



16 November 2016

**Ernst Willheim**

**Visiting Fellow**

**ANU College of Law**

Canberra ACT 0200  
Australia

**[www.anu.edu.au](http://www.anu.edu.au)**

Senator Chris Black  
Chair  
Senate Foreign Affairs, Defence and Trade Legislation Committee

Dear Senator Black

### **Inquiry into the Civil Nuclear Transfers to India Bill 2106**

Thank you for your letter dated 10 November 2016 inviting me to make a written submission relating to the above Bill. Submissions are sought by 17 November 2016.

#### **Summary**

The key purpose of the Bill appears to be to facilitate the export of Australian uranium to India by providing that certain steps taken in the export approval process are 'taken not to be inconsistent with Australia's obligations' under certain international agreements and by further providing that in the exercise of certain powers and functions the person 'is taken to have had due regard to Australia's obligations, responsibilities and commitments...'.(clause 8). The bill would have no direct effect on the exercise of powers and functions that are in fact consistent with Australia's international obligations and procedural obligations. If, however, those steps were not consistent with those obligations or with procedural requirements, the bill would create a legal fiction, by providing that they are 'not inconsistent'.

Your Committee may wish to consider whether this is an appropriate approach to implementation of Australia's international obligations and procedural requirements.

I add that the operation of any legal fiction created by the legislation is of course confined to Australian domestic law. The legislation does not diminish any relevant Australian obligations under international law.



## **Background**

I draw to the Committee's attention that in 2015 the proposed Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful uses of Nuclear Energy was considered in depth by the Joint Standing Committee on Treaties. I made a submission to the Joint Committee in which I drew attention to Article VI of the proposed Treaty and expressed the view that Article VI did not specifically require prior Australian consent to high level reprocessing by India of Australian uranium. That question was of course highly relevant to obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). My submission, and other expert submissions relating to the nuclear non proliferation regime, are I understand available on the Joint Committee's website. The Joint Committee in its report referred to my submission at paragraphs 6.46, 6.47, 6.48, 6.53 and p 69. I assume your Committee will invite those who made expert submissions to the Joint Committee to also make submissions to your Committee on the complex issues involved in exporting uranium to a country such as India which, although it has both nuclear weapons and civilian nuclear power installations, is not a party to the NPT.

## **Why Is the Bill thought to be necessary?**

Introducing the Bill into the House of Representatives, the Minister in her Second Reading speech said

The bill provides that decisions approving civil nuclear transfers to India are taken not to be inconsistent with Australia's obligations relating to nuclear safeguards under the NPT and the South Pacific Nuclear Free Zone Treaty, if particular conditions are met. Those conditions relate to the application of nuclear safeguards under India's agreement with the IAEA as well as the Australia-India agreement on civil nuclear cooperation.<sup>1</sup>

The Explanatory Memorandum is to similar effect

The purpose of the Bill is to clarify that decisions approving civil nuclear transfers to India are taken not to be inconsistent with, or have been made with due regard to, Australia's obligations relating to nuclear safeguards...if particular conditions are met'.

The Minister did not explain why it was thought to be necessary to provide by legislation that nuclear transfers to India 'are taken not to be inconsistent with Australia's obligations'. Similarly, the Minister did not explain why it was thought to be necessary to provide by legislation that the exercise of certain powers and functions 'is taken to have had due regard to Australia's obligations, responsibilities and commitments...' As explained above, the Bill would have no direct effect if those steps were in fact consistent with the relevant obligations and procedures. The only possible operation for the proposed legislation

---

<sup>1</sup> Hansard, H of R, 9 November 2016, 9.

would be in circumstances where there was an actual or alleged breach of Australia's obligations or an actual or alleged failure to observe procedures. In those circumstances the proposed legislation would seemingly validate what might otherwise be invalid.

The obvious inference is that the Government is contemplating action that may be inconsistent with Australia's obligations or the exercise of powers or functions without regard to those obligations and that the Government wishes prospectively to validate such activities. In other words, the legislation in substance provides that civil nuclear transfers to India which would in fact be inconsistent with Australia's obligations are, by force of the legislation, taken not to be inconsistent with those obligations. Similarly, the legislation provides in effect that decisions taken without regard to Australia's obligations are taken to have been made with due regard to those obligations. The legislation, if enacted, would cure, for the purposes of Australia's domestic law, any invalidity arising from breaches of Australia's obligations or breaches of Australian procedural requirements. It need hardly be said that the operation of the legislation would be confined to Australian domestic law. The legislation would not have any effect in relation to Australia's obligations as a matter of international law.

### **The merits of the legislation**

The Committee may wish to consider the merits of legislation which in effect contemplates future breaches of Australia's international treaty obligations or future breaches of Australian procedural requirements but provides that the relevant action is valid notwithstanding such breaches. Or, to put this in a broader context, is it acceptable to legislate to provide that, if an officer of the executive government makes a decision that is unlawful, that decision is 'taken to be' to be lawful? Is this compatible with the rule of law in a democratic society?

International treaty obligations are not to be taken lightly. Nor are procedural requirements under Australian law. Is a bill which purports to make legal, or valid, future conduct which would otherwise be illegal, or invalid, the appropriate way to deal with these very serious issues? Is the preferable course to ensure that decisions are taken in full compliance with Australia's international treaty obligations and Australian procedural requirements? The Bill therefore raises serious issues warranting careful consideration by your Committee.

Yours sincerely,

Ernst Willheim  
Visiting Fellow,

Centre for International and Public law  
ANU College of Law