

Chapter 1

Introduction

Referral of inquiry

1.1 On 9 November 2016, the Civil Nuclear Transfers to India Bill 2016 (the bill) was introduced in the House of Representatives by the Minister for Foreign Affairs, the Hon Julie Bishop MP. On 10 November 2016, the Senate referred the provisions of the bill to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 24 November 2016. The Selection of Bills Committee listed the following reasons for referral:

To ensure the bill achieves the object of codifying, for the special case of India, and for the purposes of the relevant laws, the content of Australia's relevant international obligations in relation to nuclear safeguards to be applied by the IAEA [International Atomic Energy Agency] in India.¹

Conduct of inquiry

1.2 The committee advertised the inquiry on its website, calling for submissions to be lodged by 17 November 2016. The committee also wrote directly to a range of individuals and organisations likely to have an interest in the bill, drew their attention to the inquiry and invited them to make written submissions.

1.3 The committee received nine submissions to the inquiry. These submissions are listed at Appendix A and are published on the committee's website.

Background

1.4 On 5 September 2014, the *Agreement between the Government of Australia and the Government of India on Cooperation in the Peaceful Uses of Nuclear Energy* (the Agreement) was signed in New Delhi. On 28 October 2014, the Agreement was tabled in the Parliament and referred to the Joint Standing Committee on Treaties (JSCOT). JSCOT made six recommendations in the report tabled on 8 September 2015, including:

- urging the Australian Government to commit significant diplomatic resources to encouraging India to become a party to the Comprehensive Test Ban Treaty, and to negotiate a Fissile Material Cut-Off Treaty;
- that the Australian Government consider facilitating the negotiation of a nuclear arms limitation treaty for the Indian subcontinent region;
- that, should the Australia-India Agreement be ratified, uranium sales to India only commence once:
 - India has achieved the full separation of civil and military nuclear facilities, as verified by the IAEA;

1 Selection of Bills Committee, *Report No. 8 of 2016*, 10 November 2016, Appendix 1.

- India has established an independent nuclear regulatory authority under law;
 - the Indian nuclear regulator's existing policies and arrangements have been reviewed to ensure its independence;
 - the frequency, quality and comprehensiveness of onsite inspections at nuclear facilities have been verified by the IAEA as being best practice standard;
 - the lack of sufficient planning for the decommissioning of nuclear facilities has been rectified;
- that the Australian Government outline the legal advice it has received regarding the consent to enrichment provisions in Article VI of the proposed Australia-India Agreement; and
 - that the Australian Government outline the legal advice it has received concerning whether the proposed Australia-India Agreement breaches Australia's obligations under the South Pacific Nuclear Free Zone Treaty (Rarotonga Treaty).²

Government response to JSCOT report

1.5 The Australian Government tabled a response to the committee's six recommendations on 11 November 2015.

1.6 The response to recommendation one and two provided assurance that India has been a key focus of its efforts to promote entry into force of the Comprehensive Nuclear-Test Ban Treaty as well as negotiations towards a fissile material cut-off treaty.³ It noted that although only the states involved can decide to negotiate an arms limitation agreement, Australia and India have established an annual dialogue to discuss issues on nuclear disarmament and ways to reduce the risk of nuclear conflict in the region.⁴

1.7 Of particular interest to this inquiry is the government's response to recommendation three, which suggested that uranium sales to India only commence once certain conditions are met. Although the response agreed with the committee on the importance of the conditions raised, it stated the government was satisfied that steps had been taken to address each condition, and did not agree that exports to India should be deferred.⁵

1.8 The response noted that the Agreement already provides adequate provisions for the separation of India's civil and military facilities, and pointed out that India is

2 Joint Standing Committee on Treaties, *Report 151: Treaty tabled on 28 October 2014*, September 2015, pp xiii–xiv.

3 Australian Government Response to the Joint Standing Committee on Treaties *Report 151*, p. 1.

4 Australian Government Response to the Joint Standing Committee on Treaties *Report 151*, pp 1–2.

5 Australian Government Response to the Joint Standing Committee on Treaties *Report 151*, p. 4.

working to enhance its regulation in nuclear safety. The response noted that the remaining conditions were similar to those made by the Integrated Regulatory Review Service (IRRS), which provided an in-depth review of India's performance against IAEA safety requirements, and that the IAEA and India have developed an action plan to address the IRRS recommendations.⁶

1.9 The response to recommendation four noted that no specific legal advice regarding the consent to enrichment provisions had been sought. The response to recommendation five advised that it is not the practice of the Australian Government to disclose its legal advice.⁷

Purpose of the bill

1.10 The purpose of the bill is to 'codify, for the special case of India, the content of Australia's relevant international obligations for the purposes of relevant laws'.⁸ This makes it clear 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 under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the South Pacific Nuclear Free Zone Treaty, if particular conditions are met.

1.11 The bill will protect uranium mining companies in Australia from domestic legal action challenging the consistency of the safeguards applied by the IAEA in India and Australia's international non-proliferation obligations. It will also protect any future bilateral trade in other nuclear-related material or items for civil use.⁹

1.12 In 2008, the Nuclear Suppliers Group (NSG) accepted that nuclear trade would be possible with India on the basis of its commitments and actions in support of nuclear non-proliferation, even though it is not a signatory to the NPT.¹⁰ The decision was agreed to by the 48 members of the NSG, which includes all of the major nuclear supplier countries and others that are active in non-proliferation efforts. This includes Australia which sits on the Board of Governors of the IAEA.¹¹

1.13 Under this framework and related agreements made with India, the IAEA applies a robust safeguards regime to India's civil nuclear fuel cycle, where Australian obligated nuclear material will exclusively remain. The Department of Foreign Affairs and Trade (DFAT) emphasized that the measures in place to prevent the diversion of Australian uranium from the civil part of India's fuel cycle are at least as strong as

6 Australian Government Response to the Joint Standing Committee on Treaties *Report 151*, pp 2–4.

7 Australian Government Response to the Joint Standing Committee on Treaties *Report 151*, p. 4.

8 Explanatory Memorandum, p. 2.

9 Explanatory Memorandum, p. 2.

10 Department of Foreign Affairs and Trade and the Australian Safeguards and Non-Proliferation Office, *Submission 5*, p. 1.

11 Minerals Council of Australia, *Submission 4*, p. 2.

those in place for other export destinations.¹² These include explicit commitments by India in a binding bilateral agreement with Australia, and robust inspection and accounting procedures enforced by the IAEA.¹³ According to DFAT, the United States, Canada, France, Japan, Korea, Russia and Kazakhstan, among others, have established nuclear cooperation with India on the basis of the NSG's 2008 decision.¹⁴

1.14 The department highlighted that since 2008, India has met its commitments to support international non-proliferation efforts, which include: continuing its moratorium on nuclear testing, separating its civil and military nuclear activities and accepting IAEA safeguards on the former. Furthermore, India has brought its Additional Protocol with the IAEA into force and is working with Australia and others to promote negotiations on a Fissile Material Cut-off Treaty.¹⁵

The provisions of the bill

1.15 Clauses 1 to 7 establish the short title of the Act; its commencement (the day after the Act receives Royal Assent); its object, simplified outline and definitions; as well as asserting that it extends to Australia's external territories and binds the Crown in all its capacities.

1.16 Subclause 8(1) provides that, as long as the conditions set out in subclause 8(3) are met, the exercise of powers or the performance of functions under the *Nuclear Non-Proliferation (Safeguards) Act 1987* (and any prescribed legislative instruments) regarding the export from Australia of nuclear or nuclear-related items, is considered consistent with Australia's obligations under specified international agreements relating to the safeguards to be applied in India. The subclause is drafted with reference to Section 70 of the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

1.17 Subclause 8(2) provides that, as long as the conditions set out in subclause 8(3) are met, the exercise and performance of functions by a person under the *Defence Trade Controls Act 2012* or the *Customs (Prohibited Exports) Regulations 1958* (and any prescribed legislative instruments) regarding the export from Australia of nuclear material or nuclear-related items are considered to have had due regard to Australia's obligations, responsibilities and commitments, under the specified international agreements in relation to the safeguards to be applied in India.

1.18 Subclause 8(3) specifies the conditions referred to in subclauses 8(1) and 8(2). The conditions state that both the Australia-India Agreement and the India-IAEA Agreement must be in force, and that person exercising a power or performing a function in connection with the export from Australia of nuclear material or nuclear-

12 Department of Foreign Affairs and Trade and the Australian Safeguards and Non-Proliferation Office, *Submission 5*, p. 2.

13 Department of Foreign Affairs and Trade and the Australian Safeguards and Non-Proliferation Office, *Submission 5*, p. 1.

14 Department of Foreign Affairs and Trade and the Australian Safeguards and Non-Proliferation Office, *Submission 5*, p. 2.

15 Department of Foreign Affairs and Trade and the Australian Safeguards and Non-Proliferation Office, *Submission 5*, p. 2.

related items must be satisfied that IAEA safeguards will apply to the material or item(s) in India. This provision refers to how administrative procedures related to export from Australia or nuclear material or nuclear-related items shall be exercised.

1.19 Subclause 8(4) provides that the section applies to the exercise of a power or performance of a function before, on or after commencement of the Act. However, the Explanatory Memorandum asserts that 'the Act will not negatively affect any person as a result of the retrospectivity of this provision'.¹⁶

1.20 Clause 9 provides that, if the India-IAEA agreement is amended, the Minister must give notice of the amendment by notifiable instrument. This is to ensure that the Parliament will be notified of any amendment agreed by India and the IAEA. It is important to note, that any amendment that materially affected the operation of the India-IAEA agreement would need to be approved by the IAEA's Board of Governors, of which Australia is a member.

1.21 Clause 10 provides that the Minister may make rules prescribing certain matters. Subparagraphs 8(1)(ii) and 8(2)(ii) specify matters that may be prescribed by rules.

