National Portrait Gallery of Australia Bill 2012

Moira Coombs, Law and Bills Digest Section
John Gardiner-Garden, Social Policy Section

Contents

Purpose ........................................................................................................................................... 3
Background ....................................................................................................................................... 3
   The creation of a National Portrait Gallery................................................................................. 3
   The development of a National Cultural Policy .......................................................................... 4
Main issues ....................................................................................................................................... 6
   Governance arrangements for the National Portrait Gallery of Australia................................. 6
   Basis of policy commitment ........................................................................................................ 7
      Budget for 2012–13 .................................................................................................................. 7
      Link to the National Cultural Policy ....................................................................................... 7
Committee consideration .................................................................................................................. 8
   Senate Selection of Bills Committee .......................................................................................... 8
   Senate Scrutiny of Bills Committee .......................................................................................... 8
   Parliamentary Joint Committee on Human Rights .................................................................... 9
Position of non-government parties and independents .............................................................. 9
Position of major interest groups ................................................................................................ 10
Financial implications ..................................................................................................................... 11
Statement of Compatibility with Human Rights ......................................................................... 11
Key provisions ............................................................................................................................... 12
Part 2— National Portrait Gallery of Australia ............................................................................. 12
   Establishment ............................................................................................................................ 12
Functions .................................................................................................................. 12
Powers ....................................................................................................................... 12
Part 3—Board of the National Portrait Gallery of Australia ....................................... 13
Division 1—The Board ............................................................................................... 13
Termination of appointments of Board members ....................................................... 14
Division 2—Procedures of the Board ........................................................................ 15
Part 4—Director, staff and consultants ..................................................................... 15
Division 1—Director ................................................................................................ 15
Division 2—Staff and consultants ............................................................................ 17
Part 5—Planning ....................................................................................................... 17
Part 6—Finance ....................................................................................................... 17
Part 7—Other matters ............................................................................................. 18
Annual Report .......................................................................................................... 18
Ministerial Directions ............................................................................................... 18
Delegation by the Minister ....................................................................................... 19
Concluding comments .............................................................................................. 19
CAC Act bodies ....................................................................................................... 21
National Portrait Gallery of Australia Bill 2012

Date introduced: 23 August 2012

House: House of Representatives

Portfolio: Regional Australia, Local Government, Arts and Sport

Commencement: The Act commences on 1 July 2013

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the National Portrait Gallery of Australia Bill 2012 (the Bill) is to establish the Gallery as an independent Commonwealth statutory authority subject to the Commonwealth Authorities and Companies Act 1997 (CAC Act).¹

Background

The creation of a National Portrait Gallery

The idea of a National Portrait Gallery was first suggested by the painter Tom Roberts in the early 1900s, but it was the support in the early 1990s of patrons, Gordon and Marilyn Darling, that reignited the idea of such a gallery. In 1994, under the management of the National Library of Australia, the Gallery’s first exhibition was launched in Old Parliament House.² In 1998 the National Portrait Gallery was established as part of the Government department responsible for the Arts, and given a board, a budget and a brief. The first display opened in 1999 in the refurbished Old Parliament House, in what had been the Parliamentary Library and two adjacent wings. Funding for a dedicated $87 million dollar building was provided in the Federal Budget for 2005 and Sydney-based

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architectural firm Johnson Pilton Walker was awarded the job of creating the Gallery. In December 2006 construction started and the Gallery’s new home opened its doors in 2008.

At the opening of the Gallery in 2008 the then Prime Minister, Kevin Rudd commented on the history of the idea for a National Portrait Gallery:

The idea for a National Portrait Gallery was first raised by a painter – his name was Tom Roberts, in the early part of the last century. Though best known nowadays for his landscapes, Roberts was also a significant portrait artist.

He sensed the emergence of a distinctive Australian identity and saw the need to develop a collection of artworks to capture this. Fortunately, these views were shared by others. At the time, Roberts, along with Arthur Streeton, were painting at their Collins Street studio in Melbourne, set up by Hugh Paterson, a fellow painter and its administrator. One of the regular visitors to this studio was the Prime Minister of the time, Labor Prime Minister Andrew Fisher. His office was literally next door. He liked to pass away the time and to escape the rigours of political office by spending time with artists. There Malcolm lies a reflection for both us for the future.

The friendship between Andrew Fisher and Hugh Paterson led to several initiatives to promote the development of Australian art, like the establishment of an Historic Memorials Committee, an Art Advisory Board to commission Australian artists to paint prominent politicians and significant national events. These set the foundations for Australia’s national art collections and bring us to where we are today: standing between our own National Gallery and National Portrait Gallery.

The development of a National Cultural Policy

A National Cultural Policy is in the process of being developed, and will be delivered later in 2012. The Policy will set out ‘a strategic framework of support for individuals, organisations and communities involved in cultural expression’.

The National Cultural Policy discussion paper was launched on 11 August 2011. The discussion paper incorporated comments and issues which had been identified during the initial public consultation stages by then Arts Minister Peter Garrett in 2009–10. An opportunity was given to arts bodies and

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3. Ibid.
4. Ibid.

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individuals to provide feedback until 21 October 2011. A great many submissions were received as a result and these have informed the development of the Policy.

There have been recent reviews which have ‘provided a focus in the development of the National Cultural Policy’. They are the Mitchell Review, entitled Building Support: Report of the Review of Private Sector Support for the Arts in Australia, published in October 2011 and the Review of the Australia Council of May 2012.

The aim of the Mitchell Review as noted in its executive summary was:

‘to identify new opportunities for greater connections between artists and arts organisations with the business community and philanthropists.’ The Review was intended to maximise financial and in–kind support to the arts in order to supplement existing funding to the arts from government. Importantly, it was not intended to build private sector support with the intention of reducing government funding.

Harold Mitchell is reported as saying recently that:

Budgets are always under pressure but the Government should not shy from its commitment to the arts.

Government should remain supportive of the arts because it is so important, and (funding) is not at a very high level anyway, compared to many other things we do ... the general proportion of arts company income—one third each from government, the private sector and box office—is right.

The review of the Australia Council examined the ‘governance structure of the way arts funding is administered’.

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7. S Crean (Minister for the Arts), Next step to first National Cultural Policy in almost 20 years, media release, 11 August 2011, viewed 5 September 2012, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1182971%22
15. S Crean, Speech at the Melbourne Recital Centre, op. cit.
The Review is important to the development of the National Cultural Policy and will ensure the Australia Council is best-placed to respond to the arts and culture sector of today and into the future.

The Australia Council has been in place since 1975, and this report sets out a strategic vision for the Council which, if implemented, would provide the Council with significant flexibility to grow with the Australian arts sector in the 21st century.

At its heart, the Review recognises the Council has been a central player in the growth of Australia’s world-class arts sector but that emerging art forms and technologies, which are changing the nature of artistic practice, pose challenges for how we define excellence and distribute funding to the arts and culture sector.16

Main issues

Governance arrangements for the National Portrait Gallery of Australia

The Bill aims to establish the Gallery as a statutory authority under the CAC Act. Statutory authorities under the CAC Act are both legally and financially separate from the Commonwealth.17

Further information on CAC Act bodies is included in the Appendix to this Bills Digest.

In his second reading speech to the Bill, the Minister stated that:

Establishing the gallery as a separate statutory authority subject to the Commonwealth Authorities and Companies Act 1997 will ensure it is able to establish governance arrangements appropriate for managing a significant national collection. It will ensure the gallery is overseen by a governing Board, provide for greater financial certainty and independence, increase its public profile and position it more effectively to attract corporate sponsorship and philanthropy.18

The Minister further recognises that the Gallery ‘should have a similar status to Australia’s other great national collecting institutions, as a Commonwealth authority’.19


19. Ibid.

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The proposed governance arrangements for the Gallery are closely modelled on those already in place for other iconic cultural institutions such as the National Gallery.\(^\text{20}\) The legislative framework adopted for the establishment of the Portrait Gallery as an independent statutory authority is also similar to that of more recently established CAC Act bodies such as Screen Australia\(^\text{21}\) and the National Film and Sound Archives.\(^\text{22}\)

The Minister for the Arts, Simon Crean, stated that ‘the National Portrait Gallery will make the transition to become an independent statutory authority from July 2013 to bring it into line with other major national cultural institutions. This will give the Gallery deserved recognition as an iconic national institution’.\(^\text{23}\)

**Basis of policy commitment**

**Budget for 2012–13**

In the 2012—13 Budget, the Government provided $2.7 million over three years for the establishment of the National Portrait Gallery as a statutory authority under the CAC Act from 1 July 2013. Budget Paper No. 2 states: ‘the measure supports the establishment and operation of a governing Board, and the engagement of additional staff’. The cost of this measure will be met from within the existing resourcing of the Department of Regional Australia, Local Government, Arts and Sport.\(^\text{24}\)

**Link to the National Cultural Policy**

While the Minister states in his second reading speech to the Bill that ‘establishing the National Portrait Gallery of Australia as a statutory authority, supports and delivers on the goals of the National Cultural Policy’, that Policy has not yet been finally determined.

Further comments from non-government parties and independents and from major interest groups on this issue are outlined under the respective headings below.

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\(^\text{23}\) S Crean (Minister for the Arts), Government building the future for Arts and creativity, media release, 8 May 2012, viewed 3 September 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1622403%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1622403%22)


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Committee consideration

Senate Selection of Bills Committee

The Senate Selection of Bills Committee resolved at its meeting on 12 September 2012 not to refer the Bill to a Committee.25

Senate Scrutiny of Bills Committee

The Senate Standing Committee for the Scrutiny of Bills drew attention to clause 54 of the Bill, part of which enables the regulations to prescribe penalties for offences against the regulations. The Committee notes:

[that it prefers] to see important matters dealt with in primary legislation and it is of concern that the need to create offences through regulations is not justified in the Explanatory Memorandum. While it is acknowledged that the clause limits the penalties for offences against the regulations to 50 penalty units (consistent with the recommended maximum penalty for such offences in the Guide to Framing Commonwealth offences), given the absence of an explanation for the proposed approach, the Committee seeks the Minister’s advice as to whether such matters can be dealt with in the primary legislation.26

The Minister responded to the Committee on 18 September 2012, advising:

The inclusion of Clause 54, as drafted, is consistent with similar powers granted to other national collecting institutions under their enabling legislation such as the National Museum of Australia Act 1980 (NMA Act) and the National Gallery Act 1975 (NG Act). It is my understanding that the inclusion of provisions in the legislation enabling the national cultural institutions to create offences by regulation is vital in ensuring that the national collecting institutions can appropriately adapt to protect the valuable cultural material in their care.27


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In particular, the Minister drew the Committee’s attention to section 44 of the NMA Act and section 46 of the NG Act, both of which allow regulations to be made ‘prescribing penalties not exceeding a fine of $500 for offences against the regulations’. 28

The Minister also emphasised that any regulations will be subject to parliamentary disallowance.

The Committee has asked the Minister to include key information set out in his response, in the Explanatory Memorandum to the Bill. 29

Parliamentary Joint Committee on Human Rights

In the Committee’s Second Report of 2012, published on 12 September 2012, the Committee sought clarification on the claims made that the current Bill does not engage human rights. The Committee notes:

[that it] seeks clarification from the Minister for the Arts whether the Bill, by its nature, could be said to promote the right to take part in cultural life in article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. 30

Position of non-government parties and independents

All speakers on the Bill agreed that they were proud to support the National Portrait Gallery becoming a statutory authority. For example, The Nationals’ member Paul Neville stated:

The National Portrait Gallery is now taking its place with our iconic national institutions and it is appropriate that it be given full statutory recognition and authority. 31

However, Liberal Party member Michael Keenan commented that:

While the coalition supports this bill, and sees a bright future ahead for the Gallery under these new arrangements, the future for the arts and collecting institutions in Australia under this Government is under a cloud of uncertainty. 32

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He further noted that Labor ‘still not delivered the National Cultural Policy they promised back in 2009’.33

**Position of major interest groups**

Further comments concerning the development of the National Cultural Policy have been made by major interest groups.

The Policy was expected to be delivered during budget week in May 2012. The lobby group ArtsPeak expressed disappointment at the policy’s delay.34 ArtsPeak called for minimal delay in announcing the National Cultural Policy and was disappointed to learn that it had been postponed. It noted:

> The cultural sector has fundamental significance in providing value to the creative endeavours, quality of life and expression of identity of the Australian community...

> ArtsPeak believes that [what is] urgently needed is an articulation of specific strategies within a National Cultural Policy and appropriate resource allocation to further advance the contribution made by the arts to all Australians.35

It further affirmed:

> While we are disappointed to hear of the delay, we wish to reaffirm our support for the development of a well crafted and well resourced National Cultural Policy, and to assure the Government that our aspirations for a stronger and better supported arts industry remain undiminished.36

The Australian Major Performing Arts Group (AMPAG)37 is seeking reassurance from the Government about the delayed National Cultural Policy and whether it will maintain funding in real terms.38

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33. Ibid.


36. Ibid.

37. Australian Major Performing Arts Group (AMPAG) is an umbrella group for Australia’s major performing arts companies covering entities such as theatre, circus, contemporary dance, classical ballet, classical music, opera, musicals and comedy.

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The Lord Mayors of Sydney and Melbourne stated recently that they ‘are frustrated at the Gillard Government’s delayed National Cultural Policy’. Lord Mayor of Sydney, Clover Moore further commented:

Given the concern in the cultural community about the Federal Government not progressing its cultural plan now, and the state also being very slow to implement the plan that was meant to go on the table in 2010...it’s important we progress the work that we’re committed to doing.

Financial implications

The Explanatory Memorandum to the Bill states that ‘the National Portrait Gallery of Australia Bill 2012 is not expected to have an impact on Commonwealth expenditure’.

As noted above, funding for the establishment of the Gallery is appropriated in the 2012–13 Budget.

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found at page 2 of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that:

This Bill does not engage any of the applicable right and freedoms and is compatible with human rights as it does not raise any human rights issues.

As discussed above, the Parliamentary Joint Committee on Human Rights has sought clarification from the Minister as to whether the Bill could be said to promote the right to take part in cultural life. As at the date of writing this Digest, a response from the Minister had not yet been published on the Committee’s website.

38. M Westwood, ‘Call for funds for cultural policy’, The Australian, 4 September 2012, p. 15, viewed 10 September 2012,
   http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1893352%22
40. Ibid.
   http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4869_ems_27f1bdb6-d809-4fbd-8b9a-d2d2525cd623%22
42. Ibid., p. 2.

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Key provisions

Part 2 — National Portrait Gallery of Australia

As noted above the legislative framework for the establishment of the Gallery is modelled on that of other similar CAC Act bodies such as the National Gallery, Screen Australia and the National Film and Sound Archive.

Establishment

Subclause 6(1) of the Bill establishes the National Portrait Gallery of Australia. Subclause 6(2) of the Bill provides that the Gallery is a body corporate; must have a seal; may acquire, hold and dispose of real and personal property; and may sue or be sued. Subclause 6(3) of the Bill provides that the Gallery’s seal will be kept in such custody as the Board directs and only be used as authorised by the Board.

Functions

Subclause 7(1) of the Bill provides that the functions of the Gallery are to:

- develop, preserve, maintain, promote and provide access to a national collection of portraits, other works of art and related material\(^{43}\) and
- develop and engage a national audience in relation to this material through exhibitions, education, research, publications and public and online programs.

Subclause 7(2) of the Bill provides that in performing its functions, the Gallery is to endeavour to make the most advantageous use of the national collection in the national interest, and to promote the efficient, effective, economical and ethical use of public resources. The Gallery may charge fees in the performance of its functions or in providing services (subclause 7(3) of the Bill). The fees should not amount to a tax (subclause 7(4) of the Bill).

Powers

Clause 8 of the Bill deals with the powers of the Gallery. Subclause 8(1) of the Bill provides that the Gallery has the power to do all the things that are necessary to perform the Gallery’s functions. Subclause 8(2) of the Bill sets out certain of the Gallery’s powers, but the list is not limited to these powers. The powers listed are the power to:

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43. Under clause 4 of the Bill, national collection means the national collection under paragraph 7(1)(a) of the Bill ‘consisting of portraits (including portraits that reflect the identity, history, diversity and culture of Australia), other works of art and related material’.

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• enter contracts
• occupy, use and control any land, building structure or other improvement made available to the Gallery under section 9 of the Bill
• purchase, hire, commission, produce, or accept as a gift or on deposit or loan, portraits, other works of art or related material
• hire out or lend portraits, works of art or related material
• provide financial assistance to persons by loan, grant or award on commercial terms or otherwise
• accept gifts, devises, bequests and assignments
• act as trustee of money or other property vested in the Gallery on trust and
• do anything incidental to any of the Gallery’s functions.

Part 3—Board of the National Portrait Gallery of Australia

Division 1—The Board

Clause 13 of the Bill establishes the Board of the Gallery. Clause 14 of the Bill defines the role of the Board. It is responsible for the proper and efficient performance of the Gallery’s functions (subclause 14(1) of the Bill). It can do anything that is necessary or convenient in connection with the performance of its duties (subclause 14(2) of the Bill). Anything done by the Board on behalf of the Gallery or with the authority of the Board is taken to have been done by the Gallery (subclause 14(3) of the Bill). The Explanatory Memorandum to the Bill states that ‘it is intended that the Gallery acts through the Board and it has the capacity to conduct the ordinary business of the Gallery, including setting policies and procedures’.44

Clause 15 of the Bill concerns the membership of the Board. The Board will consist of a Chair and a Deputy Chair and minimum of three members but not more than seven other members.

Clause 16 of the Bill provides for the appointment of Board members. The Minister appoints members by written instrument (subclause 16(1) of the Bill). Subclause 16(2) of the Bill ensures that a person must not be appointed as a Board member unless that person has the relevant knowledge and experience in relation to the affairs of the Gallery. A Board member holds office on a part-time basis, for a period specified in the instrument of appointment, not exceeding three years (subclauses 16(3) and (4)). If a Board member’s periods of appointment, either consecutive or non-consecutive, exceed nine years, the person cannot be appointed as a Board member (subclause 16(5)).

Subclause 16(6) of the Bill provides that the Board is not affected in its performance of functions or the exercise of powers if the number of Board members falls below five for a period of not more than 12 months. The number must not fall below three.


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Termination of appointments of Board members

Clause 21 of the Bill provides for the termination of the appointment of a Board member.

Subclause 21(1) of the Bill provides that the Minister may terminate the appointment of a Board member for misbehaviour or if the Board member is unable to perform the duties of office because of physical or mental incapacity.

Subclause 21(2) of the Bill provides that the Minister must terminate an appointment if the Board member:

- becomes bankrupt or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors or compounds with creditors, or makes an assessment of remuneration for the benefit of creditors
- is absent from three consecutive Board meetings without a leave of absence or
- fails to comply with an obligation imposed on the member by section 27F or 27J of the CAC Act.45

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45. Section 27F concerns a director’s duty to notify other directors of matters of material personal interest before voting on matters which involve these interests. Section 27J deals with the restrictions on voting and being present when a matter of material personal interest is being considered: Commonwealth Authorities and Companies Act 1997.

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Comment

These provisions appear to be consistent with common practice for the termination of the appointment of a Board member to a statutory authority.\(^\text{46}\)

Division 2—Procedures of the Board

Clause 23 of the Bill provides for the convening of meetings. Subclause 23(1) of the Bill provides that the Chair must convene meetings as are necessary for the efficient conduct of the Board’s affairs. The Chair must convene at least two Board meetings in a calendar year (subclause 23(2) of the Bill) and the Chair must convene a Board meeting if directed by the Minister (subclause 23(3) of the Bill). If a majority of the Board request in writing that the Chair convene a meeting, the Chair must do so (subclause 23(4) of the Bill).

Clause 24 of the Bill concerns the quorum for Board meetings. Subclause 24(1) of the Bill provides that a quorum constitutes a majority of the current Board members. However if a Board member is required by section 27J of the CAC Act not to be present or take part in a decision which subsequently means that there is no longer a quorum, the remaining Board members will constitute a quorum for the purpose of any deliberation or decision at the meeting on those matters (subclause 24(2) of the Bill).

Clause 28 provides that the Board may regulate the conduct of meetings as it thinks fit subject to the current Bill and the CAC Act.

Part 4—Director, staff and consultants

Division 1—Director

Clause 30 of the Bill establishes the office of Director of the National Portrait Gallery of Australia. Clause 31 of the Bill concerns the role of the Director. Subclause 31(1) of the Bill provides that the Director is responsible for the day to day running of the Gallery. The Director has the power to do all the things necessary to be done in connection with the performance of the Director’s duties (subclause 31(2) of the Bill). Subclause 31(3) of the Bill provides that the Director must act in accordance with any policies and directions of the Board. However subclause 31(3) does not apply when the Director is exercising powers and functions under the Public Service Act 1999 (subclause 31(4) of the Bill). Subclause 31(5) of the Bill provides that a written policy or direction under subclause 31(3) is not a legislative instrument.\(^\text{47}\)

\(^{46}\) For example, similar provisions are included in the Screen Australia Act 2008 and the National Gallery Act 1975.

\(^{47}\) Legislative instrument is defined in section 5 of the Legislative Instruments Act 2003. Briefly a legislative instrument is an instrument in writing that is of a legislative character and is made in the exercise of a power delegated by
Clause 32 of the Bill provides for the appointment of the Director. The Director is to be appointed by the Minister in the case of the first appointment, otherwise by the Board (subclause 32(1) of the Bill). The Minister must agree in writing before a person is appointed as Director by the Board (subclause 32(2) of the Bill). The appointment is by written instrument (subclause 32(3) of the Bill). The Director holds office on a full-time basis (subclause 32(4) of the Bill) and for the period specified in the instrument of appointment, which must not exceed five years (subclause 32(5) of the Bill). A person may be re-appointed for a further period.\footnote{48} The Director must not be a Board member (subclause 32(6) of the Bill).

Clause 39 of the Bill provides that the Board may terminate the appointment of the Director for misbehaviour or incapacity, if the Director becomes bankrupt, is absent for 14 consecutive days or 28 days in 12 months, or engages in paid employment outside the duties of his office without approval. However the Minister’s agreement in writing is required before the appointment is terminated (subclause 39(2) of the Bill).

Comment

The Board has discretion to terminate the appointment of the Director on any of the grounds outlined in subclause 39(1) of the Bill. There are no circumstances in which the Director’s appointment must be terminated.

As noted above, different arrangements apply to the termination of a Board member, whereby a Board member’s appointment must be terminated in certain circumstances.\footnote{49} Mandatory termination also applies in certain circumstances to the Directors of equivalent statutory authorities such as the National Gallery\footnote{50} of Australia and the National Museum of Australia.\footnote{51} The Governor-General may terminate the appointment of a Director of these institutions for misbehaviour or incapacity, but must terminate the appointment of the Director if he or she becomes bankrupt or enters into an arrangement with creditors; is absent for 14 consecutive days or 28 days in 12 months; is absent without leave from three consecutive Board or Council meetings; engages in other paid employment without approval or fails, without reasonable excuse to comply

\footnote{48}{Section 33AA of the Acts Interpretation Act 1901 provides that a legislative power to appoint includes a power to re-appoint. Acts Interpretation Act 1901, viewed 9 October 2012, \url{http://www.comlaw.gov.au/Details/C2012C00001}}

\footnote{49}{That is, if he or she becomes bankrupt or enters into an arrangement with creditors; is absent without leave from three consecutive Board meetings; or fails to comply with certain CAC Act obligations (see discussion on clause 21 of the Bill, above).}


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with sections 27F or 27J of the CAC Act. The Explanatory Memorandum to the Bill does not explain why there is a difference between the termination provisions applying to the Board and the Director, or why the termination provisions applying to the Director of the Gallery differ from those applying to the Directors of similar authorities.

Division 2—Staff and consultants

Clause 41 of the Bill provides for the employment of staff. Persons engaged as staff of the National Portrait Gallery of Australia must be engaged under the Public Service Act 1999 (subclause 41(1) of the Bill). Subclause 41(2) of the Bill provides that the Director and the staff of the Gallery constitute a statutory agency for the purposes of the Public Service Act and the Director is the head of the agency.

Part 5—Planning

Clause 44 of the Bill provides for a corporate plan. In accordance with subclause 44(1) the Board must prepare a corporate plan in writing at least once in each three year period and submit it to the Minister. Under subclauses 44(2) and (3) of the Bill the plan must cover a three year period and include details relating to the Gallery such as:

- objectives that the Gallery will pursue
- the strategies and policies that the Gallery will adopt to achieve the objectives and
- other matters as the Minister requires.

The plan may also include other matters.

Subclause 44(4) of the Bill provides that the Chair must inform the Minister of any changes to the plan and any matters that may significantly affect achieving the objectives set out in the plan. The Minister may provide written guidelines to the Chair to assist the Chair to determine whether the Minister requires a matter to be included in the plan or whether the matter significantly affects the achievement of the objectives of the plan (subclause 44(5)). The guidelines mentioned are not legislative instruments (subclause 44(6) of the Bill). Subclause 44(7) of the Bill provides that the Board must ensure that the first corporate plan is done within 12 months of the commencement of the Bill.

Part 6—Finance

Clause 45 of the Bill provides for money payable to the Gallery. This is money appropriated by Parliament for the purposes of the Gallery (subclause 45(1) of the Bill). Subclause 45(2) of the Bill

52. See footnote 45 for an explanation of sections 27F and 27J of the CAC Act.

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provides that the Finance Minister may give directions about the amounts and the times at which money is to be paid under subclause 45(1). A direction by the Finance Minister is not a legislative instrument (subclause 45(3) of the Bill). Subclause 45(4) of the Bill defines the term Finance Minister as the Minister administering the Financial Management and Accountability Act 1997.

Clause 47 of the Bill provides for restrictions on financial transactions. Unless the Gallery has the written approval of the Minister it is restricted from doing the following:

- acquiring any property, right or privilege for an amount above that prescribed by the regulations (paragraph 47(1)(a) of the Bill)
- disposing of any property, right or privilege if the amount of the disposal exceeds the amount prescribed by the regulations (paragraph 47(1)(b) of the Bill)
- entering into a contract for the construction of a building if the Gallery is to pay an amount exceeding that prescribed by the regulations (paragraph 47(1)(c) of the Bill) or
- entering into a lease of land for a period exceeding 10 years (paragraph 47(1)(d) of the Bill).

Part 7—Other matters

Annual Report

Clause 49 of the Bill provides that the Gallery must in each annual report include details of any land, buildings, structures or other improvements made available under section 9 of this proposed Act during the relevant financial year and any disposals of portraits or other works of art or related material under section 11 of this proposed Act during the financial year.

Ministerial Directions

Subclause 50(1) of the Bill provides that the Minister, by legislative instrument, may give directions to the Board relating to the performance of powers or functions of the Gallery or may require a report or advice on matters concerning any of the Gallery’s functions or powers. A note to subclause 50(1) of the Bill states that section 42 (disallowance provisions)\(^\text{53}\) or Part 6 (sunsetting)\(^\text{54}\) of the

\(^{53}\) Legislative instruments must be tabled in Parliament within six sitting days after the registration of the instrument (section 38 of the Legislative Instruments Act 2003 (LI Act)). A notice of motion to disallow must be made within 15 sitting days after the instrument is tabled in Parliament (section 42 of the LI Act). If a resolution is passed in pursuance of the motion within that 15 sitting day period, the instrument or provision ceases to have effect - it is disallowed. However, under section 44 of the LI Act, ministerial directions to any person or body are listed as legislative instruments that are not subject to disallowance.

\(^{54}\) Part 6 of the LI Act prescribes the timeframe for which a legislative instrument remains in force. However, under section 54 of the LI Act, ministerial directions to any person or body are listed as legislative instruments that are not subject to sunsetting.

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Legislative Instruments Act 2003 do not apply to these directions. The directions are therefore not subject to parliamentary scrutiny nor will they automatically sunset after 10 years.

Subclause 50(2) of the Bill provides that directions under paragraph 50(1)(a) must be of a general nature only and must be complied with by the Board (subclause 50(3) of the Bill).

Delegation by the Minister

Clause 51 of the Bill concerns the delegation of powers by the Minister. Subclause 51(1) of the Bill provides that the Minister may delegate in writing any or all of the Minister’s powers or functions under this proposed Act to the Secretary of the Department or an SES employee or acting SES employee. However, these delegation powers of the Minister under subclause 51(1) do not apply under particular clauses of the Bill, being clause 9 (making land available to the Gallery), clause 16 (appointment of Board members), clause 17 (appointment of acting Board members), clause 21 (termination of appointments), clause 32 (appointment of a Director), clause 39 (termination of the appointment of a Director) or clause 50 (ministerial directions) (subclause 51(2) of the Bill). When a delegate exercises powers or performs functions under a delegation, the delegate must comply with any directions of the Minister (subclause 51(3) of the Bill).

Concluding comments

As noted above, the establishment of the National Portrait Gallery in its own right appears to have wholehearted support. However, the development of the National Cultural Policy and the issue of funding generally for the Arts are still of significant concern.

At around the time of the Budget, concerns were raised in the media that although funding had received a boost in relation to arts initiatives, including increased funding to national collecting institutions, there has been an overall reduction in government funding in the arts sector.55 A news report commented that:

The arts initiatives in Tuesday’s federal budget will be a disappointment to those who have been awaiting the National Cultural Policy. While the budget contains $64.1 million of arts initiatives including a boost to national collecting institutions, it disguises an overall reduction in government cultural spending.

The total arts and culture heritage budget was $1.15 billion this financial year, but will fall by $76 million in 2012–13 and by another $60 million the following year.56

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56. Ibid.

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As noted earlier, the funding for the National Portrait Gallery to become a statutory authority will be met from within existing departmental resourcing. The National Portrait Gallery Board already exists, currently with a Chair, Deputy Chair and three members.

In March 1998 the ‘fledging institution’ had its inaugural director appointed. With this Bill the Gallery leaves behind its fledgling status and takes its place with the other major national collecting institutions. As Senator Alston remarked in 1998:

The National Portrait Gallery reflects our history by paying tribute to the extraordinary and ordinary Australians who have contributed to our national life. To this end all national institutions have a role to play, and a particular expertise to offer’. 57

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Appendix

CAC Act bodies

CAC Act bodies are established ‘as bodies corporate, for a public purpose, with the ability to hold money on their own account. They are more independent from the Commonwealth in a financial sense, but powers of direction can also apply to these bodies in other important ways’. They also have a governing Board subject to directors’ duties.

Directors of the governing Board must act in the interests of the body. The relevant portfolio Minister and the Minister for Finance have broad powers to require the authority to provide information about its activities.

There are a number of duties for officers of Commonwealth authorities, as well as directors. ‘These include duties of care and diligence, good faith, proper use of position, proper use of information, compliance with statutory duties and for directors, disclosure of, for example, material personal interests’.

Usually the authority has financial autonomy in relation to the Government, ‘where a body needs to operate commercially and where the Australian Government does not provide a substantial proportion of its funding through appropriations’.

According to the Governance Arrangements for Australian Government bodies, the following factors make it appropriate to apply the CAC Act:

- the body operates commercially with the intention of making a profit, in a competitive environment, and it would likely be classified as outside the GGS (whole of government and general government sector)
- the body has an entrepreneurial focus
- a governing Board would provide effective governance for a body
- there is a clear rationale for the assets of the body to not be owned or controlled by the Commonwealth directly and
- the body requires a degree of independence from general policies of the Australian Government, unless applied after consultation and formal notification.

59. Ibid., p. 22.
60. Ibid., p.23.
61. Ibid., p. 23.
62. Ibid.
63. Ibid., p. 24.

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