

EXPLANATORY STATEMENT

Subject - *Australian Civilian Corps Act 2011*

Prime Minister's Australian Civilian Corps Directions 2012

The *Australian Civilian Corps Act 2011* (the Act) established a legal framework for the engagement and management of a new category of Commonwealth employees, known as the Australian Civilian Corps (ACC), for rapid deployment to perform duties overseas, for example, to assist countries affected by natural disaster or conflict. Under s 27 of the Act, the Prime Minister may issue directions to Commonwealth employers in relation to the participation of employees in the ACC, including but not limited to the granting of leave to employees for the purposes of service in the ACC.

Participation of any individual, including any Commonwealth employee, in the ACC is entirely voluntary. Where an employee in a relevant Commonwealth agency wishes to be engaged in an ACC deployment and the employee is assessed as suitable for that deployment, the *Prime Minister's Australian Civilian Corps Directions 2012* (the Directions) would facilitate rapid release of the employee from his or her home agency. The Directions also provide for certain protections for employees, such as the right to return to their home (Commonwealth) agency on completion of their ACC service.

The Directions would help achieve consistency across Commonwealth agencies that are subject to these Directions, in relation to the release of employees for ACC employment and related employee entitlements. The Directions would also provide clarity and transparency for those agencies as well as those employees who might be interested in joining the ACC. The above outcomes would be achieved by a general requirement for all relevant agencies to release employees for ACC training or deployment except in the circumstances specified in the Directions, and also a general requirement, subject to the specified exceptions, to arrange for return of employees to their home agencies after their ACC deployment.

The Directions do not deal with the superannuation and workers compensation entitlements of employees while on leave without pay to serve in the ACC, because these matters are dealt with separately by legislation governing those matters. For example, ACC employees who are existing members of Commonwealth employee superannuation schemes may, pursuant to declarations made under the Superannuation Acts (e.g. *Superannuation (CSS) Temporary Employee Approval 2011 (No.1)*), continue to accrue superannuation entitlements under their current scheme in respect of their ACC employment. Similarly, Commonwealth employees would continue to be covered by the *Safety, Rehabilitation and Compensation Act 1988* in respect of their ACC employment.

The Directions have been developed in consultation with relevant Australian Government agencies, including amongst others the Australian Public Service Commission, which provided input in relation to the effects of the Directions on APS employees and APS agencies.

ATTACHMENT

The Directions are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, and would commence the day after they are registered on the Federal Register of Legislative Instruments.

A detailed explanation of the Directions is set out in the Attachment. The Statement of Compatibility with Human Rights is included at the end of this Explanatory Statement.

Authority: Section 27 of the *Australian Civilian Corps Act 2011*

Details of the Prime Minister's Australian Civilian Corps Directions 2012

Clause 1 – Commencement

This clause provides that the Directions take effect on the day after they are registered on the Federal Register of Legislative Instruments.

Clause 2 – Interpretation

This clause defines certain terms used in the Directions. Importantly, 'Commonwealth employer' is defined to have the same meaning as in s 27 of the Act, and therefore means:

- (a) a person who, on behalf of the Commonwealth, has the powers of an employer in respect of an employee of the Commonwealth;
a body corporate that:
 - (i) is established by or under a law of the Commonwealth for a public purpose; and
 - (ii) has employees;
- (b) a company that:
 - (i) is a wholly-owned Commonwealth company (within the meaning of the *Commonwealth Authorities and Companies Act 1997*); and
 - (ii) has employees.

Based on the above definition, a 'Commonwealth employer' for the purposes of the Directions includes, for example, any person who is an Agency Head under the *Public Service Act 1999*, and any other person who has statutory power to engage employees in an FMA Agency (i.e. an 'Agency' as defined in the *Financial Management and Accountability Act 1997*), as well as any entity that is subject to the *Commonwealth Authorities and Companies Act 1997* and has employees. Note that, according to cl 2(2) of the Directions, any function conferred by the Directions on a 'Commonwealth employer' – except the function to decline to release an employee under cl 5(2)(a) – may be exercised by a person authorised by the employer to do so. (See also the explanation of cl 5 below, which indicates that the function under cl 5(2)(a) must be exercised by the Commonwealth employer personally.)

Section 13 of the *Legislative Instruments Act 2003* also applies in relation to the interpretation of the Directions. Accordingly, any term that is defined in the Act (eg. 'AusAID', 'Director-General') has the same meaning when used in the Directions, and the *Acts Interpretation Act 1901* applies to the provisions of the Directions as if they were sections of an Act. Relevantly, s 17AA of the Acts Interpretation Act defines 'APS employee' to have the same meaning as in the *Public Service Act 1999*. The Public Service Act, in turn, defines 'APS employee' to mean:

- a person engaged under s 22 of the Public Service Act, including any ongoing employee, employee engaged for a specified term or for a specified task, or for irregular or intermittent duties; or
- a person engaged as an APS employee under s 72 of the Public Service Act as a result of machinery of government changes.

In short, therefore, any reference to ‘APS employee’ in the Directions means any person engaged as an APS employee under s 22 or 72 of the Public Service Act.

Clause 2 of the Directions defines ‘Commonwealth employee’ as excluding locally engaged employees, i.e. employees engaged overseas under section 74 of the *Public Service Act 1999*. Such employees are not considered APS employees under the Public Service Act, and many aspects of the legislative and policy framework for the APS do not extend to those employees. Consistent with that, the Directions do not apply to locally engaged employees.

‘ACC Register’ is defined to mean the register maintained by AusAID, which includes information concerning individuals identified by AusAID as potentially suitable for engagement as ACC employees. Application to join the ACC Register is open to the public. Inclusion on the register is based on merit and is subject to satisfactory completion of relevant training as well as health and security screening. This arrangement enables suitably qualified civilian specialists to be identified and deployed expeditiously as soon as a need to deploy is identified, without relying on an open recruitment process at that point.

Clause 3 – Policies and practices

This clause requires all FMA Agencies to have employment policies and practices which support ACC recruitment and deployments. This provision is similar to the requirement under the APS Bargaining Framework, which requires agencies to incorporate leave policies and employment practices that support the release of community service volunteers for emergency services duties and Defence Reservists for peacetime training and deployment.

It is up to each agency to determine its own approach to the employment policies and practices required by clause 3. In particular, clause 3 does not require an agency to amend its policies or practices or redevelop new ones if the agency’s current policies and practices do not inhibit its employees’ participation in the ACC. At the minimum, however, it is intended that FMA Agencies should have policies and practices that support the granting of unpaid leave to an employee under s 26 of the ACC Act where the employee would not otherwise be able to participate in ACC training or ACC deployment.

The requirement under clause 3 does not apply to any agency that is not an FMA Agency, because it is considered unlikely that non-FMA Agencies would be staffed by a significant number of Commonwealth employees, e.g. as APS employees. It is expected that most non-FMA Commonwealth agencies would engage employees in their own right according to their enabling legislation, and have a considerable degree of autonomy under their legislation regarding the management of staff. It would be unreasonable to require such an agency to devote resources to reviewing their policies and practices to ensure they sufficiently support the ACC for the benefit of the small number of APS employees engaged in those agencies. However, in the event that any APS employee engaged in the agency is required to attend compulsory ACC training or is identified as suitable for ACC deployment, the agency would be subject to the same requirements as those applicable to FMA Agencies in relation to release and return (see cll 4 to 6 of the Directions and the notes below).

Clause 4 – Permission to attend training

This clause requires any agency which engages APS employees and any FMA Agency to release their employees, at the request of the employee, to attend compulsory ACC training.

Where a non-FMA Agency engages both APS employees and non-APS employees, the release requirement only applies in relation to the APS employees.

An agency is required to release an employee to the extent that the employee's employment terms and conditions allow for such release. Subclauses 4(2) and (3) recognise that there is potentially a wide variety of possible bases on which Commonwealth employers could allow their employees to attend ACC training, depending on the employment terms and conditions that apply to the employee in each case. For example, if an employee seeks 5 days paid leave to attend ACC training, but his or her terms and conditions only enable paid leave for up to 3 days to be granted in the circumstances, the employer could comply with cl 4(2) by granting paid leave for 3 days, and unpaid leave for 2 days if otherwise permitted by the relevant terms and conditions of employment.

It should be noted that, in the above example, if the employer has no discretion under the employee's terms and conditions to grant unpaid leave in the circumstances, which means the employer has no obligation under cl 4(2) to grant such leave, the employer may still choose to grant 2 days unpaid leave to the employee according to s 26 of the Act to enable the employee to complete the ACC training. Section 26 of the ACC Act permits an employer to grant unpaid leave to an employee for the purposes of service in the ACC. Any training to prepare an individual for potential ACC deployments would be for the purposes of service in the ACC, and so unpaid leave could be granted under s 26 for such training. The power under s 26 is in addition to any other power the employer may have to grant unpaid leave. (See also the requirement under cl 3 for FMA Agencies to have policies and practices to support ACC recruitment and deployments and the notes on that clause in this Explanatory Statement.)

Clause 5 – Leave for deployment

This clause requires any agency which engages APS employees and any FMA Agency to release their employees, at the request of the employee, to undertake ACC deployments. Where a non-FMA Agency engages both APS employees and non-APS employees, the release requirement only applies in relation to the APS employees.

Clause 5 is intended to facilitate rapid release of employees who are engaged in certain Commonwealth agencies, and who are on the ACC Register, to be deployed to countries seeking time-critical civilian specialist assistance. By delivering this assistance quickly and flexibly, the prospects for stabilising or rebuilding the essential functions of government in host countries are much improved.

The requirement under cl 5 applies even if the employee's employment terms and conditions do not provide for unpaid leave for the purpose of ACC deployment. In this regard, it should be noted that s 26 of the ACC Act permits an employer to grant unpaid leave to an employee for the purposes of service in the ACC, and this power is in addition to any other power the employer may have to grant unpaid leave. In other words, s 26 enables a Commonwealth employer to comply with cl 5 of the Directions where the employer's ordinary terms and conditions of employment do not provide for unpaid leave to be granted for participation in the ACC.

However, under cl 5(2)(a), a Commonwealth employer is not obliged to release an employee for ACC deployment if the employer advises the AusAID Director General that the employer declines to release an employee because, in the employer's opinion:

- the absence of the employee from his or her home employment would pose a significant risk to national security or delivery of essential government services—An example is where the employee is key personnel in a project that has significant national security implications for Australia, and it is not possible to engage alternative staff with comparable skills within a reasonable time to perform the employee's duties in his or her absence; Australia's international relations would be likely to be adversely affected as a result of the deployment of the employee—An example is where the employee had previously engaged in activities that were of particular sensitivity to the government of the host country; or there are other compelling reasons against release—Examples include:
 - where the employee's security clearance is subject to certain conditions that preclude that employee from working in the host country; or where the employee is key personnel assisting his or her portfolio Minister on a significant matter; or where a considerable number of skilled employees of the employer are simultaneously required for ACC deployments, and the release of those employees all at the same time would have significant deleterious effects on the employer's human resources.

The grounds of refusal specified in cl 5(2)(a) are intended to encompass circumstances where deployment of a particular employee is, on balance, not in the national interest. The examples given above are indicative and not exhaustive. It is generally up to a Commonwealth employer to determine whether any of the grounds of refusal exists, including whether the reason against release in a particular case is in fact 'compelling'. The obligation to release ceases to apply once the employer advises the AusAID Director General that the employer is of the opinion that an excepted circumstance exists and declines to release an employee on that basis. The Directions do not provide for the AusAID Director General or any other party to dispute the employer's decision. However, like any statutory power, any exercise of the power to decline to release an employee under cl 5(2)(a) may be subject to judicial review (e.g. on application by an aggrieved employee), and so the power must be exercised consistently with administrative law principles, e.g. it must be exercised reasonably and not for an improper purpose.

Clause 2(2) of the Directions indicates that the refusal power under cl 5(2)(a) cannot be exercised by any person other than the Commonwealth employer (e.g. the APS Agency Head, where the employee seeking release is an APS employee). That means a Commonwealth employer must personally exercise this power and must personally form the view that a ground of refusal exists. In other words, a Commonwealth employer cannot, under cl 2(2), authorise another person to decline to release an employee, nor can the employer decline to release an employee based on an opinion formed by another person. This would further safeguard against inappropriate use of the refusal power under cl 5(2)(a). Legally speaking, a person remains an employee of his or her home employer while on leave without pay to undertake ACC employment. To avoid any doubt in this regard, the note

under cl 5 makes it clear that ACC service does not break the continuity of an employee's home employment for purposes such as accrual of long service leave or parental leave. That means, for example, an employee who had been an employee in his or her home agency for 3 years, and was employed as an ACC employee for 12 months before returning to his or her home agency for another 2 years of employment there, would be regarded as having completed 5 years of continuous service with the home agency for long service leave purposes. (It should be noted that, under the *Long Service Leave (Commonwealth Employees) Act 1976*, the home agency in the above example would also have the discretion, *but not an obligation*, to count the employee's ACC service so that the employee is taken to have completed 6 years – rather than 5 years – of continuous service with the home agency for long service leave purposes.)

Clause 6 – Right of return

This clause provides for an employee's right to return to his or her home employment following the employee's ACC deployment. The requirements under this clause apply to any agency which engages APS employees, as well as any FMA Agency. Where a non-FMA Agency engages both APS employees and non-APS employees, the right of return only applies in relation to the APS employees.

Clause 6 is substantively modelled on cl 2.2 of the *Prime Minister's Public Service Directions 1999* (PMPS Directions), which ensures an APS employee may return to a position 'at-level' in his or her home APS agency following a period of leave without pay to undertake a relevant employment outside the APS. Like the right of return under cl 2.2 of the PMPS Directions, an employee's right to return to the employee's home employer after his or her ACC deployment does not guarantee return to exactly the same position occupied by the employee immediately before the ACC deployment. This recognises that the employee's original position may no longer be available (e.g. due to organisational restructure or other operational reasons) at the time of his or her return. Accordingly, cl 6(3) only requires the home employer to arrange for the returning employee to undertake duties at the employee's pre-leave classification.

The right to return under cl 6(2) of the Directions does not apply where, because of changed circumstances, it is not within the home employer's power to arrange the return: cl 6(3)(a). However, the employment of someone else to replace the employee does not constitute 'changed circumstances' within the meaning of cl 6(3)(a): see cl 6(4). Where the employee's original position is occupied by someone who replaces the employee, the employer would be required by cl 6(5) to return the employee to another position within the employee's pre-leave classification.

The 'changed circumstances' exception under cl 6(3)(a) is intended to cover situations such as where:

- the employee's original position is tied to a particular function of the home agency, and the function has transferred to another agency a result of machinery of government change. In that case, the employee may be transferred to the other agency by the Public Service Commissioner under s 72 of the Public Service Act. If the employee is transferred, it would no longer be within the power of the home employer to arrange for return of the employee to the home agency; or
- the employee's home employment has ceased during the period of his or her ACC engagement, for example:
 - if the employee was a non-ongoing employee and his or her engagement came to an end during the employee's ACC service; or
 - if the employee's employment was terminated while the employee was overseas on the grounds that he or she was excess.

Note that the mere fact that an employee was determined by the home employer to be excess does not in itself mean that the employee's home employment is terminated. Instead, the employee may continue to be employed by his or her home employer, e.g. to serve a period of retention. In that case, the home employer will still be required by cl 6(2) of the Directions to return that employee to the home agency after his or her ACC engagement, until a decision is made to terminate his or her home employment.

Apart from the exemption under cl 6(3)(a), a further exemption is provided in cl 6(3)(b), which provides that a home employer is not required to return an employee to the home agency where the employee does not wish to return. The intention of cl 6(3)(b) is to 'roll back' the legal requirement under cl 6(2) where an employee does not wish to return to his/her home agency, so that the rights and obligations of the employee and the home employer in that situation would be determined by other applicable laws as well as the terms and conditions of the employee's home employment (e.g. the home agency's enterprise agreement). Without the exclusion under cl 6(3)(b), the general requirement to return an employee to the home agency would apply despite any contrary provision in the terms and conditions of the employee's home employment in relation to this kind of situation.

Where it is within the home employer's power to arrange for the employee's return and the employee wishes to return, but the employee's pre-leave classification no longer exists, the home employer would be required by cl 6(5) to arrange for the person to perform duties at an equivalent classification determined by the employer.

However, under cl 6(7), the home employer would not be required to return an employee to the same or equivalent classification where the home employer offers the employee terms and conditions that are at least as favourable overall as those applicable to the employee immediately before the employee's ACC engagement. This would require a global assessment of all of the terms and conditions that applied to the employee before the employee's ACC engagement as compared to the new terms and conditions on offer to determine whether the new terms and conditions are overall at least as favourable to the employee as the former terms and conditions.

The intention of cl 6(7) is to enable a home employer to comply with cl 6(2) where:

- the home employer is unable to determine an equivalent classification for the employee (e.g. where the employee's pre-leave classification has been abolished without being replaced with an equivalent classification), but it is still within the home employer's power to return the employee to the home agency; or
- the home employer arranges for the employee to perform duties at a higher classification on his or her return where, for example, during the period of the employee's ACC engagement the employee was promoted to a higher classification.

In making arrangements for a returning employee as required by cl 6, or alternative arrangements where return is impossible, a Commonwealth employer must also comply with other applicable laws including the *Fair Work Act 2009*.

Clause 7 – Personal leave

This clause requires APS agencies to recognise unused personal leave accrued by employees during their ACC engagement, in the same way that APS agencies are expected, under the APS Bargaining Framework, to recognise paid personal leave accrued by an employee during a period of engagement in another APS agency. The requirement to recognise personal leave under cl 7 does not apply in relation to employees who are not APS employees.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Prime Minister's Australian Civilian Corps Directions 2012

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument facilitates rapid release of employees from certain Commonwealth agencies, if they wish to be deployed as Australian Civilian Corps (ACC) employees to perform duties overseas, for example, to assist countries experiencing or emerging from natural disaster or conflict. It achieves this by:

- requiring Commonwealth employers to have in place policies and practices to support participation by their employees in the ACC (cl 3); and
- imposing a general obligation to grant leave to an employee for ACC-related purposes (cll 4 and 5).

It also provides for certain protections for those employees, including the right to return to their home agencies to perform duties at their original classification (or an equivalent classification) on completion of their ACC service (cl 6) and recognition of personal leave accrued during ACC engagement (cl 7). Those protections are in addition to other protections and safeguards under employment law, including the *Fair Work Act 2009*.

Human rights implications

This Legislative Instrument does not limit any human rights. It promotes the human rights of ACC employees, including:

- the right to work, which includes the right to the opportunity to freely choose and accept work (art 6, ICESCR); and
- the right to the enjoyment of just and favourable conditions which includes ensuring '[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay' (art 7, ICESCR), such as through the recognition of personal leave accrued during ACC engagement.

Although this does not relate to Australia's international human rights obligations, we note that by encouraging and facilitating participation in the ACC, the Legislative Instrument is also likely to promote the human rights of persons in countries where the ACC is deployed.

Conclusion

This Legislative Instrument is compatible with human rights as it does not limit any human rights and promotes a number of human rights.

Julia Gillard
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