

National Interest Analysis [2021] ATNIA 7

with attachment on consultation

Agreement between the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for the Exchange of Naval Nuclear Propulsion Information

(Canberra, 22 November 2021)

[2021] ATNIF 10

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Agreement between the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for the Exchange of Naval Nuclear Propulsion Information

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring into force the *Agreement between the Government of Australia, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the United States of America for the Exchange of Naval Nuclear Propulsion Information* (the ENNPIA). For the ENNPIA to enter into force, the Parties must notify each other of the completion of their necessary domestic procedures through an exchange of notes. The ENNPIA will enter into force between all Parties on the date of the last note in that exchange of notes (Article X).
2. Australia will send its note as soon as practicable after the completion of domestic processes.

Overview and national interest summary

3. The purpose of the ENNPIA is to establish a legally-binding framework for the disclosure and use of information related to naval nuclear propulsion among the Governments of Australia, the United States and United Kingdom.
4. On 16 September 2021, Prime Minister Scott Morrison, US President Joe Biden and UK Prime Minister Boris Johnson announced a new enhanced trilateral security partnership between Australia, the United Kingdom, and the United States — called AUKUS. The first major initiative under AUKUS was to support Australia's acquisition of conventionally-armed nuclear-powered submarines for operation by the Royal Australian Navy. Australia, the United Kingdom, and the United States will intensively examine the full suite of requirements that underpin the delivery of these submarines, including ensuring Australia is a responsible and reliable steward of this technology.
5. Submarines are an essential part of Australia's naval capability, providing a strategic advantage in terms of surveillance and protection of our maritime approaches. Nuclear-powered submarines, when compared to conventional submarines, maintain superior characteristics of stealth, speed, manoeuvrability, survivability, and almost limitless endurance. Nuclear-powered submarines can operate with a lower risk of detection and deter actions against Australia's interests. The ENNPIA is critical to an intensive examination of the full suite of requirements that underpin the delivery of these submarines being considered as part of an 18-month consultation period.

6. The ENNPIA contributes to Australia's national interests by allowing Australia to access critical naval nuclear propulsion information from the United States and United Kingdom not otherwise available to Australia. Without access to such restricted information, Australian officials are unable to effectively determine the optimal pathway to acquire nuclear-powered submarines for the Royal Australian Navy. The ENNPIA is therefore necessary for Australia to adequately and appropriately consider the implications and associated obligations of pursuing the acquisition of nuclear-powered submarines.

Reasons for Australia to take the proposed treaty action

7. The ENNPIA will provide significant benefit to Australia. Most importantly, it will permit the transfer of US and UK naval nuclear propulsion information to Australia that is critical to enabling and identifying the optimal pathway for acquiring a nuclear-powered submarine capability in Australia.
8. In addition to the transfer to Australia and use of such information, the ENNPIA will provide an invaluable mechanism for enabling Australian civilian and military personnel to receive access to critical training and education from US and UK counterparts necessary to learn how to safely and effectively operate such a capability for Australia.
9. The ENNPIA will also enable Australia to develop the necessary skills and knowledge to create a world's best practice regulatory and safety regime to guarantee the safe operation of naval nuclear propulsion and to ensure compliance with Australia's international obligations, including under the Treaty on the Non-Proliferation of Nuclear Weapons.
10. Access to relevant naval nuclear propulsion information from the United Kingdom and the United States; together with the ability to leverage their expertise, is critical to Australia meeting important and stringent regulatory and stewardship requirements for safely acquiring, operating, and sustaining a nuclear-powered submarine capability. Such information may vary across numerous topic areas, including design, safety, regulation, operation, training, environmental protection, workforce, and force structure; and will be invaluable to Australia evaluating the full suite of requirements necessary to acquire such a capability.
11. Finally, the disclosure of naval nuclear propulsion information is restricted under US domestic law. It can only be disclosed to foreign nations, including Australia, in instances where an agreement such as the ENNPIA is in force. The United Kingdom is equally restricted in its ability to disclose such nuclear-related information with Australia because of its pre-existing treaty obligations to the United States under the *US-UK Agreement for Co-operation on the Uses of Atomic Energy for Mutual Defense Purposes of 1958*. The trilateral nature of the ENNPIA will therefore also provide the United Kingdom with the necessary authority to share its naval nuclear propulsion information with Australia. Consequently, without the ENNPIA being in place, Australia cannot receive any naval nuclear propulsion-related information from either the United States or United Kingdom in order to determine the optimal pathway for Australia to acquire nuclear-powered submarines for the Royal Australian Navy.

Obligations

Scope

12. The ENNPIA will only facilitate information sharing on naval nuclear propulsion. It does not support the transfer of any equipment or technology, nor does it support the sharing or transfer of any information on civil nuclear matters, beyond those incidentally related to naval nuclear propulsion.
13. Classified and unclassified naval nuclear propulsion information related to research, development, design, manufacture, operation, regulation, and disposal may be

communicated or exchanged between the Parties (Article II). Such information may only be communicated or exchanged if the communicating Party determines that such cooperation will not constitute an unreasonable risk to its defence and security (Article I). Importantly, the ENNPIA does not authorise any specific activities beyond information exchange. Any activity beyond the exchange of information between the Parties in order to evaluate and consider the requirements necessary to achieve the optimal pathway to deliver nuclear-powered submarines for the Royal Australian Navy is not authorised.

14. The ENNPIA requires the application of International Atomic Energy Agency safeguards with respect to all peaceful nuclear activities within the territory of Australia, consistent with its obligations the *Treaty on the Non-Proliferation of Nuclear Weapons*, the *Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards* (1974) and the *Protocol Additional to the Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards* (1997) (Article IV). The ENNPIA does not authorise, and will not support, the sharing or transfer of any information related to nuclear weapons. The ENNPIA also does not authorise the sharing or transfer of any non-naval nuclear propulsion related sensitive information.
15. The ENNPIA also provides the ability for the Parties to enter into implementing arrangements to implement the provisions of the Agreement, as may be required or useful (Article X(D)).

Protection of Naval Nuclear Propulsion Information

16. Noting the sensitivity of naval nuclear propulsion information and the restrictions on use and dissemination under US domestic law, the ENNPIA has specific requirements in relation to the use, dissemination, handling and protection of such information.
17. The ENNPIA covers information designated (and defined) as classified information, as well as unclassified naval nuclear propulsion information (which while not classified by the United States, still requires appropriate controls) (Article IX(A) and (C)). The specific requirements regarding the administrative and security controls applicable to accessing and communicating this information, including requirements on physical security, personnel security, and control of classified information, are further detailed in the Technical and Security Annexes to the ENNPIA.
18. Each Party commits to protect the information under conditions no less stringent than those afforded by the originating Party, and pursuant to the specific storage, transmittal, access, and clearance requirements detailed in the ENNPIA and its Annexes (Article V). This means that while Australia may use the naval nuclear propulsion information during the 18-month consultation period for government purposes, it is subject to the stringent requirements contained in existing Australian security frameworks and systems.
19. The ENNPIA obligates each Party not to communicate or exchange naval nuclear propulsion information provided to them by another Party to any other nation, foreign or international entities. However, each Party can communicate or exchange naval nuclear propulsion to their own nationals, or where consent of the relevant Party has been provided, to a national of that other Party (Article VI).

Intellectual Property

20. The intellectual property provisions in the ENNPIA are focused on circumstances where patentable subject matter may be generated by a recipient Party as part of the information exchange activities, within the duration of the Agreement. These intellectual property provisions are specifically negotiated without prejudice to future agreements or arrangements Australia may enter into with the United States and United Kingdom concerning the design, construction, operation, regulation and disposal of a nuclear-powered submarine, which will require additional intellectual property consideration and negotiation (Article VIII).
21. Under the ENNPIA, where an invention or discovery (where it is patentable) is owned by a recipient Party and utilises naval nuclear propulsion information of another Party (the originating Party), the ENNPIA sets up a licensing regime to that patentable subject matter for all Parties (Article VIII(A)).
22. Under this regime, a recipient Party would retain ownership of the invention in their jurisdiction, but would transfer and assign ownership of the invention to the originating Party in that originating Party's jurisdiction, subject to retention of a license to use that invention for government and mutual defence purposes in the originating Party's jurisdiction (Article VIII(A)(1)(a)). The recipient Party would also grant a license for government and mutual defence purposes licence to both other Parties to that invention, including for production and sale in the recipient jurisdiction (Article VIII(A)(1)(b)).
23. With respect to the title or licensing arrangements described above, to the extent of the rights or interests granted, no Party can discriminate against citizens of any Party in respect of granting any license or sublicense under the patents owned by it in its own or any other country (Article VIII(A)(1)).
24. The Parties also waive all claims against any other Party for compensation, royalty, or award, and agree to release the other Parties with respect to any and all such claims in relation to such patented or patentable subject matter (Article VIII(B)(2)).

Visits / Personnel Exchanges / Training

25. As part of the approved scope of information to be exchanged (Article II), the ENNPIA will also support the ability for visits, training, and secondments of civilian and military personnel of one Party with either or both Parties, where such training or secondments involve access to naval nuclear propulsion information. Where the Parties agree to carry out specific training or secondment activities, these would be subject to either implementing arrangements under the ENNPIA or pursuant to separate agreements or arrangements.
26. The ENNPIA also supports visits for the purposes of security assurances between the Parties by the relevant responsible security authorities (Security Annex, Section IV (A)).

Disagreement

27. Any disagreement that may arise between the Parties in the implementation or interpretation of the ENNPIA will only be resolved through mutual consultation and negotiation without recourse to any dispute settlement mechanisms (Article X).

Implementation

28. Australia's implementation of the ENNPIA will be led by the Department of Defence in consultation with the Department of Foreign Affairs and Trade and the Attorney-General's Department. Specific activities, engagement and access to information authorised by the ENNPIA are likely to occur pursuant to mutually determined implementing arrangements.
29. Domestic implementation of the ENNPIA does not require changes to Australian laws or regulations.

Costs

30. The ENNPIA does not contain provisions concerning costs. Each Party will bear their own incidental costs.
31. Any costs that may arise in relation to training, exchange of personnel or provision of subject matter experts will be negotiated and set out in either Implementing Arrangements, or carried out pursuant to other government to government mechanisms.
32. No regulatory costs associated with this treaty action are anticipated.

Future treaty action

33. The ENNPIA does not specify processes for its amendment. However, if the Parties jointly agreed to amend the ENNPIA pursuant to general principles of international law, for Australia any such amendment would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.
34. The ENNPIA is only intended to facilitate the sharing of naval nuclear propulsion information. A subsequent agreement would need to be negotiated to support transfers of equipment, materials or technology related to nuclear naval propulsion. Following the 18 month AUKUS consultation period, and once the requirements and commitments related to nuclear-powered submarines for the Royal Australian Navy are understood and evaluated, such an agreement would be negotiated and would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.

Termination

35. The ENNPIA will remain in force until December 31, 2023 and shall automatically extend for four additional periods of six (6) months each, unless superseded by a subsequent agreement or otherwise terminated (Article X).

36. Any Party can terminate the ENNPIA (inclusive of its Annexes) by giving at least six (6) months written notice to the other Parties, which will have the effect of terminating the entire agreement (Article X(A)).
37. In the event a Party terminates or materially breaches the ENNPIA, or determines it to be invalid, the other Parties have the right to require the return or destruction of any naval nuclear propulsion information exchanged under the ENNPIA (Article X(B)).
38. Obligations relating to use and non-disclosure of naval nuclear propulsion information, intellectual property, and security will continue in force notwithstanding any termination, expiration, or suspension of the ENNPIA, for the duration that naval nuclear propulsion information provided under the ENNPIA remains in the recipient Party's jurisdiction or control (Article X(C)).

International Agreements and Policy Division
Nuclear Powered Submarine Task Force
Department of Defence

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CONSULTATION

Commonwealth Departments

39. The Department of Defence consulted with the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, and Attorney-General's Department. No concerns have been identified.

State and Territory Governments

40. Due to the unique and expedited nature of the ENNPIA, and noting its limited information sharing scope, the Department of Defence has not consulted with State and Territory Governments. No action is expected to be required from States or Territories to implement the ENNPIA.

Public Consultation

41. No public consultation has been undertaken as the ENNPIA relates to national security and operational capability matters.