treaty of Rarotonga). Article 3 of that Treaty states in part:

> Each Party undertakes: …
>
> - (c) not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any State.

6.70 Article 4 of that Treaty states:

> Each Party undertakes:
>
> - (a) not to provide source or special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material for peaceful purposes to:
>   - ⇒ (i) any non-nuclear-weapon State unless subject to the safeguards required by Article III.1 of the NPT, or
>   - ⇒ (ii) any nuclear-weapon State unless subject to applicable safeguards agreements with the International Atomic Energy Agency (IAEA). Any such provision shall be in accordance with strict non-proliferation measures to provide assurance of exclusively peaceful non-explosive use;
> - (b) to support the continued effectiveness of the international non-proliferation system based on the NPT and the IAEA safeguards system.[50]

6.71 The International Campaign against Nuclear Weapons (Australia) obtained legal advice by Australian National University's Professor Don Rothwell. Professor Rothwell's advice:

> … was really very clear—that is, under the South Pacific nuclear weapon free zone treaty, which Australia drove and was a founding state party of, nuclear commerce is only to be countenanced subject to the provisions of article 3 of the NPT. Section 2 of that article stipulates that with non-nuclear-armed states, nuclear commerce is only to be conducted when all of those nuclear facilities in those countries, in fact all of those subject to their jurisdiction, even if they are not completely within their territory, should be bound by safeguards applied by the International Atomic Energy Agency—that is, a comprehensive safeguards agreement. India does not have a comprehensive

50 *South Pacific Nuclear Weapons Free Zone Treaty* (the Treaty of Rarotonga).

> safeguards agreement with the International Atomic Energy Agency, and therefore Professor Rothwell's advice was that such an agreement would be clearly in breach of Australia's obligations under a treaty that it drove, that really has helped to underpin the strengthening of the commitment to nuclear disarmament and nonproliferation in the region, of which we are part. I think that legal advice is an important matter to put before this committee.[51]

6.72 At the public hearing on 15 June 2015, the Committee asked Dr Robert Floyd in his capacity as the Director-General of ASNO if he had obtained external legal advice about the legality of the proposed Agreement, and if so, whether he was satisfied that the Agreement was consistent with Australia's other legal obligations.

6.73 Dr Floyd responded:

> I am satisfied that the advice we have received is that it is consistent with our legal obligations, and that advice comes from those who are expert in these matters. [52]

6.74 As discussed above in relation to reprocessing, the Committee is not in a position to make an informed judgement when experienced legal practitioners provide apparently contrary advice. The Committee believes it would be prudent for the Government to anticipate a possible challenge to the proposed Agreement on the grounds that Australia has breached the provisions of the Treaty of Rarotonga.

Conclusion

6.75 The bulk of the issues relating to specific provisions in the proposed Agreement have been resolved to the Committee's satisfaction.

6.76 In particular, the Committee is as satisfied as it can be that Australian nuclear material will be tracked and accounted for in sufficient detail to prevent its legal use in unsafeguarded nuclear facilities in India.

6.77 In relation to the lack of right of return provisions, India's reasons for wanting to retain nuclear materials are understandable. In addition, should the proposed Agreement be terminated, the safeguards applying to Australian nuclear materials are required to remain in place.

6.78 In relation to the issues arising from the consent provisions applying to refining Australian nuclear material and any conflict between the

51 Associate Professor Tilman Ruff, International Campaign to Abolish Nuclear Weapons (Australia), *Committee Hansard*, Melbourne, 18 May 2015, p. 14.

52 Dr Floyd, ASNO, *Committee Hansard*, 15 June 2015, p. 9.

proposed Agreement and the Treaty of Rarotonga, the Committee is not in a position to determine which of the two differing expert opinions in each is correct, and therefore the Committee can only advise the Australian Government that it may be prudent to expect a challenge to its view on these issues.

6.79 India's need for ongoing supplies of nuclear materials for energy security will, in the Committee's view, reinforce its commitment to adhere to the provisions of the proposed Agreement.