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AUSTRALIAN CONSERVATION FOUNDATION

Foreign Affairs, Defence and Trade Committee Department of the Senate

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Parliament House

Canberra ACT 2600

Via email: fadt.sen@aph.gov.au

27 March 2024

Dear Committee Members

Australian Naval Nuclear Power Safety Bill 2023- Response to Questions on Notice

We refer to the Foreign Affairs Defence and Trade Legislation committee hearing on Wednesday 13 March 2024 in relation to the *Australian Naval Nuclear Power Safety Bill 2023* (the **Bill**). ACF appeared at the hearing and spoke to its submission dated 1 February 2024.

During the hearing several matters arose that the Committee has sought further responses too. This letter provides ACF's responses to those matters.

Flaws in Bill – Comparison with ARPANS Act

1. Senator Shoebridge identified four areas where there is variation – and less transparency and rigour – between the existing ARPANS Act and the Bill – these are:
    a. Under the ARPANS Act the CEO must table a report of any serious accident or malfunction which occurs at a nuclear installation in each house of Parliament within three sitting days of the incident occurring – there is nothing comparable in the Bill.
    b. Section 41 of the ARPANS Act requires that if directions are given in order to protect the health and safety of people or to avoid damage to the environment or because there is a risk of death, serious illness, serious injury or serious damage to the environment, the Minister must table those directions in Parliament within 15 sitting days. The Bill does not have any comparable requirement.
    c. The ARPANS Act establishes three bodies to advise the CEO, including the Radiation Health and Safety Advisory Council, the Radiation Health Committee and the Nuclear Safety Committee, and requires at least one member of each advisory body to be a person to represent the interests of the general public. Before making the appointments, there is a public consultation process. There are no comparable provisions in this Bill, not one equivalent provision: not one separate council, not one separate body, no reference to the interests of the general public.

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d. Section 42 of the ARPANS Act requires that the exercise of the power or discretion or the performance of the duty or function is authorised only to the extent that the exercise or performance is not inconsistent with Australia's obligations under the relevant international agreements. In the ARPANS Act the test is '*not inconsistent with'*, which sets hard and fast guidelines. In the Bill there is a lesser threshold of *'must have regard to'*. The Bill allows the operator, and anyone exercising functions to act in a manner inconsistent with Australia's international obligations.

2. The question on notice from Senator Shoebridge was framed this way.

> *I took ANSTO through four instances where this bill is not comparable to the existing ARPANSA provisions and safeguards. For the sake of time, could I ask if any of you, on notice, might like to share your views on whether or not those elements should be incorporated into the bill and, if so, how?*

3. ACF agrees that the four examples/issues raised by Senator Shoebridge should be addressed via amendment to the Bill. ACF's initial view is that the ARPANSA regime should apply and hence incorporation in the Bill is not required.

4. It is accepted that there are differences between the use of nuclear materials by civilians and the military. The radiation sources in the submarine project may be quite different in scale. As such, it may be worth considering the expertise required of these bodies to advise on use of these military nuclear materials. A careful determination needs to be made as to whether it is appropriate for bodies established under the ARPANS Act to advise on the activities performed under the Bill. If not, modifications to those bodies may be more appropriate than an entirely new regime.

5. If that position is not accepted, then each of the four changes seems readily implementable via amendment to the Bill. ACF does not see value in trying to particularise that in great detail. It seems to us a straightforward drafting exercise. The primary factor is the need and benefit from enhancing transparency mechanisms akin to those in existence in the civil regulatory regime.

<u>Nuclear Duty – As Far as Reasonably Practicable</u>

6. Senator Fawcett queried ACF's submission in relation to the duty to ensure nuclear safety. In the Senator's view, it is unreasonable for persons who are trained, licensed and have operated in accordance with the rules and procedures, to be held to be in breach the duty to ensure nuclear safety. We do not in principle disagree, but the problem is that the current drafting will prove to be unenforceable rendering the legislation toothless.

7. It must be the case that where people have been professional and diligent they should not be exposed to liability or prosecution. The issue is whether the offence should be:

   a. the prosecutor must prove not only the wrongful acts but also default by the defendant **or**

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b. the prosecutor must prove the wrongful act but the defendant must establish any applicable defences. Typically, these defences include the exercise of due diligence or taking practicable steps.

8. Around Australia Work Health and Safety Laws, Public Health Laws and Environmental Laws are replete with the latter type of offence – known as strict liability offences. These seek to strike a balance between:

   a. On the one hand protecting the rights of defendants to have a due diligence defence available and

   b. On the other hand the extreme difficulty for a prosecutor to prove fault (such as intent, negligence or failure to take practicable precautions) in circumstances where the offences turn on the application of complex facts and technologies and where information is secret and often incidents come to light only some time after the incident.

9. Currently, s 18(1) of the Bill provides that:

   *A person who conducts a regulated activity must, **so far as reasonably practicable**, ensure nuclear safety when conducting the activity.*

   The provision then provides - by way of example - :

   (2) A person is liable to a civil penalty if the person contravenes subsection (1).

   (4) A person commits an offence if: (a) the person engages in conduct; and (b) the conduct is a regulated activity; and (c) the conduct results in a contravention of subsection (1).

10. This drafting means that for the duty to be enforced, the Regulator/prosecution must prove (in criminal matters beyond reasonable doubt) that:

    a. Nuclear safety was not ensured and

    b. That the acts and omissions of the person fell short of the description of **"**reasonably practicable".

11. The term "reasonably practicable" must be assessed in accordance with the definition in s5(2) which includes elements that are not purely objective such as:

    (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.

12. It will prove exceedingly difficult for a regulator/prosecutor to establish these matters – in particular to the extent that they are <u>within</u> the expertise and knowledge of the defendant.

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13. An alternative that provides proper protections for defendants but does not render the duty effectively unenforceable would be to provide for a defence if the defendant established that they exercised due diligence and reasonable. This is common in environmental offence provisions, for example, s 143(1) of the *Protection of Environment Operations Act 1997 (*NSW) makes it an offence for a person to transport waste to a place that cannot lawfully be used as a waste facility:

> *(1)* ***Offence*** *If a person transports waste to a place that cannot lawfully be used as a waste facility for that waste, or causes or permits waste to be so transported—*
> *(a) the person, and*
> *(b) if the person is not the owner of the waste—the owner of the waste, and*
> *(c) if the waste is transported in a vehicle and the person is not the owner of the vehicle—the owner of the vehicle,*
> *are each guilty of an offence.*

14. Subsections (3), (3A), (3B), and (3C) then go on to outline the defences which can be relied upon to establish that the transportation of waste to an unlawful facility is not an offence. See for example, s 143(3):

> *(3)* ***Defence—owner of waste*** *It is a defence in any proceedings against an owner of waste for an offence under this section if the owner did not transport the waste and establishes—*
> *(a) …[not relevant here]…., and*
> *(b) that the owner took reasonable precautions and exercised due diligence to prevent the commission of the offence.*

15. The drafting could be for example in ss 19(2) and (4)

> *(2) A person is liable to a civil penalty if the person does not ensure nuclear safety unless the person establishes that they took all such precautions as were reasonably practicable to ensure nuclear safety.*
> *(4) A person commits an offence if: (a) the person engages in conduct; and (b) the conduct is a regulated activity; and (c) the person does not ensure nuclear safety, unless the person establishes that they took all such precautions as were reasonably practicable to ensure nuclear safety.*

<u>Storage of International Radioactive Waste</u>

16. In its submissions and evidence to the Committee ACF summarized its position on the Bill allowing for storage of nuclear of international nuclear waste. Senator Fawcett raised this issue in questions (see Transcript p29).

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17. We maintain our view that section 12 should be amended to replace '*AUKUS submarine'* with '*Australian submarine'*, and we agree that it would assist to amend s 7(1) to remove the words '*and includes such submarine that is not complete (for example, because it is being constructed or disposed of')*' in relation to the AUKUS submarines.

18. There are two circumstances where Australia could store or dispose of international radioactive waste:

    a. It is imported into Australia from overseas (**scenario 1**); or

    b. If a submarine requires emergency repair that results in the removal of nuclear material, this material will need to be stored for a discrete period (**scenario 2**).

19. The Bill should address both streams.

20. With respect to **scenario 1**, it would be cleanest to have a standalone section which provides that nothing in this Act permits the import of NNP material from overseas, including pre-existing NNP material.

21. For **scenario 2**, further detail may be required as it may be reasonable for Australia to provide interim storage for NNP material because of an emergency repair.

22. ACF suggests that s14(1)(d) should also be amended to ensure that it does not permit the storage or disposal of nuclear waste from an AUKUS submarine. The Bill currently provides:

> *(1) Each of the following is a material activity:*
>
> …
>
> *(d) maintaining, storing or disposing of NNP material or NNP equipment or plant in a designated zone or an Australian submarine.*

23. Turning to the meaning of '*NNP material*' in s15, it is defined to mean:

> *(1)* ***NNP material*** *(short for naval nuclear propulsion material) means any natural or artificial material (whether in solid or liquid form, or in the form of a gas or vapour) that:*
>
> *(a) emits ionizing radiation spontaneously; and*
>
> *(b) is from, or for use on, an AUKUS submarine.*

24. The combined effect of these provisions also indicate that Australia can store and dispose of nuclear material from AUKUS submarines. This could be dealt with by inserting a qualification into s 14(1)(d) (see below in **bold**, being):

> *maintaining, storing or disposing of NNP material* ***(excluding NNP material from an UK/US submarine)*** *or NNP equipment or plant in a designated zone or an Australian submarine.*

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Designated Zones

25. Section 10 provides for "designated zones" to be created by regulation. ACF cannot find any constraint on that power.

26. This was raised during the evidence from the Department of Defence. Mr Reid (Deputy Secretary Governance, Department of Defence) stated (Transcript p42), "the provision for regulations to be made in relation to designated zones is broad".

27. Senator Shoebridge asked several questions of DoD about this (TS40-42). ACF considers the answers add nothing in terms of scope of the power to create these zones.

28. ACF has examined the Bill further and is firmly of the view that there is no constraint on the creation of designated zones by regulations. At a minimum, a consultation and public notification process should be required prior to designation.

29. In addition, there is a drafting error in section 14. The current use means that NNP Activities could be carried out anywhere in Australia without a licence.

30. The current drafting of section 11 which includes the concept of designated zones in each limb of the definition of "facility activity" has the effect that it would not be an offence to carry out a designated activity outside a designated zone. This drafting achieves the exact opposite of what is clearly intended. Section 10 says:

> *Regulated activities can only occur in a designated zone or in relation to an Australian submarine.*

31. A facility activity is defined as being an activity described in s12 in a designated zone. For example, preparing a site for an NNP facility outside a designated zone would not be a facility activity. Therefore, that activity can occur outside a designated zone without being contrary to s10.

32. Similarly, s18 imposes a general duty to conduct regulated activities to ensure safety, however operating an NNP facility in a designated zone is a regulated activity and operating an NNP facility outside a designated zone is not a regulated activity. This is exactly the opposite of what is intended by the Bill.

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Whether a statutory oversight committee of MPs/Senators can replace the transparency measures ACF proposed

33. Senator Fawcett raised the utility of an oversight committee in relation ACF's concerns about transparency (Transcript p29-30).

34. ACF considers an oversight committee could be useful where national security concerns warrant decreased transparency. However, it is not an entire solution. ACF again draws the Committee's attention to the clear ARPANSA guidance that 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*. Each of the applications and decisions needs to be considered separately in terms of appropriate transparency measures. We refer to the detailed consideration given to this issue against each aspect of the regulatory system in ACF's submission.

35. A model to consider is open transparency, coupled with an option to reduce transparency for national security reasons. Where the regulator approves such a reduction that decision must be examined by the oversight committee.

36. Thank you for considering this submission and the Committee's efforts to ensure this critical regulatory system is robust and fit-for-purpose.

Yours sincerely,

Adam Beeson

General Counsel