Australian Astronomical Observatory (Transition) Bill 2018

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House: House of Representatives
Portfolio: Jobs and Innovation
Commencement: 1 July 2018

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at June 2018.
Purpose of the Bill

The purpose of the Australian Astronomical Observatory (Transition) Bill 2018 (the Bill) is to amend the Australian Astronomical Observatory Act 2010 and to repeal the Australian Astronomical Observatory (Transitional Provisions) Act 2010. The proposed amendments would remove the Australian Astronomical Observatory (AAO) from within the Department of Industry, Innovation and Science (DIISR) from 1 July 2018 and place it—along with its assets, liabilities and other matters—under consortia comprised of relevant universities. The Bill also provides the legislative basis for continuing departmental activities to facilitate the transition of the AAO, and to support the recently created (July 2017) Australia-European Southern Observatory (ESO) Strategic Partnership. By transferring the AAO from the Government to the research sector, the Bill will help implement the Government’s 2017–18 Budget measure ‘Maintaining Australia’s Optical Astronomy Capability’.¹

Structure of the Bill

This Bill is divided into two schedules. **Schedule 1** contains two parts:

- **Part 1** contains a number of amendments to the Australian Astronomical Observatory Act and
- **Part 2** repeals the whole of the Australian Astronomical Observatory (Transitional Provisions) Act.

**Schedule 2** contains transitional provisions and consists of four parts:

- **Part 1** contains preliminary provisions, including definitions and extra-territorial operation
- **Part 2** covers assets and liabilities and
- **Parts 3 and 4** cover transfer of other matters and miscellaneous provisions.

Background

In July 2015, the National Committee for Astronomy of the Australian Academy of Science published *Australia in the Era of Global Astronomy*, its plan for Australian astronomy for the decade 2016–2025.² The Bill sits within the context of this report, which highlighted the need for access to larger telescopes for optical and infra-red astronomy, continued development of instrumentation capacity in Australia, and the need for continued partnership between observatories and universities.

Currently, the Australian Astronomical Observatory (AAO) is a division of the Department of Industry, Innovation and Science (DIISR). The AAO operates the Anglo-Australian telescope (AAT), amongst others, on behalf of the astronomical community of Australia. The AAO was known as the Anglo-Australian Observatory until July 2010, when the Australian Government took full ownership of the AAT following the withdrawal of the UK Government from the project. As part of the DIISR, the Observatory is funded by the Australian Government. Its function is to provide world-class observing facilities for Australian optical astronomers.³

The AAO is headquartered in North Ryde, Sydney, and the 3.9 metre AAT (as it is still called) is on land owned by the Australian National University (ANU) at the Siding Spring Observatory, near

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3. Australian Astronomical Observatory (AAO), ‘*About the AAO*’, AAO website.
Coonabarabran, NSW. Although the AAT is still in regular use, Australian astronomy needs more access to the current generation of far larger (8-metre) optical and infra-red telescopes. Such instruments are located in Chile, and are operated by the ESO, a consortium representing astronomers from 15 nations.

In July 2017, the Australian Government entered into a 10-year strategic partnership with the ESO, which will help provide access to the necessary large telescopes for Australian researchers. Much future Australian astronomy research is likely to involve multi-national collaboration using the Chile-based instruments. Accordingly, funding for the operation of the AAO (and therefore for the much smaller AAT) was due to cease by 30 June 2020. However, as the AAT is still functional, it is feasible to continue its operational life, which would allow its use as a testbed for new instrumentation innovations, as well as a local observatory for Australia. Under the terms proposed by the Bill, the AAT could continue until 2024–25, operated by the ANU on behalf of a consortium of universities managed by the existing not-for-profit company Astronomy Australia Limited (AAL). (Note that this is incorrectly described in the Bill’s Explanatory Memorandum as Australia Astronomy Limited.) The AAO’s astronomical activities, assets and staff will transfer from the Commonwealth to the new university consortium.

Over time, Australia has also developed considerable capacity for astronomical instrumentation, and this currently resides with the AAO at North Ryde. Under the Bill, this would be transferred to a consortium of Macquarie University, the ANU, and the University of Sydney. The second reading speech states that the ongoing instrumentation work will be supported by Astronomy Australia Limited, which is part of the National Collaborative Research Infrastructure Strategy (NCRIS). It appears to be the Government’s intention, as stated in the speech, that the new consortium could help commercialise Australian innovations derived from astronomy.

Director-General of the ESO, Professor Tim de Zeeuw, was quoted as saying that Australia’s expertise in astronomical technology (including advanced adaptive optics and fibre-optics) is ideally matched with ESO’s instrumentation programme, and that Australia will benefit from access to industrial, instrumentation and scientific opportunities at ESO’s La Silla Paranal Observatory in Chile.

Committee consideration

Senate Standing Committee for Selection of Bills Committee

The Selection of Bills Committee recommended that the Bill not be referred to a committee for inquiry.
Policy position of non-government parties/independents

Labor welcomed ‘the decision of the government to join the European Southern Observatory’ after the relevant 2017 Budget announcement. At that time, Labor was ‘concerned at the lack of detail around plans to change the ownership of the Anglo-Australian Telescope’. Labor has stated its ‘reluctant support’ for the Bill, noting that without ALP support the ‘the Bill’s failure would result in the closure of the Anglo-Australian Telescope and the Australian Astronomical Observatory laboratories in 2020’. Labor also claimed that the transition is likely to result in job losses at both the AAT and the instrumentation facilities at North Ryde.

Independents do not appear to have commented on the Bill at the time of writing this Bills Digest.

Position of major interest groups

Stakeholders responded positively after the relevant 2017 Budget announcement. Organisations such as Science and Technology Australia welcomed ‘the boost to Australia’s astronomy research program, which will ensure Australia is poised to better collaborate and participate in important international research’.

Professor Les Field, Secretary for Science Policy at the Australian Academy of Science, stated that it was ‘pleasing to see $26 million to support an astronomy partnership with the European Southern Observatory, ensuring Australia’s involvement in major astronomy initiatives around the world’.

Universities and astronomers were also pleased, with ANU Vice-Chancellor and Nobel Prize-winning astronomer, Professor Brian Schmidt, reportedly thanking ‘Senator Arthur Sinodinos for taking the initiative to solve “a long-standing problem that has been facing astronomical researchers in Australia”’ through this measure.

Financial implications

As mentioned above, the Bill was foreshadowed in the Budget of 2017–18, which provided $26.1 million over four years from 2017–18 ($120.0 million over 11 years) to ‘maintain Australia’s capability in optical astronomy and its international competitiveness in space and astronomy enabled research’. The measure is to allow Australia to become a strategic partner with the ESO for ten years from 1 January 2018.

The Explanatory Memorandum states that, as the Bill terminates the AAO and its governance body (the AAO Advisory Committee) two years earlier than previously anticipated, there will be

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15. K Carr (Shadow Minister for Innovation, Industry, Science and Research) and D O’Neill (Shadow Assistant Minister for Innovation), Another year, science and research suffers from a negligent Government, media release, 10 May 2017.
16. Ibid.
18. Ibid.
operational savings of $25.2 million during the financial years 2018—19 and 2019—20, which partly offsets the $26.1 million expenditure in the new Budget measure.\textsuperscript{23}

\textbf{Statement of Compatibility with Human Rights}

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\textsuperscript{24}

\textbf{Parliamentary Joint Committee on Human Rights}

The Parliamentary Joint Committee on Human Rights does not believe that the Bill raises human rights concerns.\textsuperscript{25}

\textbf{Key issues and provisions}

\textbf{Abolition of the AAO}

The Bill will abolish the AAO and the AAO Advisory Committee, which reports to the Secretary of the DIISR and to the Director of the AAO. \textbf{Part 1 of Schedule 1} amends the Australian Astronomical Observatory Act, including its short title, which would be renamed as the Astronomical Functions Act. However, other parts of the Australian Astronomical Observatory Act are retained (among which are the astronomical functions of the Secretary of the DIISR), and the Government says this is to provide a legislative basis for future government initiatives.\textsuperscript{26} The proposed amendments to the Australian Astronomical Observatory Act change its primary purpose from being the establishment of the AAO, to its new purpose of providing the Secretary of DIISR with astronomy-related functions.

Section 3 of the Australian Astronomical Observatory Act, a section which contains the simplified outline of the Act, is repealed and replaced by \textbf{item 3 of Schedule 1} of the Bill. This states that the Secretary of the Department has various functions relating to optical astronomy, and that the Commonwealth may charge fees in connection with ‘things done’ in the performance of the Secretary’s functions, which may be delegated to APS employees in the Department.

\textbf{Part 2 of Schedule 1} repeals the whole of the Australian Astronomical Observatory (Transitional Provisions) Act, which had provided for the integration of the former Anglo-Australian Observatory and its staff, assets, liabilities, contracts and commitments into the Commonwealth in 2010. Given the abolition of the AAO by the Bill, this transitional legislation (as the Explanatory Memorandum states) is no longer required.\textsuperscript{27}

\textbf{Transitional provisions}

\textbf{Schedule 2} of this Bill concerns transitional provisions and applies within and outside Australia,\textsuperscript{28} to cover the transfer of current AAO instruments, liabilities or commitments to any offshore entities—possibly, for example, the ESO. \textbf{Part 2} transfers assets and liabilities from the Commonwealth to designated entities, as determined by the Minister (likely to be the consortia,\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{23} Explanatory Memorandum, op. cit. p. 2.
\item \textsuperscript{24} The Statement of Compatibility with Human Rights can be found at page 4 of the Explanatory Memorandum to the Bill.
\item \textsuperscript{25} Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, 4, 8 May 2018, p. 96.
\item \textsuperscript{26} D Coleman, op. cit.
\item \textsuperscript{27} Explanatory Memorandum, op. cit., p. 8.
\item \textsuperscript{28} See item 2 of Schedule 2.
\end{itemize}
as outlined earlier in this Digest). This is restricted to those assets and liabilities that relate to the AAO immediately before the transition time of 1 July 2018 (subitem 3(1)).

**Item 11** in Part 4 of Schedule 2 makes the Commonwealth liable to pay reasonable compensation if it acquires property on other than just terms.

Of note in this Bill are the transitional rules provided for by item 12 of Schedule 2. These provide for the Minister, by legislative instrument, to make rules prescribing matters in relation to repeals made by the Bill. These rules, if made within a 12-month period starting at the transition time of July 2018, may modify the effect of Schedule 2 within the Bill. In other words, the proposed rules can change the operation of a part of the Bill (Schedule 2). This circularity means that, if passed, the item 12 Rules would constitute a Henry VIII clause. A Henry VIII clause (named after the well-known British monarch of that name) is defined as any ‘provision in a primary Act which gives the power for secondary legislation (regulations [or rules]) to amend, repeal or [be] inconsistent with the primary legislation’.29 In general, the Senate Standing Committee for the Scrutiny of Bills considers:

> There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament, as such clauses impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.30

These clauses are, however, limited by subitem 12(3) which sets out what the rules modifying Schedule 2 may not do, and this includes directly amending the text of the Act. The Explanatory Memorandum provides that under subitem 12(2) rules can only be made during a 12-month period starting at the time of transition (1 July 2018).31 In addition, the rules would be made by legislative instrument and would be subject to disallowance.32

The Explanatory Memorandum notes the existence of the Henry VIII clause but claims there is a sound justification for it. The Explanatory Memorandum considers that modifications to the operation of Schedule 2 (the transitional provisions) may be necessary in case of ‘unforeseen circumstances arising from the transfer of the AAO.’33 (In fact, the AAO is being abolished and its scientific functions, along with assets, liabilities and commitments are being transferred.) The Explanatory Memorandum states that such rules ‘may also be necessary to minimise disruption...and to address any operational issues that arise during the transition.’34

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29. Rule of Law Institute of Australia, ‘*Henry VIII clauses and the rule of law*’, Rule of Law Institute of Australia website.
31. Item 12 of Schedule 2 to the Bill could also be read as placing a 12-month time limit on the making of rules that modify the effect of that Schedule, rather than limiting the making of all rules under that item.
34. Ibid.