



**Australian Government**

**Department of Regional Australia,  
Local Government, Arts and Sport**

Mr Stephen Palethorpe  
Committee Secretary  
Senate Rural and Regional Affairs and Transport Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Mr Palethorpe

I refer to your letter of 26 March 2013 inviting the Secretary to make a submission to the Senate Rural and Regional Affairs and Transport Legislation Committee addressing (all or some of the issues) identified in the Australia Council Bill 2013 and Australia Council (Consequential and Transitional Provisions) Bill 2013.

The Bills implement the Australian Government response to the 2012 Review of the Australia Council, which is a key pillar of reform outlined in the National Cultural Policy, *Creative Australia*.

As such, I welcome the opportunity to provide the attached submission on the issues identified in the Australia Council Bills, including some contextual information around the Bills' development. The submission has been cleared by the Minister for the Arts, the Hon Tony Burke MP, in line with the Government guidelines for official witnesses before Parliamentary committees and related matters regarding clearance of submissions to Parliamentary committees.

Yours sincerely

Dr Stephen Arnott  
Assistant Secretary  
Creative Sector Development Branch  
Office for the Arts  
17 April 2013

Encl. Department of Regional Australia, Local Government, Arts and Sport submission to the Senate Rural and Regional Affairs and Transport Legislation Committee

# **Senate Rural and Regional Affairs and Transport Legislation Committee Inquiry into the Australia Council Bill 2013 and related Bill**

## **Submission**

### **The Department of Regional Australia, Local Government, Arts and Sport**

The Department of Regional Australia, Local Government, Arts and Sport (the Department) has been invited to provide a submission to the Senate Rural and Regional Affairs and Transport Legislation Committee Inquiry into the Australia Council Bill 2013 and related Bill (the Inquiry).

#### Introduction

The Australia Council Bill 2013 and the Australia Council (Consequential and Transitional Provisions) Bill 2013 (the Bills) implement the Australian Government response to the 2012 Review of the Australia Council (the Review).

The Review found there is need for significant reform of the Council and the way in which it provides funding to the sector. To enable that reform the Review also recommended the development of new enabling legislation for the Council.

In all, the Review made 18 recommendations around reform of the Council, including:

- providing an updated purpose for the Council, underpinned by a clear statement of its functions in the Council's enabling legislation, including to support Australian arts practice in all of its diversity;
- updating the Council's governance arrangements and operational structure, including the introduction of a conventional, skills-based governing board and the development of a three year strategic plan;
- reform of the Council's artform board structure to allow for greater funding flexibility and an updated and strengthened peer assessment process.

As the framework for the reform of the Council, the Bills will ensure that the Council is best placed to serve a contemporary arts sector now and into the future. Specifically, the Bills include functions that give the Council flexibility to respond to the evolving demands of the sector as well as strengthening the central tenet of the Council since its inception – the making of funding decisions at arm's length from Government based on the expert assessment of peers from within the arts sector.

#### Summary of submission

So as to provide context for the development of the Bills, this submission contains background information on the following matters:

- the 2012 Review of the Australia Council and the Australian Government response to the Review as part of the National Cultural Policy, *Creative Australia*;
- the framework of the Australia Council Bills, including a comparison of the *Australia Council Act 1975* and the Australia Council Bill 2013; and
- the Human Rights Statement of Compatibility included in the Explanatory Memoranda.

## The National Cultural Policy and the 2012 Review of the Australia Council

The Australian Government committed to the development of a National Cultural Policy in 2010.

- On 11 August 2011, the then Minister for the Arts, the Hon Simon Crean MP, released a discussion paper for public comment to inform development of the National Cultural Policy.
  - 2,000 people completed the online survey and 450 submissions were made in relation to the discussion paper. Feedback through the survey and submissions highlighted the need for reform of the Australia Council.
- On 19 December 2011, the then Minister announced an independent review of the Australia Council, to be chaired by Mr Angus James and Ms Gabrielle Trainor. The Australian Government response to the Review of the Australia Council (the Review) would be announced as part of the National Cultural Policy.
- On 23 February 2012, an online survey was announced seeking stakeholder input into the Review. The survey was available for two weeks and closed on 9 March 2012. A total of 2007 responses to the survey were received.
- On 15 May 2012, the then Minister publicly released the key conclusions and recommendations of the Review report. The Review report is available online at the following link:  
<http://creativeaustralia.arts.gov.au/full-policy/#m-320>.
- On release of the Review report, stakeholders were invited to provide their comments on the report by 8 June 2012.
  - More than 70 comments were provided by a range of industry stakeholders, including: the Australia Council (the Council), state government arts agencies, peak arts organisations, a range of arts organisations in receipt of funding through the Council and individual artists.

On 13 March 2013, the then Minister released the National Cultural Policy, *Creative Australia*. The Policy included the Australian Government response to the Review, which is provided at **Attachment A**.

The Australian Government response agreed to the introduction of new enabling legislation for the Council to implement the recommendations of the Review. On 20 March 2013, the Australia Council Bill 2013 and Australia Council (Consequential and Transitional Provisions) Bill 2013 were introduced to the House of Representatives and read a first and second time by the then Minister.

### Framework of the Australia Council Bills

The Australia Council Bills seek to modernise the Council's enabling legislation and implement the Australian Government response to the Review. Of the 18 recommendations made in the Review report, there are 10 that relate to the modernisation of Council's enabling legislation. (One recommendation, number 17, specifically called for new enabling legislation for the Council). The Australian Government response to these recommendations has informed the drafting of the Parts of the Bill as follows:

#### *Part 2 – The Australia Council* (Recommendation 1 refers)

- The revised functions require the Council to support and foster Australian arts practice that is recognised for excellence through a diverse range of activities.

- The Bill also includes a range of arts related functions, not all of which are directly related to support for Australian arts practice, but rather contribute to the development of a culture of excellence in the Australian arts sector and foster an appreciation for the arts more broadly.
- This Part also preserves the principle of funding decisions being made at arm's length from Government by preventing the Minister from being able to direct the Council in relation to its funding decisions.

### *Part 3 – The Board of the Australia Council*

(Recommendation 9 refers)

- The Council will, for the first time, have a skills-based Governing Board comprising a Chair, a Deputy Chair, the CEO and at least five (but not more than nine) other members.
- The Chair will be appointed by the Arts Minister, with additional members appointed by the Minister in consultation with the Chair.
- Consideration will be given to Board membership to provide for the right mix of corporate skills and knowledge of, and experience in, the arts sector.
- The Council CEO will be appointed by the Board, following consultation with the Minister. The CEO is an ex officio member of the Board, by virtue of having been appointed to the office of CEO rather than having been appointed to the Board, and will have deliberative, but not voting, rights on the Board.

### *Part 4 – Committees*

(Recommendations 12, 14 & 15 refer)

- The Board will be able to convene committees to advise or assist in the performance of the Council's legislated functions.
- This Part allows the Council to maintain the principle of peer assessment of artistic excellence, in that the Board may establish expert committees of artist peers for assessment purposes.
- The Board will have the flexibility to convene as many – or as few – committees as necessary, ensuring that it can meet the needs of a constantly evolving arts sector.

### *Part 5 – CEO, Staff and Consultants*

(Recommendation 11 refers)

- The Council can employ staff and engage consultants.

### *Part 6 – Planning*

(Recommendations 2, 10 & 13 refers)

- Corporate planning requirements have been introduced for the first time. The Council is now required to identify strategic priorities and key performance indicators and submit these to the responsible Minister for endorsement. This corporate plan, and any variation, does not take effect unless it has been endorsed by the Minister.

An overview of the content of the Australia Council (Consequential and Transitional Provisions) Bill 2013 is provided at **Attachment B**.

A table comparing the content of the *Australia Council Act 1975* and the Australia Council Bill 2013 is provided at **Attachment C**.

### *Functions of the Australia Council Bill 2013*

The functions in the Australia Council Bill 2013 have been developed in line with the Australian Government response to the Review and in collaboration with the Australia Council. The Functions section is a critical element of the legislation – it sets the parameters for the Council's activities and, combined with the Powers section of the legislation, provides the framework within which the Council can support Australian arts practice.

- The table at **Attachment D** has been included to assist the Committee map the new Functions against those in the 1975 Act.

Within the remit provided for in its functions and powers, the Council will have the flexibility to support a wide variety of activities across a broad range of art forms.

Most of the functions contained in the Council's original enabling legislation, the *Australia Council Act 1975*, have been retained in the updated list of functions, either explicitly or implicitly. To reflect modern legislative drafting practice, some have either been removed from, or reordered within, the *Australia Council Bill 2013*.

- For example, the function listed at paragraph 5(a)(vi) of the *Australia Council Act 1975* requires the Council "to formulate and carry out policies designed to uphold and promote the right of persons to freedom in the practice of the arts".
  - This function is not contained in the revised functions contained in the *Australia Council Bill 2013*; however, it is included in the section "Matters to be taken into account by Council" at paragraph 11(b): "The Council must, in the performance of its functions and the exercise of its powers, have regard to the right of persons to freedom in the practice of the arts".

More generally, support for arts in the community and development of national identity is provided for in a number of the functions of the *Australia Council Bill 2013*.

- For example, in regard to the matter of "national identity", the Bill defines the term "Australian arts practice" and includes it in two of the Council's functions. The 1975 Act has no equivalent definition or use of the term "Australian" in this context. (Refer also to the Statement of Compatibility with Human Rights section below).

In relation to "community", the Bill provides for the Council:

- to foster excellence in Australian arts practice by supporting a diverse range of activities [9(1)(b)];
- to promote the appreciation, knowledge and understanding of the arts [9(1)(d)]; and
- to support and promote the development of markets and audiences for the arts [9(1)(e)].

The consideration of "community" sits comfortably within these functions, as set out in the Explanatory Memorandum that accompanies the legislation.

- These terms are not, however, explicitly in the Bill. To list specific sectoral groups, or indeed art forms, will have the likely effect of restricting the Council's activities and in fact limiting the Council's flexibility to support a range of Australian creative practice over time.

A function contained in the 1975 Act which required the Council to take into account the policies of State Governments and of local governing bodies in relation to the arts has been removed. This is on the basis that, as a *Commonwealth Authorities and Companies Act 1997* agency, the Council is accountable to the Commonwealth. This is consistent with other statutory authorities in the arts portfolio.

Also, consistent with current legislative drafting practice, the intent and intended interpretation of the *Australia Council Bill 2013* is outlined in the accompanying Explanatory Memorandum, including the use of examples to demonstrate how the functions are expected to be performed by the Council.

These matters are further addressed in a comparison of the functions of the *Australia Council Act 1975* and the *Australia Council Bill 2013* provided at **Attachment D**.

## Governance

The Bills include significant reform of Council's governance arrangements. The Council's existing governance structures were created for a smaller organisation and in a vastly different arts sector and broader society.

The Bill provides for a skills-based governance board structure with a strong strategic and contemporary focus, clear lines of communication with the Australian Government and mandated planning processes.

The responsible Minister is also to have regard to the need for the Board to include members who have skills, experience or involvement with the arts.

The Council will now be required to produce a corporate plan that is endorsed by the responsible Minister. This brings the Council into line with other modern Commonwealth statutory authorities.

### Constitutional basis clause in the Australia Council Bill 2013

As is common practice, a constitutional basis clause has been included in the Australia Council Bill 2013, clarifying the relevant heads of Commonwealth constitutional power that relate to different functions and powers in the Bill. This establishes the constitutional basis for the Bill.

For further information on the types of activities that Council may undertake in relation to each head of Commonwealth constitutional power, the commentary on the constitutional basis clause included in the Explanatory Memorandum for the Australia Council Bill 2013 is provided at **Attachment E**.

### Statement of Compatibility with Human Rights for the Australia Council Bills

The Explanatory Memorandum includes a Statement of Compatibility with Human Rights (the Statement). The inclusion of the Statement is standard practice for all new Bills and is in accordance with requirements under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Consultation with the Attorney-General's Department indicated that the use of the term "Australian resident" required clarification to make clear the intent of differentiation on the basis of residency status.

The Memorandum makes clear that the use of the term – and the related term "Australian arts practice" – is appropriate, reasonable and legitimate in implementing the Australian Government response to the Review, and may therefore be viewed as not constituting discrimination according to the United Nations Human Rights Committee (General Comment 18).

The Statement also addresses the ways in which the Bill engages the right to enjoy and benefit from culture under Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights and the right to freedom of expression in the form of art under Article 19(2) of the International Covenant on Civil and Political Rights through the functions and powers of the Council provided for in the Bill.

The Statement included in the Explanatory Memorandum for the Australia Council (Consequential and Transitional Provisions) Bill 2013 notes that the Bill does not raise any human rights issues, however provides commentary for the avoidance of doubt regarding measures in the Bill that could involve a civil penalty and how these relate to the right to a fair trial under Article 14 of the ICCPR.

For further information on the human rights engaged by the Australia Council Bills, the Statements included in the Explanatory Memoranda for both Bills are provided at **Attachments F and G**.

## List of Attachments

A	Australian Government response to the 2012 Review of the Australia Council
B	Overview of the Australia Council (Consequential and Transitional Provisions) Bill 2013
C	Comparison of <i>Australia Council Act 1975</i> and Australia Council Bill 2013
D	Comparison of Functions: <i>Australia Council Act 1975</i> and Australia Council Bill 2013
E	Constitutional Basis of Australia Council Bill 2013 (Extract from Explanatory Memorandum)
F	Statement of Compatibility with Human Rights – Australia Council Bill 2013 (Extract from Explanatory Memorandum)
G	Statement of Compatibility with Human Rights – Australia Council (Consequential and Transitional Provisions) Bill 2013 (Extract from Explanatory Memorandum)

## APPENDIX B

### REVIEW OF THE AUSTRALIA COUNCIL AUSTRALIAN GOVERNMENT RESPONSE

#### REVIEW RECOMMENDATION 1

The Review finds that Nugget Coombs' original vision for the Council is still relevant but needs to be updated to reflect the Council's place in a 21st century Australia and a contemporary arts sector. It must be communicated clearly, and be used to inform the Council's Strategic Priorities and Key Performance Indicators, that are agreed to by the Minister for the Arts. The measure that is implicit in this vision is that of 'excellence', and this continues to be the Council's benchmark for the work it supports.

The Review recommends that a new purpose for the Council be expressed as follows:

*To support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field.*

This purpose should be supported by four principles for the Council. These are to:

- support work of excellence, at all stages of the artistic life cycle;
- promote an arts sector that is distinctively Australian;
- ensure that the work it supports has an audience or market; and
- maximise the social and economic contribution made by the arts sector to Australia.

The purpose should also be supported by a clear statement of its functions under its legislative mandate, which would include:

- to administer and measure the impact of funding to artists and arts organisations in a manner which achieves high accountability standards;
- to undertake and commission research and advocate for Australian arts to promote the sector and to better inform policy decisions; and
- to support and promote professional development and cultural leadership in the Australian arts sector.



### **GOVERNMENT RESPONSE: AGREED IN PRINCIPLE**

The recommended purpose for the Council preserves the important principle of making decisions on grants at arm's length from government and sets out a clear and contemporary statement about the Australian Government's goals for Australia's arts sector in the 21st century.

The four principles which sit under the new purpose provide guidance for how implementation of the Council's purpose should be measured and reported on. This will assist to give clarity about the Council's activities, both to the Australian Government and the arts sector.

The Council's purpose will be defined by the functions drafted for incorporation in the Council's new enabling legislation.

It is important to note that while the Government endorses the broad direction of a high level strategic plan, the Government plays no role in determining the allocation of funding across genre or artform or deciding individual grants.

### **REVIEW RECOMMENDATION 2**

This statement of purpose should be supported by a three year Strategic Plan, agreed with the Minister, which defines the KPIs against which the Council should be measured.

### **GOVERNMENT RESPONSE: AGREED**

The strategic planning obligations of Commonwealth statutory agencies are set out in their enabling legislation. Consistent with this practice, the Council's new enabling legislation will require it to prepare a strategic plan at least once a year, with the plan to cover up to a period of up to four years. The strategic plan will be required to set out:

- The objectives the Council will pursue in the performance of its legislated functions;
- The strategies and policies that the Council will adopt to achieve those objectives;
- Performance indicators for assessment of the Council's performance of its functions;
- The investment and financing programs of the Council, including strategies for managing financial risk;
- The financial targets and projections for the Council;

- An analysis of factors likely to affect achievement of targets or create significant financial risk for the Council or for the Commonwealth; and
- A review of performance since the start of the year previous to the year in which the plan is prepared, measured against the most recent plan for any part of that period.

The Council's strategic plan must be given to the Minister for his or her endorsement before the start of the period to which the plan relates. The Council will be able to vary the strategic plan as required, and in doing so would seek the minister's approval of any variation.

### REVIEW RECOMMENDATION 3

The Review recommends that the Council work to remove duplication through the merger of the Australia Business Arts Foundation (AbaF) and the Artsupport program as recommended by the Review of Private Sector Support for the Arts undertaken by Mr Harold Mitchell AC in 2011. However, this Review recommends the merged functions should sit within the Australia Council, subject to the resolution of the taxation issues surrounding transfer of the Australia Cultural Fund which is administered by AbaF.

### GOVERNMENT RESPONSE: AGREED

As announced in the 2012-13 Budget Papers, the Government has agreed to amalgamate AbaF and Artsupport. In February 2013, the Government launched the new merged agency, Creative Partnerships Australia, a one-stop-shop for the encouragement of private giving, social investment and philanthropy for the arts. CPA will also explore new models of support for the arts and build partnerships between artists, business, private donors and the community to support the arts.

### REVIEW RECOMMENDATION 4

The Review recommends that the Council and the Office for the Arts undertake a joint program audit. This audit would take account of the Council's new purpose and apply the excellence versus access filter to current programs. The agreed program split would then be the subject of sector consultation, before implementation.

- The Council is best placed to focus its resources on supporting and recognising excellence in Indigenous arts practice and Office for the Arts is best placed to support access to Indigenous arts practice, with its attendant, wider social and economic objectives, in community.
- A similar principle to that above may also apply to community arts projects.

- The audit must include assessment of touring programs. The Council should administer those programs which focus on work of excellence and Office for the Arts on those which promote access to artistic product.
- Service delivery, wherever possible, should be devolved to the sector.

**GOVERNMENT RESPONSE: AGREED IN PRINCIPLE**

The Government notes that a joint program audit has been completed which will be updated based on the Council's new Act, on the basis that this legislative mandate is the filter through which Council's role and program delivery is determined. The Council and the Office for the Arts will work together to ensure clarity for applicants about which agency – either the Council or the Office for the Arts – they should apply to for funding.

On 22 August 2012, the Government announced the transfer of six programs from Office for the Arts to the Australia Council – Playing Australia, Visions of Australia, Festivals Australia, Contemporary Touring Initiative, Contemporary Music Touring Program and the Visual Arts and Craft Strategy.

The decision to transfer the administration of these programs to the Australia Council has been taken in the context of the wide-ranging discussion and consultation about the future of arts and culture sectors undertaken to inform the development of the national cultural policy and the Review of the Australia Council.

The transfer of programs will contribute to delivering on the goals of the national cultural policy—it preserves the principles of arm's-length decision making and peer review in relation to arts funding; it consolidates most Australian Government arts funding with the Australia Council; and it will improve the service to the arts sector by providing the sector with a single source of funding with consistent application and reporting processes.

The Office for the Arts will work with the Council to ensure the seamless transfer of administrative responsibility for these programs in order to cause minimal disruption for current grant recipients and applicants for current funding rounds.

## REVIEW RECOMMENDATION 5

The Review recommends that the Council work to grow the Council's linkages.

The Review:

- (a) concludes that the Council has a clear and important role in supporting professional development in the arts sector as part of its remit to support works of artistic excellence. To this end, the Review recommends the Council become a member of the Australian Roundtable for Arts Training Excellence in order to engage more directly with the national Arts Training Organisations. The Council's support in the professional development area should extend to supporting strategic initiatives in the sector as well as specific programs of support. Particular initiatives identified through the Review's consultations for further investigation include:
  - the development of a 'mentor bank', matching expertise (both artistic and administrative) in major and key organisations with small-to-medium organisations in need of professional development assistance, and
  - an information portal providing information on jobs, training, education and professional development opportunities for young and emerging artists, especially those that support business development and management and cultural leadership in the arts context.
- (b) recommends more regular and formal dialogue with other arts agencies, especially the national collecting institutions, to promote collaboration and to better leverage the role and value of the collections as part of the sector; and
- (c) recommends the Council diversify its approach to investing in international engagement and cultural exchange, with a sustained emphasis on the Asian region.

## GOVERNMENT RESPONSE: AGREED

The Government agrees that the Council must work to expand its linkages both across the Australian Government arts portfolio and with government arts agencies in the state and territory governments.

Implementation of this recommendation will be the responsibility of the Council's Governing Board. The recommended activities will need to be considered by the Board in the development of its new strategic plan.

The Board will also be required to identify a process for more regular and formal dialogue with other Australian Government arts and cultural agencies as part of its planning development process.

**REVIEW RECOMMENDATION 6**

In order to facilitate implementation of the new purpose for the Council, the Review recommends that the Australian Government provide additional funding of \$21.25 million per annum to the Council to cover current funding pressures and changes to its purpose as follows:

1. *Research and Advocacy*—the provision of this additional funding will be tied to a Key Performance Indicator as agreed with the Minister. Funding is to be used by the Council to develop a detailed and systematic data collection program for the benefit of the Australian Government and the sector as a whole (much the same as that undertaken by Screen Australia, including an annual 'state of the industry' report). Additional funding of \$1 million per annum would enable this work to take place.
2. *The Council to act as a funding generator*—the Council's role in developing funding to the arts from the sector could be enhanced through the addition of a 'commercial' funding program allowing the Council to develop new models of funding for the sector, such as micro-loans and matching programs. Additional funding of \$3 million per annum would enable the Council to establish a pilot program rolling out new models of funding.
3. *Major Performing Arts contestable fund*—top-up funding to the Council of \$1.25 million per annum as the Australian Government contribution to establish a \$2.5 million excellence funding pool available to Major Performing Arts organisations on a competitive basis, to reward outstanding performance in fulfilling Major Performing Arts goals with criteria to be determined as part of the opening up of the Major Performing Arts organisations to broader peer review.
4. *Unfunded excellence*—as discussed above, the Council has identified significant levels of unfunded excellence among its current application base. On the basis of estimates that unfunded excellence for the Council is about \$15 million, this Review proposes top-up funding of this amount to meet this growing gap in the sector.
5. *Professional development*—the Council has an important role in building the professional capacity of the arts sector. Funding of \$1 million per annum will assist the Council to develop, in collaboration with training and development providers and private sector mentors, formal programs of professional development for arts sector managers and cultural leaders. This will also fund the investigation and early development of an arts careers information portal and a mentor bank to provide opportunity and expert support for those who work in the sector.

### GOVERNMENT RESPONSE: AGREED

The Government agrees to the provision of additional funding to enable the Australia Council to carry out its new purpose and functions, and to meet existing needs.

Specifically the Government will provide \$75.3 million over four years commencing from 2013–14 for this purpose. This includes:

- \$1 million per annum to develop and implement a detailed and systematic data collection program for the benefit of the Australian Government and the sector as a whole.
- \$1.25 million per annum to harness excellence in the major performing arts companies and allow them to address strategic priorities of national significance, with the funding to leverage additional matched funding from state and territory governments;
- \$15 million per annum as additional funding across a range of art forms to address an identified significant level of 'unfunded excellence' among the Council's current application base for established, emerging and hybrid art forms; and
- \$1 million per annum to build the professional capacity of the arts sector through training and development of providers and private sector mentors, formal programs of professional development for arts sector managers and cultural leaders, and the investigation and development of services to support employment and careers in the arts sector.

The Government also agrees to provide new funding to support 'commercial' funding programs that will develop new models of funding for the sector, such as micro-loans and matching programs. However, as these programs fall within the scope of responsibilities of the new private sector support agency, Creative Partnerships Australia, funding support for these initiatives will be addressed through the Government response to the Mitchell Review. Any further funding for the Council will need to be considered in the context of future budgets.

### REVIEW RECOMMENDATION 7

The Review recommends that, in order to provide the Council with increased funding flexibility, the Australian Government pursue with the states and territories the opening up of the MPA Framework to allow for competitive funding based on peer review.

**GOVERNMENT RESPONSE: AGREED IN PRINCIPLE**

The Australian Government notes that peer review provides a mechanism for informed evaluation and assessment of artform specific funding applications which can be effective in helping to enhance artistic standards and competitiveness.

The Major Performing Arts funding framework, agreed to by the Meeting of Cultural Ministers in August 2011, outlines a commitment by all governments in Australia to fund the 28 Major Performing Arts companies. This framework outlines incentives to encourage and reward artistic success.

Any change to the existing or future frameworks will take place in negotiation with state and territory governments.

**REVIEW RECOMMENDATION 8**

To arrest the erosion of the Council's funding base, the Review also recommends exempting the Council from any further application of the efficiency dividend.

**GOVERNMENT RESPONSE: NOTED**

Australian Government policy is that all agencies, with few exceptions, are subject to the annual efficiency dividend, which is designed to improve administrative efficiency by Australian Government agencies. Any request for exemption from the efficiency dividend will need to be considered in the context of future budgets.

**REVIEW RECOMMENDATION 9**

The Review recommends that new enabling legislation for the Council clearly provide for a conventional, skills-based Governing Board. The new Act should limit membership of the Board to nine, with all appointments made by the Minister after receiving advice from the Chair. The Chair should be appointed by the Minister. The Board should be composed primarily of people with a deep experience in and passion for artistic practice who can bring a balanced blend of skills and expertise to the Council and through it, to Australia's cultural life.

**GOVERNMENT RESPONSE: AGREED**

The Government agrees that the introduction of a more conventional Board structure as recommended by the Review will assist the Council to improve its strategic planning and governance processes, and will more appropriately meet its long-term operational needs. This reform will be complemented by the reform of the Council's administrative structure as recommended by the Review. The Government will consult with the Council regarding the appropriate skills mix required for the new governing board.

### REVIEW RECOMMENDATION 10

The Review recommends that this new Board set its direction and develop its vision with management through its strategic planning processes. Its Board sub-committees (for example, Audit, Finance, Risk, Nominations) should operate to contribute to the governance of the organisation but not to approve funding or dictate the Council's strategic priorities.

#### GOVERNMENT RESPONSE: AGREED

The Government supports a standard governance approach across agencies governed under the *Commonwealth Authorities and Companies 1997*. Recommendation 10 is in line with such an approach.

### REVIEW RECOMMENDATION 11

The Review recommends that the CEO should be appointed by the Board following consultation and agreement with the Minister.

#### GOVERNMENT RESPONSE: AGREED

Recommendation 11 brings the Council in line with more contemporary legislation for agencies governed under the *Commonwealth Authorities and Companies 1997*. Consistent with good governance arrangements, the CEO will be accountable to the Board.

### REVIEW RECOMMENDATION 12

Sector Advisory Panels, which would be the principal agents for engagement with the artforms and custodians of artform practice within the sector, should support and inform the work of the new Board and management, as directed by that Board. Specifically, the Panels should provide sectoral expertise and advise on and inform the Strategic Priorities of the Board. The Board may constitute any number of Advisory Panels and determine their mandates based on the needs of the Board in developing and executing its Strategic Priorities. It may conclude the activities of any Panel as it sees fit.

#### GOVERNMENT RESPONSE: AGREED

Implementation of recommendation 12 will ensure that artform expertise is available to advise the Council's new Governing Board and to inform its strategic directions.

### REVIEW RECOMMENDATION 13

A new governance structure for the Council should be put in place that allows for clear lines of responsibility and function for the Board and executive under the



Minister, in consultation with Office for the Arts. New operational structures for the Council's executive and staff may flow from the implementation of this model.

**GOVERNMENT RESPONSE: AGREED**

The Australian Government agrees to the implementation of a new governance structure for the Council including clearer lines of communication between the Governing Board and the Government. Implementation of the new governance structure will be subject to consultation as recommended below, and will ultimately be a decision for the new Governing Board.

**REVIEW RECOMMENDATION 14**

The Review recommends that a new model for grant allocation be implemented that:

- a) Replaces the standing Artform Board structure with a general stream for grant applications across all artforms; and
- b) Maintains the centrality of peer assessment but promotes flexibility and breadth by adopting, but adapting, the model employed by the Canada Council for the Arts that allows for more peers to become involved in assessment and thereby diversifying the mix of peers.

**GOVERNMENT RESPONSE: AGREED IN PRINCIPLE**

The Government agrees with the broad principles contained in the grants assessment model recommended by the Review. The Government agrees that the Council should adopt a flexible approach to providing peer assessed grants funding to the sector which enables it to change and adapt the manner in which it receives and assesses applications for funding in future.

**REVIEW RECOMMENDATION 15**

To support these reforms the Review recommends a new operational structure for the Council which would cover key areas recommended by the Review. These aspects of the Council's recommended governance structure are included to show how the Board and Executive would interact, especially noting the role of the Sector Advisory Panels.

**GOVERNMENT RESPONSE: NOTED**

The Government notes the suggested operational structure. However, implementation of this recommendation will be the responsibility of the Council's Governing Board.

**REVIEW RECOMMENDATION 16**

The Review recommends community consultation to inform the Council's finalisation of its new operational structure.

**GOVERNMENT RESPONSE: AGREED**

The Government agrees that the Council should undertake community consultation on implementation of recommended changes to its organisational structure, and encourages the Council to do so.

Implementation of this recommendation will be the responsibility of the Council's Governing Board.

**REVIEW RECOMMENDATION 17**

The Review recommends development of an entirely new Act for the Council, based on the templates provided by the enabling legislation for the National Film and Sound Archive of Australia and Screen Australia, for introduction to Parliament in the 2014–15 financial year. The new Act should do the following:

- a) preserve the principles of operation at arm's length from government, and peer-based review of funding decisions
- b) require the development of a Strategic Plan for every three years, updated annually in the Budget context and agreed by the Minister
- c) provide for a new Board for the Council, made up of nine members all appointed by the Minister in consultation with the Chair (who will be appointed by the Minister alone). The Act must allow for the appointment of Board members with appropriate skills to meet the Council's governance needs as well as having strong and demonstrated knowledge of the arts sector.

**GOVERNMENT RESPONSE: AGREED**

The Australian Government agrees that new legislation is required to enable reform of the Council's governance and administrative structures, and to implement its new purpose as recommended by the Review. New legislation will provide the Government with the opportunity to ensure significant and lasting reform of the Australia Council. Timing will be subject to Parliamentary processes.

**REVIEW RECOMMENDATION 18**

The Review recommends that the Chair's mandate be to consult further on the proposed changes, specifically through exposure drafts of the new Act and prepare the organisation for the new Act's implementation as well as facilitate and drive the transition.

**GOVERNMENT RESPONSE: AGREED IN PRINCIPLE**

It is the Government's role to prepare legislation and consult with the public as appropriate. It will be important for the Chair of the Council to be actively involved in these consultations and provide feedback to the Government on the views of the arts sector. The form of the final legislation will ultimately be a matter for the Parliament.

**Overview:**  
**Australia Council (Consequential and Transitional Provisions) Bill 2013**

**Schedule 1 – Repeal**

- This provides for the repeal of the *Australia Council Act 1975*.

**Schedule 2 – Transitional Provisions**

***Part 2 – The Council***

- This Part provides for the continuation of the appointments of the Chairperson and Deputy Chairperson of the Council – on existing terms and conditions – to be carried over in the new Bill.
- The time the appointees have already served in the offices will count towards their tenure under the new Bill.
- This Part also provides for the continuation of the appointment of the General Manager (CEO) to be carried over in the new Bill on an acting basis, until such time as the Board can convene to consider and appoint – in consultation with the responsible Minister – a longer-term CEO.
- All other appointments will cease following the enactment of the new Bill. However, former appointees will be eligible for re-appointment (with consideration being given to time already served on the old Council's Boards).

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

- The current employees of Council will be transferred to the new operating environment on existing terms and conditions.
- The assets and liabilities of the old Council will be the assets and liabilities of the continued Council.

***Part 4 – Reporting Obligations***

- This Part provides for the transition to the reporting obligations under the new Bill, including the final annual report of the old Council and the first annual report of the continued Council.

***Part 5 – Miscellaneous***

- The Council will – for the avoidance of doubt – continue to be exempt from State and Territory taxes, including stamp duty.
- This Part also provides for the responsible Minister to make rules, by legislative instrument, necessary to give effect to any transitional arrangements that may arise.

# Comparison of Australia Council Act 1975 and Australia Council Bill 2013

## Attachment C

Content	Australia Council Act 1975	Australia Council Bill 2013
Definitions	Definitions	
	Section 3	Section 4
	<ul style="list-style-type: none"> <li>▪ <b>Arts</b> includes creative and interpretative expression through theatre, literature, music, visual arts, film and craft.</li> <li>▪ <b>Community interest representative</b> means a person who:               <ul style="list-style-type: none"> <li>a) in the Minister's opinion, understands the interests of the general community in relation to the arts; and</li> <li>b) is not a professional artist.</li> </ul> </li> <li>▪ <b>Professional artist</b> means a person who practises one or more of the arts as a profession.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Arts</b> means the creation or performance of works of interpretative expression through any medium.</li> <li>▪ <b>Australian artist</b> means an artist who is an Australian citizen or an Australian resident.</li> <li>▪ <b>Australian arts practice</b> means the creation or performance, wholly or partly by Australian artists, of arts.</li> <li>▪ <b>Australian resident</b> means an individual who resides in Australia and is the holder (within the meaning of the <i>Migration Act 1958</i>) of a permanent visa (within the meaning of that Act).</li> </ul>
Ministerial Directions – Arm's Length Decision Making	Ministerial Directions	
	Section 6B	Section 12
	<ul style="list-style-type: none"> <li>▪ The Minister <b>can</b> (by legislative instrument) direct the Council with respect to the performance of its functions or the exercise of its powers.</li> <li>▪ The Minister <b>cannot</b>, however, direct the Council in relation to the making of a decision around a grant, the lending of money or the provision of a scholarship or other benefit.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The Minister <b>can</b> (by legislative instrument) direct the Council with respect to the performance of its functions or the exercise of its powers.</li> <li>▪ The Minister <b>cannot</b>, however, give a direction in relation to the making of a decision by the Council relating to the provision of support (including by the provision of financial assistance or guarantee).</li> </ul>

## Comparison of Australia Council Act 1975 and Australia Council Bill 2013

Content	Australia Council Act 1975		Australia Council Bill 2013
Governing Board	<i>Board Membership</i>		
	Section 9	<ul style="list-style-type: none"> <li>No fewer than 10, no more than 14, members, including the Chair and Deputy Chair.</li> <li>The General-Manager is also an ex-officio member of the Board if the Chair is only appointed on a part-time basis.</li> </ul>	Section 16 <ul style="list-style-type: none"> <li>No fewer than 8, no more than 12, members, including the Chair, Deputy Chair, and CEO as an ex-officio (non-voting) member.</li> </ul>
	<i>Appointments to the Board</i>		
	Section 9	<ul style="list-style-type: none"> <li>Chair appointed by the Governor-General.</li> <li>All other members appointed by the Minister.</li> <li>Members (other than the Chair) are appointed to the Board on the basis that they have been appointed as Chairs of the artform Boards under Section 20 (see below).</li> <li>The Minister should endeavour to ensure a majority of arts practitioners and a reasonable balance of persons who have practised various arts.</li> </ul>	Section 17 <ul style="list-style-type: none"> <li>Chair appointed by the Minister.</li> <li>Minister appoints remaining Board members following consultation with the Chair.</li> <li>Members are appointed on the basis that they have the requisite skills, including members who have experience or involvement in the arts, as determined by the Minister in consultation with the Chair.</li> <li>Such expertise could include skills or experience in a range of artforms, administration or artistic leadership of major performing arts companies, marketing, strategic planning, corporate governance, financial, legal, or corporate sponsorship and philanthropic expertise (refer page 17 of Australia Council Bill 2013 Explanatory Memorandum).</li> </ul>



## Comparison of *Australia Council Act 1975* and *Australia Council Bill 2013*

Content	<i>Australia Council Act 1975</i>		<i>Australia Council Bill 2013</i>
Artform Boards/ Committees	<i>Establishment of Artform Boards/Committees</i>		
	Section 20	<ul style="list-style-type: none"> <li>Boards are established by the Minister. The Minister may also revoke the notice under which the Board was established.</li> </ul>	Section 31 <ul style="list-style-type: none"> <li>Committees are established by the Board.</li> <li>Terms of reference for Committees are determined by the Board.</li> </ul>
	<i>Peer Assessment</i>		
	<ul style="list-style-type: none"> <li>No specific reference in the legislation.</li> </ul>	Section 31	<ul style="list-style-type: none"> <li>The Council is provided with the necessary flexibility to establish committees of persons with appropriate experience, including for allocating grants based on peer assessment, to enable the Council to maintain access to artform specific expertise, as well as strategic advice on the arts sector more broadly.</li> </ul>
	<i>Membership of Artform Boards/Committees</i>		
	Section 22 <ul style="list-style-type: none"> <li>No fewer than 5, no more than 9 members.</li> <li>There are term limits for members.</li> <li>Remuneration set by Remuneration Tribunal.</li> </ul>	Section 31	<ul style="list-style-type: none"> <li>No prescribed minimum or maximum number of members.</li> <li>Term limits for members are at the discretion of the Board of the Council.</li> <li>Remuneration set by Remuneration Tribunal.</li> </ul>
<i>Appointment of Artform Board/Committee members</i>			
Section 22	<ul style="list-style-type: none"> <li>The Minister appoints Artform Board members.</li> <li>Members are appointed to the Artform Boards on the basis that they practise or have practised the arts, or are otherwise associated with the arts.</li> <li>At least one member must be a community interest representative.</li> <li>Members are eligible for reappointment, subject to prescribed term limits.</li> </ul>	Section 31	<ul style="list-style-type: none"> <li>The Board of the Council appoints Committee members.</li> <li>Appropriate experience required for committees, terms and conditions of Committee members, as well as procedures of Committees are to be determined by the Board.</li> </ul>

## Comparison of Australia Council Act 1975 and Australia Council Bill 2013

Content	Australia Council Act 1975		Australia Council Bill 2013	
General Manager/ Chief Executive Officer (CEO)	Appointment of the General Manager/CEO			
	Section 19A	<ul style="list-style-type: none"><li>The General Manager appointed by the Minister.</li></ul>	Section 35	<ul style="list-style-type: none"><li>CEO appointed by the Board in consultation with the Minister.</li><li>CEO is an ex-officio (i.e. non-voting) member of the Board.</li></ul>
	Term of Appointment			
	Section 19B	<ul style="list-style-type: none"><li>The term of appointment shall not exceed 7 years.</li><li>Individuals are eligible for reappointment.</li></ul>	Section 35	<ul style="list-style-type: none"><li>The term of appointment shall not exceed 5 years.</li><li>Individuals are eligible for reappointment.</li></ul>
	Corporate Plan			
Planning	<ul style="list-style-type: none"><li>There are no corporate planning requirements in the <i>Australia Council Act 1975</i>.</li></ul>	Section 45	<ul style="list-style-type: none"><li>The Council must submit a Corporate Plan (covering a three year period) once a year.</li><li>The Plan must identify strategic priorities and key performance indicators and be endorsed by the Minister.</li></ul>	
Application to External Territories	Extended Geographic Application of the Act			
	Section 6	<ul style="list-style-type: none"><li>The Council may perform its functions and exercise its powers outside Australia for the benefit of Australia or Australians.</li></ul>	Section 5	<ul style="list-style-type: none"><li>The Act extends to every external territory and will apply both within and outside of Australia.</li><li>The Council may perform its functions and exercise its powers outside Australia for the benefit of Australia or Australians.</li><li>For example, the Council may provide support for Australian artists to display or perform works at an arts festival, biennale or equivalent overseas.</li></ul>



# Comparison of functions: *Australia Council Act 1975* and *Australia Council Bill 2013*

Attachment D

<b>Australia Council Bill 2013 Function</b>		<b>Comments from Australia Council Bill 2013 Explanatory Memorandum</b>	<b>Relevant <i>Australia Council Act 1975</i> Function</b>	
9(1)(a)	To support Australian arts practice that is recognised for excellence.	This function reflects the new purpose of the Council as recommended in the Review and agreed in principle in the Australian Government response to the Review.	5(a)(i)	To promote excellence in the arts.
			5(a)(ii)	To provide, and encourage the provision of, opportunities for persons to practice the arts.
			5(a)(v)	To foster the expression of a national identity by means of the arts.
			5(a)(i)	To promote excellence in the arts.
			5(a)(ii)	To provide, and encourage the provision of, opportunities for persons to practise the arts.
9(1)(b)	To foster excellence in Australian arts practice by supporting a diverse range of activities.	This function gives Council the broad power to support a wide variety of activities that will contribute to the development of excellence in Australian arts practice. This could include, for example: <ul style="list-style-type: none"> <li>supporting artists from overseas to visit Australia and impart their skills and knowledge to Australian artists, for example, by hosting master classes; or</li> <li>supporting an Australian artist pursue an arts project involving young people in, for example, a regional community that will benefit both the community (through increased access to demonstrations of artistic excellence) and the artist (through further development of their arts practice).</li> </ul>	5(a)(iii)	To promote the appreciation, understanding and enjoyment of the arts.
			5(a)(iv)	To promote the general application of the arts in the community.
			5(a)(v)	To foster the expression of a national identity by means of the arts.

## Comparison of functions: *Australia Council Act 1975* and *Australia Council Bill 2013*

<b>Australia Council Bill 2013 Function</b>	<b>Comments from Australia Council Bill 2013 Explanatory Memorandum</b>	<b>Relevant <i>Australia Council Act 1975</i> Function</b>
9(1)(c) To recognise and reward significant contributions made by artists and other persons to the arts in Australia.	<p>This could include, for example:</p> <ul style="list-style-type: none"> <li>• rewarding an Australian artist for a significant achievement in their practice;</li> <li>• providing an award to an artist from overseas who has contributed to the development of an Australian arts organisation, for example, as the Principal Conductor of an orchestra; or</li> <li>• acknowledging the contribution of a prominent business leader or philanthropist in encouraging investment in Australian arts practice, or for imparting business knowledge or expertise to Australian artists to support the sustainability of the Australian arts sector.</li> </ul>	<p>5(a)(vii) To promote the knowledge and appreciation of Australian arts by persons in other countries.</p> <p>5(a)(viii) To promote incentives for, and recognition of, achievement in the practice of the arts.</p>
9(1)(d) To promote the appreciation, knowledge and understanding of the arts.	<p>This highlights the Council's role as an advocate for the arts. In performing this function, it is envisaged that the Council could support activities that seek to raise awareness of, or educate the community about, the arts. For example, this could include demonstrating the benefits the arts have to both individuals (including improved academic outcomes) and communities (including improved social cohesion).</p>	<p>5(a)(iii) To promote the appreciation, understanding and enjoyment of the arts.</p> <p>5(a)(iv) To promote the general application of the arts in the community.</p>
9(1)(e) To support and promote the development of markets and audiences for the arts.	<p>This highlights the Council's role in ensuring that the work it supports has an audience or market. It also highlights the Council's audience development role.</p>	<p>5(a)(iii) To promote the appreciation, understanding and enjoyment of the arts.</p> <p>5(a)(iv) To promote the general application of the arts in the community.</p>



## Comparison of functions: *Australia Council Act 1975* and *Australia Council Bill 2013*

Australia Council Bill 2013 Function		Comments from Australia Council Bill 2013 Explanatory Memorandum	Relevant Australia Council Act 1975 Function
9(1)(f)	To provide information and advice to the Commonwealth Government on matters connected with the arts or the performance of the Council's functions.	This will allow the Council to inform the Australian Government about developments in the contemporary arts sector, with a view to informing Australian Government policy in relation to the arts. It will also strengthen the Council's accountability to the Australian Government regarding its activities and the performance of its functions as a Commonwealth statutory authority.	5(b) -  (5(c) in ComLaw and Austlii website versions)  To furnish advice to the Government of the Commonwealth, either of its own motion or upon request made to it by the Minister, on matters connected with the promotion of the arts or otherwise relating to the performance of its functions.
9(1)(g)	To conduct and commission research into, and publish information about, the arts.	This implements the Australian Government response to the Review, namely that the Council should have a new research function that is linked to its advocacy role in informing Australian Government policy in relation to the arts. It is envisaged that this function will include the conducting of research on a particular artform, research into developments in the Australian arts sector (such as the careers of Australian artists or audience attendance at arts exhibitions or performances), as well as national and global trends in the arts more broadly.	5(vii)  5(b) -  (5(c) in ComLaw and Austlii website versions)  To promote the knowledge and appreciation of Australian arts by persons in other countries.  To furnish advice to the Government of the Commonwealth, either of its own motion or upon request made to it by the Minister, on matters connected with the promotion of the arts or otherwise relating to the performance of its functions.

## Comparison of functions: *Australia Council Act 1975* and *Australia Council Bill 2013*

<b>Australia Council Bill 2013 Function</b>	<b>Comments from Australia Council Bill 2013 Explanatory Memorandum</b>	<b>Relevant <i>Australia Council Act 1975</i> Function</b>	
9(1)(h)  To evaluate, and publish information about, the impact of the support the Council provides.	This will allow for the Council's role to measure the impact of the funding it administers to artists and arts organisations in the service of high accountability standards to be enshrined in the functions, as agreed in the Australian Government response to the Review. This function is intended to promote greater accountability and transparency not only to the Government but to the arts sector regarding the provision of Australian Government funding to the arts.	5(b) - (5(c) in ComLaw and Austlii website versions)  To furnish advice to the Government of the Commonwealth, either of its own motion or upon request made to it by the Minister, on matters connected with the promotion of the arts or otherwise relating to the performance of its functions.	
9(1)(i)  To undertake any other function conferred on it by this Act or any other law of the Commonwealth.	The Council will undertake any other function conferred on it by the Bill or by any other law of the Commonwealth.	Not applicable – new function included to reflect current drafting practice.	
9(1)(j)  To do anything incidental or conducive to the performance of any of the above functions.	The Council also has the ability to undertake anything that may be incidental or conducive to the performance of its functions.	5(c) - (5(d) in ComLaw and Austlii website versions)  To do anything incidental or conducive to the performance of any of the foregoing functions.	
9(2)  The Council may charge fees for things done in performing its functions.	The Council may charge fees for the activities it undertakes in performing its functions (where applicable).	Not applicable – new function included to support consistency with other Commonwealth statutory authorities within the arts portfolio, such as Screen Australia and the National Film and Sound Archive.	

## Comparison of functions: *Australia Council Act 1975* and *Australia Council Bill 2013*

<b>Australia Council Bill 2013 Function</b>	<b>Comments from Australia Council Bill 2013 Explanatory Memorandum</b>	<b>Relevant <i>Australia Council Act 1975</i> Function</b>
<p>9(3) The Council may perform its functions alone or together with other persons.</p>	<p>The Council will be able cooperate with others so that it may perform its functions. This could include the Council developing a public-private sector partnership to promote funding for the arts.</p>	<p>Not applicable – new function included to support consistency with other Commonwealth statutory authorities within the arts portfolio, such as Screen Australia and the National Film and Sound Archive.</p>

**Extract from Australia Council Bill 2013 Explanatory Memorandum**

**Clause ^6: Constitutional basis**

Clause ^6 invokes certain heads of Commonwealth constitutional power in relation to the Council's powers and functions to ensure the legislation would continue to have effect if the powers and functions of the Council were confined to those constitutional powers.

Subclauses ^6(a) and ^6(b) refer to the implied nationhood power of the Parliament, that is, the implied power of the Parliament to make laws with respect to nationhood. This head of constitutional power includes the Commonwealth's ability to engage in activities that are particularly relevant to the government of a nation and which could not be carried out otherwise. In the context of this Bill, it is envisaged that this could include national initiatives in the arts, which is a crucial aspect of the Council's mandate, for example, through its functions to support and foster excellence in Australian arts practice through a diverse range of activities.

Subclause ^6(c) refers to the Parliament's power to make laws with respect to corporations that paragraph 51(xx) of the Constitution applies to. In the context of this Bill it is envisaged that this could include an incorporated major performing arts company. The reference to this constitutional head of power relates to the Council's ability to provide support to corporations in the performance of its functions and the exercise of its powers.

Subclause ^6(d) refers to the Parliament's power to make laws "in relation to trade and commerce with other countries, among the States, between Territories or between a Territory and a State". This constitutional head of power is considered to be relevant to the Council's function under paragraph ^9(1)(e), "to support and promote the development of markets and audiences for the arts".

Subclause ^6(e) refers to the Parliament's power to make laws "in relation to the collection of statistics", which is important for the Council's exercise of the functions it is given under paragraphs ^9(1)(f), (g) and (h) relating to research.

Subclause ^6(f) refers to the Parliament's power to make laws "in relation to external affairs". It is envisaged that this power could be relied on in the context of this Bill to encompass any activities undertaken by the Council either overseas or by engaging people from overseas in the performance of its functions or the exercise of its powers. Specifically, this constitutional head of power is relevant to the Council's function to develop markets and audiences for the arts under paragraph ^9(1)(e), as well as activities that may be undertaken by the Council under paragraph ^9(1)(b), for example, activities that foster excellence in Australian arts practice through cultural engagement and the development of people-to-people links through the arts.

Subclause ^6(g) refers to the Parliament's power to make laws "in relation to a Territory", and would be relevant to the Council's performance of its functions and the exercise of its powers within a Territory. For example, this could involve an

initiative that would promote the appreciation, knowledge and understanding of the arts (a function of the Council under paragraph ^9(1)(d)), and which could involve activities being undertaken within a Territory.

Subclause ^6(h) refers to the Parliament's power to make laws "in relation to copyrights, patents, designs and trademarks", and is, in the context of this Bill, related to the Council's functions to support and foster excellence in Australian arts practice, for example, through supporting Australian artists to protect and benefit from the intellectual property in relation to the works they create.

Subclause ^6(i) refers to the Parliament's power to make laws "for purposes relating to any race for whom it is deemed necessary to make special laws", which may be relevant to the Council's activities in supporting Australia's diverse arts and cultural practices, including, in particular, promoting Aboriginal and Torres Strait Islander arts practice, for example.

Subclause ^6(j) refers to the Parliament's power to make laws "in relation to the executive power of the Commonwealth", and is intended to relate to activities that may be viewed as part of the Commonwealth's execution and maintenance of the Constitution and the laws of the Commonwealth.

Subclause ^6(k) refers to the Parliament's power to make laws "in relation to matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth", and is intended to encompass any matters that may be related to the above constitutional heads of power.



**Extract from Australia Council Bill 2013 Explanatory Memorandum**

**Statement of Compatibility with Human Rights**

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

**Australia Council Bill 2013**

This Bill is generally compliant 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*, aside from specific parts of the Bill which could be interpreted as discriminatory under article 26 of the International Covenant on Civil and Political Rights (ICCPR), however those measures are appropriate, reasonable and legitimate measures, as discussed below.

**Overview of the Bill**

The purpose of the Bill is to modernise the Council's enabling legislation and implement the Australian Government's response to the Review through the following measures:

- providing for new functions and powers for the Council to support and foster excellence in Australian arts practice through a diverse range of activities;
- updating the Council's governance arrangements to reflect the enabling legislation of other modern Commonwealth statutory authorities, such as Screen Australia and the National Portrait Gallery of Australia, including the introduction of a skills-based governing board and updating of the Council's corporate planning and reporting requirements;
- providing the Council with the flexibility to establish committees to receive strategic advice on artforms and the arts sector more broadly; and
- allowing the Council to determine a new system of peer assessment of grants applications that focuses on the needs of artists and adapts to developments in a 21<sup>st</sup> century arts sector.

**Human rights implications**

The Bill engages the following human rights:

*Right to enjoy and benefit from culture*

The Bill engages the right to enjoy and benefit from culture, including the right to take part in cultural life.

Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to take part in cultural life. The United Nations Committee on Economic, Social and Cultural Rights has stated that



culture includes oral and written literature, music and song, non-verbal communication, and the arts more broadly.

These cultural forms and the right to take part in their creation and enjoyment are promoted through the Council's functions under clause ^9 of the Bill, including:

- by providing support for Australian arts practice that is recognised for excellence, which allows for Australian artists to create and perform arts that can be enjoyed by audiences both in Australia and overseas;
- by fostering excellence in Australian arts practice through support for a diverse range of activities, which it is envisaged can include a range of cultural activities that may be enjoyed by Australian artists and the audiences with whom they engage through these activities;
- by promoting the appreciation, knowledge and understanding of the arts, which allows for the Council to raise awareness about opportunities for persons to take part in cultural life through the arts; and
- by supporting and promoting the development of markets and audiences for the arts, which provides opportunities for the Council to encourage persons to take part in cultural life through engagement with the arts.

#### *Right to freedom of expression*

The Bill engages the right to freedom of expression in the form of art.

Article 19(2) of the ICCPR recognises the right to freedom of expression through any medium, including in the form of art.

This right is promoted through the functions and powers of the Council under clauses ^9 and ^10 of the Bill, in that the Council supports artists to express themselves through art by providing them with financial assistance to do so.

The right to freedom of expression in the form of art is also promoted in the Bill under paragraph ^11(b) of the Bill through the requirement for the Council to consider "the right of persons to freedom in the practice of the arts" in the performance of its functions and the exercise of its powers. This paragraph is included in the Bill to maintain the intent of paragraph 5(a)(vi) of the AC Act, that is, for the Council "to uphold and promote the right of persons to freedom in the practice of the arts".

As an example, the Council would be required, under paragraph ^11(b) of the Bill to consider the impact of the support it provides and the activities it undertakes on the right to freedom in the practice of the arts, or, the right to freedom of expression in the form of art. This may involve the right to freedom in the practice of the arts being considered by the Council when making decisions on the types of artistic works or projects that may be eligible for funding by the Council.

### *Right to equality and non-discrimination*

Article 26 of the ICCPR protects all persons from discrimination in any form on the basis of prohibited grounds. The prohibited grounds include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

One of the Council's functions is to support or foster excellence in "Australian arts practice". "Australian arts practice" includes a definition of Australian artist that refers to Australian citizens or residents. Subsequently, the definition of "Australian resident" refers to residents with permanent visa status, and is consistent with the definition of "Australian resident" included in the *Tertiary Education Quality and Standards Agency Act 2011*.

As a consequence of these definitions, the definition of "Australian resident" in the Bill could be interpreted as an instance of a public authority differentiating on the basis of residency status. Because the definition of "Australian resident" in the Bill does not include temporary or foreign residents, these could be regarded as falling under the definition of "other status" in Article 26 of the ICCPR as interpreted by the United Nation Human Rights Committee (United Nations Human Rights Committee, General Comment 18).

The United Nations Human Rights Committee states a differentiation of treatment will not always constitute discrimination under Article 26 of the ICCPR if the difference in treatment has a legitimate aim and an objective and reasonable justification (United Nations Human Rights Committee, General Comment 18, Paragraph 13). The definition of "Australian resident" (and potential difference in treatment on the basis of residency status) has been included in the Bill to provide for the new purpose of the Council agreed in principle in the Australian Government response to the Review, that is, "to support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field."

In support of the Council's new purpose, the Bill has been drafted such that the Council's functions will include the provision of support or the undertaking of activities that will foster excellence in "Australian arts practice". It is envisaged that some of the Council's functions under clause ^9 could allow for the involvement of temporary or foreign residents in the activities that the Council supports. However, these activities would ultimately need to "foster excellence in Australian arts practice". That is, they would need to demonstrate a benefit to the work of Australian artists, arts organisations, or the Australian arts sector more broadly. This is because the Council is the Australian Government's principal arts funding body, and it is a primary role of the Council to administer Australian Government funding to Australian artists or arts organisations (comprised of people who are Australian citizens or residents that permanently reside in Australia).

## **Conclusion**

The Bill is generally compatible with human rights because it advances the protection of the right to enjoy and benefit from culture and the right to freedom of expression in the form of art. These rights are promoted through the functions and powers that provide for the Council to support and promote Australian arts practice that is recognised for excellence. This support will allow for artists to create and perform arts that can be enjoyed by a range of persons both in Australia and overseas.

While the Bill may be interpreted as differentiating between groups on the basis of "other status" due to the definition of "Australian resident" included in the Bill, this differentiation has a legitimate aim and objective and reasonable justification in providing for the Council's functions as the Australian Government's principal arts funding body.

**The Honourable Simon Crean MP**

**Minister for Regional Australia, Regional Development and Local Government,  
Minister for the Arts**

**Extract from Australia Council (Consequential and Transitional Provisions) Bill 2013 Explanatory Memorandum**

**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**