

The Senate

Rural and Regional Affairs
and Transport
Legislation Committee

Australia Council Bill 2013 [Provisions]

Australia Council (Consequential and
Transitional Provisions) Bill 2013
[Provisions]

May 2013

© Commonwealth of Australia 2013

ISBN 978-1-74229-811-5

This document was prepared by the Senate Standing Committee on Rural and Regional Affairs and Transport and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Members

Senator Glenn Sterle, Chair	Western Australia, ALP
Senator the Hon. Bill Heffernan, Deputy Chair	New South Wales, LP
Senator Alex Gallacher	South Australia, ALP
Senator Fiona Nash	New South Wales, NATS
Senator Rachel Siewert	Western Australia, AG
Senator the Hon. Lin Thorp	Tasmania, ALP

Substitute members for this inquiry

Senator the Hon. George Brandis	Queensland, LP
to replace Senator the Hon. Bill Heffernan (on 23 April 2013)	

Participating members participating in this inquiry

Senator the Hon. George Brandis	Queensland, LP
Senator Gary Humphries	Australian Capital Territory, LP
Senator Christine Milne	Tasmania, AG

Secretariat

Mr Stephen Palethorpe, Secretary
Mr James Warmenhoven, Inquiry Officer
Dr Chris Curran, Principal Research Officer
Mr Terry Brown, Principal Research Officer
Ms Trish Carling, Senior Research Officer
Mr Nick Craft, Senior Research Officer
Ms Kirsty Cattanach, Research Officer
Ms Lauren Carnevale, Administrative Officer

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3511
Fax: 02 6277 5811
E-mail: rrat.sen@aph.gov.au
Internet: www.aph.gov.au/senate_rrat

TABLE OF CONTENTS

Membership of committee.....	iii
Abbreviations	vii
List of Recommendations	ix
Chapter 1.....	1
Introduction	1
Conduct of the inquiry.....	1
Purpose of the bill.....	1
Structure of report.....	2
Acknowledgements	2
Chapter 2.....	3
Background and key provisions of the bills	3
Introduction	3
The Australia Council Review	3
The Bills	5
Chapter 3.....	15
Issues	15
General support for the Bills	15
Functions of the Council	16
Governance concerns.....	27
APPENDIX 1	33
Submissions Received.....	33
APPENDIX 2	35
Public Hearings and Witnesses	35
APPENDIX 3	37
Senate Scrutiny of Bills Committee, Alert Digest No. 5 of 2013	37

ABBREVIATIONS

AMPAG	Australian Major Performing Arts Group
the Bill	Australia Council Bill 2013
the Department	The Department of Regional Australia, Local Government, Arts and Sport

LIST OF RECOMMENDATIONS

Recommendation 1

3.56 The Committee recommends that clause 9 of the Bill be amended to include words to the effect of:

- To support Aboriginal and Torres Strait Islander arts practice;
- To uphold and promote freedom of expression in all artistic forms;
- To provide support for the arts in a manner that reflects the diversity of Australia; and
- To encourage community participation in the arts.

Recommendation 2

3.72 The Committee recommends that where the purpose of a committee established under clause 31 of the Bill is to recommend a decision relating to policy or funding in a particular art form, the committee is to be constituted of at least one member with appropriate experience in that art form, for the purpose of peer assessment.

Recommendation 3

3.73 The Committee recommends that, subject to the other recommendations made in this report, the Australia Council Bill 2013, and the Australia Council (Consequential and Transitional Provisions) Bill 2013, be passed.

Chapter 1

Introduction

Conduct of the inquiry

1.1 The Australia Council Bill 2013 and the Australia Council (Consequential and Transitional Provisions) Bill 2013 were introduced and read a first time in the House of Representatives on Wednesday, 20 March 2013.¹

1.2 On 21 March 2013, on the recommendation of the Selection of Bills Committee, the provisions of the bills were referred to the Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by 9 May 2013.²

1.3 The reasons given for the Selection of Bills Committee's recommendation were to determine the impact of the provisions contained in the bills on the Australia Council and on Australian arts and cultural organisations.³

1.4 In accordance with its usual practice, the committee advertised the inquiry on its website and also wrote to a number of relevant organisations inviting submissions. Twenty-eight submissions were received, as shown in Appendix 1.

1.5 The committee held a public hearing on Tuesday, 23 April 2013, in Canberra. A list of witnesses who appeared at the public hearing may be found at Appendix 2. The references to the Hansard transcript made in this report are to the proof transcript and page numbers between it and the official transcript may vary. The Hansard transcript of the hearing is available online at the committee's website.⁴

1.6 After the committee had concluded its deliberations, the Senate Scrutiny of Bills Committee made its comments on the bills available to the committee. The committee appreciates receiving these comments which it notes and which may be found at Appendix 3.

Purpose of the bill

1.7 The Australia Council Bill 2013 (the bill) provides for the functions, powers and governance structure and arrangements of the Australia Council. It establishes a governing board and provides for the terms and conditions of appointed board

1 *House of Representatives Votes and Proceedings*, 20 March 2013, p. 2185.

2 *Journals of the Senate*, 21 March 2013, p. 3865.

3 Selection of Bills Committee, *Report No. 4 of 2013*, Appendix 4.

4 See www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/aust_council_bills_2013/hearings/index.htm.

members, procedures of the board, and enables the board to establish committees. The bill also provides for the appointment of a Chief Executive Officer and staff and consultants, requires an annual corporate plan to be prepared, provides for financial arrangements and provides for annual reporting requirements.

1.8 The Australia Council (Consequential and Transitional Provisions) Bill 2013 repeals the *Australia Council Act 1975*, and enables the Australia Council to continue to operate during the transition period.

Structure of report

1.9 The remaining chapters of this report are as follows:

- Chapter 2 describes the background to, and the key provisions of, the bill; and
- Chapter 3 sets out the key issues raised during this inquiry.

1.10 Additional comments or reports in relation to these bills may be tabled in the Senate at a future time.

Acknowledgements

1.11 The committee appreciates the time and effort of all those who provided both written and oral submissions to this inquiry—particularly in view of the short timeframe. Their contributions have assisted the committee considerably in its inquiry.

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.

-
- 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.

Chapter 3

Issues

General support for the Bills

3.1 Many who gave evidence to the Committee both accepted that the legislation governing the Australia Council should be brought up to date and supported the general thrust of the Bills.¹ In general terms, the Australia Council Bill was seen as improving the clarity of the Council's remit, reflecting the Council's responsibilities both to support artists and develop audiences for their work, and—by creating a skills-based Board and requiring a corporate plan—was seen as laying down the basis for a more flexible and effectively operating Council in the future.

3.2 However, despite the broad support for the bills, many witnesses also raised concerns in two key areas: the changes to particular functions of the Council as set out in clause 9 of the Bill, and the effect of changes to the general governance arrangements as set out in clauses 17 and 31 of the Bill. These concerns are discussed in further detail below.

Funding procedures

3.3 Some submitters raised concerns about funding procedures. For example, Ms Elizabeth Rogers, representing a number of regional arts organisations, noted the perception that Australia Council funding was difficult to access for those applicants from regional areas.²

3.4 The Queensland Minister for Science, Information Technology, Innovation and the Arts considered that the Bill had missed an opportunity to address entrenched inequality in arts funding between some States.³

3.5 The Arts Law Centre recommended that the Bill should specifically establish funding arrangements for Aboriginal and Torres Strait Islander arts programs.⁴

3.6 And the Australian Major Performing Arts Group (AMPAG) noted that base funding, which was vital for the major performing arts companies, was negotiated within tripartite agreements between companies and the Australian Government and relevant State governments. AMPAG's support for the Bill was conditional on the

1 See, for example, Australian Major Performing Arts Group, *Submission 8*; APRA/AMCOS, *Submission 23*; Music Council of Australia, *Submission 10*; Museum of Contemporary Art Australia, *Submission 26*; Chamber of Arts and Culture WA Inc, *Submission 12*; and Australian Copyright Council, *Submission 9*.

2 Ms Elizabeth Rogers, *Committee Hansard*, 23 April 2013, p. 13.

3 Hon John-Paul Langbroek MP, *Submission 28*, p. 2.

4 Arts Law Centre of Australia, *Submission 17*, p. 2.

continuation of tied funding, and it proposed that subclause 10(3) of the Bill operate concurrently with subclause 12(2) in so far as it related to base funding allocations for major performing arts organisations.⁵

3.7 No evidence was put to the Committee to suggest that the passage of the Bill would have any effect on specific funding decisions, and, given the limited scope and expedited timetable of this inquiry, the Committee considers that it is not the appropriate forum in which to evaluate issues relating to funding.

3.8 No concerns were raised, either in submissions or at the hearing, in relation to the Australia Council (Consequential and Transitional Provisions) Bill 2013, and that bill is not referred to in this Chapter.

Functions of the Council

3.9 Many witnesses queried the proposed changes to the functions of the Australia Council. The Council's existing functions under the Act, and proposed new functions under the Bill, are set out in paragraphs 2.14–2.20 of this Report.

3.10 The Department of Regional Australia, Local Government, Arts and Sport (the Department) drew the Committee's attention to the Australia Council Review, which had recommended that the Council's core purpose should be restated in the following terms: 'to support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field.' The Department also told the Committee that the functions under the Bill had been redrafted to give effect to that purpose.⁶

3.11 However, some witnesses felt that the existing functions were much more appropriate for an organisation involved with the arts such as the Australia Council than were the new functions. For example, Mr Rodney Hall, a former Chairman of the Australia Council said:

What is it about [the existing Australia Council functions] that warrants deletion? It seems to me that all of them are very worthy aims... I think Nugget Coombs or whoever drafted those did a very good job of them. But you pointing that out is very significant because it is to do with the attempted relocation of the council as an administrator of a block of public funds, in order to generate income to an industry. We all know we can put things in different categories; we can examine the arts as an industry if we like, but in point of fact that is not how the arts operate. They generate money, which could be called an industry, but the arts are what make the market—the market does not exist until the work of art is created to make the market... Removing these provisions from the act is to relocate the council as a manager of resources to generate other resources, rather than a manager of resources to invest in the development and exploration of where

5 Australian Major Performing Arts Group, *Submission 8*, p. 2.

6 Dr Stephen Arnott, *Committee Hansard*, 23 April 2013, p. 48.

art is taking us including the new art forms and the new electronic platforms of delivery. To me, the old act is on that very basis actually a more practical and workable document for the exploration of the new than the bill that is before you... [The] new provisions are entirely to do with some preconceived idea of a saleable product, because it has had endorsement already. I think the old act is much more open to exploring, much more open to saying, 'Let's get excellence as our very first principle'—promoting excellence.⁷

3.12 Emeritus Professor David Williams said that 'it does seem that some of the very best of the 1975 Act has gone by the book,'⁸ and a similar view was put by Ms Tamara Winikoff, representing the National Association for the Visual Arts, who also preferred the existing functions, with some modest updating:

In principle, I would agree with maintaining what was covered by the old functions. The thing that has become more evident in the intervening 40 years is the active role of communities as participants in the creation of art, the critiquing and discussion of arts practice as well as being the audience for arts. In trying to promote that slightly different take on the fostering of community participation, we believe that that needs a bit of updating, but otherwise we would agree with you that the functions as they are stated in the old act, with the exception of the things that we have mentioned, are fine.⁹

3.13 Mr Rowan Ross, representing AMPAG, told the Committee that he was unaware of the reasons why the existing functions had been changed,¹⁰ and Ms Gabrielle Trainor, who co-chaired the Review which gave rise to the legislation, told the Committee that the Review had not specifically recommended the removal or re-drafting of any particular functions.¹¹

3.14 Some witnesses felt that particular functions included in the 1975 Act, which had been removed by the Bill, should be retained. Others felt that certain functions which formed part neither of the existing Act nor the Bill should be added to those in the Bill.

3.15 In evidence, concerns were raised about the 'excellence' function, the 'community arts' function, the 'national identity' function, the 'state and local government bodies' function and the 'freedom of expression' function. The view was also put that the Bill should include a specific 'indigenous arts' function. Each of these items is discussed below.

7 Mr Rodney Hall, *Committee Hansard*, 23 April 2013, p. 26.

8 Emeritus Professor David Williams, *Committee Hansard*, 23 April 2013, p. 31.

9 Ms Tamara Winikoff, National Association for the Visual Arts, *Committee Hansard*, 23 April 2013, p. 38.

10 Mr Rowan Ross, AMPAG, *Committee Hansard*, 23 April 2013, p. 18.

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

Excellence

3.16 Under subparagraph 5(a)(i) of the existing Act, one function of the Australia Council is to formulate and carry out policies designed 'to promote excellence in the arts.'

3.17 The Bill proposes to divide this function, requiring the Council 'to support Australian arts practice that is recognised for excellence' and 'to foster excellence in Australian arts practice by supporting a diverse range of activities.'¹²

3.18 The Explanatory Memorandum observes that the first limb 'reflects the new purpose of the Council as recommended in the Review' as well as 'the Council's leadership role in the Australian arts sector', and the second limb was 'intended to ensure that the Council can continue to support a wide range of activities that will contribute to the development of excellence in Australian arts practice.' Some examples of this were provided:

- supporting artists from overseas to visit Australia and impart their skills and knowledge to Australian artists;
- an Australian artist pursuing 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); or
- a project that facilitates cultural engagement between Australian artists and artists overseas which would develop people-to-people links and further develop the arts practice of participants.¹³

3.19 In evidence, it was suggested that this difference in wording represented a narrowing of function—from 'promoting excellence' to, in effect, 'supporting established excellence,' and from 'fostering excellence' to 'fostering excellence through diversity'. For example, Mr Elizabeth Rogers told the Committee:

If it is going to be used as 'excellent', it has to be a really generic term rather than a really specific interpretation of the word. My feeling is that the clause in the 1975 Act, 'to promote excellence in the arts', is perhaps a broader term than 'to support Australian arts practice that is recognised for excellence'. It is about the promotion, the fostering, the encouraging and the aspiration to be excellent as well as those who have achieved the standard of national and international recognition.¹⁴

3.20 And Mr Rodney Hall noted that:

12 Australia Council Bill 2013, paragraphs 9(1)(a) and (b).

13 Australia Council Bill 2013, paragraphs 9(1)(a) and (b).

14 Mr Elizabeth Rogers, *Committee Hansard*, 23 April 2013, p 11.

I think you quite rightly point out that new provisions are entirely to do with some preconceived idea of a saleable product, because it has had endorsement already. I think the old act is much more open to exploring, much more open to saying, 'Let's get excellence as our very first principle'—promoting excellence. I have to say that the Council had a lot to do with the training institutions in its early days and with the idea of training for excellence. Once we have got the excellence we can make an exciting mix out of it, but excellence does not, except in rare case, come from a predesignated spread of a multiple, jack-of-all-trades attitude to what the arts are. I do believe very much that the original nine points are pretty succinct. It is very interesting to read into it what the new direction is breaking down as much as what it is trying to put in its place.¹⁵

3.21 While conceding that the wording did appear more narrow, Mr Rowan Ross doubted that it would have any practical effect, observing that 'in reality I am not sure that anything is going to change.'¹⁶

3.22 Some felt that the wording entrenched a 'top-down' supply driven model. For example, Regional Arts NSW noted that:

...the notion of 'excellence' runs the risk of appearing exclusive and elitist and eliciting differences in interpretation that will be problematic for policy-makers, grant assessors and community grant seekers, to name but a few. It is expected that the requirement for excellence will preclude many grant-seekers from submitting applications to Australia Council programs... Under the revised functions the significant amount of new Federal funding recently directed to the Australia Council will be skewed towards 'excellence' to the detriment of participation and access.¹⁷

3.23 The Department did not accept that the re-wording represented a 'narrowing' of purpose, but was simply a re-phrasing.¹⁸ For example, the Bill did not 'foster excellence by supporting diversity', but fostered excellence 'by supporting a diverse range of activities,' and the use of the term 'recognised' for excellence was simply intended to reflect the principle of peer assessment—"that peers convene to 'recognise' excellence in Australian arts practice and make decisions to support this excellence".¹⁹

15 Mr Rodney Hall, *Committee Hansard*, 23 April 2013, p. 27.

16 Mr Rowan Ross, *Committee Hansard*, 23 April 2013, p. 17.

17 Regional Arts NSW, *Submission 2*, p. 1; Queensland Minister for Science, Information Technology, Innovation and the Arts, *Submission 28*, p. 1.

18 Dr Stephen Arnott, *Committee Hansard*, 23 April 2013, p. 48.

19 Department of Regional Australia, Local Government, the Arts and Sport, *Supplementary Submission*, pp 1–2.

Arts in the community

3.24 Under subparagraph 5(a)(iv) of the existing Act, one function of the Australia Council is to formulate and carry out policies designed 'to promote the general application of the arts in the community.'

3.25 The Bill would remove this function, replacing it with a separate and distinct function 'to support and promote the development of markets and audiences for the arts'.²⁰

3.26 The Explanatory Memorandum states that this function is intended to include the Council's role in ensuring that the work it supports has an audience or market. In the Australian Government's response to the Review, this was agreed as a principle in support of the Council's new purpose and also highlights the Council's audience development role. It is also linked to the function listed at paragraph 9(1)(g), which relates to the conducting and commissioning of research on the arts, as the performance of this function may assist in the development of markets and audiences for the arts.

3.27 A number of submissions proposed that this 'regrettable'²¹ omission represented a clear shift from community engagement and a commitment to recognise citizens as creators. It was also argued that it was contrary to aspects of *Creative Australia*. With no mention of the community in the Bill, it was suggested that the Australia Council no longer had any explicit responsibility for arts in the community, particularly in regional areas.²² Indeed, the absence of this function was also seen as narrowing of the focus of the Council to excellence in arts practice and the development of markets and audiences.²³ In the words of Artslink Queensland:

Those drafting the new Bill have completely overlooked the fact that, despite the high level of engagement and participation by Australian citizens in a range of arts activity, the vast majority do not have an opportunity to engage with the output of the subsidised arts funded by the Australia Council.

Under the proposed legislation there is no obligation for the Australia Council to find ways to translate the goals and values of our new National Cultural Policy into action: that is, to find ways to overcome the educational, financial, social and cultural barriers to citizens as cultural

20 Australia Council Bill 2013, paragraph 9(1)(e). The Australian Performing Arts Centres Association strongly supported the inclusion of this function: *Submission 25*, p. 1.

21 Australian Society of Authors, *Submission 7*, p. 1.

22 For example, Regional Arts Australia, *Submission 1*, p. 1; Australian Society of Authors, *Submission 7*, p. 1; Queensland Minister for Science, Information Technology, Innovation and the Arts, *Submission 28*, p. 1; Tasmanian Regional Arts, *Submission 6*, p. 1; Ms Elizabeth Rogers, *Committee Hansard*, 23 April 2013, p. 10.

23 Regional Arts NSW, *Submission 2*, p. 1.

producers, and to promote their active and critical engagement with new art and with their cultural heritage.²⁴

3.28 Similarly, Museums Australia noted that much innovative policy work and program support had recently gone into bringing artists into communities as spearhead agents of community cultural development, especially in regional communities. The passive concept of 'audiences' and the instrumental concept of 'markets' was an inadequate substitute for the much more active concept of 'community engagement'.²⁵

3.29 Community Arts Network WA suggested that a 'community arts' function and a 'markets and audiences' function should not be seen as mutually exclusive.²⁶

3.30 In response, the Department observed that the other functions in the Bill were sufficiently broad to encompass community arts, and that explicitly including them might make the function too sector specific:

The bill does not seek to list any particular sector or audience so that it is not actually limiting the functions of the council into the future. If you start putting one specific sector or interest group in then you beg a question about where are the others.²⁷

3.31 Ms Trainor and Mr James drew the Committee's attention to one of conclusions of their Review, where the separate roles of the Council and the Department had been clearly distinguished:

We saw there was an overlap, or concentric circles, of access and excellence. We thought that, whilst there were those overlaps, we should give responsibility for excellence to the Australia Council and responsibility for more broader access to the department. In that context, we did understand there was overlapping because we talk about the life cycle of an art form. So we are not actually saying that the Australian Council would only look at excellence by itself because there is a life cycle of excellence which you need to promote and stimulate.²⁸

National identity and diversity

3.32 Under subparagraph 5(a)(v) of the existing Act, one function of the Australia Council is to formulate and carry out policies designed to 'foster the expression of a national identity by means of the arts.'

24 Artslink Queensland, *Submission 14*, pp 2–3.

25 Museums Australia, *Submission 21*, p. 2.

26 Community Arts Network WA, *Submission 4*, p. 2.

27 Ms Stephanie Foster, *Committee Hansard*, 23 April 2013, p. 49.

28 Mr Angus James, *Committee Hansard*, 23 April 2013, p. 3.

3.33 The Bill removes this function and a number of witnesses challenged the removal of a particular 'national or cultural identity' function from the Bill.²⁹ For example, Artslink Queensland noted that *Creative Australia* sought to ensure that 'Australian identity and stories are not swamped in a globe awash with cultural products, that the full diversity of our society is represented'.³⁰ It continued: 'Extraordinarily the new bill does not seek to enshrine this function into the work of Australia's principal arts funding body.'³¹

3.34 The Australian Society of Authors drew the inference that, as the Australia Council will now have no responsibility for Australian cultural identity, it may not concern itself with any related matters—such as advancing the means and resources by which our own stories and cultural meanings may be further developed and disseminated.³²

3.35 For some, the greater diversity inherent in a multicultural Australia made the idea of a 'national identity' a little more problematic,³³ while others proposed that terms such as 'culture' and 'heritage' might provide some alternative broad underpinning concepts relevant to the functions of the Council.³⁴

3.36 The Arts Law Centre of Australia, referring to the Convention on the Protection and Promotion of the Diversity of Cultural Expression, recommended that the bill include a specific function which reflected part of that Convention—to support and promote the creation of diverse cultural expressions and to encourage access to a diversity of cultural expressions.³⁵ According to the National Association for the Visual Arts, the inclusion of such a provision would ensure:

...the opportunity for the Council to support “a diverse range of activities” in recognition that our culture is one which includes cultural expression by people from a range of cultural experience and backgrounds. This includes the perspectives of Indigenous artists, those with a disability, artists living in regional and remote areas of the country and people from different genders and sexual orientations.³⁶

3.37 In response, the rationale for the removal of this particular function was put by the Department in the following exchange:

29 Regional Arts Australia, *Submission 1*, p. 2.

30 *Creative Australia*, p. 43.

31 Artslink Queensland, *Submission 14*, p. 2.

32 Australian Society of Authors, *Submission 7*, p. 2.

33 Ms Elizabeth Rogers, *Committee Hansard*, 23 April 2013, p. 18.

34 Museums Australia, *Submission 21*, p. 2.

35 Ms Robyn Ayres, *Committee Hansard*, 23 April 2013, p. 38.

36 National Association for the Visual Arts, *Submission 16*, p. 2.

Ms Foster: Once again if we look at the way in which Australian arts practice is designed, we think that goes to the heart of that sentiment which, if you like, in 70s language was trying to articulate that we were building a national identity and the arts was part of that.

Senator BRANDIS: So you think this language is dated.

Ms Foster: I do. If you look at the kind of explanation we have in the cultural policy which has been released, it really is saying that we are a vibrant, proud nation with a strong identity and arts is fundamental to that.³⁷

State and local governing bodies

3.38 Under subparagraph 5(a)(ix) of the existing Act, one function of the Australia Council is to formulate and carry out policies designed 'to encourage the support of the arts by the States, local governing bodies and other persons and organisations.'

3.39 A number of submissions queried the removal of this function. For example, the Chamber of Arts and Culture WA Inc proposed that, with no mention of relationships between state and local government, the Australia Council will have no responsibility for working with these partners:

A significant proportion of arts organisations and arts bodies rely on matching State and Territory funding to function effectively. Initiatives developed and pursued by the Australia Council in the past including the Visual Arts and Craft Strategy have supported this approach and were further supported by an MOU through the (now lapsed) Cultural Ministers Council. The newly developed National Arts and Culture Accord has the potential to deliver further benefits to the people of Australia.

As local government authorities take an increasingly high profile role throughout Australia in terms of development and funding of galleries, museums and programs of cultural enrichment, it becomes more important that this role is given weight within the new Bill. *Creative Australia* refers to the 'dependency on partnerships – across agencies, with state and territory and local governments.' The roles of States, Territories and Local Governments are critical to developing a holistic approach and to achieving better value for investment.

Relieving the Australia Council of a fundamental responsibility to work effectively and fairly with these partners presents a significant risk to the diversity and breadth of our cultural fabric.³⁸

3.40 The Australian Performing Arts Centres Association saw the removal of this function as 'a critical issue' and proposed that the Bill include a provision requiring

37 Ms Stephanie Foster, *Committee Hansard*, 23 April 2013, p. 49.

38 Chamber of Arts and Culture WA Inc, *Submission 12*, p. 5. See also National Association for the Visual Arts, *Submission 16*, p. 4.

effective communication and collaboration between the multiple tiers of government, specifically in relation to funding and research initiatives.³⁹

3.41 Similarly, the Music Council of Australia proposed that this function be retained 'to ensure the Australia Council exerts its influence and authority to maximise support for the arts across the country—appropriate for the lead national agency.'⁴⁰ Its retention was seen as vital in leveraging increased support for the arts from multiple sources, and encouraging efficient use of resources and minimising duplication.

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

There are structures like ministerial meetings between cultural ministers. There is an accord that has just been signed between the Commonwealth and the states on cooperation and collaboration in all of these areas. So there is a much more sophisticated architecture around this now that did not exist in the seventies when it was seen to be much more necessary to make a conscious statement that somehow we needed to draw the states and the territories into this space.⁴¹

Freedom in the practice of the arts

3.43 Under subparagraph 5(a)(vi) of the existing Act, one function of the Australia Council is to formulate and carry out policies designed 'to uphold and promote the right of persons to freedom in the practice of the arts'.

3.44 The Bill removes this as a Council function, but relocates it in paragraph 11(b) as a matter which the Council must take into account in the performance of its functions and the exercise of its powers.

3.45 For many, the removal of this function was a significant matter of concern.⁴² For example, the Australian Society of Authors suggested that the political and social implications of the omission were profound—in effect implying that, as it will take no responsibility for the right of persons to freely practice the arts, the Australia Council will thus have no responsibility towards the protection and extension of freedom of

39 Australian Performing Arts Centres Association, *Submission 25*, p. 2.

40 Music Council of Australia, *Submission 10*, p. 2.

41 Ms Stephanie Foster, *Committee Hansard*, 23 April 2013, p. 50.

42 See, for example, Regional Arts Australia, *Submission 1*, p. 2; and Country Arts WA, *Submission 3*, p. 2.

artistic expression.⁴³ For the Museum of Contemporary Art Australia, this function 'sits at the foundation of a diverse and confident arts sector'.⁴⁴

3.46 The National Association for the Visual Arts believed that locating the issue of freedom of expression in the matters to be taken into account did not oblige the Council to be proactive:

It is a rather passive statement. What we would recommend is the insertion of a new clause in 'Functions' which says: 'to uphold and promote the rights of persons to freedom of expression in the form of art or the arts'. We believe that this should not be a passive act by the council but the council should be active in not only respecting the issue of freedom of expression in its own work and decision-making, but also that it should take an active role in promoting those rights in the community.⁴⁵

3.47 The Arts Law Centre of Australia drew attention to Article 19(2) of the International Covenant on Civil and Political Rights, which refers to 'the right to freedom of expression in the form of art' and proposed that the provision should be redrafted in terms which accorded with Article 19(2).

Arts Law believes the statement "*the right to freedom of expression in the form of art*" reflects the wording of Article 19(2) ICCPR, which states the freedom of expression then goes on to provide examples of the freedom, which include "in the form of art". Arts Law submits that the statement "*the right of persons to freedom in the practice of the arts*" could be misunderstood to be merely a freedom to practice art, rather than what is intended, as described in the Explanatory Memorandum, to engage the 'right to freedom of expression in the form of art' that is set out in Article 19(2) ICCPR.⁴⁶

3.48 In a practical sense, Mr Rowan Ross from AMPAG, noting that freedom of expression had been moved from a function to a matter to be taken into account, observed 'at the end of the day the council still has to have regard to it, so it is still important'.⁴⁷

3.49 The Department explained that the repositioning of this provision was not intended to demote it in importance, but simply to ensure that the Council took it into account with regard to the performance of all its functions.⁴⁸

43 Australian Society of Authors, *Submission 7*, p. 2.

44 Museum of Contemporary Art Australia, *Submission 26*, p. 1.

45 Ms Tamara Winikoff, *Committee Hansard*, 23 April 2013, p. 37.

46 Arts Law Centre of Australia, *Submission 17*, p. 4.

47 Mr Rowan Ross, *Committee Hansard*, 23 April 2013, p. 18.

48 Ms Stephanie Foster, *Committee Hansard*, 23 April 2013, p. 47.

Centrality of Aboriginal and Torres Strait Islander art

3.50 As noted in paragraph 2.2 of this Report, the First Goal in *Creative Australia* is: 'Recognise, respect and celebrate the centrality of Aboriginal and Torres Strait Islander cultures to the uniqueness of Australian identity'. However, the Bill makes no mention of Aboriginal and Torres Strait Islander culture and its primacy in Australia's heritage and identity. The 1975 Act similarly makes no such mention and the Australia Council Review did not make a recommendation on this issue.⁴⁹

3.51 Many submitters stated that the Bill should specifically acknowledge Aboriginal and Torres Strait Islander art, given current discussions about the Constitutional recognition of indigenous peoples and, more particularly, to ensure that the Bill was in accordance with the National Cultural Policy. Its inclusion was seen as a way of obliging the Australia Council to find ways to translate the goals and values of the new National Cultural policy into action.⁵⁰ Indeed, no-one argued against the inclusion of this function.

Committee view

3.52 The Committee accepts that the environment which gave rise to the Australia Council Act in 1975 is very different from the environment which prevails today. There is a need to refresh and modernise the functions of the Council to take account of the many changes since 1975, and to provide flexibility in the face of changes yet to come.

3.53 Many of the functions set out in the Bill are unobjectionable, and are generally applicable to any Commonwealth statutory authority. Conversely, some of the functions are specific to the Australia Council.

3.54 While semantic arguments may be had as to whether the 'excellence' function has been narrowed, and whether the change will have any practical effect on the work of the Council, the Committee notes that the legislated functions of an organisation are vital. They set out the basic purposes of the organisation and, in relation to the Australia Council, should take account of its special status as an organisation for the advancement of the arts. In addition the purposes should, wherever possible, accord with *Creative Australia*—the National Cultural Policy.

3.55 Given this, and in view of the significant evidence presented to it, the Committee sees merit in proposing a number of additional functions for the Council. In the committee's view, the centrality of Aboriginal and Torres Strait Islander cultures to Australia's artistic identity should be made explicit. Freedom of artistic

49 Department of Regional Australia, Local Government, the Arts and Sport, *Supplementary Submission*, p. 1.

50 See, for example, Regional Arts Australia, *Submission 1*; Community Arts Network WA, *Submission 4*; Dr Judith Pippen, *Submission 5*; Tasmanian Regional Arts, *Submission 6*; and Arts Law Centre of Australia, *Submission 17*.

expression should be among the core functions of the Council, rather than simply a matter to be taken into account. The functions of the Council should also recognise the diversity at the heart of Australia's national identity. And the function of encouraging community participation in the arts should be restored. Accordingly the committee makes the following recommendation.

Recommendation 1

3.56 The Committee recommends that clause 9 of the Bill be amended to include words to the effect of:

- **To support Aboriginal and Torres Strait Islander arts practice;**
- **To uphold and promote freedom of expression in all artistic forms;**
- **To provide support for the arts in a manner that reflects the diversity of Australia; and**
- **To encourage community participation in the arts.**

Governance concerns

Difficulties with the current structure

3.57 The existing governance structure of the Australia Council is set out at paragraphs 2.21–2.27 of this Report. The difficulties created by this structure were neatly put by one of the Australia Council Review's co-authors in the following exchange:

ACTING CHAIR: If I understood you correctly, the recommended changes to the board structure are because if you have a collection of people on the board who all represent a specific performing arts group—visual arts or whatever—it is difficult to be strategic and all work together because everyone is protecting their patch. Is that basically it?

Mr James: Correct, yes. Because their funding is tied and all those things there is no strategic discussion about the distribution of money because everyone is protecting their own interests as it relates to their own budget which they see as their capacity to distribute amongst their sector. If, for instance, the board determined it wanted to have a strategic approach to a new genre or an existing genre of art that it wished to push and promote because it saw it as uniquely Australian, such as Indigenous art, then at the moment, because the budgets are all locked into silos and the decision making is all locked into silos, the board has no real play on that strategic element.⁵¹

3.58 This view was in large measure supported by Ms Darani Lewers, appearing on behalf of seventeen other signatories, many of whom had prior associations with the Council, who noted the tension that existed between the need for a Board capable

51 Mr Angus James, *Committee Hansard*, 23 April 2013, p. 4.

of oversight, and the demands and contradictions in a system of funding based on peer assessment:

I think that there is a problem with the artform boards protecting their patch, looking after their funds when they come to divvying up the budget once a year. You can understand that in the circumstances the arts have not been well funded over recent years... I think it is very important that you keep that connection between the arts community through the boards to the council. So it is important that the boards be represented on council but I can see that it is also important the council has the freedom to be able to look at the future and the changes that are happening in the arts from the position of a national overview and that they should be able to do that without special interests. I recommend that the boards do not sit on council when it comes to budget time and the division of the funds.⁵²

3.59 This compromise view was endorsed by Emeritus Professor Williams:

Without the arts people being at the top table, the community is marginalised from the general policy direction overview and so forth. But then we would consider the board chairs being excused while the final budget decision carve up is being made.⁵³

The Board

3.60 The response taken by the Bill to these contradictions proposes a governance structure involving a conventional, non-representative, variously-skilled Governing Board, with responsibility for budgets, liaison with government and strategic planning, to be assisted, where necessary, by Committees of experts for various purposes such as peer assessment. The intent underlying these changes is set out 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 art form 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

52 Ms Darani Lewers, *Committee Hansard*, 23 April 2013, p. 30.

53 Emeritus Professor David Williams, *Committee Hansard*, 23 April 2013, p. 30.

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.⁵⁴

3.61 Criticisms of this proposed change were both general and specific. For example, Mr Rodney Hall said:

There is an implication that in some way council has not been corporately responsible in the way it has managed its money. That astonishes me. Certainly in my experience of it, both as a client and as the chair of the council, the council has been ultra-meticulous over the years to have all the fiscal aspects of its management absolutely open and above board... It may look like a very eccentric way of putting a board together if you take a business model, but then business is not run on peer assessment. So the model that the council has developed has been specific to that... I really do not see any necessity for making it into this kind of corporate, streamlined model which I think will not be flexible in terms of its delivery to the arts or the public. I think it is a completely unnecessary thing to do.⁵⁵

3.62 Given that, under subclause 17(4), when making appointments to the Board the Minister must only have regard to the *desirability* of including members who have skills, experience or involvement in the arts, the National Association for the Visual Arts thought that a potential lack of artistic expertise on the Governing Board might represent a handicap:

In relation to governance structure, what we are seeking is a more precise descriptor of the kinds of appointments to the governing board of the Australia Council to ensure that the majority of members of the governing board and any committees that they appoint are deeply embedded in the arts industry and have broad experience and knowledge across all the arts.⁵⁶

3.63 To similar effect, the Australian Performing Arts Centres Association, while recognising the value of moving to a skills-based Governing Board, was mindful that substantial and diverse arts industry experience remained critical in the delivery of informed and relevant governance in the arts sector. It therefore recommended that a substantial component of the Board be members with practical arts experience, not simply 'a knowledge of' the arts.⁵⁷

Committees

3.64 Under the Bill, the way in which arts practitioners retain their involvement under the new governance structure is through the committees which may be established under clause 31. Committees may be constituted wholly by Board

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

55 Mr Rodney Hall, *Committee Hansard*, 23 April 2013, pp 24–5.

56 Ms Tamara Winikoff, *Committee Hansard*, 23 April 2013, p. 36.

57 Australian Performing Arts Centres Association, *Submission 25*, p. 2.

members (presumably audit or planning committees), wholly by non-Board members, or partly by either.⁵⁸ A Note to subclause 31(1) states that for example, the Board may establish an expert committee of persons with appropriate experience for the purposes of peer assessment.

3.65 The Explanatory Memorandum elaborates on this provision in the following terms:

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 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.⁵⁹

3.66 Some witnesses felt that the commitment to the peer assessment principle should be made more explicit. For example, the National Association for the Visual Arts proposed that, rather than the existing note, the Bill should provide that 'where the duties of such a committee are to make funding decisions, it should be made up of peers who are persons who practise the arts or are otherwise closely associated with the arts'.⁶⁰

3.67 Others felt that a discretion to establish committees might mean that funding decisions might be made in the absence of peer assessment.⁶¹ For example, the Australian Major Performing Arts Group considered it crucial for the Board to continue to rely on specialised advice with regard to the major performing arts companies (which were responsible for approximately 60 per cent of the Council's budget), and so recommended that an advisory committee with responsibilities and knowledge similar to that existing in the Major Performing Arts Board should be established to advise the Council about those companies.⁶²

3.68 The Department clarified that the role of the artform boards would be transferred to the Australia Council committees. While acknowledging that significant reform was proposed to the existing board structure, the Department stated that:

...it is not the case that the art form boards are being abolished... [The] Bills include provisions to transfer the power to establish committees to the

58 Australia Council Bill 2013, subclause 31(2).

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

60 Ms Tamara Winikoff, *Committee Hansard*, 23 April 2013, p. 36.

61 See Ausdance, *Submission 24*, p. 2.

62 Ms Janet Millar, *Committee Hansard*, 23 April 2013, p. 15.

Council, thus granting the Council more flexibility in peer assessment and other areas.⁶³

Committee view

3.69 The Committee considers that, in general terms, the Australia Council Bill 2013 will modernise the governance structure of the Council and bring it into line with other comparable statutory authorities such as Screen Australia.

3.70 The lack of a strategic focus, and the inability to develop one, seems to have been one of the weakness of the Council's existing governance structure. However, it is not clear that a standardised, conventional business model for corporate governance is necessarily suitable for an organisation such as the Australia Council. As Mr Rodney Hall put it, its structures may look eccentric if you take a business model, but business is not run on peer assessment.

3.71 With one proviso, the Committee considers that the governance structure under the Bill is likely to provide a better combination of the long-term strategic vision and the short-term direction than presently exists. That proviso concerns the Committees appointed to assist the Board. Where such a Committee is established to consider policies or funding involving a particular art form, then it is proper that that art form be represented on the Committee. This will ensure that peer assessment continues under a contemporary Australia Council.

Recommendation 2

3.72 The Committee recommends that where the purpose of a committee established under clause 31 of the Bill is to recommend a decision relating to policy or funding in a particular art form, the committee is to be constituted of at least one member with appropriate experience in that art form, for the purpose of peer assessment.

Recommendation 3

3.73 The Committee recommends that, subject to the other recommendations made in this report, the Australia Council Bill 2013, and the Australia Council (Consequential and Transitional Provisions) Bill 2013, be passed.

Senator Glenn Sterle

Chair

63 Department of Regional Australia, Local Government, the Arts and Sport, *Supplementary Submission*, p. 2.

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Regional Arts Australia
2	Regional Arts NSW
3	Country Arts WA
4	Community Arts Network WA
5	Dr Judith Phippen PhD
6	Tasmanian Regional Arts
7	Australian Society of Authors
8	Australian Major Performing Arts Group
9	Australian Copyright Council
10	Music Council of Australia
11	Dr Rodney Hall
12	Chamber of Arts and Culture WA Inc
13	Ms Darani Lewers AM
14	Artslink Queensland
15	Anne Dunn AM, Professor Andrea Hull AO and Deborah Mills
16	National Association for the Visual Arts
17	Arts Law Centre of Australia
18	Ms Michelle Kotevski
19	Ms Pauline Peel
20	Kultour
21	Museums Australia
22	Live Performance Australia
23	APRA and AMCOS
24	Australian Dance Council, Ausdance
25	Australian Performing Arts Centres Association
26	Museum of Contemporary Art Australia
27	Department of Regional Australia, Local Government, Arts and Sport
28	Department of Science, Information Technology, Innovation and the Arts Queensland

Additional Information Received

- Received on 1 May 2013, from the Department of Regional Australia, Local Government, Arts and Sport. Answers to Questions taken on Notice on 23 April 2013.

APPENDIX 2

Public Hearings and Witnesses

Tuesday, 23 April 2013

- ARNOTT, Dr Stephen, Assistant Secretary, Creative Sector Development Branch, Office for the Arts, Department of Regional Australia, Local Government, Arts and Sport
- AYRES, Ms Robyn Kay, Executive Director, Arts Law Centre of Australia
- CHRISTIE, Ms Elizabeth Patricia, Acting Chief Executive Officer, Australia Council
- FOSTER, Ms Stephanie, Deputy Secretary, Office for the Arts and Regional Strategy and Coordination, Department of Regional Australia, Local Government, Arts and Sport
- GRYBOWSKI, Mr Antony Leon, Executive Director, Arts Organisations Division; and Acting Executive Director, Arts Funding Division, Australia Council
- HALL, Mr Rodney, Private capacity
- JAMES, Mr Angus, Co-chair, Review of the Australia Council
- LEWERS, Ms Darani, Private Capacity
- MILLAR, Ms Janet, Director, Policy and Communications, Australian Major Performing Arts Group
- ROGERS, Ms Elizabeth, Chief Executive Officer, Regional Arts New South Wales, and Board Member, Regional Arts Australia
- ROSS, Mr Rowan Alexander, Director, Australian Major Performing Arts Group
- TRAINOR, Ms Gabrielle, Co-chair, Review of the Australia Council
- WILLIAMS, Emeritus Professor David, Private Capacity
- WINIKOFF, Ms Tamara, Executive director, National Association for the Visual Arts

APPENDIX 3
Senate Scrutiny of Bills Committee
Alert Digest No. 5 of 2013

Australia Council Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Regional Australia, Local Government, Arts and Sport

Background

This bill will replace the *Australia Council Act 1975*, as recommended in the report of the *Review of the Australia Council*, which was publicly released on 15 May 2012.

The bill will:

- provide the Council the flexibility to establish committees, including for the purposes of awarding grants based on peer assessment; and
- introduce a skills-based governing board consisting of a Chair, Deputy Chair, and between five and nine other members with arts or corporate knowledge or expertise, and the CEO as an ex-officio Board member.

The committee has no comment on this bill.

Australia Council (Consequential and Transitional Provisions) Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: Regional Australia, Local Government, Arts and Sport

Background

This bill contains consequential amendments and transitional provisions related to the replacement of the *Australia Council Act 1975* by the Australia Council Bill 2013, as recommended in the report of the *Review of the Australia Council*, which was publicly released on 15 May 2012.

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

Schedule 2 of the bill contains transitional provisions which allow for the continued operation of the Council during the transition period.

Trespass on personal rights and liberties—reversal of onus of proof

Schedule 2, subitem 14(3)

Item 13 of Schedule 2 imposes obligations on the members of the new Board to prepare, on behalf of the previous Board, an annual report in accordance with Schedule 1 of the *CAC Act* for the transitional reporting period. Item 14 is included to ensure compliance with these obligations. Subitem 14(2) provides that a breach of these obligations will be a civil penalty provision for the purpose of the *CAC Act*, though a pecuniary penalty order can only be made in respect of a serious contravention (this is the effect of paragraph 14(2)(a) - see the explanatory memorandum at page 11).

Subitem 14(3) provides that in circumstances in which a contravention of the final annual reporting obligations (pursuant to item 13) consists of an omission from the financial statements that 'it is a defence if the defendant proves that the information omitted was immaterial and did not affect the giving of a true and fair view of the matters required by the Finance Minister's orders to be included in the statements'.

The statement of compatibility argues that any contravention of reporting obligations required by item 13, as detailed in item 14, is a civil penalty and not a criminal charge (see pages 3 and 4). Nevertheless, contraventions may result in the imposition of a pecuniary penalty. The explanatory memorandum does not address why the proposed approach, in which the defendant will be required to prove the matters referred to in subitem 14(3) is appropriate. **The committee therefore seeks the Minister's advice as to the rationale because it is not clear that they are matters which would be peculiarly within the defendant's knowledge.**

Pending the Minister's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

