AUSTRALIAN CONSERVATION FOUNDATION

[1 FEBRUARY 2024]

Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee - Inquiry into the *Australian Naval Nuclear Power Safety Bill 2023*

Introduction

The Australian Conservation Foundation Inc (ACF) was founded in the mid-1960s with the support of eminent Australians, the Government and the wider community and is Australia's lead national environment organization and advocate for the environment.

ACF is strictly non-partisan, and we are proud of our political independence.

ACF and AUKUS

ACF holds serious concerns around the AUKUS nuclear submarine project, its costs and consequences and the way this initiative is being advanced.

ACF welcomes this opportunity to comment on the current Bill but maintains there needs to be a much broader examination of the AUKUS proposal. ACF supports the broad civil society call for further scrutiny and a dedicated Parliamentary inquiry into the wider AUKUS initiative. A dedicated and transparent inquiry with terms of reference that address the cost and rationale of AUKUS as well as nuclear proliferation, emergency management, and waste management is required. The current inquiry is part of the modular and constrained approach to assessing and advancing AUKUS which is failing to address genuine concerns with the strategic foundation of AUKUS.

ACF's participation in this inquiry should not be seen as tacit approval for the AUKUS initiative overall. ACF's focus in this submission is on the environmental ramifications of AUKUS in Australia. The submission starts from the premise a regulatory system of some kind related to AUKUS in Australia will be adopted by Federal Parliament. The submission identifies gaps in the regime and issues that require further consideration and provides practical recommendations for improvement.

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Summary

- ACF's is deeply concerned with the Bill's potential for approval to be granted for the storage in Australia of high-level radioactive waste from submarines operated by other countries.

- The safety of the Australian public should be the paramount concern here. The Bill's proposed objects do not adequately reflect this. The objects need to be expanded.

- The current drafting does not provide for any meaningful community information, consultation or reporting. The principles of open government and accountability would suggest that the default position ought to be that information will be available but permit exceptions based on regulations or ministerial discretion.

- The current drafting permits abrogation of responsibility by Commonwealth entities. Non-government third parties (e.g. contractors) could be solely responsible for compliance with the relevant duties. This could include organisations based outside Australia. Given the nature of the risk, Commonwealth entities should be subject to ongoing responsibility, regardless of contractual arrangements.

- The Bill proposes a compliance regime which would make enforcement of the nuclear safety duty problematic. The use of "as far as reasonably practicable" is rare in the criminal offence context and should not be used in the context of nuclear safety.

- Licences ought only to be issued to entities that have demonstrated capability and record and reputation for meeting their regulatory obligations. A requirement that licences only be issued to entities that are a fit and proper person should be included.

Other issues addressed in this submission are:

- Consent considerations and the UN Declaration on the Rights of Indigenous Peoples
- Nuclear Non-Proliferation Treaty
- A Nuclear Industry by Stealth?
- Disregard of advice from ARPANSA's Radiation Health and Safety Advisory Council
- Clarification on Relationship of New Regulator with Existing Agencies

Summary of Recommendations

1. The Bill be amended to ensure that it only provides for the licencing of radioactive waste storage facilities for HLW from Australian submarines.

2. The Federal Government develop an open approach to future HLW management in Australia that is informed by the wider consideration of domestic ILW (intermediate-level waste) management.

3. That the objects of the Bill be redrafted to address protection of a range of people and the environment, and transparency of information and decision-making and accountability of the Government.

4. That the Bill be amended to improve transparency by requiring, subject to national security exceptions, public notification of applications and decisions, a public register of key applications and decisions and mandatory reporting requirements. The Committee should consider principles of open government and comparable regulatory regimes in developing its detailed recommendations to improve transparency.

5. That the Bill be amended to establish a clear-cut obligation to ensure nuclear safety and then provide a defence if the defendant can demonstrate that they exercised due diligence and took all reasonably practicable precautions.

6. That the Bill be amended to recognise and reflect the foundational management principle of free, prior and informed consent (FPIC).

7. That the Bill be amended to ensure the Commonwealth cannot contract out of liability in relation to compliance with the duties on licence holders created by the Bill. A mechanism should be included to ensure the Commonwealth bears responsibility in relation to nuclear safety for the actions of a contractor who holds a licence.

8. That the Bill be amended to ensure the definition of Commonwealth Contractor does not include sub-contractors to a Commonwealth sub-contractor.

9. That the Bill be amended such that the responsibility of each person in the supply chain or logistics chain is expressed, including in terms of the duties and incident reporting, in a manner similar to the National Heavy Vehicle Laws and Work Health and Safety Laws

10. That the Bill be amended to include a requirement that licences only be issued to entities that are a fit and proper persons similar to the *Protection from Harmful Radiation Act 1990* (NSW) or *Protection of the Environment (Operations) Act* 1997 (NSW).

11. That the Committee request ARPANSA's Radiation Health and Safety Advisory Council give evidence and consider the divergence of the Bill from the Council's 2022 advice to the ARPANSA CEO.

12. The Committee recommend the ARPANS Act exclusion be modified or removed.

13. The Committee take evidence from the Department on, and consider, the interaction between the new regulatory regime, ARPANSA and potentially relevant state and territory regulatory controls.

14. The Committee consider amendments to provide for a formal means of contact between ARPANSA and the new regulator. This could include a formal position with the new regulator of the requirement to consider ARPANSA guidance materials.

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High-Level Radioactive Waste from Other Countries

The AUKUS initiative brings a profound elevation in the cost, complexity and challenges of radioactive waste management in Australia through the introduction of High-Level Waste (HLW)[1]. This material needs to be securely isolated from people and the wider environment for periods of up to 100,000 years.[2]

Speaking on the ABC in March 2023 Defence Minister Marles stated:

> We are making a commitment that we will dispose of the nuclear reactor. That is a significant commitment to make. This is going to require a facility to be built in order to do that disposal, obviously that facility will be remote from populations, and today we are announcing that that facility will be on Defence land, current or future.

Part of the AUKUS deal is that Australia must manage all radioactive waste generated by the submarines on Australian soil. Minister Richard Marles said this was a pre-condition for the whole program.

The ABC also reported that while the sole responsibility of the submarine nuclear waste disposal lies with Australia, the White House has promised the US and UK will help, quoting a White House representative:

> The United Kingdom and the United States will assist Australia in developing this capability, leveraging Australia's decades of safely and securely managing radioactive waste domestically.

At no point has a compelling case been made for why Australia should take responsibility for the management of this waste, especially in relation to waste arising from purchased secondhand US Virginia class submarines.

This lack of rationale was highlighted in an article by Kym Bergmann titled the Nightmare of Nuclear-powered Submarine Disposal in the July-August, 2023edition of the Asia-Pacific Defence Reporter (**APDR**):

> Why Australia has committed to this expensive process, hazardous to human life is unknown. In summary form, we will need to put in place facilities for the following:
> • To remove the fuel from the sub.
> • To store the recently removed fuel in pools of water.
> • To transfer the fuel from the pools to dry casks.
> • To store the dry casks on an interim basis.
> • To permanently dispose of the spent fuel deep underground.

[1]The *National Radioactive Waste Management Act 2012*(Cth) defines "*high level radioactive material*" as "*material which has a thermal energy output of at least 2 kilowatts per cubic metre*."

[2] *IAEA Technical Document – theManagement of High-Level Radioactive Waste, IAEA Bulletin, Vol.21, No.4*

• To permanently dispose of the rest of the reactor (excluding the fuel).

It is unknown whether the estimated project cost of $368 billion covers this. It is unknown where the facilities will be built. It is unknown whether the decommissioning of submarines
will occur at their east coast base. In addition, the U235 will have to be in a secure location and then guarded forever to prevent its theft for conversion into weapons.

APDR went on to ask:

> One of the many mysteries around the AUKUS deal is why Australia has agreed to disposing of the Virginia class submarines here. Surely the logical thing would be to have an agreement where the US took them back at the end of their lives and decommissioned them using their well established procedures.
> Who benefits from compelling Australia to develop our own waste disposal industry? Why not lease the used Virginia class subs rather than purchase them outright?
> To this can be added the mystery of why agree to second hand submarines at all? Australia is in the process of voluntarily transferring $3 billion to subsidise US industry – with no deliverables – to build new submarines and in return we will receive ones that are around one third of their lives old.
> It seems like turning up to a car showroom, handing over the cash for a new vehicle but leaving with one that's several years old. No one has been able to explain how this is even remotely a good deal for Australian taxpayers.

ACF is deeply concerned about the possibility of mission creep with the approach to radioactive waste management. Neither the US or UK have a disposal pathway for HLW from nuclear submarines. This is despite decades of experience with the generation and management of HLW from civilian and military nuclear activities.

Given the secrecy that has characterised the AUKUS arrangement to date, the deeply divisive and top-down approach of Australia's earlier attempts to locate a national disposal site and that the Bill contemplates the management of waste and other materials from UK and US submarines, this concern over the potential for increasing the volume, complexity and source of AUKUS waste streams needs active attention from the Committee.

As the AUKUS plan requires HLW disposal, ACF suggests that the Committee, through receiving evidence from the Department and in its recommendations, seeks to improve transparency around radioactive waste challenges and options. In particular, the Committee recommends an open approach to future HLW management that is informed by the consideration around domestic ILW (intermediate-level waste) management.

The Committee should move to clearly reject any attempt to make Australia host to international high level radioactive waste (HLW). The current Bill needs modification in this regard.

Clauses 7 and 12 of the Bill read together can be interpreted as including radioactive waste from an UK and US submarines. This is because the definition of *NNP Facility* (naval nuclear propulsion facility) in cl 12 includes:

> (d) a radioactive waste management facility that:
> (i) is for managing, storing or disposing of radioactive waste from an AUKUS submarine; and
> (ii) has an activity that is greater than the activity level prescribed by the regulations.

This section applies to an '*AUKUS submarine*' rather than specifically to an Australian submarine. Section 7 defines AUKUS submarines to include both Australian submarines and UK/US submarines:

> 7 What are AUKUS submarines?
>
> (1) An AUKUS submarine is:
>
> (a) an Australian submarine; or
>
> (b) a UK/US submarine; and
>
> includes such a submarine that is not complete (for example, because it is being constructed or disposed of).
>
> (2) An Australian submarine is a conventionally-armed, nuclear-powered submarine operated, or under construction in 19 Australia, for naval or military purposes by Australia.
>
> (3) An UK/US submarine is a conventionally-armed, nuclear-powered submarine operated, or under construction in Australia, for naval or military purposes by the United Kingdom or the United States of America.

The scope of clause 12(d) could be limited by simply removing the reference '*AUKUS submarine*' and replacing it with '*Australian submarine*'. This amendment would mean that a NNP facility could be a radioactive waste management facility for the management of radioactive waste from an Australian submarine only. Alternatively, clause 12(d)(i)) could be altered to include "*while operating in Australian waters*" after "*AUKUS submarine*".

Whatever the amendment, the effect needs to be clear that the Bill does not provide for Australian storage of HLW from the submarines of other countries.

Recommendation: The Bill be amended to ensure that it only provides for the licencing of radioactive waste storage facilities for HLW from Australian submarines.

Recommendation: The Federal Government develop an open approach to future HLW management in Australia, that is informed by consideration of domestic ILW (intermediate-level waste) issues.

Improving the Objects of the Bill

The objects are silent about accountability and transparency in decision making except by implication through the concept of "trust in relation to the nuclear safety". The objects of the Bill reflect the focus on AUKUS promotion as much if not more than measured regulation. They currently are:

> (a) to promote the nuclear safety of activities relating to AUKUS submarines; and
>
> (b) to promote public confidence and trust in relation to the nuclear safety of Australia's nuclear powered submarine enterprise; and
>
> (c) to promote the defence and interests of Australia; and
>
> (d) to support the AUKUS partnership.

Objects (c) and (d) should not be the primary considerations of an independent regulator and are inconsistent with fundamental international radiation protection frameworks. The IAEA 2022 International Legal Framework for Nuclear Safety is crystal clear and states that the fundamental safety objective is to protect people and the environment from the harmful effects of ionizing radiation.

The failure to recognise or reflect this in what is being proposed as the foundational document for a new, complex area of radiological risk that Australia has previously had scant experience of is profoundly deficient and should not be accepted by the Committee.

The role of an effective independent regulator should be to effectively protect people and the wider environment from the adverse impacts of radiation.

ACF submits the objects clause would benefit from including additional objectives that expressly address:

- protecting workers, other persons and communities against harm to their health, safety and welfare through the elimination or minimisation of risks arising from regulated activities;
- promoting the provision of advice, information, education and training in relation to nuclear safety;
- ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act

The Australian Radiation Protection and Nuclear Safety Act 1998 (ARPANS Act) establishes a regime to regulate the operation of nuclear installations and the management of radiation sources, including ionizing material and apparatus and non-ionizing apparatus. The object of the ARPANS Act is:

> The object of this Act is to protect the health and safety of people, and to protect the environment, from the harmful effects of radiation.

The *Australian Naval Nuclear Power Safety (Transitional Provisions) Bill 2023* does provide for the transition of existing licences for certain facilities granted under the ARPANS Act which would now be considered a regulated activity to be transferred to the Bill. Therefore, the Bill establishes two separately regulatory pathways:

- with naval nuclear propulsion plants, facilities and material being regulated by the Bill and the new Regulator; and
- other civilian/medical nuclear plants, facilities and material continuing to be regulated by the Australian Radiation Protection and Nuclear Safety Agency.

ACF maintains that the safety of people and communities and the protection of the environment should be high priorities in both regulatory schemes.

Recommendation: That clause 6 be redrafted to the following effect:

The objects of this Act are:

(a) to promote the nuclear safety of all activities relating to AUKUS submarines;
(b) to protect the health and safety of people, and to protect the environment; and
(c) to **ensure** public confidence and trust in relation to the nuclear safety of Australia's nuclear-powered submarine enterprise including, except where necessary in the interests of national security or protection of technology, through –

(i) ensuring that the relevant and meaningful information relating to AUKUS submarines is available to the public, except where it is necessary to limit the provision of such information for reasons of national security, defence operational capability or the protection of confidential technology and learnings;
(ii) providing opportunities for public involvement and participation in decisions relating to activities that may impact communities; and

~~(c) to promote the defence and interests of Australia; and~~
~~(d) to support the AUKUS partnership;~~
(c) protecting workers, other persons and communities against harm to their health, safety and welfare through the elimination or minimisation of risks arising from regulated activities;
(d) promoting the provision of advice, information, education and training in relation to nuclear safety;
(e) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act

Transparency and Accountability

For many years following Federation, the protection of Government information through secrecy provisions was quite normal. However, from the 1970s with the introduction of Freedom of Information Legislation around the country, the more modern view has been that transparency and the availability of information to the public is fundamental to the functioning of a democratic system of government.

The Australian Public Service Commission has identified that "Openness of government, transparency around decisions, and management of information are all key drivers of public trust."[3] The OECD has made similar observations: "Transparency is therefore essential to hold governments to account and maintain confidence in public institutions."[4]

[3] State of the Service report Chapter 2 Transparency and Integrity.
[4] OECD library, Public Finance, Transparency in Governmnet decision Making

The Office of the Victorian Information Commissioner said in March 2022[5]:

> Trust in government is crucial to a healthy democracy. We need to have confidence in government's ability to discharge its responsibilities honestly, fairly, and in the public interest. Giving the public access to information held by government plays an important role in building this confidence.
>
> Open and transparent government enables us to gain insight into what government is doing, why it is doing it and how. This empowers us to scrutinise government decisions and hold government to account, which is crucial to building trust. An informed public is also more engaged in the democratic process and can make meaningful contributions to public policy.

The House of Lords in *R v Shayler* observed:[6]

> Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. …Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant

However, it has to be accepted that when it comes to matters of national security (and some other areas of government decision making) a balance must be struck. As observed by Finn J in *Bennett v President, Human Rights and Equal Opportunity Commi*ssion (2003) 134 FCR 334, [98]–[99], "[o]fficial secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not".

At the time the AUKUS initiative was announced in September 2021 the acquisition on nuclear submarines was described by the Chief of Navy Vice Admiral Michael Noonan as "*the single most consequential capability decision*" and one that would "*no doubt change the shape of our nation*".

Given the profound strategic, safety and economic implications of this decision there has been scant public or Parliamentary review or scrutiny of the AUKUS project. it is unacceptable that such a fundamental policy decision can be advanced with such limited transparency or review. ACF maintains this approach actively reduces scrutiny and precludes the credible and comprehensive consideration of the suite of complex issues. The current modular approvals approach undermines community confidence and procedural credibility.

The close alignment between the proposed regulator and the proponent (Defence) makes even more important that transparency and accountability are include in the Bill.

[5] How Transparency and Privacy build Trust in Government 22 March 2022
[6] R v Shayler [2003] 1 AC 247, [21].

The approach being advanced in the Bill is inconsistent with clear ARPANSA guidance and at variance with international principles outlined by the International Atomic Energy Agency (IAEA). IAEA Safety Standards Series No. GSG (general safety guide) 6 states:

> The public rightly expects to have access to reliable, comprehensive and easily understandable (plain, unambiguous and jargon-free) information about safety and regulatory issues in order to form opinions and make fully informed decisions. The public also expects to have fair and reasonable opportunities to provide their views and to influence regulatory decision-making processes.
>
> The effective independence of the regulatory body is a key factor in ensuring safety. In any interaction with interested parties, the regulatory body should not be unduly influenced to take any action that could compromise safety or that would call its independence into question. In this respect, it is to be recalled that the final decision on regulatory matters always lies with the regulatory body. The regulatory body is responsible for the regulatory oversight of safety and should not be biased in favour of or against the use of nuclear or radiation technologies. This message should be communicated to interested parties, including the regulatory body's own staff.

ACF is concerned by the possibility of Ministerial intervention in the operations of the proposed regulator. Clause 105 of the Bill provides the ability for the Defence Minister to issue a binding directive to the regulator should they be satisfied that this is "in the interests of national security". Ministerial satisfaction and national security can be subject to various constructions and interpretations and this very general power could lead to scenarios where the role of the proposed regulator is overly constrained with a resultant diminution in human and environment protection.

The drafting of the Bill appears to start from the position that public participation in the relevant regulatory processes should be limited. Those processes include:

- applications for and grant of licences
- enforcement actions
- amendments to licences
- end of term arrangements for licences
- changes to designated zones.

There will be aspects of these processes that will need to be kept secret. However, the Bill ought to make provision for making information publicly available where that does not impinge on legitimate national security concerns.

One framework for considering public participation is:

- advising the public of the proposal to make a decision e.g. of applications for licences
- allowing the public to make submissions
- informing the public of the outcome
- the keeping of registers of decisions and making these available to the public
- the making of reports to the Minister and making these public.

The following table considers how the Bill currently addresses this framework:

Framework Element	How is it addressed by the Bill?	Comment
Advising the public of the proposal to make a decision e.g. of applications for licences	It is not addressed	The Bill ought to include provisions for advising the public of relevant applications but subject to exemptions issued by the Minister or set out in the regulations
Allowing the public to make submissions	It is not addressed	The Bill ought to include provisions for public notification of proposed decisions and the making of submissions but subject to exemptions issued by the Minister or set out in the regulations
Informing the public of the outcome	cl76 requires enforcement notices to be displayed in a prominent place, otherwise it is not addressed	The Bill ought to include provisions for advising the public of relevant decisions and actions but subject to exemptions issued by the Minister or set out in the regulations
The keeping of registers of decisions	It is not addressed	The Bill ought to include provisions for the keeping of registers of particular decisions and public access to these but subject to exemptions issued by the Minister or set out in the regulations
The making of reports to the Minister and making these public.	The annual report prepared for the Regulator (cl122) and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013*.	The Bill ought to include minimum mandatory reporting requirements that can be the subject of exemptions by the regulations.

The Bill should include mechanisms for the public to obtain meaningful information and also be consulted. In particular, we consider that the Bill could address these issues by:

- at a minimum, including a requirement that the Regulator keep a public register which is made available for public inspection
- that the public be consulted or given the opportunity to comment on significant decisions such as prior to the declaration of any additional designated zones.

The inclusion of a requirement to keep a public register ensures that the community and any non-governmental organisations has access to relevant, meaningful and timely information in respect of the AUKUS submarines and any associated facilities or material. Provisions similar to sections 308 and 309 of the *Protection of the Environment Operations Act 1997* (NSW) would be appropriate for this Bill. In particular, the Regulator should be required to record the following matters in the register, details of:

- each licence application made to the Regulator;
- each decision of the Regulator made in respect of any such licence application;
- each licence issued by the Regulator;
- each variation of the conditions of any such licence;
- each decision of the Regulator to suspend, or cancel any such licence;
- prohibition notices issued under section 78;
- convictions in prosecutions under the Act by the Regulator;
- any reported nuclear safety incidents;
- such other matters as are prescribed by the regulations

ACF acknowledges that there are legitimate circumstances and reasons for not disclosing certain information in order to safeguard Australia's interests and defence priorities. However, the starting point should be to support principles of open government and then provide for exceptions that can be made by the Minister or in the regulations.

Recommendation: That the Bill be amended to improve transparency by requiring, subject to national security exceptions, public notification of applications and decisions, a public register of key applications and decisions and mandatory reporting requirements. The Committee should consider principles of open government and comparable regulatory regimes in developing its detailed recommendations to improve transparency.

Making the Nuclear Safety duty enforceable

The various duties in Part 2 Division 2 are limited by reference to what is "reasonably practicable". For example clause 20 provides:

> A person who is the holder of a licence must establish, implement and maintain a nuclear safety management system that ensures, so far as reasonably practicable, the nuclear safety of regulated activities conducted by the licence holder and other persons authorised by the licence. (emphasis added)

The word "practicable" means "capable of being put into practice, done, or effected, especially within the available means or with reason or prudence".

As a result, the concept of what is practicable is limited by the available means – including the budget. The concept does not imply a balancing of the beneficial outcomes with the costs but rather a limit on what is required by reference to the available means. This limiting of the duty to the available means is evidence by the Bill's definition of 'reasonably practicable' contained in clause 5(2):

> **reasonably practicable**, in relation to a duty imposed on a person under subsection 18(1), 20(1), 22(1) or 24(1) to ensure nuclear safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring nuclear safety, taking into account and weighing up all relevant matters, including:

(a) the likelihood of the hazard or risk concerned eventuating; and
(b) the degree of harm that might result from the hazard or risk concerned eventuating; and
(c) what the person concerned knows, or ought reasonably to know, about:
(i) the hazard or the risk concerned; and
(ii) ways of eliminating or minimising the hazard or risk concerned; and
(d) the availability and suitability of ways to eliminate or minimise the hazard or risk concerned; and
(e) after assessing the extent of the hazard or risk concerned and the available ways of eliminating or minimising the hazard or risk concerned, the cost associated with available ways of eliminating or minimising the hazard or risk concerned, including whether the cost is grossly disproportionate to the hazard or risk concerned.

This definition effectively lowers the standard of compliance to be a subjective determination of what means are available, rather than an objective standard.

Further, the onus of establishing a breach of the duty will fall on the regulator who will be required to establish that the regulated person did not take action that was reasonably practicable and therefore embroils the regulator in an endeavour to prove that the regulated person had the available means.

In ACF's view the duties should not be limited by the concept of "reasonably practicable" but rather should require the holder of the duty to implement and maintain a nuclear safety management system that ensures the nuclear safety of regulated activities. The Bill should then provide a defence if the licence holder having breached the duty establishes they; took proper and practical steps to prevent the breach; and exercised all due care, skill and diligence to prevent the breach. The result would be that the duty holder is not held to an impossible standard of perfection but bears the onus of demonstrating that they exercised due diligence.

This issue interacts with our comments about the abrogation of responsibility by the Commonwealth. The effect of the word "practicable" might be to excuse the Commonwealth and its contractors from liability where a decision has been made to not make sufficient resources available to the various activities and facilities.

Recommendation: That the Bill be amended to establish a clear-cut obligation to ensure nuclear safety and then provide a defence if the defendant can demonstrate that they exercised due diligence and took all reasonably practicable precautions.

Potential abrogation of responsibility by Commonwealth entities

The Bill envisages a regime to regulate 3 types of regulated activities being:

- a facility activity (defined in clause 11)
- a submarine activity (defined in clause 13)
- a material activity (defined in clause 14).

Clause 19 provides that a person must not conduct a regulated activity if the person does not hold an Australian naval nuclear power safety licence (a **licence**) authorising the person to conduct the regulated activity. As a result, a person must apply for a licence under clause 30.

Clause 28 provides that only "*a Commonwealth-related person*" may apply for a licence. Clause 29 of the Bill defines 'Commonwealth-related person' as:

> (1) A Commonwealth-related person is:
> (a) the Commonwealth; or
> (b) a corporate Commonwealth entity; or
> (c) a Commonwealth company; or
> (d) a Commonwealth contractor.
> (2) A person is a Commonwealth contractor if:
> (a) the person is not a person referred to in paragraph (1)(a), (b) or (c); and
> (b) the person is a party to a contract with a person referred to in any of those paragraphs; and
> (c) the contract relates to a regulated activity.

Clearly the class of people who may hold a licence must be limited and they need to be capable of being managed by the Commonwealth and in fact managed by the Commonwealth.

ACF has two concerns about the current drafting.

Firstly, that a licence can be held by a "Commonwealth Contractor" without any oversight by or accountability of the Commonwealth or a corporate Commonwealth entity or a Commonwealth company (we will refer to these collectively for present purposes as the Relevant Commonwealth Entity). The effect of this will almost inevitably be that the Relevant Commonwealth Entity will see the responsibility for the regulated activity as being borne by the Commonwealth Contractor that holds the relevant licence. In this way the Relevant Commonwealth Entity can effectively seek to "contract out" of responsibility for the activity.

Obviously, it is the person who holds the licence who is required to comply with any conditions of the licence and who will be subject to oversight by the Regulator. Whilst it may be practical that the contractor holds the licence, the regime should not enable the Relevant Commonwealth Entity to distance itself from responsibility for ensuring that the activities are carried out to the necessary standards.

This issue might be addressed by requiring that the Commonwealth must exercise a proper and competent supervisory role over the Commonwealth Contractor. This could be achieved by, for example:

- requiring that before the regulator issues a licence to a Commonwealth Contractor, there must be an enforceable undertaking in place from the Relevant Commonwealth Entity as to the supervisory systems that will be implemented by the Relevant Commonwealth Entity. This could deal with issues such as, how standards of work will be set and reviewed, auditing and inspection and reporting and record keeping.

- Requiring that for every licence issued to a Commonwealth Contractor the Relevant Commonwealth Entity hold a supervisory licence, or

- Establishing a chain of responsibility regime that does not excuse the Relevant Commonwealth Entity and Relevant Commonwealth Entity personnel from liability for the actions of Commonwealth Contractors unless it can be shown that the Relevant Commonwealth Entity and the relevant person exercised due diligence to

prevent the occurrence of breaches of relevant standards. This type of arrangement is used in Heavy Vehicle National Law and provides that every party involved in heavy vehicles is accountable for the safety of the heavy vehicle, its driver and load throughout the journey.

ACF's second and associated concern is that the definition of a Commonwealth Contractor extends to sub-contractors. This is because a Commonwealth-related person is a person named in clause 29(1) which includes a Commonwealth contractor which is in turn defined to mean a person party to a contract with a person referred to in clause 29(1). Therefore, a person in a contract with a person who is in a contract with the Commonwealth is within the definition of Commonwealth Contractor.

Recommendation: That the Bill be amended to ensure the Commonwealth cannot contract out of liability in relation to compliance with the duties on licence holders created by the Bill. A mechanism should be included to ensure the Commonwealth bears responsibility in relation to nuclear safety for the actions of a contractor who holds a licence.

Recommendation: That the Bill be amended to ensure the definition of Commonwealth Contractor does not include sub-contractors to a Commonwealth sub-contractor.

Mutual responsibility

The Bill distinguishes between the holder of the licence and the person or class of persons who may be authorised under a licence. The Bill then focusses on the person who holds the licence as being the responsible person. For example, clause 21 concerns the duty to report nuclear safety incidents.

A person who is the holder of a licence must report, in accordance with subclause (3), any nuclear safety incident that occurs in relation to a regulated activity authorised by the licence. In this instance, it is the licence holder who has the duty to report a nuclear safety incident, not anyone who is authorised under a licence to conduct a regulated activity. The nature of the regulated activities is such that notification requirements ought to apply to:

- the licence holder
- the relevant supervisory Commonwealth entity
- any person who witnesses a nuclear safety action.

These types of mutual obligation provisions are well known to work health and safety legislation and environment protection legislation around Australia.[7]

Of course, there is necessarily some sensitivity about such reporting obligations because of the need to maintain secrecy over matters of national security. However, this can be managed through:

[7] For example s16 of the *Work Health and Safety Act 2011* (NSW), see also the duty to report pollution incidents under s 148 of the *Protection of the Environment (operations) Act 1997* (NSW)

- the entity to whom the report must be made
- that entity's information security
- the content of the report
- exemptions in appropriate situations.

Recommendation: That the Bill be amended such that the responsibility of each person in the supply chain or logistics chain is expressed, including in terms of the duties and incident reporting, in a manner similar to the National Heavy Vehicle Laws and Work Health and Safety Laws

Fit and Proper Person

Parliament ought to be concerned to ensure that a licence can only be held by a Commonwealth Contractor if they are a fit and proper person.

By way of example, the *Protection from Harmful Radiation Act 1990* (NSW) provides that an Authority must refuse an application unless it is satisfied that the applicant is a fit and proper person to hold the licence. Section 5 of the Act outlines the matters the Authority may consider when determining whether an applicant is a fit and proper person, including:

- whether the person has contravened relevant legislation, or has held a licence which has been suspended or cancelled
- the record of compliance with relevant legislation of the person
- whether, in the opinion of the Authority, any dealings of the person with regulated material under a licence will or will not be in the hands of a technically competent person
- whether, in the opinion of the Authority, the person is of good repute, having regard to character, honesty and integrity
- whether the, in the previous 10 years, has in this or any other Australian jurisdiction—
  - been convicted of an offence involving fraud, dishonesty or other behaviour that the Authority considers would render the person unfit to hold a licence or accreditation or
  - been subject to a finding of professional misconduct or unsatisfactory professional conduct by a body that regulates, or investigates complaints about, health practitioners and
- whether the person has demonstrated to the Authority the financial capacity to comply with the person's obligations under the licence or accreditation or the proposed licence or accreditation.

Similar concepts can be found in other environmental legislation such as the *Protection of the Environment (Operations) Act 1997* (NSW).

Recommendation: That the Bill be amended to include a requirement that licences only be issued to entities that are a fit and proper person similar to the *Protection from Harmful Radiation Act 1990* (NSW) or *Protection of the Environment (Operations) Act* 1997 (NSW)

AUSTRALIAN CONSERVATION FOUNDATION

Consent considerations and the UN Declaration on the Rights of Indigenous Peoples

A key area of concern for ACF in relation to the AUKUS plan is the long-term management of radioactive waste, particularly High Level Waste (HLW). HLW is an issue Australia has had limited experience of and expertise in and remains a major and unresolved global management issue, including among our AUKUS partners.

The September 2023 End of Mission report by Mr Marcos Orellana, the UN Special Rapporteur on Toxics and Human Rights clearly conveyed this concern, stating: *The introduction of high-level radioactive waste into Australian territory, from nuclear-powered submarines under the new AUKUS plans, poses significant management challenges.*

Australia has a poor history with existing domestic radioactive waste management and siting and there is a pressing need for any future waste management and regulation to be based on clear foundational principles including free, prior and informed consent (FPIC). This is particularly important given the disproportionate adverse impact of nuclear activities, including waste management, on First Nation peoples.

The importance of FPIC in any mature radioactive waste management regime was further highlighted in the UN Special Rapporteurs report, which noted:

> There is a deep disconnect or distance between the government and community narratives concerning toxics.
>
> This disconnect appears particularly acute between Indigenous Peoples and the government. For example, where the government perceives instances of the "not-in-my-back-yard" phenomenon in regards to the siting of radioactive wastes, representatives of First Nations have spoken to me about the ongoing colonization of their territories. It is instructive that all siting initiatives by the government for a radioactive waste repository have failed.
>
> The recent case of Kimba, where the Barngarla Indigenous people in South Australia mounted legal resistance to the siting of radioactive wastes in their lands, is also instructive. I wish to applaud the decision of the Federal Government to not appeal the Federal Court's judgment that found apprehension of bias in the decision-making process.
>
> There are various lessons that can be taken from this case, such as the need to align all regulations and practices with the standards of the UN Declaration on the Rights of Indigenous Peoples, including the right to free, prior and informed consent.

The UN Declaration on the Rights of Indigenous Peoples provides guidance in advancing responsible radioactive waste management in Article 29(2) which requires that: *States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent*.

ACF notes and welcomes the recent consideration by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia (November 2023), in particular the recommendations:

AUSTRALIAN CONSERVATION FOUNDATION

> (i) the Commonwealth Government ensure its approach to developing legislation and policy on matters relating to Aboriginal and Torres Strait Islander people (including, but not limited to, Closing the Gap initiatives) be consistent with the Articles outlined in the United Nations Declaration on the Rights of Indigenous Peoples, and
>
> (vi) that the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the definition of 'human rights', so that it be formally considered by the Parliamentary Joint Committee on Human Rights when scrutinising legislation.

Consistency with the principles of free, prior and informed consent is a fundamental in developing any new regulatory approach to radioactive waste management and ACF urges the Committee to ensure that an amended Bill reflects this need.

Recommendation: The Bill be amended to recognise and reflect the foundational management principle of free, prior and informed consent (FPIC).

Nuclear Non-Proliferation Treaty

The Committee report should clarify the status and outline the exchanges between the proposed naval regulator and the IAEA on AUKUS related issues. These have been described by the IAEA as involving 'serious legal and complex technical matters'.

In March 2023 the IAEA stated that:

> …the legal obligations of the Parties and the non-proliferation aspects are paramount. The Agency will continue to have its verification and non-proliferation mandate as its core guiding principle. It will exercise it in an impartial, objective and technical manner.

ACF recommends the Committee seeks clarification on the status and details of Australia's arrangement with the IAEA Non-Proliferation Treaty Article 14 CSA (Comprehensive Safeguard Agreement) exemption which allows Australia to access nuclear propulsion. In March 2023 the IAEA stated that '*an effective arrangement under Article 14 of Australia's CSA to enable the Agency to meet its technical safeguards objectives for Australia under the CSA and AP will be necessary*'.

Should AUKUS be advanced, Australia would be the only non-Nuclear Weapons State to have nuclear powered submarines. This unhelpful exercise in Australian exceptionalism and the proposed use of weapons grade highly enriched uranium (**HEU**) has clear proliferation sensitivities and is the focus of deep concern from nations in the region.

The current approach to advancing AUKUS fails to recognise or reflect the complexity and significance of the AUKUS related non-proliferation concerns.

The proposed use of a designated non-explosive military use, facilitated by direct military transfer, to place weapons grade HEU outside of IAEA safeguards is a disturbing development that could increase pressure on the already strained global non-proliferation framework. It raises the likelihood of other nations seeking similar exceptions and HEU safeguard exemptions.

These matters need to be clearly presented in the public domain ahead of any passage of the Bill to enable credible assessment and consideration of the related regulatory issues.

A Nuclear Industry by Stealth?

ACF has previously expressed concern that the AUKUS nuclear submarine plan could lead to increased pressure for a domestic nuclear industry.[8] ACF notes and welcomes that the Prime Minister has explicitly ruled out a domestic nuclear power industry and stated that the AUKUS plan is not a forerunner to any such activity. However, since the AUKUS announcement a range of voices, including the federal Opposition, have made calls for Australia to embrace domestic nuclear power.

The Prime Minister needs to act decisively to give effect to his clear statements that AUKUS is not linked to and will not advance a wider domestic nuclear industry by explicitly referencing and re-affirming the two key legislative prohibitions on domestic nuclear power in the EPBC and ARPANS Acts.

Disregard of advice from ARPANSA's Radiation Health and Safety Advisory Council

There is a disturbing discrepancy between the regulatory guidance provided by Australian Radiation Protection and Nuclear Safety Agency (**ARPANSA**) and the approach being promoted in the current iteration of the Bill. ACF urges the Committee to ensure these deficiencies are addressed.

ARPANSA's Radiation Health and Safety Advisory Council provided advice to the ARPANSA CEO via letter dated 12 October 2022. ACF urges the Committee to consider this advice and act to ensure that this is incorporated in an amended and improved regulatory framework. The ARPANSA advice is a useful contribution to the development of a credible and robust regulatory regime and differs significantly from what is proposed in the Bill.

[8] https://www.acf.org.au/dont-turn-nuclear-powered-subs-into-nuclear-power-subsidies; https://www.acf.org.au/nuclear-submarines-australia

In particular, the Council notes:

a. It is important that the framework does not allow 'national security' to mask inadequate radiation safety protection of the Australian public, weaken regulatory authority, or inhibit transparency on matters of Australian public safety.
b. International (UK and US) regimes provide a useful comparison but arose in an era of "different drivers, priorities and expectations."
c. Independence of the regulator is a critical part of its effectiveness. The regulator should be independent of the operators and departments overseeing any aspect of purchase, manufacture, maintenance, and operation of the program.
d. The regulator should be independent in its safety related decision making and hold functional separation from entities having responsibilities or interests that could unduly influence its decision making.
e. Transparency to stakeholders is fundamental for the regulator to achieve credibility, trust and respect. The framework needs a mechanism that requires operators/licensees to make available relevant information that could have an impact on public health, safety and the environment, including nuclear and radiation safety management, discharges and emissions, incidents, near misses, and abnormal occurrences.
f. A separate regulator for nuclear powered submarines, apart from existing jurisdictional radiation regulators, could present a risk to public safety.
g. The national strategy for radiation safety acknowledges the limitations of emergency management arrangements in Australia. They are not fit for purpose for a future with nuclear powered submarines.

To fail to act on this advice would be irresponsible and would undermine public confidence in the proposed regulatory regime.

Recommendation: That the Committee request ARPANSA's Radiation Health and Safety Advisory Council give evidence and consider the divergence of the Bill from the Council's 2022 advice to the ARPANSA CEO.

This concern is further exacerbated by section 132 of the Bill which states, "[t]*he Australian Radiation and Nuclear Safety Act 1998 does not apply in relation to regulated activities."*

ACF can see no public interest rationale for this exemption to the long-standing radiological protection framework.

RECOMMENDATION: The Committee recommend the ARPANS Act exclusion be modified or removed.

Clarification on Relationship of New Regulator with Existing Agencies

ACF recommends the Committee obtain detailed evidence from the Department as to the operational relationship between the proposed naval regulator, ARPANSA and state and territory regulators and related agencies. This is particularly relevant in the context of the recent assessment mission by an IAEA delegation examining Australia's regulatory framework.

In October 2023 an IAEA Integrated Regulatory Review Service (**IRRS**) team conducted a nine-day mission to review progress of Australia's implementation of recommendations and suggestions made during an initial IRRS mission in 2018.

The Review found that action was needed to attain national uniformity in radiation and nuclear safety, including finalising and implementing a national strategy for radiation safety and encouraging and facilitating effective and efficient inter-jurisdictional collaboration in the development of regulatory activities.

It is concerning that such an important new regulatory regime as that contained in the Bill is being fast-tracked by the Government at a time when the existing national regime needs active attention. ACF welcomes further detail on the formal Australian actions and response to the IAEA Review and maintains that instead of adding new layers of separate and segmented complexity to radiation regulation the Committee instead supports calls for a wholistic review of national radioactive waste management.

RECOMMENDATION: The Committee take evidence from the Department on, and consider, the interaction between the new regulatory regime, ARPANSA and potentially relevant state and territory regulatory controls.

RECOMMENDATION: The Committee consider amendments to provide for a formal means of contact between ARPANSA and the new regulator. This could include a formal position with the new regulator or the requirement to consider ARPANSA guidance materials.

Conclusion

Given the profound strategic, safety and economic implications of the AUKUS decision there has been scant public or Parliamentary review or scrutiny of the AUKUS project. Many of these issues may fall outside the remit of the current Inquiry, but they remain fully within the remit of community expectation and accountable government. ACF urges the Committee to support a review of the wider aspects of the AUKUS arrangement.

The proposed regulatory framework is deficient and in need of significant improvement. As the Australian Government looks to advance the acquisition of nuclear submarines, described by the Chief of Navy Vice Admiral Michael Noonan as "*the single most consequential capability decision*" and one that would "*no doubt change the shape of our nation*", it is imperative that the Committee act to address these deficiencies and strengthen the Bill.

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