12 October 2016

To: Committee Secretary, JSCT

RE: Public submission to the proposed Uranium Sales Agreement between Australia-Ukraine

Dear Secretary

Please accept this public submission to the JSCT Inquiry on proposed treaty actions in the *Agreement between the Government of Australia and the Government of Ukraine on Cooperation in the Peaceful uses of Nuclear Energy* (Washington DC, 31 March 2016).

Further, I request the Committee's consideration to an opportunity to appear as a Witness at a JSCT Hearing to discuss key public interest matters consequent to these proposed treaty actions.

This public submission on the proposed bilateral Nuclear Cooperation and Uranium Sales Agreement with Ukraine will focus on a few key public interest areas, across:

- Prohibitive insecurity issues in proposed sale of uranium to Ukraine;
- Lack of feasibility in proposed right of repatriation or 'return' of Australian Obligate Nuclear Material **(**AONM) including high level irradiated nuclear fuel waste;
- Failure to address real world consequences of flawed proposed treaty actions.

I provided Witness evidence as an individual to a Hearing of a JSCT Inquiry on 17th June 2013 in Canberra, following my public submission dated 3rd May 2013, on analogous aspects of proposed nuclear cooperation and uranium sales to the UAE.

JSCT Report 137 (Feb 2014) under "*Return of waste*" (sections 2.60 to 2.70) discussed some of these issues following my Witness evidence and public submission.

For your information: I have previously authored NGO public submissions to JSCT on proposed bi-lateral nuclear cooperation treaties and uranium sales agreements with China and with Russia and appeared as a Witness in each case before JSCT on behalf of Australian Conservation Foundation (in a prior long term employment as an ACF national campaigner based in Adelaide).

Thank you for consideration to this public submission and request to provide evidence as a Witness.

Yours sincerely

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Independent Environment Campaigner

(contact details provided)

Contents

Summary

The integrity of Australia's policy for control of nuclear materials & export of uranium is significantly compromised by this irresponsible proposal to introduce AONM to a country with a demonstrated record of insecurity beyond Australia's influence and beyond the realistic control of Ukraine.

Further, there is no credible substantiation of claimed 'return' of AONM to Australia, including high level irradiated nuclear fuel waste - even if a capacity to remove AONM from Ukraine were to exist.

The India Uranium Sales Agreement (JSCT Report 151, Sept 2015) is evidence that 'return' of AONM is not an essential element of Australia's policy for control of nuclear material & export of uranium.

It is incumbent on this JSCT Inquiry to address *incompatible realities* in the proposed treaty actions to introduce AONM to Ukraine and to assume a right and a capacity to 'return' AONM to Australia:

- The Federal Government does not have a *mandate* to bring any international nuclear waste to Australia *regardless* of whether it is AONM or not;

- Australia does not have facilities or capacity to store AONM subject to repatriation, including high level irradiated nuclear fuel waste and potential plutonium fissile materials;

- This proposed treaty action creates a Ministerial discretion to import certain international high level nuclear wastes and other nuclear material;

- ASNO assumes an Australian government can "*chose to invoke the right to have [Australian obligated nuclear materials] returned and stored in Australia"* (JSCT Report 137, at 2.65)*;*

- While ASNO asserts that Australia could (in theory) be one of a number of countries to which Australian obligated nuclear materials could be repatriated, ASNO states the proposed treaty action for 'return' of AONM is intended to apply directly to Australia;

- No feasibility and costing analysis has been undertaken for assumed 'returns' of AONM.

Determination of *material non-compliance* with key provisions in the Agreement, such as security related issues affecting AONM and Ukraine's nuclear operations, are core Australian decisions.

ASNO National Interest Analysis fails to credibly address Ukraine security issues and tensions with Russia that are inherent to this Agreement, and systematically fails to analyze consequences of proposed treaty action rights to 'return' of AONM across key *Implementation* and *Costs* issues, with the role of ASNO NIA (unacceptably) limited to 'outline normal operations of an agreement'.

Failure to scrutinize and plan for non-routine events is characteristic of the nuclear sector.

The conduct of this JSCT Inquiry must not be limited to '*normal operation of the Agreement'.*

Informed decision making by the public and by the JSCT Committee on this proposed nuclear treaty depends on access to requisite relevant information, which has not been provided by the NIA.

Recommendations No. 1-6 are provided to the JSCT regarding the conduct of this Inquiry and set out information that is required for *informed* decision making on proposed treaty actions.

Dr Robert Floyd, D-G ASNO (In personal communication to the author, 24 July 2013) has stated:

> *"In the event the Australian government invoked the right of return provision, it would also be in the gift of the Government to determine … the methods by which it would be handled and disposed."* (see p.12 & Appendix p.17 herein)

However, there has been no *transparency* by ASNO as to the methods that are actually required.

Two Primary Recommendations provide the core contention of this public submission:

The integrity and credibility of Australia's policy for control of nuclear materials & export of uranium is significantly compromised by asserting a treaty level right without a feasible capacity to do so.

It is incumbent on JSCT to restore integrity and credibility, where possible, to Australia's claim to be able to respond to material non-compliance in breaches of our uranium sales agreements.

Potentially this can only be done in one of two ways:

- Adopt the position in the India Uranium Sales Agreement (JSCT Report 151, Sept 2015) that repatriation of AONM is <u>not</u> an essential element of Australia's policy for control of nuclear material & export of uranium, AND amend Article XVI .2 (b) by deleting "*nuclear material*";

- OR at a minimum, recognise that it is not feasible to 'return' AONM to Australia, therefore amend Article XVI.2(b) to specify that the stated right to return AONM applies to a transfer of "nuclear material" to a third country and is <u>not</u> a 'return' of AONM to Australia.

Primary Recommendation A:

In recognition of the fact that repatriation of AONM is <u>not</u> an essential element of Australia's policy of control of nuclear material (as evidenced by the India Uranium Sales Agreement):

- **Article XVI.2 (b) of this agreement should be amended by deletion of "*nuclear material*";**

At a minimum, if the proposed treaty level right of repatriation of AONM following material non-compliance in this Ukraine agreement is to have any credibility:

- **Article XVI.2 (b) must be amended to limit a right of repatriation of AONM from Ukraine, to a transfer of AONM to a third country and <u>not</u> to constitute an assumed right of 'return' of AONM to Australia.**

Primary Recommendation B:

In-security in Ukraine and tensions with Russia has been demonstrated to be far beyond Australia's influence and beyond the realistic control of Ukraine - these grounds alone warrant exclusion of Ukraine from potential sale of Australian uranium.

Note: A Supplementary submission will support Primary Recommendation B.

Recommendations to JSCT regarding the conduct of this Inquiry:

Recommendations 1-6: Required information for *informed* decision making on treaty actions

Recommendation 1:

The JSCT Inquiry should require DFAT & ASNO present a thorough analysis of security issues faced by Ukraine including regional tensions with Russia in context of Ukraine's nuclear operations including implications for AONM and for proposed treaty actions.

Recommendation 2:

The JSCT Inquiry should require DFAT & ASNO present an analysis of requirements, capacity, costs, timelines and the risks involved (including to Australian personnel) in any proposed removal of AONM from Ukraine - including the potential for insecurity to directly affect and compromise any proposed removal and repatriation actions.

Recommendation 3:

The JSCT Inquiry must not be limited to only consider "*normal operation"* of this Agreement and must address the real world consequences of exercising proposed treaty actions.

Recommendation 4:

The JSCT Inquiry must have a focus on repatriation costs in the case of exercising the proposed treaty action for an assumed right of 'return' of AONM to Australia.

Recommendation 5:

The JSCT Inquiry should require DFAT & ASNO to explain why a proposed treaty action for 'return' of AONM to Australia:

- Is claimed to be an essential element of Australia's policy for control of nuclear material & export of uranium in 2016 – in the case of Ukraine;

- But was <u>not</u> an essential element of Australia's policy in 2014 and 2015 - in the case of the India Uranium Sales Agreement, with ASNO "*not concerned that a right of return provision is not part of the proposed agreement".*

Recommendation 6: Required information for *informed* decisions on 'return' of AONM

The JSCT Inquiry must seek and make public a detailed explanation of how proposed 'return' of AONM "*would work in practice"*, as an analysis of feasibility, requirements, capacity, costs, timeline and risks involved in proposed 'return' of AONM to Australia;

Require ASNO answer the array of practical problems raised by any 'return' of AONM, including:

- Acknowledging the Health Minister has a discretionary power under the Customs Act to authorize import of radioactive materials:

Which Ministers will have responsibility for AONM once imported to Australia?

- What existing Federal legislation and regulatory powers will apply to DFAT & ASNO exercising a treaty action right to import, store and manage AONM in Australia?

- What Federal legislative changes are required for DFAT & ASNO to import, store, manage and potentially dispose of AONM in Australia - which could include high level irradiated nuclear fuel waste and / or plutonium fissile materials?

- What agency and institutional arrangements will have responsibility for AONM in Australia?

- What are the methods by which AONM would be handled and disposed in Australia?

- Does DFAT & ASNO include or exclude use of the existing ANSTO Lucas Heights facility to store imported AONM, and if so – on what basis?

- Does DFAT & ASNO propose to use other Commonwealth facilities or military bases?

- Does DFAT & ASNO propose to establish new nuclear materials storage facilities, and if so, is this proposed to involve existing Commonwealth owned land OR does this involve and require compulsory acquisition of State / Territory land?

- What Australia port does DFAT & ASNO propose to *requisition* for import of AONM?

- What means of transport (road or rail or both) does DFAT & ASNO envisage for transfer of AONM from an Australian port to a required nuclear materials storage facility?

- Does the assumed treaty level right to require 'return' of AONM to Australia involve or require *override* of State and/or Territory legislation in WA (1999), in SA (2000), in NT (2004) and in Queensland (2007), which *prohibits* the import, transport, storage and disposal of International nuclear waste (regardless of whether it is of AONM or not)?

- What *lead times* are required by these practical issues *prior* to any 'return' of AONM**?**

- What planning, if any, exists for the required long term storage and disposal of AONM?

ASNO National Interest Analysis fails to credibly address security concerns and tensions:

The National Interest Analysis (Bilateral Safeguards Section, ASNO, March 2016) notes that "*political tensions currently exist between Ukraine and Russia"* (at 5.) and contends:

> "*In response to the risks posed by the current tensions between Ukraine and Russia, the proposed agreement includes clauses designed to minimize any security concerns involving AONM transferred to Ukraine."* (at 11.)

However, the proposed measures: of standard assurances of physical protection (Article VI); review by Australia of physical protection measures (Article VI.3); and limiting the locations where AONM can be processed, used or stored to those that have been approved by Australia (Article VIII); they comprehensively fail to address the level of security concerns involving AONM in Ukraine.

The integrity of Australia's policy for control of nuclear materials & export of uranium is significantly compromised by this irresponsible proposal to introduce AONM to Ukraine.

Demonstrated insecurity in Ukraine and tensions with Russia are far beyond Australia's influence and has been far beyond the control of Ukraine**.**

There can be no realistic security assurance to the proposed introduction of AONM to Ukraine, AND no credible substantiation of claimed repatriation of AONM, including high level irradiated nuclear fuel waste, to Australia - even if a capacity to remove AONM from Ukraine were to exist.

Insecurity in Ukraine and tensions with Russia may realistically conspire to trigger material non-compliance on security of AONM that is beyond the control of Ukraine, and escalate rapidly such that any consequent proposed repatriation of AONM can-not realistically be undertaken.

Inexplicably, ASNO fails to consider these real world realities in this National Interest Analysis.

These realities increase the likelihood that Australia has to face a determination on *both* material non-compliance and on exercise of *Article XVI Cessation of Cooperation and Transfers* rights to:

> *"b. require the return of nuclear material, non-nuclear material, equipment, components and technology subject to the Agreement."*

Recommendation 1:

The JSCT Inquiry should require DFAT & ASNO present a thorough analysis of security issues faced by Ukraine including regional tensions with Russia in context of Ukraine's nuclear operations including implications for AONM and for proposed treaty actions.

Recommendation 2:

The JSCT Inquiry should require DFAT & ASNO present an analysis of requirements, capacity, costs, timelines and the risks involved (including to Australian personnel) in any proposed removal of AONM from Ukraine - including the potential for insecurity to directly affect and compromise any proposed removal and repatriation actions.

ASNO National Interest Analysis fails to credibly analyse proposed 'return' of AONM:

'Return' of AONM is not an essential element of Australia's policy for control of nuclear material and export of uranium. As evidenced by the India Uranium Sales Agreement (JSCT Report 151, Sept 2015) that excluded a treaty level right of repatriation of AONM, and did "*not concern"* ASNO.

> *"**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***" (Dr Floyd, JSCT 151, sec 6.68)

However, the NIA for this Agreement reverts - without explanation - to an earlier contention, that:

> *"14. The proposed Agreement includes the essential elements of Australia's policy for the control of nuclear materials. These elements are: …*
>
> *g. the provision for cessation of supply by, and the repatriation of supplied items to, Australia in the event of material non-compliance with IAEA safeguards arrangements, or with key provisions in the Agreement (Article XVI);*

The NIA under "*Obligations, 28*." sets out that Article XVI confirms:

> "*…either party can require the return of items subject to the proposed Agreement in circumstances where such corrective steps are not implemented within a reasonable time period."*

Further, the NIA cites that Article XVI:

> "*sets out a range of issues for each party to consider in exercising these rights including whether the non-compliance was caused willfully and deliberately."*

Determination of *material non-compliance* with key provisions in the Agreement, such as security related issues affecting AONM and Ukraine's nuclear operations, are core Australian decisions.

In contrast, the Agreement Article XVI .5 states a determination of non-compliance with safeguards obligations described in Article XI shall be based on a finding of the IAEA Board of Governors.

Notably, Agreement Article XVI.4 states: "*Both Parties agree that detonation of a nuclear explosive device by either party would constitute non-compliance with the provisions of this Agreement."*

In reality, any ***credible threshold*** for determination and action on material non-compliance, including the assumed right to 'return' of AONM, has to be set far in advance of nuclear weapons testing.

This ASNO NIA fundamentally fails to address the consequences of proposed treaty action rights to repatriation or 'return' of AONM across key *Implementation* and *Costs* issues, in claims that:

> "*The current legislative framework in relation to nuclear transfers is sufficient to comply with the terms of the proposed agreement. …*
>
> *No changes to the existing roles of the Commonwealth or the States and Territories would arise as a consequence of implementing the proposed Agreement."* (at 30.)

> *The costs associated with implementing the proposed Agreement are the same as for all other nuclear cooperation agreements… DFAT expects to be able to manage these costs within the departmental allocation to ASNO.*
>
> *DFAT, in consultation with the office of Best Practice Regulation, has assessed that there is no regulatory impact, as the existing arrangements…will remain the same."*
>
> (Costs at 31-32.)

Dr Robert Floyd, Director-General, ASNO has explained the reasoning behind ASNO NIA claims in these cases (In personal correspondence to the author, 24 July 2013, see Appendix p.16):

> *"**Repatriation costs and the National Interest Analysis** …*
>
> *The role of NIAs is to outline expected costs associated with the normal operation of an agreement, not to anticipate all possible costs no matter how unlikely."*

However, failure to scrutinize and plan for non-routine events is characteristic of the nuclear sector.

Recommendation 3:

The JSCT Inquiry must not be limited to only consider "*normal operation"* of this Agreement and must address the real world consequences of exercising proposed treaty actions.

Recommendation 4:

The JSCT Inquiry must have a focus on repatriation costs in the case of exercising the proposed treaty action for an assumed right of 'return' of AONM to Australia.

Recommendation 5:

The JSCT Inquiry should require DFAT & ASNO to explain why a proposed treaty action for 'return' of AONM to Australia:

- **Is claimed to be an essential element of Australia's policy for control of nuclear material & export of uranium in 2016 – in the case of Ukraine;**

- **But was <u>not</u> an essential element of Australia's policy in 2014 and 2015 - in the case of the India Uranium Sales Agreement, with ASNO "*not concerned that a right of return provision is not part of the proposed agreement".***

Discussion of 'return' of AONM in bilateral Uranium Sales Agreements 2012-2015:

> ***"Public opinion in Australia would be resolutely opposed to taking back nuclear waste. That's a very big step and there wouldn't be support for it."***
>
> **Foreign Minister Bob Carr**, In: The National, "*Australia to supply UAE nuclear fuel but will not take radioactive waste*", 1st August 2012.
>
> http://www.thenational.ae/business/energy/australia-to-supply-uae-nuclear-fuel-but-will-not-take-radioactive-waste#ixzz2Shf7kPOu

Foreign Minister Carr recognized in 2012 that the Australian public is resolutely opposed to the importation and storage of International nuclear waste. This fact remains true today.

The National newspaper in Abu Dhabi (1st August 2012) reported that Australia "*has ruled out taking back the radioactive waste"* generated by proposed use of Australian uranium in UAE reactors.

The ALP National Platform (2015) reflects this strong public opinion and should inform JSCT:

> ***"Labor remains strongly opposed to the importation and storage of nuclear waste in Australia that is sourced from overseas"***

No Federal government has ever had a *mandate* to import nuclear waste - *regardless* of whether that nuclear waste is AONM or not.

This fact should inform the JSCT to reject the proposed treaty action for repatriation or 'return' of AONM from Ukraine to Australia.

JSCT Report 137 (Feb 2014) reported on discussion of proposed 'return' of AONM. This precedent discussion points to fundamental *incompatible realities* in Australia's nuclear treaty actions.

It is incumbent on this JSCT Inquiry to address *incompatible realities* in the proposed treaty actions to introduce AONM to Ukraine and to assume a right to 'return' AONM to Australia, principally:

- **The Federal Government does not have a *mandate* to bring any international nuclear waste to Australia *regardless* of whether it is AONM or not;**

- **Australia does not have facilities or capacity to store AONM subject to repatriation,** including high level irradiated nuclear fuel waste and potential plutonium fissile materials;

- This proposed treaty action creates a Ministerial discretion to import certain international high level nuclear wastes and other nuclear material;

- ASNO assumes an Australian government can "*chose to invoke the right to have [Australian obligated nuclear materials] returned and stored in Australia"* (JSCT Report 137, at 2.65)*;*

- While ASNO asserts that Australia could (in theory) be one of a number of countries to which Australian obligated nuclear materials could be repatriated, ASNO states the proposed treaty action for 'return' of AONM is intended to apply directly to Australia;

- **No feasibility & costing analysis has been undertaken for assumed 'returns' of AONM**.

In 2015 John Carlson, former Director General of ASNO, expressed some concern over right of return provisions regarding the India Uranium Sales Agreement (JSCT Report 151, sec 6.65), advising that:

> *"All out 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."*** (bold added)

ASNO noted Mr Carlson stated in his evidence that seeking **the return of nuclear material "*could raise a number of practical problems for Australia***" (ASNO, Submission No.22, March 2015).

Dr Robert Floyd, Director General ASNO, has stated (March 2013) that:

> *"**In the event the Australian Government invoked the right of return provision, it would also be in the gift of the Government to determine** whether its decision applied to some or all of the relevant nuclear material, and for nuclear material to which the decision applied **the methods by which it would be handled and disposed**."* (see Appendix herein p.17)

ASNO have failed to provide any credibly analysis of the consequences in exercising proposed treaty actions in 'return' of AONM across key *Implementation* and *Costs* issues, and have failed to be transparent on the "*practical problems*" raised by proposed 'return' of AONM or on the required "*methods by which it would be handled and disposed*" were it to be imported to Australia.

It is incumbent on conduct of this JSCT Inquiry to fill these gaps in required relevant information so as to properly facilitate *informed* decision making on proposed treaty actions.

Recommendation No.6 (at p.13) sets out a range of required information for *informed* decisions on any proposed or claimed right of 'return' of AONM to Australia.

These issues raise a number of questions for DFAT & ASNO to answer, for instance:

Q: Have DFAT & ASNO undertaken requisite planning for the claimed treaty level right to require 'return' of AONM to Australia and for the "*methods by which it would be handled and disposed*"?

Q: Does the practical issue of required lengthy *lead times* prior to any 'return' of AONM to Australia negate the claimed utility in a right of repatriation of AONM in an event of material non-compliance?

Q: Given that AONM can in theory be removed following material non-compliance for transfer to a third country, why does ASNO persist in seeking discredited rights for 'return' of AONM to Australia?

If Australia's position on a right of repatriation of AONM following material non-compliance in a uranium export agreement is to have any credibility there is a straight forward conclusion:

This treaty must be amended to limit a right of repatriation of AONM to a transfer of AONM to a third country and <u>not</u> to a 'return' of AONM to Australia.

Precedent discussion in JSCT Report 137 "*Return of waste*" is relevant to consideration of the proposed 'return' of AONM in this Ukraine agreement:

Return of waste (extracts):

2.60 The proposed Agreement's obligation for nuclear materials in the UAE to be returned to Australia in the event of material non-compliance with IAEA and international standards caused a degree of concern amongst inquiry participants.

2.61 According to Mr David Noonan, this is a circumstance that has not been countenanced before. Mr Noonan pointed out that:

> *Until now a bipartisan position has existed through the powers of the Customs Act 1901 and the Customs (Prohibited Imports) Regulations 1956, Regulation 4R Importation of Radioactive Substances, that radioactive waste is a prohibited import—unless its import is sanctioned by Ministerial discretion.*
>
> ***This treaty action creates a Ministerial discretion to import certain international nuclear wastes from the UAE**.*[56]

2.62 ***Mr Noonan argued that the Federal Government would not likely have a mandate to bring any international nuclear waste to Australia regardless of whether it originated in Australia or not.***[57]

2.63 ***Mr Noonan pointed out that Australian obligated nuclear materials that may be subject to repatriation could include high level nuclear waste such as spent nuclear fuel or plutonium, and that Australia does not at present have the facilities to store such materials.***[58]

2.65 In relation to the apparent inconsistency between the proposed agreement and the Customs (Prohibited Imports) Regulations 1956, ASNO responded that:

> ***If a circumstance arose whereby an Australian Government chose to invoke the right to have [Australian obligated nuclear materials] returned and stored in Australia** this would need to be done in accordance with the relevant laws at the time.*
>
> *Under current laws, the Customs (Prohibited Imports) Regulations 1956 would apply to the importation of fresh or spent nuclear fuel.*
>
> *As structured, Regulation 4R does not establish an absolute prohibition against importing radioactive substances such as this.*
>
> *Rather, it requires permission in writing granted by the Minister for Health and Ageing or an authorised officer. …*

2.69 …Australia would therefore be only one of a number of countries to which Australian obligated nuclear materials could be repatriated. (bold added for emphasis)

Recommendation 6: Required information for *informed* decisions on 'return' of AONM

The JSCT Inquiry must seek and make public a detailed explanation of how proposed 'return' of AONM "*would work in practice"*, as an analysis of feasibility, requirements, capacity, costs, timelines and risks involved in proposed 'return' of AONM to Australia;

Require ASNO answer the array of practical problems raised by any 'return' of AONM, including:

- Acknowledging the Health Minister has a discretionary power under the Customs Act to authorize import of radioactive materials:
  Which Ministers will have responsibility for AONM once imported to Australia?

- What existing Federal legislation and regulatory powers will apply to DFAT & ASNO exercising a treaty action right to import, store and manage AONM in Australia?

- **What legislative changes are required for DFAT & ASNO to import, store, manage and potentially dispose of AONM in Australia** - which could include high level irradiated nuclear fuel waste and / or plutonium fissile materials?

- What agency and institutional arrangements will have responsibility for AONM in Australia?

- **What are the methods by which AONM would be handled and disposed in Australia?**

- **Does DFAT & ASNO include or exclude use of the existing ANSTO Lucas Heights facility** to store imported AONM, and if so – on what basis?

- Does DFAT & ASNO propose to use other Commonwealth facilities or military bases?

- Does DFAT & ASNO propose to establish new nuclear materials storage facilities, and if so, is this proposed to involve existing Commonwealth owned land OR does this involve and require **compulsory acquisition** of State / Territory land?

- **Which Australia port does DFAT & ASNO propose to *requisition* for import of AONM?**

- What means of transport (road or rail or both) does DFAT & ASNO envisage for transfer of AONM from an Australian port to a required nuclear materials storage facility?

- **Does the assumed treaty level right to require 'return' of AONM to Australia involve or require *override* of State and/or Territory legislation** in WA (1999), in SA (2000), in NT (2004) and in Queensland (2007), which *prohibits* the import, transport, storage and disposal of International nuclear waste (regardless of whether it is AONM or not)?

- **What *lead times* are required by these practical issues *prior* to any 'return' of AONM?**

- **What planning, if any, exists for the required long term storage and disposal of AONM?**

Primary Recommendation on Lack of Feasibility in 'return' of AONM to Australia:

Primary Recommendation A:

In recognition of the fact that repatriation of AONM is not an essential element of Australia's policy of control of nuclear material (as evidenced by the India Uranium Sales Agreement):

- **Article XVI.2 (b) of this agreement should be amended by deletion of "*nuclear material*";**

At a minimum, if the proposed treaty level right of repatriation of AONM following material non-compliance in this Ukraine agreement is to have any credibility:

- **Article XVI.2 (b) must be amended to limit a right of repatriation of AONM from Ukraine, to a transfer of AONM to a third country and not to constitute an assumed right of 'return' of AONM to Australia.**

The integrity and credibility of Australia's policy for control of nuclear materials & export of uranium is significantly compromised by asserting a treaty level right without a feasible capacity to do so.

An assumed treaty level right to require repatriation or 'return' of AONM is common across a number of Australia's uranium sales agreements – excluding the most recent India sales deal.

ASNO (Sub 11 to JSCT, March 2013) states that treaty rights to require repatriation of AONM are equivalent across the UAE, Russia and China Uranium Sales Agreements (see Appendix p.16).

However, Australia lacks any feasible capacity to 'return' AONM to Australia in each case.

Australia's claim to be able to respond to material non-compliance in key security and safeguards aspects of uranium sales agreements is compromised by the lack of a real world feasible capacity to do so in the case of an assumed right to require 'return' of AONM to Australia.

Australia's policy on control of nuclear material & export of uranium is seriously compromised by the incompatibility of repatriation claims made in these treaties and the lack of feasibility to exercise these assumed treaty level rights for any 'return' of AONM to Australia.

In practice, any claim Australia makes to be able to respond to material non-compliance in key security and safeguards aspects of uranium sales agreements (where corrective steps are not taken by the party in breach) - depends entirely on repatriation of AONM to a third country.

It is incumbent on JSCT to restore integrity and credibility, where possible, to Australia's claim to be able to respond to material non-compliance in breaches of our uranium sales agreements.

Potentially this can only be done in one of two ways:

- Adopt the position in the India Uranium Sales Agreement (JSCT Report 151, Sept 2015) that repatriation of AONM is not an essential element of Australia's policy for control of nuclear material & export of uranium, AND amend Article XVI .2 (b) by deleting "*nuclear material*";

- OR at a minimum, recognise that it is not feasible to 'return' AONM to Australia, therefore amend Article XVI.2(b) to specify that the stated right to return AONM applies to a transfer of "nuclear material" to a third country and is NOT a 'return' of AONM to Australia.

Appendix 1:

Dr Robert Floyd, D-G, ASNO (personal communication to the author, 24 July 2013):

… My responses to your questions are outlined below.

Origin of the policy on the right of return or repatriation of AONM

Australia's policy on uranium supply that was announced by the Fraser Government in 1977 does include the right of return of supplied nuclear material as one of the conditions in bilateral nuclear supply agreements.

This is discussed in the "Uranium – Australia's Decision" papers in the context of sanctions in the event of a breach of a supply agreement.

The papers note that sanctions such as this also serve the purpose of being a deterrent or disincentive against any country considering breaching its safeguards undertakings.

The right of return of supplied nuclear material in the event of a breach of a supply agreement has in fact a long history in both Australia's agreements as well as those of other supplier countries.

Some of Australia's very early nuclear cooperation agreements prior to the 1977 announcement included the right of return of nuclear material in the event of a breach, such as the 1972 Australia-Japan agreement.

All of Australia's nuclear supply agreements concluded since 1977 include a provision for the return of supplied nuclear material in the event of a breach.

For example, the right of return was given explicit mention in Parliamentary Hansard for the agreement with South Korea in 1979.

I note also that most of ASNO's annual reports over the last 20 or so years include a description of Australia's uranium export policy, including listing the right of return in the event of a breach.

Repatriation costs and the National Interest Analysis

As you have observed, the national interest analysis (NIA) for the proposed UAE agreement does not include an estimate of the costs that would arise from invoking the right of return of supplied nuclear material.

None of the NIAs for other nuclear supply agreements considered by JSCOT in the last 17 years include such a cost estimate either.

The reason is that these provisions do not impose any obligations on the Australian Government, rather they provide one of the options that an Australian Government can choose to use under certain circumstances.

The role of NIAs is to outline expected costs associated with the normal operation of an agreement; *not to anticipate all possible costs no matter how unlikely.*

For example, the NIAs for nuclear cooperation agreements have not included estimates of the costs associated with taking a bilateral partner to dispute resolution or the costs of applying fall back safeguards in the event that IAEA safeguards cease to apply.

Similarly, we consider that the likelihood of a situation arising where the right of return is invoked is very remote. This judgement is supported by Australia's experience administering some 22 agreements for around 35 years where a situation has never arisen where exercising the right of return has been seriously warranted.

In the highly unlikely event of a bilateral partner committing a breach sufficiently serious for the relevant return provision to be considered, it would be in the gift of the Australian Government to decide whether to invoke the return provision and to consider what costs might be involved were Australia to take that particular option.

In the event the Australian Government invoked the right of return provision, it would also be in the gift of the Government to determine whether its decision applied to some or all of the relevant nuclear material, and for nuclear material to which the decision applied the methods by which it would be handled and disposed.

If you're interested, my office recently elaborated on some of the practical scenarios that may apply to the return of nuclear material in a response to a question taken on notice from JSCOT – see submission 11 at

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/12march2013/subs.htm

Note: ASNO (Submission 11, March 2013) states that treaty rights to require 'return' of AONM are equivalent across the UAE, Russia and China Uranium Sales Agreements (my extract below):

1. ***Explain the differences between the provisions on non-compliance and repatriation of nuclear material in the Russia and China nuclear agreements and those in the proposed UAE nuclear agreement.***

The Australia-China Nuclear Transfer Agreement, Australia-Russia Nuclear Cooperation Agreement and proposed Australia-UAE Nuclear Cooperation Agreement ***all prescribe the following rights of response that could be taken by one party in the event of a breach by the other party of key provisions of these agreements*** *or non-compliance with their respective IAEA safeguards arrangements:*

(a) require the party in breach to take corrective steps;

(b) suspend or cancel further transfers of nuclear material;

(c) if corrective steps are not taken by the party in breach within a reasonable time, ***require that party to return nuclear material subject to the agreement.***

… ***textual differences in the proposed Australia-UAE agreement, when assessed against the Russia and China agreements, do not narrow or constrain Australia's rights to respond to non-compliance.*** (bold added)