



Governance Review Implementation (Science Research Agencies) Bill 2007

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Law and Bills Digest Section

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Governance Review Implementation (Science Research Agencies) Bill 2007

Date introduced: 28 March 2007

House: House of Representatives

Portfolio: Education, Science and Training

Commencement: Schedules 1, 2 and 3 – date to be fixed by proclamation or 6 months from the date of Royal Assent, whichever comes first.

Purpose

The purpose of the Bill is to make amendments to the following Acts: the *Australian Institute of Marine Science Act 1987* (the AIMS Act), the *Australian Nuclear Science and Technology Organisation Act 1987* (the ANSTO Act), and the *Science and Industry Research Act 1949* (the SIR Act), so as to implement changes designed to enhance the governance arrangements of their corresponding statutory authorities: the Australian Institute of Marine Science (AIMS); the Australian Nuclear Science and Technology Organisation (ANSTO); and the Commonwealth Scientific and Industrial Research Organisation (CSIRO).

The Explanatory Memorandum states that the Bill is one of a series introduced by the government designed to ‘improve transparency and consistency in relation to governance arrangements for statutory authorities and office holders’¹ in response to the Government’s endorsement of observations and conclusions made by the [Review of the Corporate Governance of Statutory Authorities and Office Holders](#) (the Uhrig Review) conducted by Mr John Uhrig AC in 2003.

Background

Basis of policy commitment

The amendments in the Bill respond to and reflect the relevant findings of the Uhrig Review. They also follow an assessment of all three science agencies against the recommendations of the Uhrig review.

One of the key conclusions of the Minister’s assessment of those science research agencies was that their functions were best suited to the Board template (consistent with the recommendation made by the Uhrig review) and should thus be retained for each of the agencies.

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The Uhrig Review

As part of its 2001 election platform, the Coalition Government signalled its intention to examine the efficacy of governance arrangements of statutory authorities and office holders.

In November 2002, the Government announced a review of the governance practices of statutory authorities and office holders, with special focus on those agencies which impact on the business community. The Prime Minister, the Hon. John Howard, appointed Mr John Uhrig, AC, to head the review. The objective of the review was to examine and evaluate governance arrangements and practices and 'provide policy options for Government to get the best from statutory authorities and office holders and their accountability frameworks'.² In doing so, the Government noted the impact that the performance of statutory authorities and office holders has on business and the overall health of the Australian economy. In particular, the review was to focus on the areas where businesses have the right to expect the highest levels of efficiency, fairness and transparency in their dealings with government.

A key task was to develop a broad template of governance principles that, subject to consideration by government, might be extended to all statutory authorities and office holders. As part of the process of developing a broad template, the review was asked to consider the governance structures of a number of statutory authorities and office holders with critical relationships with business and to consider best practice corporate governance structures in both the public and private sectors.³

The Report recommended that two templates should apply to ensure good governance of statutory authorities: agencies should either be managed by a Chief Executive Officer (CEO) or by a board structure. Both templates detail measures for ensuring the boundaries of responsibilities are better understood and the relationship between Australian government authorities, Ministers and portfolio departments is made clear.⁴ However, as Uhrig explained, the purpose of the template is 'to serve as a reference point' for the development of governance arrangements and so it is 'expressed as an ideal'.⁵

Uhrig recommended that the selection of the management template and financial frameworks to be applied should be based on the governance characteristics of a statutory authority.⁶

Responses to the Uhrig Review

For a summary of the responses and debate that followed the release of the review, please refer to Richard Grant '[The Uhrig Review and the future of statutory authorities](#)' *Research Note* no. 50 2004–05, Parliamentary Library, Australia.

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The Commonwealth financial framework

Nearly all government bodies fall under the *Financial Management and Accountability Act 1997* (the FMA Act) or the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

The FMA Act focuses primarily on the obligations and responsibilities of Chief Executives and the way officials handle public money, public property and other resources of the Commonwealth. The FMA Act applies to budget-funded authorities managed by a CEO, and establishes various management and reporting responsibilities for the CEO (sections 44–46, 49 and 51), as well as allowing the Minister to give guidelines to the CEO (section 64). Furthermore, the FMA Act provides an accountability framework for CEOs to manage agency resources.

The CAC Act, on the other hand, requires directors and officers to exercise their powers and duties in the best interests of the body and for a proper purpose. Directors' duties apply to help ensure that prudent decisions are made on the resources that, as a matter of law, the body holds in its own right. The CAC Act applies to authorities that are corporate entities managed by a board. It requires the head of the board to report to the responsible Minister (sections 15–16), and to ensure that the authority's activities comply with government policies (section 28). A board structure is favoured if there is a strong commercial focus to the organisation, or if the agency is intergovernmental.

As at 31 January 2007, there were 94 FMA Act agencies and 99 CAC Act agencies.⁷ The Department of Finance and Administration publication [Governance Arrangements for Australian Government Bodies](#) (August 2005) provides further explanation on the FMA Act and CAC Act and a comparison between the two pieces of legislation.

On the basis of the findings of the Uhrig Review, Ministers and their Departments have been undertaking an assessment of their portfolio agencies against the governance templates.⁸ The Minister for Finance and Administration has assumed a coordinating role in these reviews.⁹ Thus, a number of similar Acts have been passed by Parliament incorporating Uhrig Review recommendations.

Australian Institute of Marine Science (AIMS)

AIMS was established by the Australian Government in 1972 under the AIMS Act in recognition of the significance of marine assets, especially the Great Barrier Reef, to Australia. AIMS has a broad mandate which in summary is:¹⁰

- to arrange, carry out, encourage and facilitate research and development in relation to marine science and marine technology and the application and use of marine science and marine technology; and
- to co-operate with other institutions and persons in carrying out this research and development.

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- to produce, acquire, provide and sell goods, and to provide services, in connection with marine science and marine technology and the application and use of marine science and marine technology; and
- to make available to other persons, on a commercial basis, the knowledge, expertise, equipment, facilities, resources and property of the Institute.

Australian Nuclear Science and Technology Organisation (ANSTO)

ANSTO is Australia's national nuclear research and development organisation and the centre of Australian nuclear expertise.¹¹ ANSTO was established by the Australian Government in 1987 under the ANSTO Act, replacing the Australian Atomic Energy Commission. ANSTO's head office and main facilities are located in southern Sydney at Lucas Heights. It is also responsible for running the National Medical Cyclotron at Royal Prince Alfred Hospital.

ANSTO has two nuclear reactors onsite: [HIFAR](#) and the new [OPAL](#) from the Argentine company [INVAP](#). HIFAR was shut down on 30 January 2007. OPAL went on line in April 2007.¹²

ANSTO's mandate is:¹³

- to support the development and implementation of government policies and initiatives in nuclear and related areas, domestically and internationally.
- to operate nuclear science and technology based facilities, for the benefit of industry and the Australian and international research community.
- to undertake research that will advance the application of nuclear science and technology.
- to apply nuclear science, techniques and expertise to address Australia's environmental challenges and increase the competitiveness of Australian industry.
- to manufacture and advance the use of radiopharmaceuticals which will improve the health of Australians.

Commonwealth Scientific and Industrial Research Organisation (CSIRO)

The CSIRO is the national government body for scientific research in Australia, established by the SIR Act. As at January 2006, CSIRO employed just over '6500 staff in 17 research divisions¹⁴ and two joint ventures located across 57 sites throughout Australia and overseas,¹⁵ undertaking research and development in key and strategic fields of economics, social and environmental importance. As with AIMS and ANSTO, a significant amount of CSIRO's expenditure and R&D efforts are explicitly directed towards the priority goals aligned with the National Research Priorities.¹⁶

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Financial implications

The Explanatory Memorandum states that there is no financial impact.

Main provisions

Schedule 1—*Australian Institute of Marine Science Act 1987* (the AIMS Act)

This schedule contains amendments relating to the appointment, powers, tenure and termination of the Chief Executive Officer (CEO). The theme in these amendments is a shift in decision making power toward the Council.

Item 1 - Proposed paragraph 20A(a)

Existing subsection 20A of the AIMS Act deals with certain **Council deliberations or decisions which the CEO is unable to participate in**. The proposed amendment to **paragraph 20A(a)** seeks to further limit the CEO's participation in such contexts by providing that the CEO cannot take part in any deliberation or decision of the Council with respect to him or her; and that he or she shall be disregarded for the purpose of constituting a quorum of the Council for any such deliberation or decision.

Appointment of CEO

Item 2 - Proposed section 21

The CEO of AIMS is to be appointed directly by the Council and not by the Governor-General on the recommendation by the Council.

Item 10 - Proposed subsections 30(1), (3), (4) and (5)

An **acting CEO** is to be appointed by the Council rather than the Minister, as is presently the case.

Items 4 - Proposed subsection 22(1) Tenure of CEO

The maximum period of tenure of the CEO is reduced from 7 to 5 years.

Item 6 - Proposed subsection 25(2) Terms and conditions of CEO appointment

It is proposed that the Council rather than the Minister shall determine the terms and conditions of the CEO.

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Processes for terminating a CEO

Item 8 - Proposed repeal of sections 27 and 28 and insertion of a new section 27

The **proposed subsection 27(1)** enables the Council to terminate the appointment of a CEO for misbehaviour or physical or mental incapacity.

The **proposed subsection 27(2)** provides further grounds for termination. The Council may terminate the appointment of the CEO if he or she:¹⁷

- becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
- is absent, except on leave of absence granted by the Council, from 3 consecutive meetings of the Council; or
- is absent from duty, except on leave of absence granted by the Council, for 14 consecutive days or for 28 days in any 12 months; or
- fails, without reasonable excuse, to comply with his or her obligations under section 27F or 27J of the *Commonwealth Authorities and Companies Act 1997*.

Proposed subsection 27(2) permits the Council to **terminate** the appointment of a CEO ‘if the Council is satisfied that the **performance** of a CEO has been **unsatisfactory for a significant period**’. The Explanatory Memorandum states that **as a guide, at least 3 months** may be considered as a ‘**significant period**’, and that the Board is to have a deal of discretion as to the factors to be taken into account in assessing performance and the relative importance of those factors.¹⁸

It may also be appropriate to consider that there may be instances where one significant transgression might be sufficient in and of itself to warrant termination.

Item 9 - Proposed section 29 – Maintaining a check on conflict of interest

The CEO will not be able to undertake any other work unless approval is given by the Council, rather than the Minister as is presently the case.

Item 11 - Proposes a repeal of section 42

Under the current Act, AIMS is unable to enter into a contract involving payment by AIMS, of an amount greater than \$1 million; or if a higher amount is specified in the regulations—that higher amount.

The proposed repeal of **section 42** removes this limit altogether, and accountability assumes a different appearance by a requirement set out in the Minister’s Statement of Expectations, that that Minister is notified in advance of AIMS entering into ‘**significant contracts**’. The Explanatory Memorandum states that this is in line with the provisions

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contained in section 15 of the CAC Act, and that similar amendments are also made for ANSTO and CSIRO. It is unclear as to what constitutes a ‘**significant contract**’ and it may be the case that that a contract is significant either on account of its substance or the substantial sum of money involved.

Interestingly, the same logic was not applied in the case of Tourism Australia. The recent amendments made to the *Tourism Australia Act 2004* following a review of Tourism Australia against the Uhrig recommendations yielded a different result. In that case, the threshold for the approval of contract was reduced from \$5 million to \$3 million, and it was explained that while Tourism Australia was already complying with Australian Procurement Guidelines, this change *further strengthened accountability commensurate with the high level of Australian Government funding of the organisation*. [Emphasis added]¹⁹

It is curious that organisations such as CSIRO which receive an even higher level of funding have not had the same logic applied to them.

Schedule 2—*Australian Nuclear Science and Technology Organisation Act 1987* (the ANSTO Act)

Item 7 – Proposed subsection 9(12) Composition of Boards

Existing section 9 of the Act provides that the composition of ‘the Board shall consist of the Executive Director and not fewer than 2 nor more than 6 other members’. The amendment proposes that the Board is to consist of 6-9 members including the Executive Director. The Explanatory Memorandum explains that this reflects Uhrig Review recommendations for best practice regarding governance by a board.²⁰

Uhrig explained that:

Boards with less than six members may have difficulty in meeting their statutory responsibilities due to workload pressures and the potential lack of breadth of views. This situation will be exacerbated in periods where vacancies exist.

There are, however, circumstances where a larger board may be warranted. For example, when management of the risks of the entity is such that a number of board committees are required, larger board membership may be appropriate.²¹

However, Uhrig also pointed out that ‘it was not possible nor appropriate to recommend a one size fits all when looking at the public sector’ and that “better practice” was that:

Board size should be developed taking into consideration factors such as an entity’s size, complexity, risk of operations and the needs of the board.²²

Item 8 - Proposed insertion of 16A

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The **proposed section 16A** provides that the CEO cannot take part in any deliberation or decision of the Council with respect to him or her; and that he or she shall be disregarded for the purpose of constituting a quorum of the Council for any such deliberation or decision.

Item 16 - Proposed subsection 21A(2) – Leave of absence of CEO

The Board may grant leave of absence (other than recreation leave) on such terms and conditions as the Board determines.

Item 19 - Proposed insertion of subsection 21C(3)

Section 21C of the Act deals with the conditions under which a CEO's appointment may be terminated.

Item 19 proposes the insertion of **subsection 21C(3)** which permits the Board to **terminate** the appointment of a **CEO** 'if the Board is satisfied that the **performance** of a CEO has been **unsatisfactory for a significant period**'. The Explanatory Memorandum states that **as a guide, at least 3 months** may be considered as a '**significant period**', and that the Board is to have a deal of discretion as to the factors to be taken into account in assessing performance and the relative importance of those factors.²³

It may also be appropriate to consider that there may be instances where one significant transgression might be sufficient in and of itself to warrant termination.

Item 21 - Proposed section 22 – CEO's duty to disclose pecuniary interests

The CEO must provide written notice to the Board rather than to the Minister, of all direct and indirect pecuniary interests that the CEO has or acquires in any business.

Item 24 - Proposes a repeal of section 31

Under the current Act, ANSTO is unable to enter into a contract involving payment by ANSTO, of an amount greater than \$5 million; or if a higher amount is specified in the regulations—that higher amount.

The proposed repeal of **section 31** removes this limit altogether, and accountability assumes a different appearance by a requirement set out in the Minister's Statement of Expectations that that Minister is notified in advance of ANSTO entering into '**significant contracts**'. The Explanatory Memorandum states that this is in line with the provisions contained in section 15 of the CAC Act. . It is unclear however as to what constitutes a '**significant contract**', and it may be the case that that a contract is significant either on account of its substance or the substantial sum of money involved.

Note comments above in Schedule 1 relating to the Tourism Australia Amendment Bill 2007.

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Item 25 - Proposed 42(1)(b)

Paragraph 42(1)(b) of the ANSTO Act sets out the powers that the Minister is not able to delegate. Item 24 amends 42(1)(b) **removing** reference to the Minister's powers under **subsections 26(1), (2), (9), (11), (15) and (16) and sections 28 and 31.**

Schedule 3—*Science and Industry Research Act 1949* (the SIR Act)

Item 3 - Proposed subsections 8(2), (3) and (4)

Item 3 repeals subsections 8(2), (3) and (4) and inserts new subsections which address the practical formal aspects of the establishment of Commonwealth Scientific and Industrial Research Organisation (CSIRO) consistent with the current requirements associated with incorporation of an organisation that is subject to the CAC Act.

Items 4 to 6 - Paragraphs 9AA(1)(b), (c) and (d)

Section 9AA of the SIR Act defines the powers of CSIRO.

Item 4 repeals paragraph 9AA(1)(b) and substitutes it with a new paragraph which provides that CSIRO may form, or participate in the formation of, a partnership or company.

Item 5 is a minor amendment designed to clarify paragraph 9AA(1)(c) rather than change its substance. The effect is to make it clear that CSIRO is able to

make available to a person, on such conditions and on payment of such fees or royalties, or otherwise, as the Chief Executive (CE) determines, a discovery, invention or improvement that is the property of the Organisation.

Item 6 amends paragraph 9AA(1)(d) so as to enable CSIRO to pay bonuses as determined by the CE with the approval of the Board, instead of requiring the approval of the Minister as is presently the case.

Items 7 and 8 - subsections 9A(1) and (1A)

Item 7 amends subsection 9A(1) to have the effect of providing that the Organisation may, in or in connection with the performance of its functions and the exercise of its powers:

- accept money or other property given, devised, bequeathed, assigned or otherwise made available to the Organisation (whether on trust or otherwise); and
- agree to any conditions subject to which money or other property is given, devised, bequeathed, assigned or otherwise made available to the Organisation; and
- act as trustee of money or other property vested in the Organisation upon trust.

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Appointment of Chief Executive (CE)

Item 9 – Proposed subsection 10B(1)

The CE shall be appointed by the Board. This is consistent with the governance principles recommended by the Uhrig Review.

Item 10 – Proposed subsection 10B(2)

Requires that the board must consult with the Minister prior to appointing a person as a CEO.

Item 20 - Proposed subsections 10G(1), (4), (6) and (7)

An **acting CE** is to be appointed by the Council rather than the Minister, as is presently the case.

Item 11 – Proposed subsection 10B(4)

Consistent with the logic and recommendations of the Uhrig Review, this amendment provides that in regard to matters not provided for by the Act, it is the Board (and not the Minister) that shall determine the terms and conditions upon which the CE holds office.

Item 12 – Proposed subsection 10C(2)

The Board may grant leave of absence (other than recreation leave) on such terms and conditions as the Board determines.

Item 14 – Proposed subsection 10E(1)

The Board rather than the Governor-General, may terminate the appointment of a CE for misbehaviour or physical or mental incapacity.

Items 15 - 17 – Proposed subsection 10E(2)(d) and (e) and subsection 10E(2)

The grounds for terminating the appointment of a CE which are listed in paragraphs 10E(2)(a) to (e) are to be exercised by the Board and not the Governor-General.

Item 18 - Proposed insertion of subsection 10E(3)

Section 21C of the Act deals with the conditions under which a CE's appointment may be terminated.

Item 18 proposes the insertion of **subsection 10E(3)** which permits the board to **terminate** the appointment of a **CE** 'if the Board is satisfied that the **performance** of a CE has been **unsatisfactory for a significant period**'. The Explanatory Memorandum

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states that **as a guide, at least 3 months** may be considered as a ‘**significant period**’, and that the Board is to have a deal of discretion as to the factors to be taken into account in assessing performance and the relative importance of those factors.

It may also be appropriate to consider that there may be instances where one significant transgression might be sufficient in and of itself to warrant termination.

Item 19 – Proposed section 10F CE’s duty to disclose pecuniary interests

The CE must provide written notice to the Board (rather than the Minister) of all direct and indirect pecuniary interests that the CE has or acquires in any business.

Powers and composition of the Board

Item 22 – Proposed subsection 12(2) clarifies scope of the Board’s powers

Clarifies that the Board has the necessary powers to do all things necessary or convenient to be done for in connection with the performance of its functions.

Item 23 - Proposed subsection 14A(4) Creation of Deputy Chairperson of Board position

The position of Deputy Chairperson of the Board is created by this amendment, and it provides that the Governor-General shall appoint one part-time Board member to be Chairperson of the Board and another of the part-time members to be the Deputy Chairperson of the Board.

Item 31 - Proposed repeal and replacement of subsection 15(5)

Where the Chairperson is not present at a meeting, the Deputy Chairperson shall preside at the meeting. Where the Deputy Chairperson is not present at a meeting, the members must elect one of their members to preside at the meeting.

Item 32 - Proposed insertion of section 15A

The CE cannot take part in any deliberation or decision of the Council with respect to him or her; and he or she shall be disregarded for the purpose of constituting a quorum of the Council for any such deliberation or decision.

Item 36 - Proposed insertion of new section 22A(1) – Delegation of the Board’s Powers

The Board may (by resolution) delegate to an eligible person (or to a committee of eligible persons) all or any of the Board’s powers under the Act or the regulations.

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It may be contrary to the logic of having a board and providing for decision-making to be more diffuse, to permit the delegation of the board's powers to an 'eligible person'. It is also unclear as to how long this delegation may be provided for and the desirability for having an extended period of delegation in the absence of checked guidelines.

Item 37 - Proposed repeal of section 50

Section 50 of the SIR Act provides that CSIRO 'shall not, except with the approval of the Minister, enter into a contract involving the payment or receipt by the Organisation of an amount exceeding \$250 000 or, if a higher amount is prescribed, that higher amount'.

The proposed amendment repeals **section 50** and thus removes any such limit, and accountability assumes a different appearance by a requirement set out in the Minister's Statement of Expectations that that Minister is notified in advance of CSIRO entering into '**significant contracts**'. The Explanatory Memorandum states that this is in line with the provisions contained in section 15 of the CAC Act. It is unclear however as to what constitutes a '**significant contract**', and it may be the case that that a contract is significant either on account of its substance or the substantial sum of money involved.

Note comments above in Schedule 1 relating to Tourism Australia Amendment Bill 2007.

Concluding comments

As already noted, this Bill is one of series introduced by the government designed to make relevant and appropriate reforms in response to observations and conclusions made by the Uhrig Report.

Endnotes

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1. Explanatory Memorandum, p. 1.
 2. Senator the Hon. N. Minchin, [Australian Government Response to Uhrig Report](#), *Media Release*, 12 August 2004.
 3. J. A. Uhrig, AC, Review of Corporate Governance of Statutory Authorities and Office Holders, June 2003, p.1.
 4. Senator the Hon. N. Minchin, op cit.
 5. J.A. Uhrig, op. cit., p. 83.
 6. *ibid*, p.12, point 6.

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7. Department of Finance and Administration, Chart of FMA Act and CAC Act agencies, < http://www.finance.gov.au/Publications/docs/FMA_CACFlipchart.pdf > accessed on 1 May 2007.
8. 'More than 160 Australian Government Agencies are being assessed against the Uhrig Report principles and templates'. Sussan Ley, MP, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, 'Second Reading Speech: Primary Industries and Energy Research and Development Amendment Bill 2007', House of Representatives, *Debates*, 1 March 2007.
9. *ibid.*
10. Section 3, AIMS Act.
11. ANSTO homepage < http://www.ansto.gov.au/discover/about_ansto.html > Accessed 5 May 2007.
12. 'OPAL Nuclear Reactor's International Role: A myriad projects revealed as Australia's top nuclear research centre's new reactor comes on line' ABC Radio Australia Innovations Program, 16 April 2007
13. ANSTO Mission Statement
http://www.ansto.gov.au/discover/about_ansto/mission_and_strategy.html, Accessed 5 May 2007.
14. CSIRO's 17 Research Divisions are:
 - Australia Telescope National Facility
 - Energy Technology
 - Entomology
 - Exploration & Mining
 - ICT Centre
 - Industrial Physics
 - Land and Water
 - Livestock Industries
 - Manufacturing and Materials Technology
 - [Marine and Atmospheric Research](#)
 - Mathematics and Information Sciences
 - Minerals
 - Molecular and Health Technologies
 - Petroleum Resources
 - Plant Industry
 - Sustainable Ecosystems

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Textiles and Fibre Technologies

CSIRO also participates in two joint ventures:

[Ensis](#) - forestry and forest products, with New Zealand's Forestry research organisation named Scion

[Food Science Australia](#) - with the Victorian government

15. CSIRO Snapshot, April 2006. p. 3.
16. *ibid*, p. 6; <http://www.aims.gov.au/pages/research/nrp/national-research-priorities.html>, Accessed 5 May 2007.
17. *Governance Review Implementation (Science Research Agencies) Bill 2007*, pp. 3-4.
18. Explanatory Memorandum, p. 8.
19. [Tourism Australia Amendment Bill 2007](#), *Bills Digest*, Parliamentary Library Australia. p. 8.
20. Explanatory Memorandum, p. 1.
21. J.A. Uhrig *op. cit.*, p. 96.
22. *ibid*.
23. Explanatory Memorandum, p. 8.

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