AUSTRALIAN CIVILIAN CORPS BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Foreign Affairs, the Honourable Stephen Smith MP)
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OUTLINE

The Australian Civilian Corps Bill 2010 (the Bill) establishes the Australian Civilian Corps, and creates a legal framework for the employment and management of Australian Civilian Corps employees.

Australian Civilian Corps employees will be a unique category of Commonwealth employee, engaged for specified periods to work in crisis environments overseas before returning to their regular employment.

The Bill provides for terms and conditions and other employment arrangements that are specifically designed for this kind of employment.

FINANCIAL IMPACT STATEMENT

There are no direct financial impacts from this Bill.
NOTES ON CLAUSES

In these notes on clauses the following abbreviations are used:

ACC Australian Civilian Corps
APS Australian Public Service
Department Department of Foreign Affairs and Trade
FW Act Fair Work Act 2009
PS Act Public Service Act 1999

Part 1 - Preliminary

Clause 1 - Short title

1. Once enacted, the short title of the Bill will be the Australian Civilian Corps Act 2010.

Clause 2 - Commencement

2. The table in this clause sets out when the Bill's provisions commence.

3. Clauses 1 and 2 commence on the day that the Australian Civilian Corps Act receives the Royal Assent (item 1 of the table). Clauses 3 to 31 commence on the 28th day after the Australian Civilian Corps Act receives the Royal Assent (item 2 of the table).

Clause 3 - Objects

4. This clause sets out the objects of the Bill, which are:
   - to establish the ACC; and
   - to provide a legal framework for the effective and fair employment and management of ACC employees.

Clause 4 - Simplified outline

5. This clause provides a simplified outline of the Bill.

Clause 5 - Definitions

6. This clause contains a list of every term that is defined in the Bill.

7. The definitions are explained below in alphabetical order.

AusAID

8. AusAID means the Australian Agency for International Development. A reference to AusAID should be interpreted as being a reference to whatever body of that name is in existence from time to time.
Australian Civilian Corps Code of Conduct

9. ACC Code of Conduct is the code of conduct prescribed under subclause 15(1).

Australian Civilian Corps employee

10. An ACC employee is a person engaged under clause 19.

Australian Civilian Corps Values

11. ACC Values are the values prescribed under clause 12.

Director-General

12. Director-General means the Director-General of AusAID.

enterprise agreement

13. Enterprise agreement has the meaning given to it by section 12 of the FW Act.

fair work instrument

14. Fair work instrument has the meaning given to it by section 12 of the FW Act.

overseas

15. Overseas means outside of Australia and the Territories.

WR Act collective transitional instrument

16. WR Act collective transitional instrument means an award, a collective agreement or a pre-reform certified agreement.

Clause 6 - Crown to be bound

17. This clause provides that the Australian Civilian Corps Act will apply to the Crown in each of its capacities, not only in right of the Commonwealth.

18. However, the clause makes clear that even though the Act will apply to the Crown, the Crown is not liable to be prosecuted for any offence under the Act nor can a pecuniary penalty be imposed.

Clause 7 - Extension to external Territories

19. This clause provides that the Australian Civilian Corps Act will apply to every external Territory. External Territory has the meaning given to it by the Acts Interpretation Act 1901.
Clause 8 - Extension to things overseas

20. This clause provides that the Australian Civilian Corps Act will apply to all actions, omissions, matters and things overseas. This clause expressly extends the application of the Act to things that take place outside of Australia.

Clause 9 - Relationship with Fair Work Acts

21. This clause provides that the Australian Civilian Corps Act will have effect subject to the FW Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Fair Work Acts). This clause ensures that the Act does not override the Fair Work Acts, even though the Act is a later Act.

22. Subclause (2) makes clear that the rule in subclause (1) is limited only to the Fair Work Acts and should not be taken to apply to the relationship between the Australian Civilian Corps Act and any other Act.

Part 2 - Australian Civilian Corps

Clause 10 - Constitution of the Australian Civilian Corps

23. This clause provides that the ACC will consist of ACC employees.

24. The ACC will not have any separate legal existence from the Commonwealth and will not be a separate agency under the *Financial Management and Accountability Act 1997*.

25. The ACC will not have its own annual report. Instead, a report on the ACC’s activities will be included in AusAID’s Annual Report.

Clause 11 - Management of the Australian Civilian Corps

26. This clause provides that the Director-General is, under the Minister, responsible for the management of the ACC. The reference to the Minister in this clause makes clear that the Director-General’s responsibility for the management of the ACC is subject to the Minister’s powers under the Constitution (and in particular section 64 of the Constitution).

Clause 12 - Australian Civilian Corps Values

27. This clause provides for regulations to be made which will prescribe the ACC Values. The ACC Values will provide the philosophical underpinning for the ACC and articulate the culture and operating ethos of the ACC. The ACC Values will provide the context within which powers under the Australian Civilian Corps Act will be exercised.

28. It is intended that the ACC Values will be based on the APS Values, but tailored to reflect the unique nature of the ACC and its overseas working environment.
Clause 13 - Director-General's directions about the Australian Civilian Corps Values

29. This clause provides that the Director-General may issue directions in relation to the ACC Values. Any directions that are issued by the Director-General will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

30. Directions may be issued for the purpose of determining the scope or application of any particular value. In this way the Director-General will, where necessary, be able to resolve any conflicts that arise in practice between the ACC Values and provide further clarification on their operation in relation to particular situations or deployments.

31. Subclause (2) makes clear that the ACC Values will have effect subject to any restrictions contained in the directions.

Clause 14 - Director-General must uphold and promote the Australian Civilian Corps Values

32. This clause requires the Director-General to uphold and promote the ACC Values.

Clause 15 - Australian Civilian Corps Code of Conduct

33. This clause provides for regulations to be made which will prescribe the ACC Code of Conduct. It is intended that the ACC Code of Conduct will be a public statement of the standards of behaviour and conduct that are expected of ACC employees. It is proposed that the ACC Code of Conduct will incorporate elements of the APS Code of Conduct and will draw on the various overseas codes of conduct which already apply in APS agencies which have employees on duty overseas (including AusAID's Code of Conduct for Overseas Service).

34. Subclause (2) provides that the ACC Code of Conduct must include a rule that ACC employees must at all times behave in a way that upholds the ACC Values.

35. Subclause (3) makes clear that the ACC Code of Conduct will apply to all ACC employees.

Clause 16 - Director-General's directions about the Australian Civilian Corps Code of Conduct

36. This clause provides that the Director-General may issue directions in relation to the ACC Code of Conduct. Any directions that are issued by the Director-General will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

37. Directions may be issued for the purpose of determining the scope or application of any particular provision of the ACC Code of Conduct. In this way the Director-General will, where necessary, be able to resolve any conflicts that arise in
practice between the provisions of the Code and provide further clarification on their operation in relation to particular situations or deployments.

38. Subclause (2) makes clear that the ACC Code of Conduct will have effect subject to any restrictions contained in the directions.

**Clause 17 - Breaches of the Australian Civilian Corps Code of Conduct**

39. This clause allows the Director-General to impose various sanctions on an ACC employee who is found, in accordance with the relevant procedures made under subclause (3), to have breached the ACC Code of Conduct. The available sanctions will be: termination of employment; re-assignment of duties; deductions from salary, by way of fine; and a reprimand.

40. Subclause (2) makes clear that the Director-General’s power to impose sanctions will be subject to any limitations set out in the regulations. For example, the regulations may limit the amount that may be deducted from an employee’s salary, by way of a fine.

41. The sanctions are modelled on those available under section 15 of the PS Act for a breach of the APS Code of Conduct. However, a reduction in classification or salary (as opposed to a deduction from salary) were intentionally not included as these were not considered appropriate given the short-term nature of most ACC employment.

42. Subclause (3) requires the Director-General to establish procedures for determining whether an ACC employee has breached the ACC Code of Conduct.

43. Subclause (4) provides that the procedures may also set out matters to be taken into account in determining the sanction to be imposed on an ACC employee who has been found to have breached the ACC Code of Conduct.

44. Subclause (5) makes clear that subclause (4) does not limit subclause (3).

45. Subclause (6) provides that the procedures:

- must have due regard to procedural fairness;
- may be different for different categories of ACC employees; and
- must entitle an ACC employee to an internal AusAID review of the following decisions:
  - a decision that the employee has breached the ACC Code of Conduct; and
  - a decision to impose a sanction on the employee.

46. There are two fundamental principles of procedural fairness; the hearing rule and the bias rule. The hearing rule requires a decision-maker to give an opportunity to be heard to a person whose interests will be adversely affected by the decision. The bias rule requires a decision-maker to be disinterested or unbiased in the matter to be decided.
47. By providing that the procedures may be different for different categories of ACC employees, the clause provides flexibility for managing alleged breaches of the ACC Code of Conduct. For example, for particular deployments the procedures may provide that some allegations do not need to be investigated 'in-country'.

48. Subclause (7) permits the instrument made under subclause (3) to provide for exceptions to the entitlement to a review of a decision. These exceptions might include where the application for review is frivolous or vexatious.

49. Subclause (8) requires the Director-General to take reasonable steps to ensure that every ACC employee has ready access to the documents that set out the procedures.

50. Subclause (9) makes clear that an instrument made under subclause (3) may be varied by the Director-General in accordance with subsection 33(3) of the Acts Interpretation Act 1901 but the instrument may not be revoked.

51. Subclause (10) provides that the procedures for determining whether an employee has breached the ACC Code of Conduct will not be a legislative instrument for the purposes of the Legislative Instruments Act 2003. This provision is merely declaratory of the law and is not a substantive exemption from the Legislative Instruments Act 2003.

Part 3 - Australian Civilian Corps employees

Clause 18 - Employer powers etc. of Director-General

52. This clause provides that the Director-General has, on behalf of the Commonwealth, all the rights, duties and powers of an employer in respect of ACC employees. The employer of the ACC employees is legally the Commonwealth and this clause makes clear that the Director-General is the person who can exercise the common law rights and powers of the Commonwealth as employer and is the person who must perform the duties of an employer. Amongst other things, the general powers of the Director-General as an employer would include establishing appropriate management arrangements for the ACC.

53. Subclause (2) permits regulations to be made which would confer other rights, duties or powers in respect of ACC employees on the Director-General.

Clause 19 - Engagement of Australian Civilian Corps employees

54. This clause provides for the Director-General to engage persons, on behalf of the Commonwealth, as ACC employees. ACC employees may be engaged for the purposes of performing or potentially performing duties overseas, or performing duties in Australia that are incidental, preparatory or ancillary to the performance or potential performance of overseas duties. These incidental, preparatory or ancillary duties might include undertaking training in Australia prior to a deployment or attending debriefing after a deployment.
55. Subclause (2) makes clear that the engagement of ACC employees must be for a specified term. This reflects the nature of deployments for ACC employees which will be time-limited. There will therefore be no ongoing ACC employees.

56. Subclause (3) permits the specified term to be extended but the regulations may impose limitations on the extension of a term - for example, the regulations could provide that an ACC employee's term may not exceed 3 years or that an ACC employee's term may only be extended twice.

57. Subclause (4) permits the Director-General to impose conditions on engagement. These conditions may deal with probation, citizenship, formal qualifications, security and character clearances, and health clearances. Health clearances may include psychological clearances. These conditions may be conditions which are required to be satisfied before the employment commences or during the employment.

58. Subclause (5) makes clear that subclause (4) does not limit by implication the conditions that may be applied to the engagement of an ACC employee. As such, other conditions may also be imposed on engagement.

59. Subclause (6) makes clear that a person may be engaged as an ACC employee whether or not they are employed by the Commonwealth in some other capacity or by another employer. This means that the doctrine of inconsistent commissions would not operate to prevent a person from being engaged as an ACC employee. However, this section does not imply that a person who is already employed by the Commonwealth or another employer has a right to take up an ACC engagement and to take leave from their existing employment (but see clause 26 below regarding the power to grant leave and clause 27 on the Prime Minister's directions to Commonwealth employers).

**Clause 20 - Remuneration and other conditions**

60. This clause enables the Director-General to make, from time to time, a written determination setting ACC employees’ terms and conditions. A determination may apply to an individual ACC employee or to a category of ACC employees.

61. The legislative note to this subclause makes clear that the National Employment Standards under the FW Act which provide certain minimum entitlements to national system employees will apply to ACC employees.

62. Subclause (2) makes clear that a determination is of no effect to the extent that it would reduce the benefit to an ACC employee of an individual term or condition applicable to the employee under an enterprise agreement.

63. The legislative note to this subclause informs the reader that a determination will be of no effect to the extent that it purports to reduce a benefit to an employee under the National Employment Standards. This is because the Australian Civilian Corps Act will operate subject to the FW Act.
64. Subclause (3) provides that a determination may apply, adopt or incorporate without modification, any of the provisions of a fair work instrument or a WR Act collective transitional instrument as in force from time to time. This means that the determination could, for example, incorporate particular provisions of the AusAID Enterprise Agreement.

65. The legislative note to this clause informs the reader that a determination may also apply, adopt or incorporate provisions of the National Employment Standards. However, a determination will be of no effect to the extent that it purports to reduce a benefit to an employee under the National Employment Standards. This is because the Australian Civilian Corps Act will operate subject to the FW Act.

Clause 21 - Assignment of duties

66. This clause provides that the Director-General may, from time to time, determine the duties of an ACC employee, and the place or places that the duties are to be performed. This enables the Director-General to determine the duties and work location of an ACC employee, and to change the employee’s duties or work location during a deployment.

Clause 22 - Suspension

67. This clause provides for the making of regulations to deal with the suspension of ACC employees from their duties. Regulations may be made which provide for suspension from duty with or without pay.

68. This provision is necessary as there is no common law power for employers to suspend employees from duty without pay. The regulations may provide for suspension where, for example, an ACC employee is suspected of breaching the ACC Code of Conduct.

Clause 23 - Termination of employment

69. This clause gives the Director-General the right to terminate the employment of an ACC employee at any time. Termination must be by written notice. The legislative note to this clause refers to the rules and entitlements that apply to termination of employment under the FW Act.

Clause 24 – Secondment of Australian Civilian Corps employees

70. This clause enables the Director-General to arrange for an ACC employee to be seconded for a specified period to any body or organisation. This includes secondments to international bodies or organisations such as the United Nations.

71. There are at least two types of secondments that may occur under this clause. First, an ACC employee may be assigned duties in the body or organisation by the Director-General, but will not become an employee of that body or organisation. Second, an ACC employee may be granted leave without pay from their ACC duties to take up employment in the body or organisation for the period of the secondment.
72. Subclause (2) provides that the Director-General may enter into an agreement with the body or organisation in relation to the secondment. The agreement could deal with matters such as the secondee’s duties, performance management, security requirements, managing misconduct and reporting.

73. Subclause (3) provides that the Director-General may enter into an agreement with an ACC employee in relation to their secondment to a body or organisation. This includes a secondment undertaken where the employee is granted leave without pay from their ACC duties. The agreement could deal with matters such as the secondee’s duties, performance management, confidentiality, conduct requirements and reporting.

74. Subclause (4) provides that the Director-General may terminate a secondment by notice to the body or organisation.

75. Subclause (5) makes clear that a secondment does not affect the secondee’s status as an ACC employee or the application of the Australian Civilian Corps Act to the secondee. This means, for example, that the ACC Code of Conduct would continue to apply to an ACC employee that is on secondment (subject to any directions issued by the Director-General about the Code under subclause 16(1)).

76. Subclause (6) makes clear that this clause does not affect any rights, powers or immunities that a secondee has by virtue of holding an office or position to which they have been seconded. It also makes clear that the clause does not affect the extent to which the secondee is subject to obligations or liabilities in relation to discipline by virtue of holding any office or position to which they have been seconded.

**Clause 25 - Limitation on Ministerial directions to Director-General**

77. This clause provides that the Director-General will not be subject to direction by any Minister in relation to individual ACC staffing decisions. This clause is intended to ensure the independence of the Director-General in making these decisions.

**Part 4 - Leave for the purposes of service in the Australian Civilian Corps**

**Clause 26 - Power to grant leave for the purposes of service in the Australian Civilian Corps**

78. This clause gives an employer, at the request of an employee, the power to grant the employee unpaid leave to allow the employee to serve in the ACC.

79. This clause would operate to allow an employer to grant an employee unpaid leave where the applicable industrial instrument or contract did not provide for unpaid leave entitlements or imposed limitations on accessing unpaid leave entitlements that impeded the employee’s ability to serve in the ACC.

80. Subclause (2) makes clear that this power to grant unpaid leave does not replace any other power of an employer to grant unpaid leave.
Clause 27 - Prime Minister may issue directions about leave etc. to Commonwealth employers

81. This clause gives the Prime Minister the power to issue directions concerning the granting of leave to employees for the purposes of service in the ACC and for any other purposes relating to the participation of employees in the ACC. The directions may be given to Commonwealth employers.

82. Commonwealth employer is defined as:
   • a person who exercises the powers of an employer in relation to employees of the Commonwealth;
     o this category would include an Agency Head under the PS Act;
   • a body corporate established by or under a law of the Commonwealth for a public purpose who has employees;
     o this category would include a body corporate such as the Australian Government Solicitor;
   • a wholly-owned Commonwealth company (within the meaning of the Commonwealth Authorities and Companies Act 1997) who has employees;
     o this category would include a company such as the Australian Institute for Teaching and School Leadership Ltd.

83. The directions could require that Commonwealth employers grant leave to their employees to allow the employees to undertake training relevant to an ACC deployment or to undertake a deployment. The directions may be given in relation to any other matter that relates to the participation of employees in the ACC such as a direction regarding recognition of an employee’s service in the ACC or a direction about the transition of employees back to their regular employment following ACC service.

84. Subclause (3) provides that the directions must not relate to a particular employee. This is consistent with the limitation on Ministerial directions under clause 25.

85. Any directions that are issued by the Prime Minister under this clause will be a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Part 5 - Miscellaneous

Clause 28 - Payments in special circumstances

86. This clause enables the Minister to authorise the making of payments in special circumstances that relate to, or arise out of, ACC employment. This provision removes the need to use general 'act of grace' payment arrangements in cases relating to ACC employment matters. For example, to reimburse legal costs incurred by an ACC employee or to provide payments where an ACC employee has suffered a detriment because of incorrect advice.

87. Subclause (2) provides that the Minister will be able to authorise payments of specific amounts or periodical payments.
88. Subclause (3) makes clear that payments may be authorised under this clause even though they would not otherwise be authorised by law or required to meet a legal liability.

89. Subclause (4) provides that an authorisation will not be able to be made under this clause if it would involve, or be likely to involve, a total amount of more than $100,000. This will ensure that where an amount might exceed $100,000 it will have to be referred for decision by the Minister for Finance and Deregulation under the general arrangements for ‘act of grace’ payments by the Commonwealth.

90. Subclause (5) makes clear that conditions will be able to be attached to any payment authorised by the Minister. If a condition is breached, the payment will be able to be recovered by the Commonwealth as a debt in a court of competent jurisdiction.

**Clause 29 - Disclosure or use of personal information**

91. The Information Privacy Principles (IPPs) contained in the *Privacy Act 1988* (Privacy Act) provide, among other things, a legal framework for the collection, storage, access and correction, use or further disclosure of personal information by government agencies. The *Freedom of Information Act 1982* (FOI Act) also provides a mechanism for access to, and correction of, personal information.

92. Personal information is defined widely in those Acts to mean information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

93. This clause allows regulations to be made authorising the disclosure or use in specific circumstances of personal information. The regulations may also impose restrictions on the collection, storage, access, use or further disclosure of information disclosed under the regulations.

94. These provisions will assist in the effective management of the ACC. For example, the regulations could authorise the release of certain personal information relating to ACC employees to contractors performing people management functions for the ACC. Or, the regulations could authorise the disclosure of certain personal information to other employers of ACC employees such as information relating to breaches of the ACC Code of Conduct by their employee.

**Clause 30 - Delegations**

95. Subclause (1) provides that the Minister may delegate any or all of his or her powers or functions under the Act or the regulations to:

- another Minister;
- an SES employee or acting SES employee in AusAID;
- a person who holds an office or appointment under an Act.
Subclause (2) provides that the Director-General may delegate any or all of his or her powers or functions under this Act, the regulations or any other instrument made under this Act to an APS employee in AusAID or an ACC employee. This will allow for greater flexibility in the management of the ACC, both overseas and in Australia. This approach is consistent with the ability of an Agency Head to delegate powers and functions to an APS employee under the PS Act.

Subclause (3) provides that a delegate exercising powers or functions must comply with any directions of the delegator.

Subclause (4) excludes from the power of delegation, any power to make, vary or revoke a legislative instrument. These powers and functions can only be exercised by the person on whom the power is conferred.

Clause 31 - Regulations

This clause provides that the Governor-General will have a general regulation-making power in relation to matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to this Bill.