

Chapter 2

Background and key provisions of the bills

Introduction

2.1 On 13 March 2013, the then Minister for the Arts, the Hon Simon Crean MP, launched *Creative Australia: the National Cultural Policy*, celebrating Australia's strong, diverse and inclusive culture, and describing the essential role of arts and culture in Australian life and how creativity is central to Australia's economic and social success.¹

2.2 *Creative Australia* represented three years of discussion and consultation. At its core were five equally important and linked goals:

- Recognise, respect and celebrate the centrality of Aboriginal and Torres Strait Islander cultures to the uniqueness of Australian identity.
- Ensure that government support reflects the diversity of Australia and that all citizens, wherever they live, whatever their background or circumstances, have a right to shape our cultural identity and its expression.
- Support excellence and the special role of artists and their creative collaborators as the source of original work and ideas, including telling Australian stories.
- Strengthen the capacity of the cultural sector to contribute to national life, community wellbeing and the economy.
- Ensure Australian creativity thrives in the digitally enabled 21st century, by supporting innovation, the development of new creative content, knowledge and creative industries.

The Australia Council Review

2.3 On 19 December 2011, as part of the development process for *Creative Australia*, the Minister announced an independent review of the Australia Council—Australia's peak arts funding and advisory body. It had been nearly 40 years since the establishment of the Council, and approximately 20 years since it had last been examined.

2.4 The purpose of the Review, which was chaired by Mr Angus James and Ms Gabrielle Trainor, was to assess whether the original purpose of the Australia

1 *Creative Australia: National Cultural Policy, Executive Summary.*

Council² remained relevant, and to determine an appropriate governance and administrative model to ensure that the Council was able to:

- act on funding decisions guided by the overall principle of excellence and artistic merit;
- have a strong and robust arms-length peer assessment process for all funding decisions and that the decision-making process met the community's expectations of fairness and transparency; and
- be guided by enabling legislation that reflected the diversity of the Australian arts and cultural sector today and, with consideration of emerging creative areas, into the future.³

2.5 In addition to the consultation undertaken for *Creative Australia*, the reviewers separately undertook interviews with approximately 50 individuals and organisations and considered 2007 responses to an online survey specifically targeting the terms of reference.⁴

2.6 The Review reported in May 2012. In general terms, it found that the Australia Council had served Australia well—playing an important role in identifying, nurturing and promoting artistic talent, and was staffed by highly professional, knowledgeable and passionate people. However, the Council's rigid structure was seen as imposing constraints on what had become a free-moving, fluid and ever-innovative art sector—constraints that the Review recommended be removed.⁵

2.7 The Review made eighteen recommendations across six areas that outlined a broad mandate for change. Specifically in relation to the Council's purpose, the Review recommended that it be updated to ensure that the Council focussed on funding and promoting artistic excellence in all its forms, leaving the primary work of policy development and programs supporting broad access to the arts to the Office for the Arts.⁶

2.8 In making this recommendation, the Review recognised the interlinked nature of access and excellence in the artistic life cycle—that these concepts were not mutually exclusive. It also acknowledged that the standard of excellence was difficult to define, and highly subjective, but, as the expert funding body for the arts, viewed the Council as well-placed to make this assessment, using peers drawn from the sector as its decision-makers.

2 In the words of Dr HC Coombs: 'to ensure the best is encouraged and those who produce it are given the greatest opportunity to achieve the highest quality of which they are capable'.

3 Trainor, G. and James, A., *Review of the Australia Council*, May 2012, p. 11.

4 Ms Gabrielle Trainor, *Committee Hansard*, 23 April 2013, p. 1.

5 Ms Gabrielle Trainor, *Committee Hansard*, 23 April 2013, p. 1.

6 *Review of the Australia Council*, May 2012, p. 9.

2.9 In relation to the governance and administration of the Council, the Review recommended a revised, more conventional board structure with a strong strategic and contemporary focus, clear lines of communication with the Australian Government and mandated planning processes. It outlined a new model for the allocation of grants which removed consideration of funding applications along artform lines and which established and changed the way in which applications were received, depending on needs in the sector. This addressed a gap identified by stakeholders in relation to new and multidisciplinary artforms, which currently struggled to fit within the Council's funding programs.⁷ This revised structure would retain a focus on the input of experts from the various practice areas to inform and enrich the Council's work. The Review concluded:

If implemented, these recommendations are designed to firmly establish the Australia Council as the expert body for funding work of artistic excellence as part of a contemporary arts ecology. The reforms will deliver flexibility to allow the Council to use its expertise to respond to needs in the sector and to make judgements about how to structure, adapt and change the manner in which it provides funding as the sector evolves. But the recommendations also provide for safeguards by prescribing a more formalised requirement for communication and planning with the Australian Government.⁸

The Bills

2.10 In launching *Creative Australia*, the Government accepted almost all of the recommendations of the Review, and the Australia Council Bill 2013 and the Australia Council (Consequential and Transitional Provisions) Bill 2013 have been introduced to give effect to some of these recommendations.

2.11 The Australia Council Bill 2013 is intended to replace the existing *Australia Council Act 1975*. The purpose of the Bill is to modernise the Council's enabling legislation by:

- 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

7 *Review of the Australia Council*, May 2012, p. 10.

8 *Review of the Australia Council*, May 2012, p. 10.

- 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 21st century arts sector.⁹

2.12 The Australia Council (Consequential and Transitional Provisions) Bill 2013 contains consequential amendments and transitional provisions related to the replacement of the Australia Council Act. In general terms, the Bill allows the continued operation of the Australia Council during the transitional period.

2.13 In relation to the functions and governance structure of the Australia Council, it is useful to compare the relevant provisions of the existing Act with those proposed in the Australia Council Bill.

Existing functions of the Australia Council

2.14 The functions of the Australia Council are currently set out in section 5 of the *Australia Council Act 1975* (the Act). These are:

- to formulate and carry out policies designed:
 - to promote excellence in the arts;
 - to provide, and encourage the provision of, opportunities for persons to practise the arts;
 - to promote the appreciation, understanding and enjoyment of the arts;
 - to promote the general application of the arts in the community;
 - to foster the expression of a national identity by means of the arts;
 - to uphold and promote the right of persons to freedom in the practice of the arts;
 - to promote the knowledge and appreciation of Australian arts by persons in other countries;
 - to promote incentives for, and recognition of, achievement in the practice of the arts; and
 - to encourage the support of the arts by the States, local governing bodies and other persons and organizations;
- 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; and
- to do anything incidental or conducive to the performance of any of the foregoing functions.

9 Explanatory Memorandum, Australia Council Bill 2013, p. 3.

2.15 Section 6 sets out the powers of the Council and, in addition, section 6A sets out three matters to be taken into account by the Council in the performance of its functions and the exercise of its powers:

- the policies of the Commonwealth Government in relation to the arts;
- the policies of State Governments, and of local governing bodies, in relation to the arts, so far as it is practicable to do so; and
- such other matters, if any, as the Minister specifies by notice in writing to the Chairperson.

Recommendations of the Review

2.16 As noted above, the Review recommended 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.'¹⁰

2.17 It proposed that this purpose be supported by four principles, requiring the Council:

- to support work of excellence, at all stages of the artistic life cycle;
- to promote an arts sector that is distinctly Australian;
- to ensure that the work it supports has an audience or market; and
- to maximise the social and economic contribution made by the arts sector to Australia.¹¹

2.18 This purpose should also be supported by a clear statement of the Council's functions under its legislative mandate, which would include:

- to administer and measure the impact of its funding 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.¹²

Proposed new functions of the Australia Council under the Bill

2.19 Clause 9 of the Bill sets out the proposed new functions of the Australia Council:

10 *Review of the Australia Council*, May 2012, p. 14.

11 *Review of the Australia Council*, May 2012, p. 14.

12 *Review of the Australia Council*, May 2012, p. 14.

- to support Australian arts practice that is recognised for excellence;
- to foster excellence in Australian arts practice by supporting a diverse range of activities;
- to recognise and reward significant contributions made by artists and other persons to the arts in Australia;
- to promote the appreciation, knowledge and understanding of the arts;
- to support and promote the development of markets and audiences for the arts;
- to provide information and advice to the Commonwealth Government on matters connected with the arts or the performance of the Council's functions;
- to conduct and commission research into, and publish information about, the arts;
- to evaluate, and publish information about, the impact of the support the Council provides;
- to undertake any other function conferred on it by this Act or any other law of the Commonwealth;
- to do anything incidental or conducive to the performance of any of the above functions.

2.20 Clause 10 restates (and provides for some additional) powers of the Council and, in addition, clause 11 sets out three matters to be taken into account by the Council in the performance of its functions and the exercise of its powers:

- the policies of the Commonwealth Government in relation to the arts; and
- the right of persons to freedom in the practice of the arts; and
- any matters specified in directions given under subsection 12(1).¹³

Existing governance and administration structure

The Council

2.21 Section 9 of the Act establishes the membership of the Australia Council. Subsection (1) provides that the Council comprises between 10 and 14 members. Subsection (2) provides that the Council consists of:

- the Chairperson;
- the Chairperson of each Board;

13 If enacted, subsection 12(1) would provide for Ministerial directions in relation to the performance of functions and the exercise of powers by the Council, or directions requiring the provision of a report or advice on a matter that relates to any of the Council's functions or powers. This provision updates an existing power in section 6B of the Act.

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- persons 'who practise or have practised the arts or are otherwise associated with the arts'; and
 - at least one 'community interest representative'.

2.22 In appointing Council members who are arts practitioners, the Governor-General must endeavour to ensure that 'a majority of the members holding office...are persons who practise or have practised the arts', and the membership of the Council 'includes a reasonable balance of persons who practise or have practised the various arts'.¹⁴

Boards

2.23 Under Part IV of the Act, the Minister is empowered to establish a single co-ordinating Board, and such number of other Boards (known as Artform Boards) as the Minister thinks fit.

2.24 The statutory functions of these Boards are:

- to make such inquiries, and furnish to the Council such reports, in connection with matters referred by the Council; and
- to have functions and powers delegated by the Council.¹⁵

2.25 The co-ordinating Board consists of a chairperson and between four and twelve other members. Other Boards consist of a chairperson and between four and eight other members. A majority of the members of a Board must be 'persons who practise the arts or are otherwise associated with the arts,'¹⁶ and at least one Board member must be a community interest representative.¹⁷

2.26 In its *2011-2012 Annual Report*, the Council notes the establishment of seven Artform Boards: an Aboriginal and Torres Strait Islander Arts Board, a Literature Board, a Music Board, a Visual Arts Board, a Dance Board, a Major Performing Arts Board and a Theatre Board, each comprised of between seven and nine members. These Boards are 'the principal administrators of the Australia Council's funding role' and 'the Council's major source of advice on the development of arts policy and grant programs':

The Australia Council has delegated the power to allocate grants principally to the boards. In assessing grant applications the boards may seek additional guidance in their decisions from experts listed in the Council's Register of Peers. Peers may be invited once per year by each board to assist at grant assessment meetings.

14 *Australia Council Act 1975*, ss. 9(4).

15 *Australia Council Act 1975*, s. 21.

16 *Australia Council Act 1975*, ss. 22(3).

17 *Australia Council Act 1975*, ss. 22(3A).

Peers also provide ‘in-the-field’ assessments and general policy advice to the boards, as commissioned. Under the Council’s Conflict of Interest Code, board members and peers may not assess or advise on their own grant applications or grant applications through which they would be major beneficiaries via a third party. In 2011–12, 17 peers provided external assessments of initiatives or performances and 41 peers participated in board and committee grants assessment meetings.¹⁸

2.27 In evidence to the Committee by Mr Rodney Hall—a former Chairman of the Australia Council—this governance structure was characterised in the following terms:

The Australia Council structure is not, I think, clearly understood in the public, and it is certainly not understood in the review of the Council and the preparation of material for the bill. I think it is clear if one can visualise peer assessment as a kind of ladder, with two uprights and three rungs. One upright is the peer assessors, the other upright is the professional staff, and they are connected with a rung at each level. As I look at it, the ladder's strength comes from vertical integration. In this case, the peer assessment panel is in touch with arts needs and practice as well as understanding the direction the arts is taking. These panels are convened at the first level by an Arts Form Board, which is the second level, and the board chair at the top level, who is the chair of the council. The staff structure on the other leg mirrors this—both vertical and horizontal connections. So it is not a business model. It is a model specifically for the function that it performs.¹⁹

Recommendations of the Review

2.28 The Review found a number of major impediments in the current governance structure:

- the Council did not have the ability to develop a balanced, conventional, skills-based board that served the Council’s strategic and operational needs—in particular, the role of the chairs of each Artform Board on the Council had inherent conflicts;
- the size of the Governing Board was determined by the number of Artform Board chairs and not the needs of the Board;
- the credibility of the Council’s new Governing Board with the arts sector must be balanced with the requirement for broad-based strategic planning and policy setting; sufficient independence to reduce the potential for conflict of interest; and broader professional expertise among its membership;
- there was no requirement for the Council to take a formal role in setting the strategic direction of the organisation, for example, through a Strategic Plan;

18 Australia Council, *Annual Report 2011-12*, pp 51–2.

19 Mr Rodney Hall, private capacity, *Committee Hansard*, 23 April 2013, p. 21.

- there was insufficient provision for the Minister and the Council to collaboratively engage in corporate and strategic planning processes;
- the appointment process was burdensome, with Ministerial responsibility required for every appointment, and the Governor-General's approval needed to appoint the Chair;
- there was no requirement for the Minister to take into account the organisation's overall skill sets when appointing members of the Governing Board, the Artform Boards or the Council's General Manager/Chief Executive Officer; and
- the Board currently had no formal role in the appointment of the General Manager/CEO of the Council.²⁰

2.29 Given these impediments, the Review made a number of recommendations. First, it recommended the 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.²¹

2.30 It also recommended that the enabling legislation should provide for:

- a conventional, skills-based Governing Board of no more than nine members, with all appointments made by the Minister after receiving advice from the Chair, who should also be appointed by the Minister;
- this 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';
- this new Board should set its direction and develop its vision with management through its strategic planning processes—Board sub-committees (for example, Audit, Finance, Risk, Nominations) should contribute to the governance of the organisation but not to approve funding or dictate the Council's strategic priorities;
- 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 Board and management, as directed by that Board—these Panels should provide sectoral expertise and advise on and inform the Strategic Priorities of the Board; and
- 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, and may conclude the activities of any Panel as and when it saw fit.²²

20 *Review of the Australia Council*, May 2012, p. 25.

21 *Review of the Australia Council*, May 2012, Recommendation 17, p. 36.

22 *Review of the Australia Council*, May 2012, pp 25–6.

2.31 The rationale for such a Board structure was put to the Committee by one of the Review's co-authors in the following terms:

We were very clear that one of the things we were trying to remove from the board to make it more contemporary was the representational nature of the board, which actually meant that strategy decision-making had inherent conflicts in it. We are not trying to remove from the board the deep capacity to examine the arts and also policy and innovation going forward and that was our fundamental premise for making the recommendation we made. We believe that this cannot turn into, for want of a better description which was pushed at us, a corporate board. It cannot be full of lawyers, accountants and investment bankers. That would not be a good outcome. We think it can be filled with people who have some of the skills that those people provide but who are also in the arts community themselves and have deep understanding. We are trying to get the right mix so that we get a board that is operating truly strategically rather than being caught in a silo mentality.²³

2.32 In responding to this recommendation, the Government agreed:

...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.²⁴

2.33 In addition, the Government noted:

- the desirability of a standard governance approach across agencies governed under the *Commonwealth Authorities and Companies Act 1997*; and
- that the use of Sector Advisory Panels 'will ensure that artform expertise is available to advise the Council's new Governing Board and to inform its strategic directions'.²⁵

Governance and administration under the Bill

2.34 The Bill essentially adopts the governance structure proposed by the Review. Part 3 of the Bill establishes a Board comprising the Chair, Deputy Chair, Chief Executive Officer and between five and nine other members. A person must not be appointed as a Board member unless the Minister is satisfied that the person has 'appropriate qualifications, knowledge, skills or experience' and, in making

23 Mr Angus James, *Committee Hansard*, p. 4.

24 Department of Regional Australia, Local Government, Arts and Sport, *Submission 27*, p 15.

25 Department of Regional Australia, Local Government, Arts and Sport, *Submission 27*, p 16.

appointments to the Board, the Minister 'must have regard to the desirability of the Board including members who have skills, experience or involvement in the arts.'²⁶

2.35 The Explanatory Memorandum accompanying the Bill expands on these provisions in the following terms:

Subclause 17(3) provides for a skills-based Board to be introduced, which will provide for a mix of arts and corporate knowledge and expertise, as recommended in the Review. Such knowledge or expertise could include (but is not limited to) 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.

Subclause 17(4) is intended to assist readers by making it clear that the Minister must consider the importance of having people with skills or experience in the arts appointed to the Board of the Council, as well as people who are involved in the arts more broadly. This includes, for example, having arts practitioners or arts workers appointed to the Board, that is, people with arts management or arts administration expertise.²⁷

2.36 Division 3 of Part 3 sets out procedures for the conduct of Board meetings, including voting, the making of decisions without meeting, and the keeping of minutes.

2.37 Part 4 of the Bill deals with the establishment of committees. Subclause 31(1) provides that the Board *may* establish committees to advise or assist in the performance of the functions of the Council or the Board. A committee may be constituted wholly by Board members, or wholly by non-Board members, or by a combination. It is the role of the Board to determine a committee's terms of reference and the procedures it should follow. A Note to subclause 31(1) states: 'For example, the Board may establish an expert committee of persons with appropriate experience for the purposes of peer assessment.'

2.38 The Explanatory Memorandum expands on this provision in the following terms:

The inclusion of subclause 31(1) will support the implementation of the Australian Government's response to the Review's recommendation to remove the obligation for the Council to establish artform boards. It is intended that the inclusion of this measure will provide the Council with the necessary flexibility to establish committees, including for allocating grants based on peer assessment, and will enable the Council to maintain access to artform specific expertise, as well as strategic advice on the arts sector more broadly. The note in this subclause is intended to clarify that the principle of peer assessment of grant applications is provided for in this section, and

26 Australia Council Bill 2013, subclauses 17(3) and (4).

27 Explanatory Memorandum, Australia Council Bill 2013, p 17.

that this will be ensured through the establishment of expert committees comprised of persons with appropriate experience, that is, arts experience or artform specific knowledge and expertise.²⁸

2.39 The essence of the relationship between the existing provisions and the new provisions was outlined by the Department in the following exchange:

Senator BRANDIS: Don't you think, Dr Arnott, the Australian public, or at least the arts community, would be very surprised to learn that what the government is bringing forward to the parliament is a bill in which we replace an arrangement in which the artform boards' chairs have a seat around the table, and all the arts are represented at the peak of the Australia Council, to a position in which there is no requirement that even a majority of the board have any background in the arts – and, strictly speaking, because it is only something the minister has to regard as a desideratum, there is no requirement that any of the members of the board have knowledge, skills or experience in the arts?

Ms Foster: Senator, I think we are really, as I said, going to the question of the function of the board, which is about focusing on organisational performance, strategy, planning and operational frameworks, risk management, compliance, major expenditure, financial and other reporting and stakeholder management. That is the function of the board in the organisation. It will be supported, in its decision-making, by a series of committees with expertise who will be making recommendations and/or decisions on issues directly relating to the funding of grants, for example.

Senator BRANDIS: Depending on what the board decides and what committee structures it decides to set in place, and that will depend on who is on the board at any given time.

ACTING CHAIR: Am I right in thinking that the boards as described in the old act are being replaced by the committees in the new act – as they are described in the original, the *Australia Council Act 1975*. It talks about membership of boards. I think the council creates the boards in a similar way to the way the board will be establishing committees under the new act.

Ms Foster: That is correct.²⁹

2.40 Chapter 3 of this Report will discuss in detail the issues raised before the Committee in relation to the changes outlined above.

28 Explanatory Memorandum, Australia Council Bill 2013, p. 21.

29 Ms Stephanie Foster, *Committee Hansard*, 23 April 2013, p. 44.