Australia Council (Consequential and Transitional Provisions) Bill 2013

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Law and Bills Digest Section

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Australia Council (Consequential and Transitional Provisions) Bill 2013

Date introduced: 20 March 2013

House: House of Representatives

Portfolio: Regional Australia, Local Government, Arts and Sport

Commencement: Sections 1 to 3 commence on Royal Assent. Schedule 1 of the Bill commences at the same time as section 3 of the Australia Council Act 2013 commences.¹ Schedule 2 commences on the later of: the day on which this Act receives Royal Assent and the day the Australia Council Act 2013 receives Royal Assent. These provisions do not commence at all if the Australia Council Act 2013 does not receive Royal Assent.

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 (Consequential and Transitional Provisions) Bill 2013 is to repeal the Australia Council Act 1975 (the Australia Council Act)² and allow for the continued operation of the Australia Council through the transition period. The Australia Council will continue to operate under the Australia Council Act 2013, when enacted.³

In particular, the transition provisions provide for the continuation of certain appointments made under the existing legislation, ensure the continuation of terms and conditions of employment for staff, and provide for the transfer of the assets and liabilities of the Australia Council and the responsibilities involved in current legal proceedings.

Background

The background to this Bill can be found in the Bills Digest on the Australia Council Bill 2013.⁴

1. The Australia Council Bill 2013 is currently before Parliament. If passed it will be enacted as the Australia Council Act 2013.
3. See footnote 1.
Committee consideration

Senate Rural and Regional Affairs and Transport Legislation Committee

The Bill was referred by the Senate Selection of Bills Committee to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 9 May 2013. Details of the inquiry are at:

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) considered the provisions of this Bill in its Alert Digest No. 5 of 2013.

The Scrutiny of Bills Committee draws attention to Schedule 2 subitem 14(3) of the Bill. Item 13 of Schedule 2 to the Bill requires the members of the new Board to prepare an annual report, as required under Schedule 1 to the Commonwealth Authorities and Companies Act 1997 (CAC Act), for the transitional reporting period. Item 14 of Schedule 2 provides that if an annual reporting requirement is contravened, any member of the new Board who caused that contravention or failed to take all reasonable steps to comply with the requirement, contravenes subitem 14(1). Under subitem 14(2), a contravention of subitem 14(1) is to be treated (broadly) in the same way as a breach of a civil penalty provision under the CAC Act. Subitem 14(3) then provides that if the contravention of the annual reporting requirement consists of an omission from the financial statements, it is a defence if the information that was omitted was immaterial and ‘did not affect the giving of a true and fair view of the matters required by the Finance Minister’s Orders to be included in the statements’.

The Committee noted:

The Explanatory Memorandum does not address why the proposed approach, in which the defendant will be required to prove the matters referred to in subitem 14(3) is appropriate. The Committee therefore seeks the Minister’s advice as to the rationale because it is not clear that they are matters which would be peculiarly within the defendant’s knowledge.

7. Under subitem 14(2) of Schedule 2 of the Bill, a pecuniary penalty order will only be able to be made under Schedule 2 of the CAC Act in respect of a ‘serious’ contravention and a compensation order cannot be made.
Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.9

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.10

The Government states that ‘the inclusion of a civil penalty provision in this Bill does not engage Article 14 of the International Covenant on Civil and Political Rights (ICCPR)’.11 The Explanatory Memorandum notes that the Bill does not propose to treat a contravention of reporting obligations as a criminal charge. The purpose of item 14 of Schedule 2 to the Bill is to ensure compliance with obligations under the CAC Act and reporting obligations under item 13 of the Bill. The Statement of Compatibility further notes:

The imposition of a civil penalty will not result in criminal conviction and the person will not have a criminal conviction recorded against them in the event that a court determines that the imposition of a civil penalty is to be applied to the contravention of the reporting obligations.12

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) examined the Statement of Compatibility with Human Rights in relation to this Bill in its Sixth Report of 2013.

The Human Rights Committee also raised the issue of the civil penalty that could be imposed on a new member of the Board for contravening the final annual reporting requirements (item 14 of Schedule 2 of the Bill). Members of the new Board could be subject to a civil penalty of up to $200,000 under clause 313 of Schedule 2 of the CAC Act.14 The Committee raised two concerns about these provisions.

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9. Ibid., pp. 8–9. Under Senate Standing Order 24, the Senate Standing Committee on Scrutiny of Bills reports on the clauses of Bills in relation to certain matters. One of those matters involves assessing whether the words of Bills or Acts trespass unduly on personal rights or liberties.
10. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.
13. Under this Bill, clause 3 of Schedule 2 of the CAC Act will apply in the following way. Under paragraph 3(1)(a) a court may order a person to pay a pecuniary penalty of up to $200,000 if the court decides that a person has contravened subitem 14(1) of Schedule 2 to the Bill and the contravention is ‘serious’. (Under paragraph 14(2)(a) of Schedule 2 to the Bill, subitem 14(1) is to be treated as if it was a civil penalty provision specified in clause 1 of Schedule 2 to the CAC Act.) Subparagraphs 3(b)(i) and (ii) of Schedule 2 to the CAC Act will not apply, in accordance with proposed paragraph 14(2)(b) of Schedule 2 to the Bill.
Firstly, the Human Rights Committee was concerned that such a significant civil penalty might be classified as a criminal penalty, which could result in inconsistency with the criminal proceedings guarantees under Article 14 of ICCPR. The Committee found that:

Given that these civil penalty provisions appear in a regulatory context, it is arguable that the penalties are not ‘criminal’ in nature. Although the penalties are large, it may be argued that they are not excessive in view of the public interests that are being protected.\(^{15}\)

Secondly, as also raised by the Scrutiny of Bills Committee, the Human Rights Committee was concerned ‘that these provisions impose a legal burden\(^ {16}\) on the defendant and that the matters that the defendant is required to prove appear to relate to matters which are not peculiarly within the defendant’s knowledge’. As such:

The committee intends to write to the Minister for the Arts to seek a justification for the imposition of a legal burden in item 13(1)\(^ {17}\) of the bill before forming a view on its compatibility with the right to a fair hearing in article 14(1) of the ICCPR. The committee requests that the justification provided should include information as to whether an evidential burden may offer a less restrictive alternative for achieving the provision’s purpose.\(^ {18}\)

Policy position of non-government parties/independents

For a discussion of the policy position of non-government parties see the Bills Digest on the Australia Council Bill 2013.\(^ {19}\)

Position of major interest groups

For the position of major interest groups see the Bills Digest on the Australia Council Bill 2013.\(^ {20}\)

Financial implications

The Explanatory Memorandum to the Bill states that the Bill is not expected to have a significant impact on Commonwealth expenditure.\(^ {21}\)

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14. If the contravention is serious (subparagraph 3(1)(b)(iii) of Schedule 2 of the CAC Act).
16. The defence is a legal burden of proof where the defendant must positively prove the matter. See: Attorney-General’s Department (AGD), *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, AGD, September 2011, p. 50, accessed 18 June 2013.
17. The Committee report should refer to item 14(3) rather item 13(1).
20. Ibid.

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Key issues and provisions

Schedule 1—Repeal of the Australia Council Act 1975

Item 1 repeals the whole Australia Council Act.

Schedule 2—Transitional Provisions

Continuation of Appointments of the Chairperson and the Deputy Chairperson

Item 2 of Schedule 2 of the Bill deals with the continuation of the appointments of the Chairperson and the Deputy Chairperson of the Australia Council as established and in existence before the transition time (old Council).  

Subitem 2(2) applies to the person holding office as the Chairperson of the Council before the transition time. The instrument appointing the Chairperson has effect after the transition time as if it were made by the Minister under section 17 of the new Act for the remainder of the person’s appointment as the Chair of the new Board.  

Subitem 2(3) provides that a determination relating to the Chairperson of the old Council in force immediately before the transition time under the Remuneration Tribunal Act 1973 has effect after the transition time as if it were a determination in relation to the Chair of the new Board.

Subitem 2(5) provides that an instrument appointing the Deputy Chair before the transition time has effect as if it were made by the Minister under section 17 of the new Act, for the remainder of the person’s appointment to the office of Deputy Chair of the new Board.

Subitem 2(6) provides that a determination relating to the Deputy Chair in force before the transition time under the Remuneration Tribunal Act 1973 has effect after that time as if it were a determination in relation to the Deputy Chair of the new Board.

Continuation of appointment of General Manager

Subitem 3(1) of Schedule 2 of the Bill applies to the person who held the office of General Manager or Acting General Manager of the old Council before transition time.

Subitem 3(2) provides that the instrument appointing the person as General Manager has effect after transition time as if it were an instrument of appointment for the person to act as the CEO under section 36 of the new Act until the Board appoints a person under sections 35 or 36 of the new Act.

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22. Old Council is defined under item 1 of Schedule 2 of the Bill. Also under this item, transition time is defined to mean the commencement of section 3 of the new Act, new Act is defined to mean the Australia Council Act 2013 and new Board means the Board of the Australia Council established by section 14 of the new Act.  

23. Once enacted, section 17 of the Australia Council Act 2013 will provide for the appointment of Board members.

Subitem 3(3) provides that a determination in relation to the General Manager under the *Remuneration Act 1973* has effect after transition time.

Subitem 3(4) provides that a determination in relation to the General Manager made under subsection 19A(3) of the old Act has effect after transition time as if it were a determination made under section 42 of the new Act in relation to the CEO.

**Appointments of other members and officers**

Item 4 of Schedule 2 of the Bill applies to a person who before the transition time held office as a member of the old Council (other than the Chairperson, Deputy Chairperson or the General Manager), a member of a committee established under section 17A of the old Act, or a member of a Board under section 20 of the old Act.

Subitem 4(2) provides that such a person ceases to hold office at transition time. However there is nothing which prevents the appointment of the person to an office under the new Act—subitem 4(3).

**Effect of the Council transition**

Item 8 of Schedule 2 of the Bill concerns employees of the Australia Council before and after transition time. Subitem 8(1) provides that continuity of employment or the terms and conditions of employment are not affected by the transition of persons engaged as employees immediately before transition time under section 41 of the old Act. Those persons after transition time are taken to be employees under section 43 of the new Act—subitem 8(2).

Item 9 provides that assets and liabilities of the old Council continue to be assets and liabilities of the continued Council.

Item 12 provides that if the old Council is a party to legal proceedings pending in a court or tribunal, the continued Council is that party to the proceedings after the transition time.

**Reporting Obligations**

Item 13 of Schedule 2 of the Bill relates to the final annual report of the old Council.

Subitem 13(1) requires that members of the new Board must prepare a report in accordance with Schedule 1 to the *CAC Act* for the old Council for the transitional reporting period.

Subitem 13(2) provides that the report need not cover a period already covered in a report by members of the old Council under section 9 of the *CAC Act*. Matters to include must be those described in subsection 38(1) of the old Act in force immediately before transition time—subitem 13(3).

Subitem 13(6) provides that the Minister must table the report in each House of the Parliament as soon as practicable.
Item 14 of Schedule 2 of the Bill concerns the contravention of the final annual reporting requirement.

Subitem 14(1) provides that each new Board member who caused a contravention or who failed to take reasonable steps to comply with subitem 13(1) contravenes this subitem.

Subitem 14(2) provides that Schedule 2 of the CAC Act25 applies in relation to subitem 14(1). Certain provisions are excluded from operation in relation to this subitem, so that a breach of the obligations will result in a pecuniary penalty order in respect of a serious contravention of the provision.

Subitem 14(3) provides that if a contravention of the final reporting requirement involves omitting information from the financial statements, it is a defence if the defendant can prove that the information is immaterial and does not affect the giving of a true and fair view of matters required by the Finance Minister’s Orders.

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25. Schedule 2 of the CAC Act deals with the civil consequences of contravening civil penalty provisions. As noted above under the heading ‘Committee consideration’, both the Scrutiny of Bills and the Human Rights Committees raised concerns about the imposition of a legal burden of proof in relation to this contravention provision.
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