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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN ASTRONOMICAL OBSERVATORY (TRANSITIONAL PROVISIONS) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Innovation, Industry, Science and Research the Honourable Kim Carr)
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OUTLINE

The Australian Astronomical Observatory (Transitional Provisions) Bill 2009 (the Bill) contains transitional provisions related to the proposed establishment of the Australian Astronomical Observatory (the AAO) within the Department of Innovation, Industry, Science and Research (the Department) by the Australian Astronomical Observatory Bill 2009 (the AAO Bill).

The Bill is part of a package of Bills that provide for the Anglo-Australian Telescope Board (the Board), which operates the Anglo-Australian Observatory (the Observatory), to be dissolved and for the Observatory to be re-established as the Australian Astronomical Observatory within the Department of Innovation, Industry, Science and Research (the Department).

In 1969, the Government of the Commonwealth of Australia (Australian Government) and the Government of the United Kingdom of Great Britain and Northern Ireland (UK Government) entered into a treaty for that provided for a bi-national authority to be established to operate a large optical telescope in Australia with financial assistance from both the Australian and UK Governments (the Agreement). As a result, the Board was established by the Anglo-Australian Telescope Agreement Act 1970.

Today, the Board operates astronomical facilities known as the Anglo-Australian Observatory. The Anglo-Australian Observatory consists principally of a national observatory located at Siding Spring Observatory near Coonabarabran in New South Wales and a headquarters and instrumentation laboratory located at Epping in New South Wales. In 2005, the UK Government decided to withdraw from its involvement in the Agreement with effect from 1 July 2010. Arrangements to give effect to this are contained in a treaty between the Australian Government and the UK Government dated 3 November 2005 (the Supplementary Agreement). The Supplementary Agreement provides for the Board to be dissolved and for its assets to be transferred to the Australian Government.

The Bill and AAO Bill give effect to the Supplementary Agreement.

Schedule 1 to the Bill provides for the repeal of the Anglo-Australian Telescope Agreement Act 1970.

Schedule 2 to the Bill contains the transitional provisions in relation to the establishment of the AAO as a unit within the Department. These provisions include provisions dealing with the transfer of employees of the Board to the Commonwealth (the Department) as APS employees, and the transfer of assets and liabilities. Schedule 2 also contains provisions in relation to the final annual report of the Board and financial statements of the Board, and other miscellaneous provisions.
FINANCIAL IMPACT STATEMENT

The financial impact of the establishment of the AAO is outlined in the Explanatory Memorandum for the Australian Astronomical Observatory Bill.
NOTES ON CLAUSES

Clause 1 - Short title
Clause 1 provides that the Bill, when enacted, may be cited as the Australian Astronomical Observatory (Transitional Provisions) Act 2009.

Clause 2 - Commencement
Subclause 2(1) provides that sections 1 to 3, and anything in the Bill not elsewhere covered in the table commence operation on the day the Bill, when enacted, receives Royal Assent. Schedules 1 and 2 commence at the same time as the Australian Astronomical Observatory Act 2009 commences (on 1 July 2010).

Clause 3 - Schedule(s)
Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

SCHEDULE 1 - REPEAL OF THE ANGLO-AUSTRALIAN TELESCOPE AGREEMENT ACT 1970

Item 1 - The whole of the Act
Item 1 repeals the whole of the Anglo-Australian Telescope Agreement Act 1970. The effect of the provision, in part, is to dissolve the Board.

SCHEDULE 2 - TRANSITIONAL PROVISIONS
The objects of the transitional provisions in Schedule 2 are, broadly speaking, to provide for the continuation of the current AAO business, and to ensure that the operations, assets and liabilities are seamlessly transferred to the Commonwealth. Staffing conditions and entitlements are to be maintained.

Part 1 - Introduction

Item 1 - Definitions
Item 1 sets out the definitions of words used in Schedule 2 to the Bill.
Part 2 - Transfer of assets and liabilities

Item 2 - Vesting of assets of Board

Item 2 provides that the assets of the Board immediately before the transition time (the time when Schedule 2 commences) cease to be assets of the Board and become assets of the Commonwealth.

The effect of item 2 is that at the transition time, the assets of the Board immediately before the transition time would become the assets of the Commonwealth without the need for any conveyance, transfer or assignment. The Commonwealth would become the Board's successor in law in relation to those assets.

Item 3 - Vesting of liabilities of Board

Item 3 provides that the liabilities of the Board immediately before the transition time cease to be liabilities of the Board and becomes liabilities of the Commonwealth.

The effect of item 3 is that at the transition time, the liabilities of the Board immediately before the transition time would become the liabilities of the Commonwealth without the need for any conveyance, transfer or assignment. The Commonwealth would become the Board's successor in law in relation to those liabilities.

Item 4 - Transfers of land may be registered

Item 4 enables land that vests in the Commonwealth under Part 2 of Schedule 2 to be registered. It is noted that, as of the date of introduction of this Bill to the Parliament, the Board has no registered assets in land to be transferred and that this item is not expected to be used.

The procedure is as follows:

- The Minister signs a certificate identifying the land and stating that the land has become vested in the Commonwealth under Part 2 of Schedule 2.
- The certificate is lodged with a land registration official (the Registrar of Titles or other proper officer of the State or Territory in which the land is situated).
- The land registration official may deal with and give effect to the certificate, and may register the matter in a way that is the same as, or similar to, the way in which dealings in land of that kind are registered.

Subitem 4(3) provides that a certificate made under subitem 4(1) is not a legislative instrument. This is because it is not legislative in character and therefore not within the meaning of section 5 of the Legislative Instruments Act 2003. Subitem 4(3) confirms this and is included to assist readers.
Item 5 - Certificates relating to vesting of assets other than land

Item 5 provides for assets other than land which vest in the Commonwealth under Part 1 of Schedule 2 to be registered.

The procedure is as follows:

- The Minister signs a certificate identifying the asset and stating that the asset has become vested in the Commonwealth under Part 2.
- The certificate is lodged with an assets official (the person or authority who, under a law of the Commonwealth, a State or a Territory, a trust instrument or otherwise, has responsibility for keeping a register in relation to the assets of the kind concerned).
- The assets official may deal with and give effect to the certificate as if it were a proper and appropriate instrument for transactions in relation to assets of that kind and make such entries in a register as are necessary having regard to the effect of Part 2 of Schedule 2 to this Bill.

Subitem 5(3) provides that a certificate under subitem (1)(b) is not a legislative instrument. This is because it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 5(3) confirms this and is included to assist readers.

Part 3 - Transfer of other matters

Item 6 - Transitional - acts of the Board to be attributed to the Commonwealth

Item 6 provides that anything done by, or in relation to, the Board before the transition time (defined as when Schedule 2 commences) has effect after the transition time as if it had been done by, or in relation to, the Commonwealth.

Item 7 - Substitution of Commonwealth as a party to certain pending proceedings

Item 7 provides that in any proceedings to which the Board was a party in any court or tribunal immediately before the transition time, the Commonwealth is substituted for the Board, from the transition time, as a party to the proceedings.

This provision is designed to ensure that any existing litigation is not affected by the dissolution of the Board.

Item 8 - Transitional - transfer of records to the Department

Item 8 provides for any records or documents that were in possession of the Board immediately before the transition time to be transferred to the Department after the transition time.
**Item 9 - Transfer of Ombudsman investigations**

Item 9 provides that if, before the transition time, a complaint was made to, or an investigation was being carried out by, the Ombudsman under the *Ombudsman Act 1976* in relation to an action taken by the Board; and immediately before the transition time, the Ombudsman had not finally disposed with the matter in accordance with the *Ombudsman Act 1976*, the *Ombudsman Act 1976* applies after the transition time as if that action had been taken by the Department.

This provision is designed to ensure that existing matters before the Ombudsman are not affected by the dissolution of the Board.

**Item 10 - References in certain instruments to the Board**

Subitem 10(1) provides for references to the Board in certain instruments to be taken as references to the Commonwealth at the transition time. The purpose is to ensure that existing instruments (e.g. contracts) continue to operate as intended after the transition. The instruments to which subitem 10(1) apply are: instruments made by the Board, instruments to which the Board was a party, instruments that were given to, or in favour of, the Board, instruments under which any right or liability accrues or may accrue to the Board or any other instruments which refer to the Board.

Subitem 10(2) defines the term 'instrument' for the purposes of subitem 10(1). Some legal instruments are exempted from the definition of an instrument because it is appropriate for references to the Board in those instruments to stand.

**Item 11 - Transfer of appropriated money**

Item 11 provides that for the purposes of the operation of an Appropriation Act (an Act appropriating money for expenditure out of the Consolidated Revenue Fund) after the transition time, references to the Board are to be read as references to the Department.

**Part 4 - Finance and annual report**

**Item 12 - Audit**

Subitem 12(1) provides that, despite the repeal of section 14 of the *Anglo-Australian Telescope Agreement Act 1970*, that section continues to apply in relation to an inspection and audit carried out in respect of a financial year that began on or before 1 July 2009, as if that section had not been repealed.

Subitem 12(2) provides that subitem (1) has effect subject to subitems (3) and (4). The effect of those subitems is that a reference in section 14 to records of the Board and to an employee of the Board includes a reference to records transferred to the Department under item 8 of Schedule 2 and a reference to an APS employee in the Department, respectively.
The purpose of the provision is to preserve the Auditor-General's powers and obligations to audit the financial records of the Board for the 2009 (and any previous) financial year under s 14 of the Anglo-Australian Telescope Agreement Act 1970.

**Item 13 - Final financial statements**
Subitem 13(1) provides that, despite the repeal of section 19 of the Anglo-Australian Telescope Agreement Act 1970, that section continues to apply in relation to financial statements for the financial year that began on 1 July 2009 as if that section had not been repealed.

However, subitem 13(2) makes it clear that the obligation to prepare and provide those financial statements is imposed on the responsible financial officer instead of the Board. This provision was inserted to enable the financial statements to be prepared by the responsible financial officer (an officer appointed under item 15) rather than the Board.

**Item 14 - Final annual report**
Subitem 14(1) provides that the responsible financial officer must, as soon as practicable after the end of the financial year that began on 1 July 2009, prepare and give to the Minister, for presentation to the Parliament, a report on the operations of the Board during that year.

Subitem 14(2) provides that a report under subitem 14(1) is taken to be a periodic report for the purposes of section 34C of the Acts Interpretation Act 1901.

**Item 15 - Responsible financial officer**
Item 15 enables the Secretary to appoint a person, in writing, as the responsible financial officer for the purposes of Schedule 2. The Secretary must not appoint a person under subitem 15(1) unless the person is an SES employee or acting SES employee or holds, or is acting in, an Executive Level 1 or 2 position or an equivalent position. It is anticipated that the person will have knowledge of the operations of the AAO for its financial year.

**Part 5 - Employees of the Board**

**Item 16 - Terms and conditions of employment**
Item 16 sets out the terms and conditions of employment for employees transferring from the Board to the Department as APS employees (other than SES employees) and new employees. The purpose is to ensure that the AATB Enterprise Agreement 2007-2010 or a subsequent agreement will continue to apply to both transferring employees (other than SES employees) and will also apply to new employees (other than SES employees).

Subitem 16(1) defines transferring employees.
Subitem 16(2) provides that where a person is a transferring employee and immediately before the transition time, the person's employment by the Board was covered by a 'designated agreement' (defined in subitem 16(5) as the AATB Enterprise Agreement 2007-2010 or an enterprise agreement), then that agreement covers the Commonwealth and the transferring employee in relation to the AAO work and there is taken to be no other enterprise agreement, modern award or award-based transitional instrument that covers the Commonwealth and the transferring employee in relation to the AAO work.

Subitems 16(1), 16(2) and 16(3) draw a distinction between APS employees and SES employees. An SES employee is not regarded as a 'transferring employee' for the purposes of item 16 (see subitem 16(1)). This is because under the Australian Government Employment Bargaining Framework, SES employees are not to be covered by the enterprise agreement which covers non-SES employees in any agency. Similarly, a 'new employee' cannot be an SES employee (see subitem 16(3)). Further, where a transferring employee becomes an SES employee after the transition time (i.e., by a promotion), the employee will cease to be covered by the designated agreement.

Subitem 16(3) deals with the terms and conditions of new employees - namely, employees who are not transferring employees and are not SES employees.

Subitem 16(4) covers employees who join the Department as performing AAO work. In such circumstances, the designated agreement would cover the Commonwealth and the new employee in relation to the AAO work, and no other enterprise agreement, modern award or award-based transitional instrument is taken to cover the new employee in relation to the AAO work. This excludes other agreements (for example a new Departmental Enterprise Agreement) from applying to such an employee.

Subitem 16(5) sets out the definitions of words used in this item.

**Item 17 - Accrued entitlements**

The purpose of item 17 is to ensure that the entitlements of employees transferring from the Board to the Department as APS employees continue in existence and are not affected by the transfer. The item provides for such people to have accrued entitlements to benefits which applied to their employment by the Board immediately before the transition time (see subitem 17(1) and subitem 17(2)).

Subitem 17(3) provides that a person's service as an employee of the Board is taken, for all purposes, to have been continuous with his or her service as an APS employee.

**Item 18 - Long service leave**

The purpose of item 18 is to ensure that employees' service in the Board will be recognised for long service leave purposes under the when the employees are engaged in the Department. Item 18 provides that service in the Board is deemed to
be a period of Government or qualifying service for the purposes of the *Long Service Leave (Commonwealth Employees) Act 1976*.

**Item 19 - Safety, Rehabilitation and Compensation Act 1988 - rehabilitation provisions**

Item 19 provides that after the transition time the Department is to be taken to be the relevant employer of an employee who, before the transition time, suffers an injury resulting in an incapacity for work or an impairment for the purposes of the *Safety, Rehabilitation and Compensation Act 1988*. The purpose of item 19 is to ensure that the Department is recognised as the relevant employer of Board employees who transfer to the Department as APS employees in respect of an injury or incapacity sustained before the transition time.

**Part 6 - Miscellaneous**

**Item 20 - Exemption from stamp duty and other State or Territory taxes**

Item 20 is required to ensure that State and Territory taxes such as stamp duty do not apply to the operations of Schedule 2 to the Bill. For example, no stamp duty will be payable on the transfer of land under Schedule 2.

This item provides that no stamp duty or other tax is payable under a law of a State or Territory in respect of an exempt matter or anything connected with an exempt matter (subitem 20 (1)). 'Exempt matter' is defined subitem 20 (2) as the vesting of an asset or liability under Schedule 2 or any other operation of Schedule 2.

Under subitem 20(3) the Minister may certify in writing that a specified matter is an exempt matter or that a specified thing is connected with an exempt matter. If the Minister does so, the certificate is prima facie evidence in all courts and for all purposes (other than in criminal proceedings) of matters stated in the certificate.

**Item 21 - Constitutional safety net**

Item 21 has been included in Schedule 2 to the Bill to ensure that to the extent that the operation of Schedule 2 would result in an acquisition of property from a person otherwise than on just terms contrary to s 51(xxxi) of the Constitution, the Commonwealth will be liable to pay a reasonable amount of compensation to the person.

Subitem 21(2) provides that where the Commonwealth and the person cannot agree on the amount of compensation, the person may institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as is determined by the court.

**Item 22 - Certificates taken to be authentic**

Item 22 provides that a document which purports to be a certificate made or issued under a provision of Schedule 2 is taken to be such a certificate and to have been
properly given, unless the contrary is established. Item 22 is included to enable persons to assume that a document purporting to be a certificate is a validly issued certificate under Schedule 2, unless there is evidence to the contrary.

**Item 23 - Delegation by Minister**

Item 23 enables the Minister to delegate, in writing, all or any of his or her powers and functions under Schedule 2 to the Secretary of the Department or an SES employee, or acting SES employee, in the Department (subclause 23(1) and subclause 23(2)). Subclause 23(3) provides that in exercising power or functions under a delegation, the delegate must comply with any directions of the Minister.

**Item 24 - Transitional - regulations**

Item 24 provides that the Governor-General may make regulations in relation to transitional matters arising out of the repeal of the *Anglo-Australian Telescope Agreement Act 1970*. 