THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIA COUNCIL (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Regional Australia, Regional Development and Local Government, the Minister for the Arts, the Honourable Simon Crean MP)
AUSTRALIA COUNCIL (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2013

OUTLINE

The Australia Council (Consequential and Transitional Provisions) Bill 2013 (the Bill) contains consequential amendments and transitional provisions related to the replacement of the Australia Council Act 1975 by the Australia Council Bill 2013 (the AC Bill 2013), as recommended in the report of the Review of the Australia Council (the Review). The Review was publicly released on 15 May 2012 by the Minister for the Arts, the Honourable Simon Crean MP.

Schedule 1 of the Bill provides for the repeal of the Australia Council Act 1975 (the AC Act 1975). This is the only consequential amendment in the Bill.

Schedule 2 of the Bill contains transitional provisions which allow for the continued operation of the Council during the transition period. Accordingly, provisions are included that provide for the continuation of the appointments of the existing Chairperson, Deputy Chairperson and General Manager of the Australia Council (the Council) appointed under the AC Act 1975. These measures are designed to ensure continuity of key roles during the organisation’s transition to a new operating environment. It also provides for continuity of the existing employees of the Council. Existing assets and liabilities will be assets and liabilities of the continued Council. The Bill also provides for the effect of the Council transition on certain matters including references in instruments to the old Council, the effect of things done by, or in relation to, the old Council, and any extant legal proceedings.

FINANCIAL IMPACT STATEMENT

The Australia Council (Consequential and Transitional Provisions) Bill 2013 is not expected to have a significant impact on Commonwealth expenditure.
ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

AC Act 1975  
Australia Council Act 1975

AC Bill 2013  
Australia Council Bill 2013

Bill  
Australia Council (Consequential and Transitional Provisions) Bill 2013

CAC Act  
Commonwealth Authorities and Companies Act 1997

CEO  
Chief Executive Officer

Continued Council  
The Australia Council as established by the Australia Council Bill 2013 (when enacted)

Council  
The Australia Council

Minister  
Minister with responsibility for the Arts

Old Council  
The Australia Council as established by the Australia Council Act 1975

Review  
Review of the Australia Council
Statement of Compatibility with Human Rights

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

Australia Council (Consequential and Transitional Provisions) Bill 2013

The Australia Council (Consequential and Transitional Provisions) Bill 2013 provides for transitional matters including the continuation of certain appointments made under the existing legislation, the continuation of existing employment terms and conditions, the transfer of assets and liabilities and the treatment of any extant legal proceedings. The Bill also provides for the repeal of the Australia Council Act 1975.

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

For the avoidance of doubt, commentary has been included to address how 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). The reasons for this are set out below. The Bill does not raise any human rights issues.

The nature of the civil penalties and why they do not constitute a ‘criminal charge’ under Article 14 of the ICCPR

The Bill does not propose to treat any contravention of reporting obligations required by Item 13, and as detailed in Item 14, as a criminal charge. For the purposes of the Bill, any contravention of the reporting requirements outlined in Item 13 will be considered a civil matter.

Item 14 is included to ensure compliance with the obligations of the Council under the CAC Act and with the reporting obligations required by Item 13.

While the CAC Act provides for the imposition of pecuniary penalty orders in the event of any declaration of contravention, it is only in the event of a serious contravention that such an imposition would be exacted. This is made clear in Item 14(2)(b). Further, the extent of the pecuniary penalty is limited by the provisions of Clause 3 of Schedule 2 of the CAC Act. That provision provides for a maximum penalty and makes clear that the civil penalty will be a civil debt payable to the Commonwealth.
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.

The Honourable Simon Crean MP
Minister for Regional Australia, Regional Development and Local Government, Minister for the Arts
NOTES ON CLAUSES

Clause 1 – Short title

This clause is a formal provision specifying the short title of the Bill. The Bill, when enacted, should be cited as the Australia Council (Consequential and Transitional Provisions) Act 2013.

Clause 2 – Commencement

Clause 2 provides that each provision of the Bill specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Item 1 of the table in Clause 2 provides that Sections 1 to 3 of the Bill, and any other Section of the Bill not provided for, are to commence on the Royal Assent.

Item 2 of the table in Clause 2 provides that Schedule 1 of the Bill commences at the same time as Section 3 of the Australia Council Act 2013 commences.

Item 3 of the table provides that Schedule 2 of the Bill is to commence on the day the Bill receives the Royal Assent or the day the Australia Council Act 2013 receives the Royal Assent, whichever is the later. However, the provisions of Schedule 2 do not commence at all if the Australia Council Act 2013 does not receive the Royal Assent.

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and that any other item in a Schedule has effect according to its terms.

Schedule 1 of the Bill provides for the repeal of the Australia Council Act 1975.

Schedule 2 of the Bill contains transitional provisions.

Part 1 of Schedule 2 of the Bill contains the definitions for the Schedule.

Part 2 provides for transitional provisions relating to the Council, including the continuation of the appointments of the Chairperson, the Deputy Chairperson and the General Manager made under the AC Act 1975. Part 2 also provides for the appointments of other members and officers made under the AC Act 1975 and clarifies how periods of appointment as members of the Old Council will be regarded. It also provides for the appointments of the first members of the Board of the Continued Council.
Part 3 of Schedule 2 of the Bill provides for the effect of the Council transition so as to avoid doubt about the transition on certain matters. It provides for the existing employees of the Old Council to be transferred to the Continued Council.

Part 3 provides for the assets and liabilities of the Old Council to be transferred to the assets and liabilities of the Continued Council.

Part 3 also provides for references in instruments, legal proceedings and things done by, or in relation to, the Old Council, to continue in relation to the Continued Council.

Part 4 of Schedule 2 of the Bill provides for the transition to the reporting obligations under the AC Bill 2013, including the final annual report of the Old Council and the first annual report of the Continued Council.

Part 5 deals with miscellaneous matters, including exemption from stamp duty and other State or Territory taxes, and the making of rules by the Minister.

**Schedule 1 – Repeal**

Schedule 1 of the Bill provides for the repeal of the AC Act 1975. There are no other consequential amendments to other Acts required.

**Australia Council Act 1975**

**Item 1 – The whole of the Act**

This item repeals the AC Act 1975, as the Old Council is to cease to exist upon the establishment of the Continued Council under the AC Bill 2013.

**Schedule 2 – Transitional provisions**

**Part 1 – Introduction**

**Item 1 – Definitions**

Item 1 contains definitions for the purposes of Schedule 2. In particular, ‘transition time’ is defined to mean the commencement of section ^3 of the AC Bill 2013.

**Part 2 – The Council**

**Item 2 – Continuation of appointments of Chairperson and Deputy Chairperson**

Item 2 provides for the continuation of the appointments of the Chairperson and Deputy Chairperson of the Old Council to the Continued Council to ensure continuity of key governance roles during the organisation’s transition to a new operating environment.
Subitems (1) and (2) of Item 2 have the effect of transitioning the appointment made to the office of Chairperson of the Old Council to the office of Chairperson for the Continued Council for the remainder of the period of that person’s appointment to the office of Chairperson. Subitem (3) provides for the transitioning of a determination made under the *Remuneration Tribunal Act 1973* in relation to the Chairperson of the Old Council to the Continued Council.

Subitems (4) and (5) of Item 2 have the effect of transitioning the appointment made to the office of Deputy Chairperson of the Old Council to the office of Deputy Chairperson for the Continued Council for the remainder of the period of that person’s appointment to the office of Deputy Chairperson. Subitem (6) provides for the transitioning of a determination made under the *Remuneration Tribunal Act 1973* in relation to the Deputy Chairperson of the Old Council to the Continued Council.

**Item 3 – Continuation of appointment of General Manager**

Item 3 provides for the continuation of the appointment of the General Manager of the Old Council to the Continued Council. The inclusion of this provision is intended to ensure management continuity for the organisation as it transitions to a new operating environment.

Subitems (1) and (2) of Item 3 have the effect of transitioning the appointment of the General Manager made to the Old Council (including an appointment as an acting General Manager) to the Continued Council until such time as a new appointment to the position of CEO is made by the Board in accordance with sections 35 or 36 of the AC Bill 2013. The position of General Manager of the Old Council will, under the AC Bill 2013, become the position of CEO of the Continued Council. This will allow for the arrangements provided for under sections 35 and 36 of the AC Bill 2013 regarding the appointment of the CEO to be upheld once the new Board of the Council has been formed. That is, in accordance with the relevant empowering provisions of the AC Bill 2013, the Council will have discretion to appoint the CEO it decides upon, following consultation with the Minister.

Subitem (3) provides for the transitioning of a determination made under the *Remuneration Tribunal Act 1973* in relation to the General Manager of the Old Council to the Continued Council (in relation to the CEO).

Subitem (4) provides for the transitioning of a determination made in relation to the General Manager of the Old Council under subsection 19A(3) of the AC Act 1975 to the continued Council (in relation to the CEO) under section 42 of the AC Bill 2013. Subsection 19A(3) of the AC Act 1975 provides for the Minister to determine the terms and conditions (in respect of matters not covered by the Act) of the appointment of the General Manager. Section 42 of the AC Bill 2013 provides for the Board to determine the terms and conditions (in respect of matters not covered by the Bill) of the appointment of the CEO. Subitem (4), therefore, has the effect of maintaining the terms
and conditions for the person appointed to the position of General Manager of the Old Council when they transition to the role of CEO of the Continued Council.

**Item 4 – Appointments of other members and officers**

Item 4 deals with the appointments, other than the Chairperson, the Deputy Chairperson or the General Manager, made to the Old Council.

Subitems (1) and (2) of Item 4 provide for the cessation of appointments made to:

- the Old Council’s governing board (other than the Chairperson, the Deputy Chairperson or the General Manager);
- committees established under section 17A of the AC Act 1975 (for example, Audit and Finance, Appeals, or Community Partnerships committees); and
- boards established under section 20 of the AC Act 1975 (for example, artform boards established for the purposes of peer assessment and advice).

Subitem (3) provides that, while these appointments will cease at the transition time, their cessation will not preclude office holders of the Old Council, for example, members of the Old Council’s governing board, Chairs or members of the artform boards, and members of committees, being appointed to offices of the Continued Council.

**Item 5 – Periods of appointment as member of old Council**

Item 5 provides that periods of appointment to an office of the Old Council will count towards the period of appointments to offices of the Board of the Continued Council. This means that any time a person has spent as an appointed member of the Old Council Board will be taken into account for the purposes of the 9 year limit on appointments provided for in paragraph ^17(7)(b) of the AC Bill 2013.

However, if a General Manager has been an ex-officio member of the Board of the Old Council under subsection 9(4B) of the AC Act 1975, this time will not count towards the purposes of the 9 year limit on appointments to the Continued Council, as the General Manager was not serving as an appointed Board member but rather a Board member by virtue of holding the office of General Manager. Subsection 9(4B) of the AC Act 1975 provides for the ex-officio status of the General Manager of the Old Council, or the person performing the duties of the General Manager, in the event that the Chairperson is appointed as a part-time member of the Board. Item 5 has the effect, therefore, that any period where a person has held the position of General Manager of the Old Council, or performed the duties of the General Manager, will not count for the purposes of the 9 year limit on appointments provided for in paragraph ^17(7)(b) of the AC Bill 2013.

**Item 6 – Appointments of first members of new Board**

Item 6 provides that subsection ^17(2) of the AC Bill 2013 will apply to the Minister’s appointment of the first members of the new Board. Subsection ^17(2) requires the Minister to consult the Chairperson of the Council before appointing Board members.
other than the Chairperson. This will be provided for in the lead up to the transition time by the Minister consulting the Chairperson of the Old Council (whose appointment will be continued following the transition time to allow for the implementation of the Council’s reformed structure under the AC Bill 2013). This item is in accordance with section 4 of the Acts Interpretation Act 1901, which allows for the exercise of powers between enactment and commencement of an Act, including, for example, the power to make an appointment.

**Part 3 – Effect of the Council transition**

**Item 7 – Object**

This Item is included for the purposes of avoidance of doubt, to make clear the effect of the Council transition on certain matters. These matters include employees of the Old Council, assets and liabilities of the Old Council, references in instruments to the Old Council, the effect of things done by, or in relation to, the Old Council, and legal proceedings. Subitem 7(2) provides for Part 3 having effect subject to the other provisions of the Schedule.

**Item 8 – Employees of old Council**

This item provides for continuity of employment as well as the terms and conditions of employment for the employees of the Old Council (subitem 8(1)). This means that the Old Council’s employees, engaged under section 41 of the AC Act 1975, will be transferred to the Continued Council as employees, engaged under section ^43 of the AC Bill 2013 (subitem 8(2)).

For the purposes of the avoidance of doubt, the transfer of “officers” under the AC Act 1975 has not been included in this Bill as there are no officers currently appointed by the Council. Accordingly, the reference to “officers” in subsection 41(1) of the AC Act 1975 has not been maintained in the AC Bill 2013.

**Item 9 – Assets and liabilities of old Council**

Item 9 provides for the transfer of the assets and liabilities of the Old Council to the Continued Council, without the need for any conveyance, transfer or assignment.

**Item 10 – References in instruments to old Council**

Item 10 applies to instruments that:
- are in force immediately before the transition time; and
- contain reference to the Old Council;
then such instruments have effect, from the transition time, as if the reference to the Old Council were a reference to the Continued Council.
Item 11 – Effect of things done by, or in relation to, the old Council

This Item provides that, if a thing was done by, or in relation to, the Old Council under the AC Act 1975, then that the thing done is taken to have effect, after the transition time, of having been done by, or in relation to, the Continued Council.

Item 12 – Legal proceedings

Item 12 applies if, immediately before the transition time, there were any proceedings to which the Old Council was a party or that were pending, in any court or tribunal, then the Continued Council, after the transition time, is that party to the proceedings.

Part 4 – Reporting obligations

Item 13 – Final annual report of the old Council

Subitem 13(1) provides for the members of the new Board of the Continued Council to prepare, on behalf of the Old Council, an annual report in accordance with Schedule 1 of the CAC Act for the transitional reporting period. The ‘transitional reporting period’ is defined in subitem 13(7) as the period beginning at the start of the financial year before the financial year in which the transition time occurs and ending immediately before the transition time. The report does not need, however, to cover a period which is part of the transitional reporting period but which has already been covered by a report given to the Minister by the members of the Old Council under section 9 of the CAC Act (subitem 13(2)).

Subitem 13(3) provides that the report must include the matters described in subsection 38(1) of the AC Act 1975 as in force immediately before the transition time. Subsection 38(1) of the AC Act 1975 provides for the Old Council to report, under section 9 of the CAC Act, the particulars of all matters specified by the Minister under section 6A of the AC Act 1975 (‘Matters to be taken into account by Council’) and the text of all directions made by the Minister under section 6B (‘Directions by Minister’) and section 7 (‘Delegation’) of the AC Act 1975.

Subitem 13(4) of Part 4 sets out how Schedule 1 of the CAC Act and the Finance Minister’s Orders referred to in that Schedule, which together specify how the report must be prepared, apply to the report required by Item 13.

Subitem 13(5) provides for the deadline for the submission to the Minister of the report required by Item 13 as the 15th day of the fourth month after the end of the transitional reporting period, unless the Minister grants an extension of time due to special circumstances.

The Minister must table the report in each House of the Parliament as soon as practicable (subitem 13(6)).
Item 14 – Contravention of final annual reporting requirement

Item 14 deals with circumstances where there is a contravention of the final annual reporting requirement. Subitem 14(4) defines ‘final annual reporting requirement’ as subitem 13(1), (3) or (5) of this Schedule. That is, the requirement of the preparation of a report, including matters described in subsection 38(1) of the AC Act 1975, to be given to the Minister by the 15th day of the fourth month after the end of the transitional reporting period, unless the Minister grants an extension in special circumstances.

Subitem 14(1) provides that the obligations in this Item apply to all members of the new Board of the Continued Council, including the CEO (as an ex-officio member of the Board).

Subitem 14(2) sets out the penalty provisions should a member of the Board of the Continued Council cause a contravention of final annual reporting requirements or fail to take reasonable steps to comply with the requirement.

Subitem 14(2)(a) provides for 14(1) to be a civil penalty provision for the purposes of Schedule 2 of the CAC Act.

Subitem 14(2)(b) has the effect of modifying subclause 3(1) of Schedule 2 of the CAC Act so that a pecuniary penalty order can only be made in respect of a serious contravention.

Subitem 14(2)(b) also has the effect of omitting clauses 4 and 5, subclause 6(2) and paragraph 11(c) of Schedule 2 of the CAC Act. This subitem is intended to make it clear that a contravention of the reporting requirements outlined in Item 13 would not result in the making of a compensation order under the CAC Act.

Subitem 14(2)(c) has the effect of modifying subclause 6(1) of Schedule 2 of the CAC Act to restrict any application by the Finance Minister for a compensation order.

Subitem 14(3) provides that if a contravention of a final annual reporting requirement consists of an omission from the financial statements, it is a defence if it can be demonstrated that the information 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.

Item 15 – First annual report of the continued Council

Item 15 provides that the first annual report prepared by the Board of the Continued Council in accordance with Schedule 1 of the CAC Act need not cover a period that has already been covered by a report given to the Minister under Item 13.
Item 16 – Review of performance in corporate plan

Item 16 provides that the corporate plan required under Part 6 of the AC Bill 2013 does not require a review of performance (as provided for in paragraph ^45(3)(g)) of any period before the first corporate plan comes into effect.

Part 5 – Miscellaneous

Item 17 – Exemption from stamp duty and other State or Territory taxes

Item 17 has been included for the purposes of the avoidance of doubt that State or Territory taxes such as stamp duty do not apply to the operations of Schedule 2 of the Bill. Item 17 is also consistent with Clause ^50 of the AC Bill 2013.

This Item provides that no stamp duty or other tax is payable under a law of a State or Territory in respect of an exempt matter or anything connected with an exempt matter (subitem 17(1)). Subitem 17(2) provides that for the purposes of Item 17, an ‘exempt matter’ is the operation of Schedule 2 in any respect. This could include potential transfer duties resulting from the transition from the Old Council to the Continued Council, for example, the transfer of assets and liabilities.

Subitem 17(3) provides that the Minister may certify in writing that a specified matter is an exempt matter or that a specified thing is connected with a specified exempt matter. If the Minister does so, the certificate is prima facie evidence in all courts and for all purposes (other than in criminal proceedings) of matters stated in the certificate.

A certification by the Minister under Subitem 17(3) is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. Subitem 17(5) confirms this and is included to assist readers.

Item 18 – Rules

Item 18 provides for the Minister to make rules prescribing matters required or permitted by this Bill or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

Subitem 18(2) provides that the rules may prescribe matters of a transitional nature, including prescribing any saving or application provisions, relating to:

- amendments or repeals made by the Bill; or
- the enactment of the Bill or the AC Bill 2013.

Any such rules are legislative instruments under section 6(a) of the Legislative Instruments Act 2003.