Australian Conservation Foundation submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee Inquiry into the Civil Nuclear Transfers to India Bill 2016

November 2016

Summary of key concerns

- There are serious and unresolved nuclear safety and security issues with the Indian nuclear sector that would be remain unaddressed by the legislation.
- The proposed legislation is inconsistent with Australia's promotion of nuclear non-proliferation and in conflict with existing international treaty obligations.
- The planned legislation gives preference to limited commercial rather than wider public and national interest.
- It is not appropriate that the legislation provide blanket protection from any future bilateral trade in other nuclear-related material or items
- It is inappropriate for the federal Government to give carte blanche protection from domestic legal recourse to private companies operating in a contested public policy space. It is not the Government's role to either 'pick winners' or restrict legal options.
- There is a lack of detailed information to support the safety, safeguards and regulatory assertions made by supporters of the legislation – including that this legislation 'does not raise any human rights issues'.
- The Foreign Minister has misrepresented the position taken by the September 2015 Joint Standing Committee on Treaties on this issue in her second reading speech. This legislation is in direct response to deficiencies and uncertainties identified by the JSCOT review. These need to be meaningfully addressed, not avoided by granting unreasonable legal favors to private corporations.
- The government has not complied with JSCOT's request for legal clarity or the provision of legal advice detailing Australia's international obligations. This vacuum should be directly addressed, not circumvented by additional 'bolt-on' legislation.
- It is premature to advance the proposed legislation in the absence of a meaningful Australian government, agency and uranium sector response to the Fukushima nuclear accident – a continuing nuclear crisis directly fuelled by Australian uranium.
- Australia is well placed to help address widespread 'energy poverty' in India through the provision of smart and sustainable renewable energy systems and resources.
- ACF welcomes the Committee's attention to this important issue and urges the Committee to not support this legislation.

For five decades the Australian Conservation Foundation (ACF) has worked with community, governments and business to celebrate and defend Australia's unique environment. ACF has had a long engagement in nuclear policy and operations across a broad range of issues and welcomes this opportunity to highlight the deep concerns we have about the Indian uranium sales deal and this specific legislation.

(i) Nuclear safety concerns with the proposed legislation:

- India's nuclear industry is the subject of continuing and unresolved safety problems and regulatory deficiencies. In 2012 the Indian Auditor General released a damning report warning of 'a Fukushima or Chernobyl-like disaster if the nuclear safety issue is not addressed'. The concerns highlighted in this report, including lax regulation, poor governance and a deficient safety culture, remain largely unaddressed. Given that Australian uranium directly fuelled the Fukushima nuclear crisis it is incumbent on Australia, as a potential uranium supplier to India, to take these concerns seriously and take explicit action to confirm the status of industry compliance with the Auditor-General's recommendations. This legislation would not advance this public interest test.

- The parties seeking to advance the sales deal and this legislation have not recognised the high level of community scepticism towards nuclear industry claims and resistance to nuclear projects in India. Of particular concern is the experience of community and civil society in opposing the controversial nuclear reactor development at Kundankulam in Tamil Nadu. In the face of strong and sustained community resistance – much driven by small scale fishers concerned about the economic impacts of a major industrial development – there was a disturbing escalation in state force and a marked reduction in political opportunities for recourse. This heavy-handed response directly resulted in the loss of lives of citizens engaged in non-violent action. It would be prudent for the Committee to explore this situation and ways to ensure it is never repeated. It is also not appropriate for this reality to be dismissed with the assertion in the Explanatory Memorandum that the proposed legislation is compatible with human rights "as it does not raise any human rights issues".

(ii) Nuclear security and non-proliferation concerns with the proposed treaty action:

- Uranium is the principal material required for nuclear weapons. Successive Australian governments have attempted to maintain a distinction between civil and military end uses of Australian uranium exports, however this distinction is more psychological than real. No number of safeguards can absolutely guarantee Australian uranium – or uranium from anywhere else – is used solely for peaceful purposes.

- The former US Vice-President Al Gore has stated that "in the eight years I served in the White House, every weapons proliferation issue we faced was linked with a civilian reactor program". Despite Government assurances to the contrary, exporting uranium for use in nuclear power programs to nuclear weapons states does enable other uranium supplies to be used for nuclear weapons programs. In reality, the primary difference between a civilian and military nuclear program is one of intent.

- India is a nuclear weapons state that developed its weapons capability by reneging on non-proliferation commitments made to facilitate a civilian reactor program with Canada.

- India is not a signatory to the Nuclear Non-Proliferation Treaty, does not allow International Atomic Energy Agency inspections of all its nuclear plants, refuses to sign the Comprehensive Test Ban Treaty and continues to expand its nuclear arsenal and missile capabilities. India's continuing tension with Pakistan makes the sub-continent is one of the world's most precarious nuclear hot spots.

- There is a very real – and fundamentally unaddressed – concern that any future provision of Australian uranium would facilitate the continuation and expansion of India's military nuclear sector. Uranium is a dual use fuel – it provides the fuel for nuclear weapons as well as nuclear power. Even if Australian uranium did not go directly to the Indian nuclear weapons program, the use of Australian uranium in civilian nuclear reactors would free up domestic reserves to be used in India's weapons program. The former head of the national security advisory board in India, K. Subrahmanyam, said in 2005: 'Given India's uranium ore crunch and the need to build up our ... nuclear deterrent arsenal as fast as possible, it is to India's advantage to categorise as many power reactors as possible as civilian ones to be re-fuelled by imported uranium and conserve our native uranium fuel for weapons-grade plutonium production'.

- India is actively expanding its nuclear arsenal and weapons capabilities through increased uranium enrichment capacity, increased attention to multiple weapons launch platforms and advanced work on improved submarine launch capabilities. The proposed legislation places no practical, political or perception barrier to any of these activities. Instead it effectively seeks to override options for any future legal challenge based around the scope and adequacy of nuclear safeguards and does nothing to signal concern over India's nuclear weapons ambitions. Such a cavalier approach is not in the best interests of Australia or the region.

(iii) The conflict with existing international treaty obligations and the proposed treaty action:

- The proposed Indian uranium sales deal and this specific piece of legislation puts trade symbolism ahead of regional responsibility. The sales deal, aided by this legislation would increase nuclear safety and security concerns, fail to advance non-

proliferation outcomes and is in clear conflict with Australia's international obligations under the South Pacific Nuclear Weapons Free Zone Treaty (Treaty of Rarotonga) which says:

States Parties are obliged not to manufacture or otherwise acquire, possess, or have control over any nuclear explosive device anywhere inside or outside the Treaty zone; not to seek or receive any assistance in this; not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any State; and not to provide sources or special fissionable materials or equipment to any non-nuclear weapon State (NNWS), or any nuclear weapon State (NWS) unless it is subject to safeguards agreements with the (International Atomic Energy Agency) IAEA.

Note: Article IV of the South Pacific Nuclear Weapons Free Zone Treaty obliges signatories to not supply equipment or material to countries not under full scope safeguards. India is not under full scope safeguards.

- ACF is concerned that despite clear legal advice from ANU's Professor Don Rothwell, in relation to the Indian uranium sales deal highlighting that any such action would conflict with Australia's extant international obligations, there has been no credible response or justification from the Australian government. Rather than address a very serious concern that affects Australia's international reputation, the government appears intent on playing issue management. This is an unacceptable approach to international law and treaty obligations. The earlier JSCOT Inquiry specifically addressed this issue and called for clarity and detail on this tension from the Government – this has not been forthcoming. Instead we now have this bolt-on after the event protection of private rather than public interest.

- It is of great concern that an existing Treaty as popular, proven and long-standing as the South Pacific Nuclear Weapons Free Zone Treaty appears to have been sacrificed to facilitate a risky trade deal. ACF urges the Committee to renew the prudent call made earlier by JSCOT and seek a public response from the government about the conflict between the proposed treaty action and the SPNWFZ and to make public any government or agency legal advice on this issue – or on related legal concerns about non-compliance with the Safeguards Act. This should occur and be subject to scrutiny well before any further legislative action is taken on this issue.

(iv) Information and procedural deficiencies with the Indian deal are not addressed by the proposed legislation:

- For two decades until 2010 Mr John Carlson was Director General of the Australian Safeguards and Non-Proliferation Office and charged with oversight of Australian uranium sales. in a paper published by the Lowy Institute Mr Carlson described the India uranium deal as legally insecure and said Australia may be unable to keep track of what happens to uranium supplied to India. He stated that *without proper reporting, Australia has no way of knowing whether India is in reality meeting its obligations to identify and account for all the material that is subject to the*

agreement, and to apply Australia's safeguards conditions to this material. It is not good enough to simply say that we trust India because it has an 'impeccable' non-proliferation record (and India's record in any case is not 'impeccable').

- Mr Carlson has noted the following areas in which the Indian uranium deal varies from existing uranium agreements, these include:

  (a) *Consent to reprocessing – reprocessing, involving separation of plutonium from spent fuel, is the most sensitive stage of the nuclear fuel cycle. To date Australia's consent to reprocessing has been limited to the EU and Japan, and has been given on what is called a programmatic basis, i.e. Australia has approved the specific 'downstream' facilities using separated plutonium and the purposes involved. In this agreement, however, Australia has effectively given consent in advance for India to reprocess in accordance with an 'arrangements and procedures' document India concluded with the US in 2010. This covers safeguards at two reprocessing plants which India plans to build, but includes only a vague reference to management of plutonium, and nothing corresponding to programmatic consent;*

  (b) *Right of return – Australia's standard conditions include a right for Australia to require the return of material and items if there is a breach of an agreement. This agreement contains no such provision.*

  (c) *Fallback safeguards – Australia's standard condition is that, if for any reason IAEA (International Atomic Energy Agency) safeguards cease to apply, the parties are to establish safeguards arrangements that conform with IAEA safeguards principles and procedures and provide equivalent assurance. This agreement requires only that the parties consult and agree on 'appropriate verification measures', a vague term readily open to differing interpretations;*

  (d) *Settlement of disputes – Australia's standard requirement is for negotiation, backed by an arbitration process. This agreement refers only to negotiation, with no mechanism for resolving deadlock.*

  (e) *Even more consequential than the agreement itself may be a second, follow-on text that the public may never get to see, a so-called 'administrative arrangement' which sets out the working procedures for the agreement. Officials are presumably working on this at present. The key question here is, will this administrative arrangement enable Australia to track and account for the nuclear material that is subject to the agreement with India?*

  (f) *The administrative arrangement should set out detailed procedures for identifying and accounting for the specific nuclear material to which the agreement applies. This includes not only the initially-supplied Australian uranium, but all subsequent generations of material derived from it, especially plutonium. If it is not possible to apply the agreement's provisions to specific material, the agreement will be meaningless.*

(g) To be effective, these procedures need to include a requirement for regular reports to Australia showing the flow of material under the agreement through the nuclear fuel cycle in India. Australia needs to be able to track and account for this 'Australian-obligated nuclear material'. This is both a proper public expectation and a legal requirement under section 51 of the Safeguards Act.

- This is a deep critique from a pro-nuclear industry insider and highlights the need for more, rather than less scrutiny. ACF believes there is a case for the Committee to seek to review the Administrative Arrangements that provide the basis of the sales deal. ACF further notes that Mr Carlson is not alone in being a senior pro-uranium, nuclear policy specialist who raised detailed concerns over the India deal through the JSCOT process. Mr Ron Walker, the former Chair of the Board of Governors of the International Atomic Energy Agency, also critiqued the terms of the deal. ACF does not support the any reduction in legal recourse options in relation to this issue.

(v) Fukushima and the proposed treaty action:

ACF notes that it has been formally confirmed that Australian uranium directly fuelled the continuing Fukushima nuclear crisis:

We can confirm that Australian obligated nuclear material was at the Fukushima Daiichi site and in each of the reactors.... (Dr Robert Floyd, d/g Australian Safeguards and Nuclear Safety Organisation, October 2011).

- ACF maintains that nuclear 'business as usual' or preferential legal treatment as is contained in the proposed legislation cannot proceed in the shadow of Fukushima. Investigations following the March 2011 disaster identified profoundly deficient practises on the part of TEPCO, the utility that operates the Fukushima plant. These were not captured in the Australian bi-lateral nuclear agreement. These revelations highlight the need for a detailed review of the adequacy of existing regulatory regimes – not additional legislative cloaking initiatives.

The need for review has been recognised at the highest international level. In September, 2011 the UN Secretary General released a key report at the UN Summit on Nuclear Safety entitled *United Nations system-wide study on the implications of the accident at the Fukushima Daiichi nuclear power plant*.

The report has direct significance for Australia given it was Australian uranium inside the Fukushima Daiichi reactor complex at the time of the meltdown. Radioactive rocks dug in Kakadu and northern South Australia are now the source of the fallout causing serious problems in Japan and far beyond. Given this, the Secretary-General's specific call for Australia to conduct *an in-depth assessment of the net cost impact of the impacts of mining fissionable material* (i.e. uranium) *on local communities and ecosystems* demands an effective response.

- ACF notes and welcomes the recognition the UN call was given by the earlier JSCOT Review into the Agreement between the Government of Australia and the

Government of the United Arab Emirates on Cooperation in the Peaceful Uses of Nuclear Energy (JSCOT Report 137, February 2014) which recommended that:

…the Government report to the Parliament on what action it has taken to implement the recommendations of the United Nations System Wide Study on the Implications of the Accident at the Fukushima Daiichi Nuclear Power Plant.

ACF notes that, sadly and inexplicably, this never happened. In the absence of this review, or any related review of the adequacy of safeguard arrangements, ACF rejects the assumption expressed by sales proponents that the India deal would set high international standards. It is indefensible to seek to advance a further highly controversial uranium sales deal in the absence of any meaningful attempt to address this modest and prudent recommendation – let alone to further seek to constrain legal recourse around compliance with long standing international treaty obligations.

(vi) Australia's role in helping address widespread 'energy poverty' in India through renewable energy systems and resources

- ACF notes that proponents of the proposed legislation have based much of their case on the need for Australia to actively support Indian moves to address widespread 'energy poverty'. ACF strongly supports such moves but maintains there is a compelling case for this to be through renewable energy, rather than fossil or uranium fuel based systems.

- Renewable energy sources are now a more significant contributor to the global energy mix than ever before, while nuclear energy's share in the world's power generation mix has declined steadily over the past two decades, following its peak of 17 per cent in 1993. Since then it dropped to around 10 per cent in 2012, while its share of global commercial primary energy production dropped dramatically to 4.5 per cent, a level last seen in 1984 (*World Nuclear Industry Status Report 2013*).

- Nuclear electricity has extremely high capital costs and is centralised and risky, while renewable energy is faster to deploy, more flexible and fit for purpose, as well as safer and cheaper. Australia's renewable energy expertise and resources mean we are well placed to help keep – or put – Indian lights on, while ensuring the Geiger counter stays off.

- ACF supports the 'leap-frog' view of technology – the idea that developing nations can jump past dirty, dangerous energy sources like coal and uranium by investing in clean, renewable energy. ACF believes the growing needs and demands in developing nations are best met through the application of advanced and flexible options. This can be clearly seen in the world of telecommunications. In developing nations the growing human aspiration for connection is being met, not by poles and wires, but by wireless and mobile platforms. ACF maintains this model also applies to energy. Instead of high-cost, high-risk options like nuclear we should be facilitating and embracing flexible and easily deployable renewable energy options.

Conclusion:

- ACF welcomes the Committee's attention to this proposed legislation. We maintain there are serious and unaddressed concerns that have not be given credible or measured attention to date and the clear need for more scrutiny is in direct conflict with the intent of this proposed legislation.

- ACF also views this as an important test of the robustness of Parliamentary procedures and mechanisms. This is especially the case as two previous JSCOT Inquiries into nuclear matters were not respected by other political actors.

- An earlier JSCOT review into the uranium sales agreement with Russia (JSCOT Report 94) recommended that any advance of the treaty action be contingent on the realisation of a series of considered and reasonable pre-conditions. This was ignored by the Executive. A deal was advanced despite JSCOT's clear and prudent recommendation. JSCOT's position has subsequently been justified and Australian uranium sales to Russia remain suspended.

- Similarly, JSCOT's review into the uranium sales agreement with the United Arab Emirates (JSCOT Report 137), made a series of recommendations to be realised prior to further support for the treaty action. Again, these were sidelined by commercial and political interests. In the context of the current proposed legislation JSCOT gave detailed attention to the many deficiencies and concerns around the Indian sales deal and recommended a highly precautionary approach. Sadly, this has not been accepted by the Government and instead we have a rush to paper over fundamental flaws with this sales plan through the introduction of this legislation.

- ACF welcomes this opportunity to highlight our deep concerns about both the wider Indian uranium sales plan and this specific legislative enabler. We would welcome the opportunity to explore these with the Committee at any hearing or to provide any further detail should this be of value to your deliberations.

- For any further clarification or detail on the issues addressed in this submission please contact