



CPSU (PSU Group) Submission:

Australian Civilian Corps Bill 2010

Senate Standing Committee on Foreign Affairs, Defence and Trade

October 2010

Introduction

The Community and Public Sector Union (CPSU) is an active and progressive union committed to the promotion of a modern, efficient and responsive public sector that delivers quality services and quality jobs. We represent around 55,000 members in the Australian Public Service (APS), ACT Public Service, NT Public Service, ABC and the CSIRO. We also have members in Telstra, commercial television and the telecommunications industry.

The CPSU welcomes the opportunity to provide a submission to the Senate Inquiry into the *Australian Civilian Corps Bill 2010* (the "Bill"). The CPSU is the major union representing employees of the Australian Agency for International Development (AusAID), the Department of Foreign Affairs and Trade (DFAT) and other government agencies which will be directly affected by the proposed introduction of the Australian Civilian Corps ("the Corps"). This submission has been prepared in consultation with CPSU members.

The CPSU supports the Australian Government in its endeavours to assist other nations dealing with natural disasters and conflict. The CPSU understands the importance of the need to have a group of people who can be quickly deployed to provide timely and appropriate assistance in stabilisation, recovery and development planning activities to countries affected by natural disasters and conflict.

While the CPSU supports the objective of the government in establishing the Corps, we have significant concerns about aspects of the proposed administration of the Corps, and in particular, the separate employment arrangements proposed by the Bill. It is not clear why this separation is necessary – what is the Bill seeking to cover that cannot be dealt with under the Public Service Act, or conversely, what constraints in existing legislation is the Bill seeking to avoid? The Public Service Act comes with a decade of precedent in its application – a new Bill, to deal with the temporary employment of people in highly stressful situations is of concern. This submission details the concerns of the CPSU and its members.

Equity in employment conditions for Commonwealth employees

A fundamental objective of the CPSU is to ensure that employees of the proposed Corps working alongside employees of other Commonwealth agencies (eg AusAID, DFAT etc) are provided with the same wages and employment conditions as comparable Commonwealth employees. The employment arrangements specified in the Bill do not appear to ensure such equity.

- **Recommendation:** To ensure equity in employment conditions of employment between AusAID/DFAT and other similar employees, and Corps employees, the Government must negotiate a "greenfields" enterprise agreement with the CPSU (and other relevant public sector unions) to cover Corps employees. This agreement must incorporate relevant terms of the relevant agreement, for example the *Australian Agency for International Development Enterprise Agreement 2009 – 2011* (the AusAID enterprise agreement) or its successor. The agreement must also incorporate relevant terms of employment specified elsewhere. For example, AusAID overseas terms and conditions are not currently reflected in the AusAID enterprise agreement. These are important because it is in these terms and conditions that country specific allowances and entitlements are laid out.

It must be noted that if the Corps is to bring in technical expertise, it may be that the correct remuneration for these skills is not reflected in existing conditions. For example, the AusAID agreement does not contain professional/technical streams. This needs to be considered and any greenfield agreement may have to provide professional scales based on comparable roles in other APS agencies or in other industries. It is vital that any pay scales be established up front to avoid individual negotiation on pay in a crisis situation.

Concerns relating to the employment arrangements for Corps employees

Under the Bill, the terms and conditions of employment of Corps employees are to be determined by the Director General of AusAID with the only safety net being that provided by the *Fair Work Act 2009*.

AusAID Director General has wide discretion re employment conditions

- Section 20(1) of the Bill provides for the Director General of AusAID to *determine in writing the remuneration and other terms and conditions of employment applying to a Corps employee, or Corps employees.*

This provides the Director General with extensive discretion to set terms of employment on an individual basis, a collective basis, or a combination of both. This wide discretion is only limited by the operation of the National Employment Standards (the NES) and the requirement that any direction cannot reduce a benefit to a Corps employee *of an individual term or condition applicable to the employee under an enterprise agreement* (s.20(2) of the Bill). The Bill appears to allow the Director General to set employment conditions for Corps employees below minimum standards applying to Commonwealth employees generally.

- **Recommendation:** The Bill must be amended to ensure that any direction under s.20(1) provides no less than the remuneration and other conditions of employment provided for in a *Fair Work instrument* and/or a *WR Act collective transitional instrument* and other conditions which apply at that time to comparable employees engaged by AusAID.

Checks and Balances on the exercise of Director General's discretion re employment conditions

- The Bill does not provide checks and balances on the exercise of the Director General's wide power to set employment conditions, select and appoint employees, direct employees and second employees to other bodies or organisations. Such checks and balances are important to ensure that the Corps is seen to operate in an open and transparent manner. This is particularly important because the Bill provides that Corps employees will be a "*new category of Commonwealth employee*" (Second Reading Speech: Minister for Foreign Affairs - Rudd, Kevin, MP Thursday, 30 September 2010 p2). According to the Minister, Corps employees are not to be employed under the *Public Service Act 1999*, the *APS Code of Conduct*, regulations and the other instruments that collectively ensure that Australian Government employment is merit based, transparent and

equitable. It is unclear why the Corps should be exempt from employment pursuant to the PS Act and the APS Code of Conduct.

- **Recommendation:** At a minimum the Director General should be bound by the APS code of conduct. The rationale for creating a new form of non-PS Act employee is not clear, and in the absence of a clear rationale, ACC employees should be employed under the PS Act.

Concerns about the operation of the register

- The Minister's speech references a register, but this is not mentioned in the Bill. Are the terms and conditions set when someone is put on the register? Who is eligible to apply for the register? Does it have an expiry date? What is the relationship of someone on the register to the Commonwealth or AusAID Director General? Who maintains the register? Who decides who is on the register? Is there really to be a register? If so, the register and details about its operation need to be included in the Bill.
- Given the Corps is open to public servants, will there be a situation where AusAID staff on the register are not deployed because AusAID (which is defacto making the decision) does not want to cover the cost?

Application of the Australian Government Employment Bargaining Framework

- The Corps employees are employees of the Commonwealth. The employment of other Commonwealth employees is subject to The Australian Government Employment Bargaining Framework ("the AGEBF"). The AGEBF provides a comprehensive framework for Australian Government employment bargaining and provides consistent bargaining rules across Commonwealth employment for the benefit of both the Government and employees. The application of the AGEBF to Corps employees would rightly impose limits on the Director General's discretion and mitigates against Corps employees being disadvantaged.

Recommendation: The AGEBF must be applied to Corps employment to provide consistency of bargaining for all Commonwealth employees

Commonwealth employees taking leave to take up employment with Corps

- The Bill provides for the granting of leave to Commonwealth employees for the purpose of employment with the Corps. Section 27 provides for the Prime Minister to issue directions to a Commonwealth employer in relation to the granting of leave to Commonwealth employees for the purposes of service in the Corps.

Recommendation: To ensure that a Commonwealth employee is not disadvantaged by obtaining leave to take up employment in the Corps, the Bill must be amended to ensure such an employee does not suffer a loss of remuneration or other conditions of employment. It is recommended to amend Section 27 of the Bill in the following way:

- In Section 27 of the Bill
 - Add new subsection 2A as follows:
 - **2A** *Directions under subsection (2) must provide that an employee granted leave shall not have their remuneration or other conditions of employment reduced as a consequence of employment in the Australian Civilian Corps.*
- The directions the Prime Minister may issue under s.27(2) are not dependent upon an APS employee actually requesting leave without pay to work for the Corps. This is in contrast to s.26(1) which provides an employer (other than a Commonwealth employer) may, *at the request of an employee* grant unpaid leave to enable the employee to take up employment with the Corps.

Recommendation: This anomaly should be rectified to guard against any suggestion that the government intends to allow Commonwealth employees to be required to take leave to begin service with the Corps without requesting such.

- There is potential under the current Bill for Corps employees to be on different wages and conditions. If someone comes from outside the APS where their salary is not maintained, they might be working on lower conditions than someone seconded from an APS agency which does have salary maintenance. Conversely, should APS employees on salary maintenance be more expensive than other employees, this raises concerns about preference not being given to APS employees because of the higher remuneration cost.

Recommendation: These complex issues must be worked through before the Bill is finalised.

- Another concern that must be addressed is the potential impact of the proposed Bill on employment entitlements such as superannuation payments. For APS employees seconded to the ACC, consideration must be given to the impact on these entitlements, with proper attention given to rectifying any possible detriment for those in defined benefit schemes.

Recommendation: Consideration must also be given to amending the Bill to ensure that employment by the ACC counts as service for all purposes.

- For AusAID and other APS employees seconded to work for the ACC there are concerns around whether their previous positions will be available on their return. This must be clarified to ensure that employees return to their substantive position.

Recommendations:

It is recommended that the Bill is amended as follows:

- Delete the current paragraph (a) of subsection 27(2) and replace with the following:
- *(a) the granting of leave to employees, **at the request of the employees**, for the purposes of service in the Australian Civilian Corps:*
or
- The Bill must be amended to ensure employment by the ACC counts as service for all purposes.
- The Bill must provide the opportunity for APS employees to return to their substantive position on the conclusion of the period of service with the ACC.

Rights and Responsibilities of Corps employees when deployed overseas

Whilst deployed overseas a Corps employee must have the same rights and obligations they would have under Australian law if they were employed within Australia. This is especially important in relation to occupational health and safety, workers compensation, the ability to initiate tort action, personal security, privacy, professional liability, due process in dealing with disputes arising from their employment and other employment and civil rights. Such Australian workplace rights and obligations should be protected and the Bill should be amended to ensure that this is the case.

At present, it is not clear where the duty of care lies – in the absence of an overarching employment agreement, is it the Director General AusAID, the Minister, AusAID or someone else? The Bill appears to be part of a process of transitioning of civilian public servants into roles traditionally occupied by defence personnel, but without the health and safety support of defence organisations. AusAID for example currently has one staff counsellor for all of its Australian and overseas deployed personnel, and CPSU members advise that AusAID struggles to meet its duty of care to ensure that those working in high pressure/traumatic/unstable situations are appropriately demobilised. Will AusAID also have a duty of care to appropriately demobilise and reintegrate Corps employees, or will these employees be cut loose at the end of their deployment? This is a significant risk for the government and for AusAID as we transition to this new way of doing business.

Recommendation: The conditions for civilians deployed by the Corps should be commensurate with those provided to ADF/AFP personnel - particularly access to medical care, prior training and security.

Continuity of service for private sector employees taking unpaid leave to take up employment with the Corps

The Bill provides that a private sector employer may grant unpaid leave to an employee to facilitate employment with the Corps (s. 26 of the Bill). Employment with the Corps must be for a fixed term which can be extended subject to any limitations prescribed by the regulations (s.19(2) and (3) of the Bill). There is a lack of clarity regarding continuity of “service” if a private

sector employee is given unpaid leave to work for the Corps. Does a private sector employee who is on unpaid leave from their normal employment to enable employment by the Corps still accrue Long Service Leave, redundancy entitlements, personal and other accrued entitlements with their normal employer during service with the Corps and how is that provided for under law?

The *Fair Work Act 2009* defines “service and continuous service” in relation to accrual of employment entitlements (s.22 of *Fair Work Act 2009*). The *Fair Work Act 2009* provides that a period of unpaid leave or absence to perform *eligible community service* is ‘service’ with the employer who grants the leave without pay to enable the employee to perform the service (s.22(2)(b)(i)). What constitutes eligible community service is set out in Division 8 of Part 2-2 of that Act and includes *voluntary emergency management activity* which appears to exclude absence of an employee to perform *voluntary emergency management activity* if that community service is paid employment (s.109(2) *Fair Work Act 2009*). As service with the Corps is paid, it appears that the *Fair Work Act* protections provided to employees performing eligible community service within Australia are currently not provided to employees taking up employment with the Corps.

Recommendation

The government should either amend the *Fair Work Act 2009* or this Bill to ensure private sector employees are not disadvantaged in relation to accrued entitlements when employed by the Corps.

Issues regarding secondment of Corps employees

The Bill allows the Director General to second Corps employees to *any body or organisation (including an international body or organisation)* (s.24(1)), enter into an agreement with a body or organisation in relation to seconded Corps employees (s.24(2)), and enter into agreement with a Corps employee in relation to that employee’s secondment (s.24(3)).

Corps employees who are seconded to another body or organisation should not suffer a reduction in remuneration or conditions of employment (including the provision of appropriate accommodation and security) during that secondment. This objective should be guaranteed in the Bill rather than requiring individual employees to negotiate the terms of the secondment. Further, an APS employee seconded to the Corps must not suffer any diminution in wages and working conditions when seconded to the Corps or ‘on-seconded’ beyond the Corps in the circumstance contemplated above.

Recommendation: to achieve this objective It is recommended that the Bill be amended as follows:

- In s.24 of the Bill add new subsection 24(3A):
- **3A** *An Agreement made under subsection (2) or (3) shall not reduce the remuneration or other employment conditions of Australian Civilian Corps’ employees*

Any Corps employee who is seconded must be provided with the same rights and obligations they would have under Australian law if they were employed within Australia. This is especially important in relation to occupational health and safety, workers compensation, the ability to

initiate tort action, personal security, privacy, professional liability, due process in dealing with disputes arising from the seconded employment and other employment and civil rights.

Recommendation: To protect such rights and obligations the Bill should be amended to enshrine these rights and obligations.

Who controls and is responsible for seconded Corps employees

- If a Corps employee is seconded to another body in accordance with the provisions of this Bill, the person's status as a Corps employee is not affected (s.24(5) of the Bill). Seconded employees are likely to be engaged in overseas locations suffering natural disaster or conflict. Such situations are often politically unstable and provide less personal security than one would expect to enjoy in Australia. When a Corps employee is seconded to another body or organisation, who controls the employee and does the body or organisation have a duty to provide a safe place and system of work, or does that duty remain with the Corps? This is a critical issue which needs to be addressed.
- Conflicts of interest may occur where a Commonwealth employee is seconded to another body or organisation if the function of that body or organisation is to deliver Corps projects. This may result in Corps employees managing and delivering projects at the same time which is clearly inappropriate. This may be addressed via the proposed Australian Civilian Corps Values to be incorporated into the proposed Australian Civilian Corps Code of Conduct (ss.12 – 16 of the Bill).

The Australian Civilian Corps Values and Code of Conduct

- The Bill provides for regulations to be made to prescribe the Australian Civilian Corps Values (s.12 of the Bill). We note that the Explanatory Memorandum states that "*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*" (para 28 of Explanatory Explanation). This intention should form part of the legislation to ensure that the regulations reflect the intention of the Parliament. It is recommended that the Bill be amended as follows:

Recommendation: In section 12 add new subsection (2) as follows:

- (2) *Regulations made under this Section must provide that Australian Civilian Corps Values will be consistent with the APS Values*""

Note that APS Values are currently being reviewed by the Government

- The Bill also provides for regulations to be made to prescribe the Australian Civilian Corps Code of Conduct (s.15 of the Bill). We note that the Explanatory Memorandum states that "*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)*" (para 33 of Explanatory Explanation). This intention should form part of the legislation to ensure that the regulations reflect the intention of the Parliament. It is recommended that the Bill be amended as follows:

Recommendation: In section 15 add new subsection (1A) as follows:

- (1A) *Regulations made under this Section must provide that Australian Civilian Corps Code of Conduct will incorporate the APS Code of Conduct and the AusAID Code of Conduct for Overseas Service”*

Further Consultation Required

Finally the CPSU calls upon the Committee to recommend to the Government that it consult with the CPSU in relation to any amendments to the Bill, the process of finalising the Bill and the employment arrangements of Corps employees generally.