



**Senate Employment, Workplace Relations and Education
Legislation Committee**

**Report on the
Research Agencies Legislation
Amendment Bill 2002**

August 2002

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Report

Referral

1.1 The Research Agencies Legislation Amendment Bill 2002 ('the bill') was introduced into the House of Representatives on 21 March 2002. On 25 June 2002 the Senate adopted the Selection of Bills Committee recommendation to refer the provisions of the bill to this Committee for report by 29 August 2002.

1.2 Eight submissions were received, and they are listed at Appendix 1.

Reasons for referral

1.3 The Selection of Bills Committee Report contained the following reasons for referring the bill to the Committee:

- Financial reporting requirements possibly too weak and inappropriate;
- Issues connected with financial management associated with commercialisation;
- Adequacy or otherwise of financial safeguards;
- Appropriateness of certain commercial ventures undertaken by these agencies.¹

Background to the bill

1.4 The Australian Institute of Marine Science (AIMS) was established by the *Australian Institute of Marine Science Act 1972* (the AIMS Act). Its functions are set out in detail in section 9 of the AIMS Act, but in general are to 'generate the knowledge needed for the sustainable use and protection of the marine environment through innovative, world-class scientific and technological research.'²

1.5 The Australian Nuclear Science and Technology Organisation (ANSTO) was established by the *Australian Nuclear Science and Technology Organisation Act 1987* (The ANSTO Act). Its mission is 'to provide expert advice, nuclear services and nuclear-based products on demand, and to identify, develop and promote innovative solutions through the application of nuclear-based research and development'³

1.6 AIMS and ANSTO are currently permitted to undertake commercial activities associated with the intellectual property generated by their research, but their respective Acts limit the extent of this commercial activity in two important ways. First, the agencies have specified limits on the size of contracts they can enter into. For AIMS, ministerial approval is required for contracts in excess of \$100,000⁴. For ANSTO, ministerial approval is required

1 Selection of Bills Committee, Report No. 5 of 2002

2 <http://www.aims.gov.au/pages/about.html>

3 <http://www.ansto.gov.au/ansto/miss.html>

4 AIMS Act, s.42.

for contracts in excess of \$1 million⁵. Second, the Acts have the effect of limiting the commercial activities of AIMS and ANSTO to matters directly related to their Functions. This means that if either organisation generates, as a by-product of their research activities, intellectual property that does not relate directly to marine science or nuclear technology (respectively), they cannot act to commercialise that intellectual property. This latter limitation appears to be the primary reason for the introduction of the Research Agencies Legislation Amendment Bill 2002 (the bill).

1.7 Schedule 1 of the bill addresses the issues raised above with respect to AIMS, and Schedule 2 does so for ANSTO. In each case, Part 1 of the Schedule increases the functions and powers of the organisation to provide for the non-marine or non-nuclear application of technologies, and Part 2 of the Schedule increases the size of the contracts AIMS and ANSTO can enter into without Ministerial approval.

1.8 In his second reading speech, the Minister explained the need for the bill as follows:

“it is imperative that the AIMS and ANSTO acts be amended so that the growing range of commercial activities of these research agencies may be fully exploited and in doing so, are fully supported by providing funds and infrastructure.”⁶

Issues

1.9 None of the submissions provided to the committee expressed concern about any direct aspects of the bill. While two submissions raised concerns about Government policy in this area, neither expressed direct criticism of the bill. In fact, one of these submissions stated that “in removing impediments now faced by ANSTO and AIMS preventing and limiting their commercial operations we believe the bill has merit.”⁷ None of the submissions expressed criticism in relation to any of the reasons expressed by the Senate Selection of Bills Committee for referring this bill to the committee.

1.10 The two submissions which expressed general policy concerns were apprehensive about the extension of commercial powers available to AIMS and ANSTO. This was considered likely to result in the organisations directing their activities towards more commercially lucrative activities, or were likely to result in the Government reducing the appropriations to these agencies. While the committee majority notes these arguments, it regards them as speculative at best. These are not issues which can properly be dealt with by this inquiry.

1.11 The committee majority noted that, while the submissions of AIMS and ANSTO addressed the terms of reference for this inquiry, they fell short of addressing the interest expressed by members of the committee during a number of inquiries about the longer term implications of the commercialisation of research. While the committee majority strongly supports this bill, and sees merit in opening up further opportunities for collaborative research, it notes that the agencies have not expounded on the scope and challenges presented by these collaborative opportunities. The committee considers that AIMS and ANSTO must

5 ANSTO Act, s.31.

6 The Hon. Peter McGauren MP, Minister for Science, House of Representatives *Hansard*, 21 March 2002, p.1842

7 *Submission 2*, Association of Professional Engineers, Scientists and Managers, Australia, p.2

be aware of the concerns and debates surrounding the commercial activities of research institutions such as universities and the CSIRO, and further concerns touching on the impact of commercial funding in public research institutions. The committee majority looks to these concerns being allayed. Following the changes to administrative arrangements since the election of the 40th Parliament, this committee has some direct oversight over the performance of research agencies and will be watching to ensure that these agencies take full and prudent advantage of their new powers. It looks forward to seeing an unfolding pattern of innovative long-term commercial ventures successfully managed in the national interest.

Issues raised by the Selection of Bills Committee

1.12 As noted in paragraph 1.3 above, the Selection of Bills Committee raised a number of issues as it referred this bill to the Committee. In the absence of evidence critical of the bill, each of the issues raised will be briefly addressed below:

Financial reporting requirements

1.13 Both AIMS and ANSTO report to the Government and Parliament in accordance with the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). The CAC Act sets our reporting and accountability requirements which are relevant to a broad range of agencies. The Committee is unaware of any specific reasons why financial reporting requirements under the CAC Act might be regarded as too weak or inappropriate.

Issues connected with financial management associated with commercialisation

1.14 Evidence before the committee did not raise any issues regarding the financial management of commercial operations undertaken by AIMS and ANSTO.

Adequacy or otherwise of financial safeguards

1.15 The financial safeguards relating to these agencies are principally the CAC Act. In addition, both must seek Ministerial approval before taking other commercial decisions, such as entering contracts beyond \$1 million (AIMS) or \$5 million (ANSTO), or borrowing money (whether from the Commonwealth or any other body). Finally, both organisations are subject to audit by the Australian National Audit Office. The Committee concludes that these financial safeguards are entirely adequate.

Appropriateness of certain commercial ventures undertaken by these agencies

1.16 The committee is not aware of which commercial ventures undertaken, or likely to be undertaken, by these agencies might be controversial. The Committee observes that the most likely controversial activities probably relate to nuclear activities, but notes that ANSTO is already able to commercialise its intellectual property for nuclear uses. This legislation relates to *non-nuclear* activities. As such, the Committee has no reason for concern regarding the appropriateness of commercial ventures undertaken by these agencies.

Recommendation

The Committee recommends that the Senate pass this bill.

**Senator John Tierney
Chair**

Report of Labor Senators

Research Agencies Legislation Amendment Bill 2002

Introduction

The Research Agencies Legislation Amendment Bill 2002 aims to facilitate commercial activities undertaken by the Australian Institute of Marine Science (AIMS) and the Australian Nuclear Science and Technology Organisation (ANSTO) by amending their respective acts of establishment. Labor senators support in general terms the aims of the bill.

The report of the Government senators states:

None of the submissions provided to the Committee expressed concern about any direct aspects of the bill. [Government senators' report, par.1.9]

Labor senators do not agree with this assertion, and contend that a number of submissions to this inquiry have raised serious and far-reaching issues. The Department of Education, Science and Training itself refers to the risks associated with commercialisation (DEST, Submission no.5, p.4).

The Chief Scientist, Doctor Robin Batterham, also alludes to potential risks, as follows:

I acknowledge achieving an appropriate balance between freeing up government funded research institutions to enable them to secure the benefits of commercialisation while protecting the principles of corporate governance and financial due diligence raises some difficult issues.

In consideration of the Bill the Committee needs to be mindful there are risks in any commercial activity." [Chief Scientist, Submission no.4, p.2]

Labor senators will discuss the issues raised by the Chief Scientist in this minority report.

Concerns have been raised in submissions about the potential implications of the passage of the bill for various aspects of the operations of the two agencies, particularly their financial dealings, and safeguards applying to these. A further concern is connected with the pitfalls and dangers experienced by a number of other public-sector organisations in commercialising their activities: Labor senators want to ensure that, as far as possible, such difficulties are avoided by the two agencies that are the subject of the bill. These concerns also arise in submissions to the Inquiry and are discussed in this report.

The particular precedents that are instructive in this regard are, first, the experience of CSIRO in commercialisation, and, secondly, that of institutions in the publicly funded higher education sector. The submission to this Inquiry from the CSIRO Staff Association (Submission 7) details some of the issues that have arisen as the Organisation has moved to increase its external earnings, including commercial earnings, highlighting the shift away from basic and strategic research and the shift in resources towards commercial operations, at the expense of aspects of the core mission of the agency. Examples from CSIRO will be used to illustrate the concerns held by Labor senators for AIMS and ANSTO.

The public university sector provides a further set of illustrations of problems and tensions arising from the trend towards greater reliance on commercial sources of income for what are essentially public-sector institutions. The report of the Senate Committee's Inquiry into the Capacity of Public Universities to meet Australia's Higher Education Needs, Universities in crisis (Senate Employment, Workplace Relations, Small Business and Education References Committee, 2001) deals with these issues at length, particularly in connection with universities' research activities. Thus the findings and recommendations of that report are highly relevant to the current inquiry. Accordingly, Labor senators will draw on that report in the context of their discussion.

Finally, conclusions are drawn, and suggestions made, on means to avoid or ameliorate, in this instance, the problems experienced elsewhere in the public sector where commercialisation of research activities has been actively pursued.

Financial management

The bill seeks to relax certain financial provisions and requirements applying to the two agencies, ANSTO and AIMS. The objective here is to allow them to enter into contractual arrangements more easily, and to free up restrictions on their borrowings. Noting that the agencies themselves have welcomed these initiatives in their submissions, the Labor senators nevertheless wish to point to some issues that, if not carefully dealt with, could give rise to concern.

In the case of both agencies, under this bill limitations applying to the monetary value of contracts that they can enter into will be wound back. For AIMS, this means an increase in the financial threshold at which Ministerial approval must expressly be sought, from \$100 000 to \$1 million. For ANSTO, the proposed amendment to its Act takes a different form: the agency will be able to enter into contracts above the current threshold of \$5 million where this is prescribed by regulation. Labor senators do not oppose these measures, although, in the case of ANSTO, the proposed intent and scope of the regulation need to be spelt out. In this way some of their reservations about other aspects of the bill might be addressed.

Of greater concern are the measures designed to remove certain restrictions associated with borrowings on the part of one of the two agencies: AIMS. The change would, it is understood, bring the AIMS legislation into line with that of ANSTO, and Labor senators' reservations about the change for AIMS are also relevant to the other agency's current situation in this regard. The Department points out in its submission (p.3) that, as a small agency with limited financial resources, AIMS lacks the capacity of larger organisations, including CSIRO, to fund commercial ventures from within its own resources. (CSIRO, under its legislation, does not have the power to make external borrowings.) DEST says that:

Legal advice indicates that without AIMS having the power to borrow, any spin-off company in which AIMS holds a significant equity interest will not have this power." [DEST, Submission no.7, p.3]

Labor senators take it that the Department is offering this consideration as a rationale for the proposed change in legislation. But the measure goes much further in that it will allow the Institute itself to borrow not just from the Commonwealth, but from other legal persons, although all borrowings will need the written approval of the Minister. AIMS will also be required to provide security for loans, under a Government guarantee.

Furthermore, AIMS will be empowered to make and guarantee loans to its associated companies. Powers related to borrowing are already available to ANSTO under its legislation. "Associated company" is defined in the bill as one in which AIMS has 15 per cent or more of the votes exercisable at a company general meeting. In other words, Labor senators note, AIMS would be given powers under this bill to lend to companies in which it enjoys an interest far short of a controlling one. Thus the Institute would be unable to prevent the company from taking decisions that might be deleterious to AIMS' own financial interests. This is of some concern.

The Department itself, however, also notes that:

... the participation of AIMS and ANSTO in spin-off companies, like any commercial activity, is not without some risk... [DEST, Submission no.5, p.4]

Labor Senators draw attention to the serious problems that have arisen in the public university sector associated with the financing of commercial ventures, including their wholly- and partly-owned companies. Examples are provided in the previous Committee's Universities in crisis report (Universities in crisis, 2001, p.236), to which a response from the Government is now months overdue: these examples include the provision by the University of NSW of a total of \$17 million in equity (\$10 million of which was a loan) to its wholly-owned company, Unisearch Limited, between 1998 and 2000. Unisearch reported a loss in 1999 of \$5.2 million. Many other, similar, cases could be pointed to. In reply to the charge that public funds were going to underwrite the losses of universities' failed commercial ventures, the Department replied that the universities concerned had assured the Department that:

... no Commonwealth funds have been utilised to fill the gap created by any losses... and there has been no report from auditors [general] about any university utilising Commonwealth monies to cover losses of private commercial arms. [Universities in crisis, 2001, pp.236-7]

The report goes on to say (p.237) that, in the case of Commonwealth-funded universities, it is not possible to distinguish Commonwealth dollars in their possession from other funds. Thus the claim that funds other than Commonwealth monies have gone to prop up commercial ventures is without basis in reality. Universities in crisis notes (p.237) the view of the Victorian Auditor-General, who has said that all assets of public universities are public assets, because they have been developed through the public university.

To draw a parallel with ANSTO and, more particularly, AIMS, the power to make loans to subsidiaries or other associated companies carries similar risk: potentially, public money could be lost. In such an instance, the resources available to the agency are diminished and its capacity to pursue its mission reduced. Given the comparative inexperience of many public-sector agencies in commercial dealings, the dangers of such eventualities must be considered.

The bill proposes a safeguard, in that the Minister's written authority would be required for borrowings and loans. While this is a source of some comfort to the Labor senators, the restriction does not constitute a guarantee that something untoward might not happen, in a financial sense. The risks associated with commercial activity, noted by the Department in its own submission, are real and must be borne in mind when approval to enter into such transactions is sought and given.

Another matter highlighted by the Senate Higher Education Inquiry of 2001 is the lack of profitability of a large number of universities' commercial ventures. Of course, interaction with the commercial world has many benefits and spin-offs, both for universities and also for the Commonwealth scientific agencies: CSIRO Staff Association expresses a view about some of these in its submission:

Our members have found working with private industry remarkable satisfying. They value the direct interaction, the focus on results and most of all seeing the fruits of their efforts being taken up and used. [CSIRO Staff Association, Submission no.7, Attachment, p.11]

It is important, though, that the valuable public assets of ANSTO and AIMS remain protected as far as possible from erosion and loss due to poor commercial decisions. To this end, it is crucial that the activities of their commercial operations, of any kind, be reported and monitored to the same standards as those applying to the agencies themselves. The next section discusses financial accountability measures.

Financial reporting and accountability

AIMS and ANSTO are subject to the financial reporting requirements of the Commonwealth Authorities and Companies Act 1997 (CAC Act). Labor senators are aware that the provisions of this Act are in certain ways relatively prescriptive, and relevant clauses are summarised in the submission by the Department of Education, Science and Training (DEST) (Submission no.5, pp.2-3).

Turning to the university sector once again for a comparison, it is interesting to note that university acts of establishment, of themselves, are generally sketchy in terms of financial reporting requirements. Universities, however, are required to report in detail to the relevant parliament in terms set down by the appropriate minister. The Commonwealth, as a condition of funding, requires universities to report on their financial standing to DEST and the Department also carries out monitoring of, and negotiations with, universities in the process known as "educational profiles". Section 14 of the Higher Education Funding Act provides for the Commonwealth Minister to lay down conditions and rules applying to this process, which is intended to ensure that universities husband taxpayers' resources in a manner that serves the best interests of the public. This process is detailed and relatively rigorous, although it is not, it should be noted, an open one.

It is notable that universities' commercial operations, carried out through wholly-owned commercial arms or other companies, are not subject to the reporting and accountability measures applying to their parent institution. The report *Universities in crisis* observes (p.234) that a number of State Auditors-General have identified what could be termed an "accountability gap" in which at least some commercial operations associated with universities take place.

A parallel phenomenon could easily exist in the case of the commercial operations and interests of Commonwealth research agencies. Labor senators draw the Government's attention to the potential dangers here, with regard to probity, accountability for the use of public funds and for the security of public investment.

In Victoria, the Minister for Education and Training, Ms Lynne Kosky, has recently announced the intention to tighten up requirements and obligations placed on university councils in that State, with regard to oversight of their commercial entities, including those

established overseas. The Government response to the review of university governance was released in August 2002. Labor senators commend the Victorian Government in taking this step, and call upon the Commonwealth Government to ensure that similar measures are instituted in the case of Commonwealth research agencies.

Commercial operations and their impact on the core business and management of research agencies

Submissions to the Inquiry from the Australian Professional Engineers, Scientists and Managers' Association (APESMA, Submission no.2) and the CSIRO Officers' Association (Submission no.7) drew the Committee's attention to potential contradictions and tensions in moves towards greater emphasis on commercial activity and income on the part of Commonwealth research agencies. APESMA, for example, noted:

... there is clearly potential for difficulty in striking a balance between commercialisation and research in the national interest. On the one hand commercialisation holds out scope for adding to the research and development dollars available to ANSTO and AIMS. On the other hand commercialisation should not be permitted to drive scientific research by cherry picking the more lucrative commercial projects at the expense of research effort in the national interest. Nor in our view should the successful commercialisation of ANSTO and AIMS' scientific work lead to the withdrawal from them of government funds to undertake public sector research and development. [APESMA, Submission no.2, p.4]

The CSIRO Staff Association's submission adduces the experience of that organisation's members in a third Commonwealth research agency, CSIRO:

The drive for external income has moved the nature of CSIRO's R&D downstream to short-term, problem solving and developmental science that is limiting advancement of knowledge. The research direction is now dictated by where and how the money can be obtained and this is not always in the interests of the industry.... Many research sponsors do not pay the full cost of the research or services they contract.... The planning of research programs is largely dictated by what proposals successfully bring in the funds. This has [led] to some duplication of research efforts and to difficulties in workforce planning with a highly specialised staff. [CSIRO Staff Association, Submission no.7, Attachment, p.5]

The submission also discusses the implications of undue reliance on the volatile commercial market in terms of job security and the existence of stable, viable career prospects for researchers and scientists (*ibid.*). A further issue raised by the CSIRO Staff Association is the instability of the commercial world when it comes to its financial and planning commitment to R&D. Referring to the "moving famine" of private sector R&D funding, the Association says:

Our members involved with the private sector sponsored projects have noted significant changes in Australian businesses over the past 5-10 years. They state that economic changes appear to be having a greater impact on the level of business expenditure on R&D than on any other business activities... the quality of scientific interaction has declined. [CSIRO Staff Association, Submission no.7, Attachment, p.12]

The submission goes on to note a recommendation of the Innovation Summit report (Innovation – Unlocking the Future, Final report of the Innovation Summit Implementation Group to the Prime Minister's Science, Engineering and Innovation Council, August 2000) to

the effect that better linkages should be built between research and industry. The Association notes further, however, that the Innovation Summit report did not deal with the structural and business practice impediments to investment by the corporate sector in R&D that currently prevail in the Australian economy.

Another issue raised by the CSIRO Staff is the dramatic increase in short-term contract employment by the agency over the last decade, coinciding with the shift to commercialisation and external sources of income generally. Contract positions of less than five years' duration have grown from less than 10 per cent to over 24 per cent of the total employee numbers in the period 1991-2001(CSIRO Staff Association, submission no. 7, p.15). The Association says that this has led to high staff turnover, loss of expertise and extra costs associated with replacing staff, training new staff and so on. This has induced, the Association, asserts, a short-term "limited vision culture inimical to good R&D outcomes" (ibid.).

APESMA raises a further issue associated with workforce planning. The Association notes (APESMA submission no.2, p.5) that, for ANSTO and AIMS, the Government requires that salaries above the Australian Public Service average must be paid for out of commercial earnings. However, it says, the scope for commercial work in the case of these agencies is relatively limited, because they are more specialised than, say, CSIRO. Thus it will become more difficult for the two agencies to attract and retain staff of internationally-recognised calibre. The Government, says APESMA, must provide greater supplementation of funding for these agencies, so that they can negotiate market salary levels for their research staff (p.6).

A problem that was identified in the Committee's Universities in crisis report, for universities, is the comparative lack of experience and expertise of university researchers and university staff more generally in dealing with the commercial world. The diversion of energy and attention of institutional management and governing bodies to overseeing and planning commercial ventures was undesirable, the report said (p.235), because it drew these individuals and structures away from their core mission. Further, where university employees became financially involved in spin-off companies, obvious dangers of conflict of interest arose (pp.257-260). All of these issues have the potential to arise in the circumstances to be facilitated by the passage of the Research Agencies Legislation Amendment Bill 2002.

The Government senators, in their report (par.1.6), identify a reason for the introduction of the bill: namely, that AIMS and ANSTO need to be able to exploit respective non-marine and non-nuclear outcomes of their research – something currently precluded under their acts. The bill, it says, will allow this to occur. While Labor senators agree that this change is desirable, they warn that the agencies should not be diverted from their core missions by these activities: if the products of their research fall too far outside the purview of these core aims, then a real danger exists that such diversion might occur.

Finally, it will be necessary for the agencies to review their intellectual property rules and regimes to ensure that the interests of all partners involved in commercial activities and the commercialisation of research are appropriately protected.

Conclusion

Labor senators, as noted at the outset, do not oppose the passage of this bill. It is hoped, however, that, in implementing the changes and developments that this bill will facilitate, the Government takes note of the concerns and reservations expressed in this minority report.

In particular, the Government should ensure that:

Safeguards are set in place to ensure that the financial management of commercial ventures undertaken by ANSTO and AIMS is soundly based, well informed and subject to open public scrutiny;

Public assets are not put at risk in the agencies' commercial ventures or operations;

Financial accountability, probity and reporting requirements with regard to commercial ventures and associated companies of the two agencies are of a rigorous standard, comparable as far as possible to those applying to the parent agencies themselves;

The core missions and public resources, including staffing resources, of the agencies are not compromised or undermined by their commercial activities;

Intellectual property regimes of appropriate rigour and robustness are put in place to protect both public assets and the interests of commercial partners; and

The freeing up of restrictions on the commercial activities of these agencies does not lead to a withdrawal of Commonwealth funds intended to provide resources for their core public-good missions.

Senator George Campbell

Senator Kim Carr

Appendix 1

List of submissions

No.	Submission from
1	Australian Institute of Marine Sciences (AIMS)
2	Association of Professional Engineers, Scientists and Managers, Australia (APESMA)
3	Australian Research Council (ARC)
4	Dr Robin Batterham, Chief Scientist
5	Department of Education, Science and Training (DEST)
6	Australian Nuclear Science Technology Organisation (ANSTO)
7	CSIRO Staff Association
8	Department of Finance and Administration

