Joint Standing Committee on Treaties – Nuclear agreement with India –additional submission from Ron Walker

Addition to my initial reply to the question put to me on notice by the Chairman on 9 February:

Please supply a succinct statement of key principles from Australia's safeguards policies that seems to be at risk in the text of the proposed agreement with India.

I am concerned that my original reply was too succinct and that the chairman might have wanted specifics.

These are set out in the table below.

For the sake of brevity, this statement is in conversational style. Mr Carlson's submissions cover most of the same points in precise technical formulations.

Basic concepts	**Relevant provisions**
<u>General</u> The effectiveness of nuclear safeguards agreements depends on all the details being tied down. In any international treaty with any country it would be reckless to be other than explicit and clear. In treaties concerning nuclear weapons, only the highest standards of precision, clarity and care to exclude any unwanted interpretations will do. In the case of India and because of factors peculiar to India, the NSG decision calls for more stringent conditions than apply to the 5 nuclear weapon states recognised by the NPT. A further imperative for making this treaty both consistent with other Australian nuclear agreements and more generally with the highest standard of international treaty drafting is that all treaties have consequences as precedents and bases for comparison for other treaties and negotiations towards future treaties. Deficiencies in the present treaty could have far reaching effects for the network of treaties contributing to the non-proliferation regime; for Australia's existing nuclear treaties with other countries and for Australia's future negotiations - notably for a Free Trade Agreement with India.	Five non-government expert submissions to JSCOT draw attention to many aspects in which the proposed treaty does not meet these standards. In addition, its stipulations are less, not more, thorough than those required by Australia's agreements with the 5 NPT nuclear weapon states. The most important deficiencies are detailed in the boxes below.

<u>Accounting and reporting.</u> This is one of the two the most important aspects of any nuclear safeguards treaty, on a par with the basic commitment to restrict the use of our uranium to peaceful uses (which the proposed treaty does provide). Australia should be confident that the controls it requires are meticulously implemented and preclude practices it does not condone. It needs to know that the importing country has established and operates a system to account specifically for Australian origin material, how that system operates and the information it produces.	Art III 5 (on the accounting system required). Article VII (on Access to IAEA reports) need strengthening to bring them up to the standard that applies in Australia's other agreements. Additional specifics might be required to meet the exceptional situation of India. Examples are given below in the box about the Adminstrative Arrangement.
<u>Reprocessing and high enrichment.</u> Under established policy, Australian origin nuclear material can be reprocessed or high enriched only if Australia is satisfied as to the applicable conditions and controls. To that end 1. India must accept a legal obligation to obtain our prior written consent, which means to abide by the conditions specified in that consent. 2. Australia must have access to enough detailed knowledge of the proposed programs to know whether or not to give the consent. This is the meaning of 'consent on a programmatic basis', the only basis on which Australia has hitherto given consent in a very limited number of cases. 3. It must also have access to enough information to know whether or not the conditions are observed.	Article Vl 1 (reprocessing) does not stipulate that Australian consent is a precondition to reprocessing in India. Moreover it does not require Australian obligated material to only be reprocessed under provisions of the US-India agreement. Use of the word "only' in Art VI 2 does not change the meaning of Art VI 1. Art Vl 4 (high enrichment) does not impose any obligation on India. It could be read to mean that prior consent is needed but equally it could be read to mean that Australia has given its consent in advance and unconditionally. No Australian attempt to find or reinforce an implicit Australian right to withhold consent, or Australian belief about Indian interpretations of the text has any legal effect. The only effective way of meeting Australian requirements is through an explicit acceptance by India that such consent is a precondition
<u>Safeguards to apply at all times and effectively</u>	Art VII 4 requires strengthening a)to bring it up to the standard of our other treaties, and b) to prohibit certain uses of Australian origin material that the India- IAEA agreement does not preclude

Dispute resolution It is especially important to have strong provisions in an agreement with India, for many reasons specific to India and quite independent of the trust our government places in that of Mr Modi.	Art XII is feeble compared to our other agreements. It needs to be strengthened to bring it up to standard.
Legal right to demand return of Australian origin material in case the treaty breaks down. Again this is remote contingency but if we fail to tie it down to the same standard as we have secured from other countries, the integrity of the treaty is visibly weaker. The main operational force of this provision is as a deterrent against inadequate implementation of the treaty by the importer.	Art XIV 2 lacks this provision, unlike our other treaties.
Fallback safeguards To provide for contingency that the third party safeguards we rely on might fail. Doubt as to how realistic this contingency may be warranted but failure to cover it would lower the general standard of comprehensiveness of the treaty.	ART VII 5 is weaker than our other treaties in that it does not set a standard for the fallback safeguards
Administrative Arrangement Given the complexity and special challenges of the civil nuclear industry in India and its partial overlap with military nuclear activities, the Administrative Arrangement (AA) need to be even more elaborate and complete that they are for our other agreements. Given the record of Indian officials negotiating this treaty and their agreements with other countries and the IAEA it would be prudent to include in the treaty (or treaty force statement(s) of interpretation) some legal requirements that would strengthen the hand of Australian negotiators of the AA. Any idea that the AA alone can impose legal obligations on India is fanciful and in any case the AA will not be concluded until after the treaty is ratified.	Some examples of treaty level obligations that are absent from the proposed text but would help achieve an adequate AA are: A stipulation that the AA must ensure that nuclear material subject to the agreement is identified and accounted for as such, and that information is provided to ASNO to meet its statutory obligation to report on the total quantities of such material in each stage of the nuclear fuel cycle; and the intended end-use of this material. A requirement for any substitution of nuclear material to be by material of equivalent in both quantity and quality, including isotopic composition. Access to IAEA reports covering material subject to the agreement If the AA when ultimately negotiated was required to be reviewed by JSCOT (if necessary in confidential hearings), that would strengthen incentives on negotiators to make sure the AA was adequate.