

ATTACHMENT 1

Nuclear Activities (Prohibitions) Act 1983 is not best practice regulation

The Council of Australian Governments has established principles of best practice regulation. This document tests the Nuclear Activities (Prohibitions) Act 1983 (NAPA) against those principles.

The Association submits that the NAPA fails the test of ‘best practice’ because it does not meet the primary test: is there a case for action? If, for whatever reason, there was a case for action in 1983, the time has well and truly come for reconsideration of that case and of the case now. The principles contemplate an Act like NAPA – one not reviewed after a long period of operation and which, in a more modern time, requires review.

Principle 1: Establishing a case for action before addressing a problem.

An important first step before considering any action is to examine closely whether there is a problem, and to make an initial decision on whether any action is required.

It is not clear what problem the NAPA is seeking to address. The Association has not been able to establish that an evidence-based case for action was considered before the legislation was enacted. The inference to be drawn from the objects of the Act is of opposition to uranium exploration and mining per se on health and safety, environmental and proliferation grounds but no evidence that the government of the day undertook a serious examination of the grounds for such a belief. In any case, it is 28 years since the legislation was enacted and sufficient time has elapsed to warrant an examination.

Principle 2: A range of feasible policy options must be considered, including self-regulatory, coregulatory and non-regulatory approaches, and their benefits and costs considered.

Once the problem has been examined and a case for government intervention has been established, officers should identify the objectives for any intervention and consider all feasible options, of both a regulatory and non-regulatory nature, that could wholly or partly achieve these objectives. Working from an initial presumption against new or increased regulation, the overall goal is the effective and efficient achievement of the stated objectives. The ‘status quo’ and effectiveness of existing regulations should be considered as an option for meeting the objectives.

It seems the government-of-the-day did not consider alternative regulatory options, even though there were alternatives in the form of Commonwealth and State legislation that existed then and still exists now or whose successors have been enacted since.

We submit that the regulatory framework outlined in our submission represents ‘feasible policy options’ to the NAPA.

Principle 3: Adopting the option that generates the greatest net benefit for the community.

This requires a rigorous regulation impact assessment of all the feasible policy options available to address the identified problem. Decision makers should adopt the option which provides the greatest net benefit to the community. Decisions about whether regulatory action is in the public interest should be informed by an assessment of the effectiveness of the proposed action in meeting the identified objective, and the costs and benefits of the proposed action for the community as a whole.

There is an opportunity, in repealing NAPA, for the Victorian Parliament to participate, via the legislative process, in an examination of the regulatory option that generates the greatest net benefit for the community.

The Association's view is that the broad Australian regulatory framework for the uranium industry – which tests applications for uranium exploration and mining on merit in accordance with existing Commonwealth and State regulation – is the option of greatest net benefit.

Principle 4: In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs; and the objectives of the regulation can only be achieved by restricting competition.

Many existing and proposed regulations and requirements restrict competition, including by imposing barriers to entry, exit, or innovation, and can have the effect of restricting consumer choice, raising prices and reducing overall economic efficiency and productivity. As far as possible, restrictions on competition should be avoided or minimised. Regulation should only restrict competition where this is necessary to achieve the objective, and the benefits of restricting competition outweigh the costs.

It is clear that NAPA is a barrier to entry into uranium development in Victoria with consequent negative impact on Victorian economic efficiency.

Principle 5: Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear.

When making a decision to adopt a regulatory solution to a problem in order to deliver the greatest net benefit for the community, it is necessary to clearly articulate any decision and new regulations for the benefit of regulators administering the solution as well as regulated parties.

We would support effective guidance to and, if necessary, training of regulators and have made proposals along these lines to, for example, the Victorian Parliamentary inquiry into greenfields exploration.

Principle 6: Ensuring that regulation remains relevant and effective over time.

To ensure regulation remains relevant and effective over time it is important that all regulation be reviewed periodically. All governments have committed to reviewing annually existing regulations

with a view to encouraging competition and efficiency, streamlining the regulatory environment, and reducing the regulatory burden on business arising from the stock of regulation.

Ensuring that regulation remains relevant and effective over time may be achieved through planning for monitoring and review of regulation as part of the development of new regulatory proposals, or by incorporating sunset provisions or review requirements in legislative instruments.

NAPA fails the test of this principle. It has not been reviewed since its enactment while there has been much change in Victoria's economic circumstances and in the global context for uranium mining.

Principle 7: Consulting effectively with affected key stakeholders at all stages of the regulatory cycle.

There should be effective consultation with affected key stakeholders at all stages of the regulatory cycle. Public consultation is an important part of any regulatory development process. Consultation should occur when the options for regulatory action are being considered and a draft RIS (also known as the 'Consultation RIS') has been produced. This will give interested parties a range of options and also in some cases a firm proposal to consider.

The Association supports consultation on the repeal of NAPA.

Principle 8: Government action should be effective and proportional to the issue being addressed.

In all responses to identified problems, government action should be effective and proportional to the issue being addressed. Effectiveness should be judged solely in terms of meeting the specified objective.

Consideration should be given to the effectiveness of implementation and administration and, as relevant, an assessment of likely compliance rates should be made taking into account matters such as incentive structures and costs to regulated parties.

Proportionality involves ensuring that government action does not 'overreach', or extend beyond addressing a specific problem or achieving the identified objective. The scope or nature of government action should be commensurate with the magnitude of a problem, its impacts, or the level of risk without action. The principle of proportionality applies equally to the implementation of regulation, including the development of frameworks for ensuring compliance.

Regulation can help to manage risk. But objectives such as 'minimising risk' or 'zero risk' are unlikely to be economically efficient. This is because such objectives do not have regard for the marginal costs and benefits to society of different levels of impact of mining (for any mineral, not just uranium). Achieving objectives such as minimum risk or zero risk is likely to reduce risks to a level where the costs of so doing exceed the benefits.

We submit that the Act fails this test on a number of counts. First, the risks associated with uranium development in Victoria have not been assessed administratively or scientifically since the legislation was enacted; and perhaps not even then. The intent of the legislation is clearly to 'minimise risk' or to reduce it to 'zero'. Yet it is not clear what the risk is that the legislation is seeking to manage. The result is that, on the face of it, the legislation is not economically efficient.

Second, while prohibition certainly eliminates any risk associated with uranium exploration and mining, it does so at a cost.

The cost is the economic activity associated with exploration and mining of uranium in Victoria and exported from it with attendant impact on Gross State Product, government royalties and taxes and, potentially, in new employment opportunities from economic activity associated with uranium exploration and mining.