Australia Council Bill 2013

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Law and Bills Digest Section

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The Bills Digest at a glance

What is the current status of the Australia Council?

- The Australia Council is currently established as a Commonwealth Authorities and Companies Act 1997 (CAC Act) authority under the Australia Council Act 1975.
- It is the body that has ‘been the primary national funder of artistic work of excellence and of the framework that supports that work…it has built its support from a narrow focus on organisations working in more ‘traditional’ artforms, to a broad agenda supporting artists and organisations from the smallest artist run initiative to major performing arts companies’.  

Why has this Bill been introduced?

- This Bill has been introduced to ‘ensure a modern governance structure for the Australia Council, including functions outlining the Australia Council’s purpose in a 21st century Australia and a contemporary arts sector’.  
- The proposed amendments reflect the outcomes of the 2012 Review of the Australia Council (the Review) that was conducted as part of the development and implementation of the National Cultural Policy – Creative Australia which was launched in March 2013.
- The Bill incorporates ten of the eighteen recommendations of the Review of the Australia Council.

What will this Bill do?

- The Bill establishes a re-organised structure of the Council and continues its existence with renewed and enhanced governance arrangements to make it consistent with other ‘modern’ CAC Act independent statutory authorities.
- It will be similar to other like organisations such as the National Portrait Gallery and Screen Australia.

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Australia Council Bill 2013

Date introduced: 20 March 2013

House: House of Representatives

Portfolio: Regional Australia, Local Government, Arts and Sport

Commencement: Sections 1—2 on Royal Assent. Sections 3—52 on a day fixed by Proclamation or on the day after a six month period from Royal Assent has elapsed.

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 of the Bill

The purpose of the Australia Council Bill 2013 (the Bill) is to replace the present structure and functions of the Australia Council as set out in the Australia Council Act 1975 (the Australia Council Act) with a revised and updated governance structure and arrangements that are consistent with other Commonwealth statutory authorities operating under the Commonwealth Authorities and Companies Act 1997 (CAC Act).

The proposed amendments are consistent with the Australian Government response to the recommendations of the Review of the Australia Council in 2012.

Structure of the Bill

This Bill is divided into eight parts.

- Part 1 contains preliminary matters and the constitutional basis for the Act
- Part 2 continues the existence of the Australia Council and deals with its functions and powers
- Part 3 establishes the Board of the Australia Council as a self-governing Board and is concerned with its role, appointment of members, their terms and conditions and the procedures that the Board operates under

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3. The Australia Council Bill 2013 sets up the organisational structure and governance arrangements for the Australia Council while the Australia Council (Consequential and Transitional Provisions) Bill 2013 repeals the Australia Council Act and makes transitional provisions for the continued operation of the Australia Council during the transition period. See the Bills Digest on the Australia Council (Consequential and Transitional Provisions) Bill 2013.
• Part 4 deals with committees and
• Parts 5—8 deal with the CEO, staff and consultants, planning, finance and other matters.

An explanation of each Part of the Bill is outlined at pages 7–29 of the Explanatory Memorandum to the Bill. Each part of the Bill addresses an aspect of the governance arrangements of the Australia Council as a statutory authority under the CAC Act.

Background

Review of the Australia Council

In December 2011, the then Minister for the Arts announced the independent review of the Australia Council (the Review). The Review was seen as an integral part of the development of the National Cultural Policy. The Minister noted at the time:

This is the first major review of the work of the Council and other agencies since the 1980s. The reviewers will consider the feedback and work closely with the Australia Council and its Executive and the outcomes of their independent review will be considered as part of the National Cultural Policy.

Gabrielle Trainor and Angus James were chosen to conduct the Review because of their ‘extensive experience in corporate change and governance in both the public and private sector’. The purpose of the Review was to determine whether the original purpose of the Council is still relevant today and to determine the most appropriate governance and administrative model to ensure the Council is able:

• to act on funding decisions guided by the overall principle of excellence and artistic merit
• have a strong and robust arms-length peer assessment process for all funding decisions and that the decision making process meets the community’s expectations of fairness and transparency and
• to be guided by enabling legislation that reflects the diversity of the Australian arts and cultural sector today and, with consideration of emerging creative areas, into the future.

The Review report noted:

The report makes 18 recommendations across six key areas for major reform to the Council, through a recalibration of the Council’s purpose, and a significant revision of the Council’s governance structure and peer review process.

9. S Crean (Minister for the Arts), Arts support review to secure new audiences and opportunities, media release, 19 December 2011, accessed 6 June 2013. See further discussion of the National Cultural Policy on page 6 of this Bills Digest
10. Ibid.
These reforms may not be easy to implement but they will, over time, put the Council in the best possible position to carry a key role in the contemporary arts sector and in the context of the broader objectives of the National Cultural Policy. The changes will require the engagement and support of the sector if they are to succeed and achieve their aims. We strongly believe the reforms will establish the Council as a modern, relevant organisation that is able to adapt to the changing needs of the Australian arts sector in the decades to come.12

Of the 18 recommendations to reform the Australia Council, 16 recommendations were accepted by the Government.13 Ten of the 18 recommendations ‘are relevant to the Council’s enabling legislation to the extent that a whole new act was called for’.14 They include:

- The need to refine the Australia Council’s legislative purpose, to ensure a modern governance structure and introduce a new grants assessment model focussed on funding work of the greatest artistic excellence regardless of artform.15

### National Cultural Policy

The [National Cultural Policy—Creative Australia](#) was released on 13 March 2013.16

Creative Australia presents ‘a vision and strategy to place arts and culture at the centre of modern Australian life’.17 The policy document sets out five overarching goals, developed in close consultation with the community. ‘These goals establish the framework which will drive future action... over the next ten years ... to ensure culture is strengthened as the expression of Australian identity and individual creativity’.18 The philosophy and goals of the policy have already been recognised in recent legislation passed by the Parliament.19

### What are the five policy goals?

The National Cultural policy encapsulates five policy goals which are to:

- recognise, respect and celebrate the centrality of Aboriginal and Torres Strait Islander cultures to the uniqueness of Australian identity
- ensure that government support reflects the diversity of Australia and that all citizens, wherever they live, whatever their background or circumstances, have a right to shape our cultural identity and its expression

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16. S Crean (Minister for the Arts), *Creative Australia launch, Address to the National Press Club*, Canberra, speech, 13 March 2013, accessed 6 June 2013. The release of the policy was much anticipated and long awaited with the policy being developed since the consultation process first commenced in 2011.
17. S Crean (Minister for the Arts), *A National Cultural Policy for a Creative Australia*, media release, 13 March 2013.

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• support excellence and the special role of artists and their creative collaborators as the source of original work and ideas, including telling Australian stories
• strengthen the capacity of the cultural sector to contribute to national life, community wellbeing and the economy and
• ensure Australian creativity thrives here and abroad in the digitally enabled 21st century, by supporting innovation, the development of new creative content, knowledge and creative industries.20

The Natural Cultural Policy also outlines what the Government intends to achieve in relation to the Australia Council:

• new legislation to ensure a modern governance structure for the Australia Council
• reaffirm and revitalise the founding principle of the Australia Council, of arm’s length, peer-assessed funding decisions
• improve the flexibility and responsiveness of the Australia Council to evolving artistic practice
• ensure artistic expertise informs the Australia Council’s strategic planning and funding priorities and
• enhance the Australia Council’s capacity to collect and publish important data on the arts, the impact of its funding and the broader achievements of Australia’s artists and arts organisations. 21

Committee consideration

This Bill was referred by both the House of Representatives and the Senate Selection of Bills Committees as outlined below.

House of Representatives Selection of Bills Committee

The Bill was referred by the House of Representatives Selection of Bills Committee to the Standing Committee on Climate Change, Environment and the Arts on 21 March 2013. A statement was read to the House by the Committee Chair Mr Tony Zappia MP on 16 May 2013. He noted amongst other things that:

This House committee has noted on several occasions during this parliament that where legislation has been referred to committees of both places there is little to be gained from the conduct of concurrent inquiries. The House committee, noting that the Senate has completed a report in a short time frame in which public input was sought and recommendations made, does not propose to conduct an additional

21. Ibid., p. 51.

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inquiry, especially not where the reasons for the inquiry are identical. To that end, no recommendation is made, and the committee considers that its task is concluded.  

**Senate Selection of Bills Committee**


**Senate Rural and Regional Affairs and Transport Legislation Committee**

The Committee inquired into both the Australia Council Bill 2013 and the Australia Council (Consequential and Transitional Provisions) Bill 2013 and reported on 9 May 2013. There were no dissenting reports.

In summary, the Committee acknowledged the need for the Council to modernise and be consistent with other Commonwealth statutory authorities in its structure and functions. The Committee also suggested additional functions which form Recommendation 1.

Altogether, the Committee made three recommendations:

- **Recommendation 1**, recommended that clause 9 of the Bill be amended to include supporting Aboriginal and Torres Strait Islander arts practice, promoting freedom of expression in all artistic forms, support for the arts that reflects Australian diversity and to encourage community participation in the arts.
- **Recommendation 2** suggested that a committee established under clause 31 of the Bill has at least one member with appropriate experience in a particular art form for the purpose of peer assessment and
- **Recommendation 3** recommended that both Bills be passed.

**Government Amendments to the Bill**

The recommendations of the Committee were adopted by the Government and amendments were made to the Bill and passed on 16 May 2013.

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24. Ibid.

25. See the Bills homepage to the *Australia Council Bill 2013* for a list of the amendments and the Supplementary Explanatory Memorandum, accessed 6 June 2013.

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Further information arising from the inquiry is outlined elsewhere where relevant in this Bills Digest.

**Senate Standing Committee for the Scrutiny of Bills**

The Committee had no comment to make on this Bill.\(^{26}\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), 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 the Bill is compatible.\(^{27}\)

**Parliamentary Joint Committee on Human Rights**

The report of the Parliamentary Joint Committee on Human Rights (Human Rights Committee) examined the Statement of Compatibility with Human Rights in relation to this Bill. The Statement explained that the Bill engaged the right to enjoy and benefit from culture under the ICESCR\(^ {28}\) and the right to freedom of expression under the ICCPR\(^ {29}\) and that both rights are promoted under the Bill. The Human Rights Committee agreed that the Bill does promote the right to culture and the right to freedom of expression.\(^ {30}\)

The Statement of Compatibility also notes that the right to equality and non-discrimination are engaged under the ICCPR because of the definition of *Australian artist* being restricted to Australian citizens and permanent residents. The Human Rights Committee noted:

> In light of the explanation provided in the statement of compatibility, the committee considers that there is an objective and reasonable basis for restricting the definition of Australian artist to Australian citizens and permanent residents, consistent with the right to equality and non-discrimination in article 26 of the ICCPR.\(^ {31}\)

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27. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.
28. *International Covenant on Economic, Social and Cultural Rights*, article 15(1)(a). This Covenant was ratified by Australia on 10 December 1975.
29. *International Covenant on Civil and Political Rights*, article 19. This Covenant was ratified by Australia on 13 August 1980.
Policy position of non-government parties/independents

Coalition view

During the debate in the House of Representatives, Mr Michael Keenan noted that the Liberals were willing to support the Bills but with some concern even with the amendments, as to what is contained within these radical changes.\textsuperscript{32} Ms Judi Moylan expressed concerns about the Bill changing the intent of the Australia Council and abandoning some of the core principles on which successive Australian governments have built their vision for an Australian culture.\textsuperscript{33} Concerns were also expressed about the change in some of the functions between the \textit{Australia Council Act} and the Bill.

The Government amendments to the Bill which take account of the Senate Committee recommendations (as noted above) also address these concerns.\textsuperscript{34}

Australian Greens

The Australian Greens Leader, Ms Christine Milne, commented in March 2013:

\begin{quote}
... [that she was pleased ] that there’s a recommendation to restructure the Australia Council, that’s something that the Greens have thought was necessary because there have been anomalies in there that haven’t allowed some arts organisations to be funded so I’m looking forward to actually having a look at the detail of that.\textsuperscript{35}
\end{quote}

Position of major interest groups

The Senate Committee canvassed the issues raised by the submissions to the Committee during its inquiry. The Committee found that there was broad support for the Bills amongst stakeholders. However, they considered that there were two main areas of concern raised in the submissions. Firstly there seemed to be a lot of concern over the changes or re-drafting of certain of the functions in \textit{clause 9} of the Bill and secondly, there was concern about the effect of changes to general governance arrangements in \textit{clauses 17} and \textit{31}.

In relation to the revised functions proposed in the Bill, the Department of Regional Australia, Local Government, Arts and Sport (the Department) noted the recommendation of the Review to restate the core purpose of the Council as follows:

\begin{itemize}
  \item \textsuperscript{34} See footnote no. 25.
  \item \textsuperscript{35} C Milne (Australian Greens Leader), \textit{National Cultural Policy, media reform, Fiji}, media release, 13 March 2013, accessed 6 June 2013.
\end{itemize}
To support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field.  

In evidence to the Committee, the Department stated that it had re-drafted the functions to accord with this purpose. Mr Rodney Hall, a former Chairman of the Australia Council, gave the Committee his opinion as to why the existing functions should not be deleted:

It seems to me that all of them are very worthy aims. I suppose how one could characterise it is that those are the functions under the old act which are to do with the council being a kind of advocate for the arts in the community and the idea of the arts as a kind of cultural enrichment of the community.

Other evidence submitted to the Committee thought that the use of the term excellence in its new context narrowed the meaning and purpose of the functions. There was discussion on a number of other aspects related to the functions. The Committee’s view was that:

Legislated functions of an organization are vital. They set out the basic purposes of the organisation and, in relation to the Australia Council, should take account of its special status as an organisation for the advancement of the arts. In addition, the purposes should, wherever possible, accord with Creative Australia—the National Cultural Policy.

As noted above, the Committee recommended that further functions should be included in the Bill and itemised them.

In relation to the proposed governance changes, concern was raised particularly in relation to the governing Board. Mr Rodney Hall said:

There is an implication that in some way council has not been corporately responsible in the way it has managed its money.

The Committee report noted:

The National Association for the Visual Arts thought that a potential lack of artistic expertise on the governing Board might represent a handicap.

The report further noted:

The Australian Performing Arts Centres Association while recognising the value of moving to a skills-based governing Board, was mindful that substantial and diverse arts industry experience remained critical in the delivery of informed and relevant governance in the arts sector. It therefore recommended that a
substantial component of the Board be members with practical arts experience, not simply ‘a knowledge of’
the arts.  

Financial implications

The Explanatory Memorandum notes that the ‘Australia Council Bill 2013 is not expected to have a
significant impact on Commonwealth expenditure’. The then Minister Simon Crean announced, at
the launch of the National Cultural Policy—Creative Australia on 13 March 2013, increased
investment of $75.3 million in new funding over four years. Mr Crean noted:

The Australian Government will immediately implement structural reforms to the Australia Council so that
it is resourced, refocussed and renewed.

Key issues and provisions

The Australia Council

Governance issues

Under the Australia Council Act, the Australia Council is a CAC Act body. This continues under the
Bill. CAC Act bodies exhibit the following features:

• are bodies corporate (being either a statutory corporation established for a public purpose or a
  company in which the Commonwealth has a controlling interest)

• hold money on their own account, rather than on behalf of the Commonwealth and

• have a governing board subject to directors’ duties (or at least one director, subject to these
duties).

The Governance arrangements further dictate:

With a governing board, the directors must act in the interests of the body, as opposed to acting as
representatives for other constituencies. A governing board may be helpful where the body has a
commercial or entrepreneurial focus. The CAC Act does not give Ministers a general power of direction in
relation to a body’s functions (this is left to the enabling legislation if required) but it does give the
responsible Minister and the Finance Minister broad powers to require the authority to provide
information about its activities...

43. Ibid., p. 29.
45. This funding is set out at p. 235 of Part 2: Expense measures, Budget measures: budget paper no. 2: 2013–14,
accessed 19 June 2013.
46. S Crean, Creative Australia launch, Creative Australia launch, Address to the National Press Club, op. cit.
47. Department of Finance and Administration, Governance arrangements for Australian Government bodies, August
The **CAC Act** includes certain duties for officers of Commonwealth authorities, as well as directors on the board. 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.\(^{48}\)

These statutory corporations are:

Commonwealth authorities [that] are governed both by their separate enabling legislation and by the **CAC Act**. The **CAC Act** imposes a single set of core reporting and auditing requirements on directors of these entities and sets out standards of conduct for officers of Commonwealth authorities that are equivalent to those applied to officers of companies by the **Corporations Act 2001**.\(^{49}\)

**The proposed amendments included in this Bill**

As noted above, the governance arrangements proposed in the Bill have been updated to accord with the requirements of the **CAC Act** and to allow the Australia Council to operate in accord with other **CAC Act** statutory authorities with similar structures and governance arrangements.

In summary, this will be achieved by:

- updating the functions, powers and governance structure and arrangements of the Australia Council
- establishing a governing board and providing for the terms and conditions of appointed board members, procedures of the board, and enabling the board to establish committees
- providing for the appointment of a Chief Executive Officer and staff and consultants
- requiring an annual corporate plan to be prepared
- providing for financial arrangements and
- providing for annual reporting requirements.\(^{50}\)

In modernising the enabling legislation, a number of the provisions in the Bill have been carried across from the **Australia Council Act**. For example, those provisions relating to the termination and resignation of members, remuneration, and procedures of the board such as the conduct of meetings. However, although these provisions are similar to those under the **Australia Council Act**, in almost every case they have been modernised and expanded to better reflect the functions and powers of the Board within the proposed new structure under the Bill.

**Establishment**

**Clause 7** of the Bill continues the existence of the Australia Council—as a body corporate established by the **Australia Council Act** (**subclause 7(1)**) continued in force by means of the provisions of the

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\(^{48}\) Ibid., pp. 22–23.


proposed *Australia Council Act 2013* and maintaining its name of the Australia Council *(subclause 7(2))*.\(^{51}\)

**Clause 8** of the Bill provides for the constitution of the Council. **Subclause 8(1)** provides that the Council:

- is a body corporate
- must have a seal
- may acquire, hold and dispose of real and personal property and
- may sue and be sued.

A note accompanying **subclause 8(1)** states that the *CAC Act* applies to the Council. **Subclause 8(2)** of the Bill provides that the Council’s seal will be kept in custody as the Board directs and is not to be used unless authorised by the Board.

**Functions of the Australia Council**

**Subclause 9(1)** of the Bill sets out the functions of the Council:

(a) to support Australian arts practice that is recognised for excellence

(b) to foster excellence in Australian arts practice by supporting a diverse range of activities

(ba) to support Aboriginal and Torres Strait Islander arts practice \(^{52}\)

(bb) to support Australian arts practice that reflects Australian diversity \(^{53}\)

(bc) to uphold and promote freedom of expression in the arts \(^{54}\)

(bd) to promote community participation in the arts \(^{55}\)

(c) to recognise and reward significant contributions made by artists and other persons to the arts in Australia

(d) to promote appreciation, knowledge and understanding of the arts

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51. The Explanatory Memorandum to the Bill at page 10 notes that the structure of the body corporate has been maintained and updated ‘to ensure consistency with the enabling legislation of other statutory authorities’ such as Screen Australia.


55. Inserted as a Government amendment 16 May 2013. All the functions were inserted in response to the recommendation 1 of the Senate Committee’s report.

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(e) to support and promote the development of markets and audiences for the arts

(f) to provide information and advice to the Commonwealth Government on matters connected with the arts or the performance of the Council’s functions

(g) to conduct and commission research into, and publish information about, the arts

(h) to evaluate, and publish information about, the impact of the support the Council provides

(i) to undertake any other function conferred on it by this Act or any other law of the Commonwealth

(j) to do anything incidental or conducive to the performance of any of the above functions.

Subclause 9(2) of the Bill provides that the Council may charge fees for performing its functions. It may also perform its functions in cooperation with others (subclause 9(3)).

Comment

The proposed functions of the Council are similar in nature to the existing functions but are broadened, have a more strategic focus and have been redrafted to reflect the new purpose of the Council—‘to support and promote vibrant and distinctly Australian creative arts practice that is recognised nationally and internationally as excellent in its field’.

Subclause 9(1) has been informed by this new purpose, whilst maintaining the intent of some functions from the AC Act which continue to be relevant to the Council’s activities under the new purpose and in the context of a contemporary arts sector.

As noted above, a number of submissions to the Senate Committee inquiry on the legislation questioned the removal of functions concerning the support of the arts by states, local governing bodies etc. The submitters saw this as a ‘significant risk to the diversity and breath of our cultural fabric’. The Department noted the following in relation to these comments:

… this provision was omitted as it was seen to have arisen out of the intellectual environment of the Seventies. Now, every state and territory had an arts funding body, and there was a strong relationship between the Council and those bodies:

There are structures like ministerial meetings between cultural ministers. There is an accord that has just been signed between the Commonwealth and the states on cooperation and collaboration in all of these areas. So there is a much more sophisticated architecture around this now that did not exist in

56. Explanatory Memorandum, Australia Council Bill 2013, op. cit., p. 10. This new purpose was a recommendation of the Review which was reflected in the Government response to the Review. Pages 11–12 of the Explanatory Memorandum explain the intended purpose of each of the proposed functions and note those which directly implement the Australian Government response to the recommendations of the Review.

57. Ibid., p. 10.


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the seventies when it was seen to be much more necessary to make a conscious statement that somehow we needed to draw the states and the territories into this space.\textsuperscript{59}

**Powers of the Australia Council**

*Clause 10* of the Bill sets out the powers of the Council. *Subclause 10(1)* provides that the Council has the power to do all things that are necessary or convenient in the performance of its functions. *Subclause 10(2)* sets out the powers which include but are not limited to the following:

- the power to enter contracts
- the power to erect buildings
- the power to occupy, use and control any land, building owned or held under lease by the Commonwealth and available to the Council
- the power to acquire, hold or dispose of real or personal property
- the power to accept gifts, devises,\textsuperscript{60} bequests and assignments
- the power to act as trustee of money and other property
- the power to provide financial assistance on commercial terms or otherwise (loan, grant, investment, award)
- the power to provide guarantees
- the power to commission or sponsor arts projects
- the power to provide or administer services, facilities, programs or equipment and
- the power to do anything incidental in relation to its powers.

**Comment**

The powers of the Council generally reflect the existing powers but have been expanded to accommodate the broadened functions.

**Board of the Australia Council**

*Clause 14* of the Bill establishes the Board of the Council. *Clause 15* deals with the role of the Board and its responsibilities:

- to ensure the proper and efficient performance of the Council’s functions
- to do all that is necessary or convenient in connection with the performance of the Board’s duties

\textsuperscript{59} Ibid., p.24.

\textsuperscript{60} Devise—a gift or disposition of an interest in land made by a will: Source: LexisNexis, *Concise Australian Legal Dictionary*, 4\textsuperscript{th} edn, edited by P Butt and D Hamer, LexisNexis Butterworths, 2011, p. 173.
• anything done in the name or on behalf of the Council by the Board or with its authority is taken
to have been done by the Council and
• if a function or power of the Council is dependent on the opinion, belief or state of mind of a
person acting in the name of or on behalf of the Council, the function or power may be
performed on that belief or opinion. The Explanatory Memorandum notes that ‘this allows for
artist peers to use their knowledge and expertise in assessing and making recommendations to
the Board or the CEO of the Council on grants applications’. 61

Membership

Clause 16 of the Bill provides that the membership of the Board will consist of:

• Chair of the Board
• Deputy Chair of the Board
• the CEO 62 and
• not less than five or more than nine other members.

The performance of functions or exercise of powers is not affected if the membership numbers falls
below eight for a period of not more than six months, but numbers cannot fall below six.

Comments on Boards and Membership

Current position

Under Part III of the Act, the Council Chairperson is appointed by the Governor-General and the
members of the Council are appointed by the Minister. The Minister may appoint a Deputy
Chairperson and under Part IIIA of the Act the Minister may appoint a General Manager of the
Council.

The existing Council is required to have not less than ten members or more than 14 members. The
membership of the Council consists of the Chairperson, the chairperson of each Board and persons
who ‘practise or have practised the arts’ and community interest representatives. 63

Currently sections 20 and 21 of the Act make provision for a single coordinating Board and other
Boards as the Minister thinks appropriate. The Boards can make inquiries and subsequently report
to the Council on any matter that had been referred by the Council. The Council also directs the
Boards in the exercise of their functions.

62. The CEO is an ex officio board member under clause 16 of the Bill. The CEO is not an appointed board member and
cannot vote at meetings of the Board. See clauses 17 and 27 of the Bill.
Members of the coordinating Board are appointed by the Minister under Part IV of the Act. The coordinating Board also has a Chairperson with not less than four, and not more than 12, other members. Other boards each have a Chairperson and not less than four, and not more than eight, other members. The membership of the Boards must include persons who practise the arts or have practised the arts and community interest representatives.\(^{64}\)

The Committee report noted the Review’s comments in relation to the major impediments in the governance system of the Australia Council:

- the Council did not have the ability to develop a balanced, conventional, skills-based board that served the Council’s strategic and operational needs—in particular, the role of the chairs of each Artform Board\(^{65}\) on the Council had inherent conflicts;
- the size of the Governing Board was determined by the number of Artform Board chairs and not the needs of the Board;
- the credibility of the Council’s new Governing Board with the arts sector must be balanced with the requirement for broad-based strategic planning and policy setting; sufficient independence to reduce the potential for conflict of interest; and broader professional expertise among its membership;
- there was no requirement for the Council to take a formal role in setting the strategic direction of the organisation, for example, through a Strategic Plan;
- there was insufficient provision for the Minister and the Council to collaboratively engage in corporate and strategic planning processes;
- the appointment process was burdensome, with Ministerial responsibility required for every appointment, and the Governor-General’s approval needed to appoint the Chair;
- there was no requirement for the Minister to take into account the organisation’s overall skill sets when appointing members of the Governing Board, the Artform Boards or the Council’s General Manager/Chief Executive Officer; and
- the Board currently had no formal role in the appointment of the General Manager/CEO of the Council.\(^{66}\)

Mr Rodney Hall, a former Chairman of the Council commented in evidence to the Committee, that the Australia Council structure is not clearly understood and ‘it is certainly not understood in the review of the Council and the preparation of material for the Bill’.\(^{67}\)

\(^{64}\) Section 22, Australia Council Act 1975.

\(^{65}\) Under Part IV section 20 of the Act, the Minister is empowered to establish a single co-ordinating Board, and such number of other Boards as the Minister thinks fit. These boards are known as Artform boards.

\(^{66}\) Senate Rural and Regional Affairs and Transport Legislation Committee, op. cit., pp. 10–11.

\(^{67}\) Ibid., p. 10.
Proposed Board and membership

The Bill proposes to replace the current structure with a self-governing board which has the power to ensure the proper and efficient performance of the Council’s functions and to do anything that is necessary in the performance of its duties. It has the capacity to set up committees to advise and assist the Board as required. It will be quite different in its structure and the way that it operates.

It is a ‘skills-based governing Board consisting of a Chair, Deputy Chair and between five and nine members with arts or corporate knowledge or expertise, and the CEO as an ex-officio Board member’. 68

Screen Australia and the National Portrait Gallery of Australia are CAC Act bodies within the Arts portfolio. 69 The provisions within the enabling Acts of these bodies in relation to their Boards are very similar to the proposals in the Bill.

Terms and conditions of employment

Clause 17 of the Bill deals with the appointment of Board members. Subclause 17(1) provides that the Minister appoints appointed Board members by written instrument and must consult the Chair before doing so—subclause 17(2). 70 The Minister must not appoint a Board member unless he/she is satisfied that the person has the appropriate qualifications, knowledge, skills or experience — subclause 17(3). When appointing Board members, the Minister must also have regard to the desirability of the Board having people with skills, experience or involvement in the arts—subclause 17(4).

Subclause 17(5) of the Bill provides that an appointed Board member holds office on a part-time basis. The instrument of appointment specifies the period of appointment which must not exceed three years—subclause 17(6). A person may be reappointed, but the total period of appointment must not exceed nine years—subclause 17(7).

Clause 19 of the Bill concerns the remuneration of appointed Board members. Appointed Board members are to be paid remuneration determined by the Remuneration Tribunal and if there is no determination, will be paid according to the prescribed rules. 71

Clause 22 of the Bill deals with the termination of appointed Board members. The Minister under subclause 22(1) may terminate an appointed Board member’s appointment for misbehaviour or if the member is unable to perform his/her duties due to mental or physical incapacity.

The Minister must under subclause 22(2) terminate the appointment of an appointed Board member if the member:

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70. Appointed Board member is defined at clause 4 of the Bill as ‘a Board member other than the CEO’.
71. In accordance with clause 52 of the Bill, the Minister may make rules by legislative instrument, prescribing matters that are required by the Act or that are necessary to give effect to the Act.
• becomes bankrupt
• applies to take the benefit of any law for the relief of bankrupt or insolvent debtors
• compounds with his/her creditors
• assigns his/her remuneration for the benefit of creditors
• fails to comply with an obligation under section 27F or 27J of the CAC Act or
• is absent from three consecutive meetings of the Board except where he/she is on leave.

Committees

Clause 31 of the Bill concerns the establishing of committees. Subclause 31(1) provides that the Board may establish committees to advise or assist in the performance of the Council’s functions or the Board’s responsibilities.

Subclause 31(1A) was inserted as a government amendment on 16 May 2013. The subclause provides that the Board must ensure that at least one member of the committee has relevant experience in the arts if the committee in accordance with the terms of reference, is to provide advice about policy or provides financial assistance or guarantees. Subclause 31(1A) has been inserted in response to Recommendation 2 of the Senate Committee’s report.

Subclause 31(2) of the Bill provides that a committee may be comprised of only Board members or wholly by persons who are not Board members or both. The Board may under subclause 31(3) determine the committee’s terms of reference, terms and conditions of member’s appointments and procedures to be followed by the committee. The Board may give directions to the committee in relation to its advice or assistance to the Board which the committee must comply with under subclause 31(4). Subclause 31(5) provides that a direction by the Board in writing under subclause 31(4) is not a legislative instrument.

Chief Executive Officer

Clause 33 of the Bill establishes the office of Chief Executive Officer of the Council.

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72. Section 27F provides that a director has a duty to notify other directors of a material personal interest if a conflict arises. Section 27I relates to restrictions on voting where a director has a material personal interest in matters being considered at a directors’ meeting.
73. Supplementary Explanatory Memorandum, Australia Council Bill 2013, p. 6, accessed 6 June 2013.
74. The Legislative Instruments Act 2003 (Cth) (LI Act) defines ‘legislative instrument’ as ‘an instrument in writing that is of a legislative character’ that ‘is or was made in the exercise of a power delegated by the Parliament’. An instrument has a legislative character if it determines or alters the content of the law rather than applying the law in a particular case; and if it directly or indirectly affects a privilege or interest, imposes an obligation, or creates, varies or removes an obligation or right.
75. According to page 22 of the Explanatory Memorandum to the Bill this position will replace the role of General Manager provided for in the Australia Council Act and is intended to be a full time position. The note to this subclause also reinforces that the CEO is an ex-officio member of the Board with no voting rights.
The role of the CEO is defined by clause 34. Subclause 34(1) provides that the CEO is responsible for the day-to-day administration of the Council. Under subclause 34(2), the CEO is empowered to do all that is necessary or convenient in connection with the performance of his/her duties. The CEO is required to act in accordance with the policies of the Board and any directions given by the Board under subclause 34(3). Anything done by the CEO in the name of, or on behalf of the Council or with its authority is taken to have been done by the Council under subclause 34(4). Subclause 34(5) provides that if the performance of a power or function of the Council is dependent on the opinion, belief or state of mind of the Council, then it is taken to have been done by the Council if it is based on the opinion, belief or state or mind of a person or body acting on behalf of the CEO or with the authority of the CEO in accordance with subclause 34(4).

Clause 35 of the Bill provides for the appointment of the CEO by the Board in consultation with the Minister. The appointment is by written instrument and the CEO holds office on a full-time basis for the period specified in the instrument. The period of appointment must not exceed five years at a time, but the CEO can be reappointed.

**Termination of the Appointment of the CEO**

Clause 41 of the Bill deals with the termination of the appointment of the CEO. Subclause 41(1) sets out the criteria where the Board may terminate the appointment of the CEO:

- for misbehaviour
- where the CEO is unable to perform his/her duties because of physical or mental incapacity
- where the Board is satisfied that the CEO’s performance has not been satisfactory for a significant time
- if the CEO:
  - becomes bankrupt
  - applies to take the benefit of any law for the relief of bankrupt or insolvent debtors
  - compounds with his/her creditors
  - assigns his/her remuneration for the benefit of his/her creditors
- is absent for 14 consecutive days or 28 days within a 12 month period except where there is a leave of absence
- fails to comply with sections 27F or 27J of the CAC Act
- if the CEO engages in paid employment outside the duties of his/her office, except with the Chairperson’s approval.

Subclause 41(2) of the Bill provides that the Minister must be notified if the Board terminates the appointment of the CEO.

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76. See footnote 72.
Corporate Plan

Clause 45 of the Bill provides that a corporate plan be prepared for the Council at least once a year and cover a period of at least three years.

Subclause 45(3) sets out the matters that must be included in the plan:

- a statement of the objectives of the Council
- strategies and policies adopted to achieve those objectives
- the Council’s performance indicators
- the investment and financing programs of the Council including strategies for managing financial risk
- financial targets and projections for the Council
- analysis of factors likely to affect the achievement of targets or create significant financial risk for the Council or the Commonwealth
- comparison of the Council’s performance during the period year previous to the plan with what was stated in the relevant plan and
- other matters as directed by the Minister.

Subclause 45(6) provides that a plan or any variation of it does not take effect until the Minister has endorsed it.

Comment

Currently, under section 38 of the Australia Council Act, the Australia Council is required to produce an annual report under section 9 of the CAC Act. This CAC Act requirement continues.\(^77\) In addition, the Bill proposes that the Council produce a corporate plan each year covering at least a three year period. This enhances the strategic planning obligations of the Council and brings the Council into line with requirements of other CAC Act agencies such as the National Portrait Gallery of Australia (from 1 July 2013) and Screen Australia. This is also consistent with Review Recommendation 2 agreed by the Government.\(^78\)

Restrictions on Financial Transactions

Clause 48 of the Bill deals with restrictions on financial transactions. Paragraph 48(1)(a) provides that the Council must not, without the written approval of the Minister, acquire any property, right or privilege which exceeds the amount or value prescribed by the rules in relation to this paragraph.

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77. Section 38 of the Australia Council Act 1975; clause 51 of the Australia Council Bill 2013.
78. Review recommendation 2 refers to a strategic plan, agreed with the Minister, which defines the KPIs (key performance indicators) against which the Council should be measured.
Written approval of the Minister is also required under paragraph 48(1)(b), when disposing of property, a right or privilege which exceeds the amount prescribed by the rules.

Paragraph 48(1)(c) requires the written approval of the Minister to enter into a contract for the construction of a building for the Council if the amount exceeds that prescribed for this paragraph by the rules or to enter a lease for a period of more than ten years under paragraph 48(1)(d).

**Comment**

The Explanatory Memorandum notes:

> These provisions are modelled on provisions of the enabling legislation of other Commonwealth statutory authorities in line with the Australian Government response to the Review’s recommendation that the Council’s enabling legislation be updated in this manner. 79

**Subclause 48(2)** of the Bill provides that paragraphs (1)(a) and (b) do not apply to:

- transactions made in the exercise of the Council’s power under paragraphs 10(2)(g) or (h) 80
- investment of money by the Council under section 18 of the CAC Act. 81

**Subclause 48(3)** of the Bill provides that the Council must not borrow money from any person. 

**Subclause 48(4)** provides that this provision does not affect the ability of the corporation to obtain goods and services on credit in accordance with section 28A of the CAC Act. 82

**Reporting requirements**

**Clause 51** of the Bill deals with extra reporting requirements. **Subclause 51(1)** provides that the annual report on the Council as required by section 9 of the CAC Act must include:

- text of any directions given under the following during the reporting years:
  - subsection 12(1)—ministerial directions to the Board
  - subsection 24(3)—Chair to convene a meeting of the Board if directed by the Minister
  - paragraph 45(3)(h)—other matters to be included in the corporate plan as directed by the Minister and
- details of any guarantees given by the Council.

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80. Paragraph 10(2)(g) of the Bill deals with the power to provide financial assistance (loan, grant, investment, award on commercial terms or not). Paragraph 10(2)(h) deals with the power to provide guarantees.
81. Section 18 of the CAC Act relates to the banking and investment practices of authorities that are government business enterprises or statutory marketing authorities.
82. Section 28A of the CAC Act deals with Commonwealth authorities using credit cards or credit vouchers to obtain goods or services.

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Subclause 51(2) provides that the Minister must table any report or financial statements given by the Board to the Minister under paragraph 16(1)(b) of the CAC Act.

Rules

Clause 52 of the Bill provides that the Minister may set out in a legislative instrument, rules prescribing matters required by the Act to be prescribed, or necessary or convenient for giving effect to the Act.

Concluding comments

The Bill brings the Australia Council into line with other CAC Act statutory authorities such as Screen Australia and the National Portrait Gallery of Australia. The changes to the structure and the governance of the Council will match those of other major bodies within the arts portfolio such as those mentioned above. These changes are designed to allow the Australia Council to operate as a body that will ‘support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field’. 83

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