2010-2011-2012-2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIA COUNCIL BILL 2013

EXPLANATORY MEMORANDUM

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

OUTLINE

The Australia Council Bill 2013 (the Bill) will replace the *Australia Council Act 1975*, as recommended in the report of the Review of the Australia Council (the Review), which was publicly released on 15 May 2012 by the Minister for the Arts, the Honourable Simon Crean MP.

The Bill will modernise the enabling legislation of the Australia Council (the Council) by updating the functions, powers and governance structure of the Council in a manner consistent with the Australian Government’s response to the Review and the governance arrangements, where appropriate, of other Commonwealth statutory authorities. This Bill will give the Council the flexibility to establish committees, including for the purposes of awarding grants based on peer assessment, thus continuing to provide for the needs of Australian artists and arts organisations in the 21st century context. The Bill also introduces 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 Council will continue to be subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

FINANCIAL IMPACT STATEMENT

The Australia Council Bill 2013 is not expected to have a significant impact on Commonwealth expenditure.
### ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AC Act</td>
<td><em>Australia Council Act 1975</em></td>
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<tr>
<td>Bill</td>
<td><em>Australia Council Bill 2013</em></td>
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<tr>
<td>CAC Act</td>
<td><em>Commonwealth Authorities and Companies Act 1997</em></td>
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>Council</td>
<td>Australia Council</td>
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<td>FMA Act</td>
<td><em>Financial Management and Accountability Act 1997</em></td>
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<td>Minister</td>
<td>Minister with responsibility for the Arts</td>
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<tr>
<td>NFSAA Act</td>
<td><em>National Film and Sound Archive of Australia Act 2008</em></td>
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<td>NPGA</td>
<td>National Portrait Gallery of Australia</td>
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<td>NPGA Act</td>
<td><em>National Portrait Gallery of Australia Act 2012</em></td>
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<td>Review</td>
<td>Review of the Australia Council</td>
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<td>SA</td>
<td>Screen Australia</td>
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<td>SA Act</td>
<td><em>Screen Australia Act 2008</em></td>
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Statement of Compatibility with Human Rights

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

Australia Council Bill 2013

This Bill is generally compliant with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, aside from specific parts of the Bill which could be interpreted as discriminatory under article 26 of the International Covenant on Civil and Political Rights (ICCPR), however those measures are appropriate, reasonable and legitimate measures, as discussed below.

Overview of the Bill

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

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

Human rights implications

The Bill engages the following human rights:

Right to enjoy and benefit from culture

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

Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to take part in cultural life. The United Nations Committee on Economic, Social and Cultural Rights has stated that culture includes oral and written literature, music and song, non-verbal communication, and the arts more broadly.
These cultural forms and the right to take part in their creation and enjoyment are promoted through the Council’s functions under clause ^9 of the Bill, including:

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

Right to freedom of expression

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

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

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

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

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

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

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

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

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

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

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

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

The Honourable Simon Crean MP
Minister for Regional Australia, Regional Development and Local Government, Minister for the Arts
AUSTRALIA COUNCIL BILL 2013

NOTES ON CLAUSES

Part 1 – Preliminary

Clause ^1: Short title

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

Clause ^2: Commencement

Item 1 of the table in subclause ^2(1) provides that clause ^1 (Short title), clause ^2 (Commencement) and any other clause of the Bill not provided for are to commence on the Royal Assent.

Item 2 of the table provides that clauses ^3 to ^52 are to commence on a date to be fixed by Proclamation or on the day after six months has elapsed since the Royal Assent, whichever is sooner.

Commencement by Proclamation has been provided for in the Bill to allow for Parliamentary timeframes during passage of the Bill and to allow sufficient time to finalise appointments or instruments related to the Bill prior to commencement.

Clause ^3: Simplified outline

This clause is a simplified outline of the Bill.

Clause ^4: Definitions

Clause ^4 sets out definitions of key terms used in the Bill. The most significant of these are:

- “Arts”, which is intended to have a broad meaning, to ensure that the definition encompasses emerging and hybrid artforms that the Council supports or may support in the context of a 21st century arts sector. This could include, for example, digital and interactive artworks.

- “Australian arts practice”, which is intended to reflect the Australian Government’s agreement to the Review’s recommendation that the Council have an updated purpose, “to support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field”. The definition refers to Australian artists, a term which is intended to encompass Australian arts organisations.
• “Australian artist” refers to Australian citizens or residents, to make clear that the Council’s support for “Australian arts practice” is achieved through providing support to Australian citizens or residents.

• “Australian resident” is defined using the definition provided in the Tertiary Education Quality and Standards Agency Act 2011, and clarifies that “Australian resident” refers to holders of a permanent visa within the meaning of the Migration Act 1958. The consequence of this is that an artist residing temporarily in Australia will not be an “Australian artist” for the purposes of the Bill.

• “Committee” refers to committees established under clause ^31 of the Bill. It is envisaged that committees established under this Bill could include, for example, an Audit and Finance Committee, a panel established to provide sector experience and advice on strategy for a particular artform, or a panel of peers established to assess grants applications.

• “Appointed Board member” refers to Board members other than the CEO, as the CEO is an ex-officio member of the Board of the Council by virtue of having been appointed to the office of CEO rather than having been appointed to the Board. Under clause ^27 of the Bill, the CEO has deliberative, but not voting rights on the Board.

Clause ^5: Extended geographic application of this Act

Clause ^5 of the Bill is intended to make it clear that the operation of the Bill is intended to extend to every external territory and will apply both within and outside of Australia.

Subclause ^5(3) has been included to ensure that the Council can engage in or support activities overseas that may benefit Australian artists, arts organisations, or audiences. For example, in performing its function to support Australian arts practice that is recognised for excellence, the Council may provide support for Australian artists to display or perform works at an arts festival, biennale or equivalent overseas.

Clause ^6: Constitutional basis

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

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

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

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

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

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

Subclause ^6(g) refers to the Parliament’s power to make laws “in relation to a Territory”, and would be relevant to the Council’s performance of its functions and the exercise of its powers within a Territory. For example, this could involve an initiative that would promote the appreciation, knowledge and understanding of the arts (a function of the Council under paragraph ^9(1)(d)), and which could involve activities being undertaken within a Territory.

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

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

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

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

Part 2 – The Australia Council

Clause ^7: Establishment

Clause ^7 refers to the body corporate originally established by section 4 of the AC Act and indicates that the existence of that body corporate is maintained by this Bill, and the body corporate will continue to be known as the Australia Council.

Although the body corporate has been maintained, the structure of the body corporate is updated by this Bill. This reflects the Australian Government’s agreement to the Review’s recommendation that the Council’s enabling legislation should be updated for consistency with the enabling legislation of other Commonwealth statutory authorities, such as SA.

Clause ^8: Constitution of the Council

Clause ^8 confirms that the Council, as established, will continue to be a body corporate, with a seal, that may acquire, hold and dispose of real and personal property and that may sue and be sued. The note in this subclause confirms that the CAC Act continues to apply to the Council. The clause is also intended to make it clear that the Board of the Council has custody of the seal, which can only be used as authorised by the Board.

Clause ^9: Functions

This clause sets out the Council’s functions and how it may perform them. The broader context for the functions of the Council is set out in the Australian Government’s response to the Review, which recommended that the Council have a new purpose – “to support and promote vibrant and distinctively Australian creative arts practice that is recognised nationally and internationally as excellent in its field.”

Subclause ^9(1) has been informed by this new purpose, whilst maintaining the intent of some functions from the AC Act which continue to be relevant to the Council’s activities under the new purpose and in the context of a contemporary arts sector.
The first paragraph under subclause ^9(1), paragraph ^9(1)(a), provides that a function of the Council is to “support Australian arts practice that is recognised for excellence”. This paragraph reflects the new purpose of the Council as recommended in the Review and includes the Council’s role in making decisions on excellence at arms-length from government, as well as the Council’s leadership role in the Australian arts sector.

Paragraph ^9(1)(b) also implements the Australian Government response to the new purpose recommended in the Review by enabling the Council “to foster excellence in Australian arts practice by supporting a diverse range of activities”. The inclusion of this function is intended to ensure that the Council can continue to support a wide variety of activities that will contribute to the development of excellence in Australian arts practice. It is envisaged that, aside from the provision of direct support to Australian artists and arts organisations through paragraph ^9(1)(a), this could include, for example:

- supporting artists from overseas to visit Australia and impart their skills and knowledge to Australian artists, for example, by hosting master classes;
- 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.

Paragraph ^9(1)(c) of the Bill provides the Council with the ability “to recognise and reward significant contributions made by artists and other persons to the arts in Australia”. This could include, for example:

- rewarding an Australian artist for a significant achievement in their practice;
- providing an award to an artist from overseas who has contributed to the development of an Australian arts organisation, for example, as the Principal Conductor of an orchestra; or
- acknowledging the contribution of a prominent business leader or philanthropist in encouraging investment in Australian arts practice, or for imparting business knowledge or expertise to Australian artists to support the sustainability of the Australian arts sector.

Paragraph ^9(1)(d) provides for the Council “to promote the appreciation, knowledge and understanding of the arts”. This highlights the Council’s role as an advocate for the arts. In performing this function, it is envisaged that the Council could support activities that seek to raise awareness of, or educate the community about, the arts. For example, this could include demonstrating the benefits the arts can have to both individuals (including improved academic outcomes) and communities (including improved social cohesion).

Paragraph ^9(1)(e) provides for the Council “to support and promote the development of markets and audiences for the arts”, which is intended to include the Council’s role in ensuring that the work it supports has an audience or market. This was agreed in the
Australian Government response to the Review 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.

Paragraph ^9(1)(f) requires the Council “to provide information and advice to the Commonwealth Government on matters connected with the arts or the performance of the Council’s functions”. This is intended to allow for the Council to inform the Australian Government about developments in the contemporary arts sector, with a view to informing Australian Government policy in relation to the arts. It is envisaged that this function will also strengthen the Council’s accountability to the Australian Government regarding its activities and the performance of its functions as a Commonwealth statutory authority. This can be achieved through the Council providing information on the nature of the activities it is undertaking, how these activities are related to developments in the contemporary arts sector, as well as providing advice to the Australian Government on approaches being taken to ensure the efficient and effective performance of the Council’s functions.

Paragraph ^9(1)(g) provides for the Council “to conduct and commission research into, and publish information about, the arts”, which implements the Australian Government response to the Review, namely that the Council should have a new research function that is linked to its advocacy role in informing Australian Government policy in relation to the arts. It is envisaged that this function will include the conducting of research on a particular artform, research into developments in the Australian arts sector (such as the careers of Australian artists or audience attendance at arts exhibitions or performances), as well as national and global trends in the arts more broadly.

Paragraph ^9(1)(h) requires the Council “to evaluate, and publish information about, the impact of the support the Council provides”. This will allow for the Council’s role to measure the impact of the funding it administers to artists and arts organisations in the service of high accountability standards to be enshrined in the functions, as agreed in the Australian Government response to the Review. This function is intended to promote greater accountability and transparency not only to the Government but to the arts sector regarding the provision of Australian Government funding to the arts.

It was agreed in the Australian Government response to the Review that the Council’s enabling legislation should be updated to reflect the enabling legislation of other modern Commonwealth statutory authorities, such as SA and the NPGA. Accordingly, under this Bill, the Council can:

- undertake any other function conferred on it by the Bill or by any other law of the Commonwealth (paragraph ^9(1)(i));
- charge fees for the activities it undertakes in performing its functions where applicable (subclause ^9(2)); and
cooperate with others so that it may perform its functions (subclause ^9(3)), which could include the Council developing a public-private sector partnership to promote funding for the arts.

The Council will also have the ability to undertake anything that may be incidental or conducive to the performance of the above functions (paragraph ^9(1)(j)), which maintains the intent of subsection 5(d) of the AC Act.

Clause ^10: Powers

Subclause ^10(1) provides the Council with the power to undertake activities that are necessary for it to perform its functions, or are connected to fulfilling the performance of its functions.

Subclause ^10(2) goes on to clarify what the Council’s powers may include, such as the ability to:

- enter into contracts;
- erect buildings, for example, if the Council were to build a building from which it would operate;
- use Commonwealth land that is made available to it for the purposes of the Council;
- acquire, hold and dispose of property, both real and personal;
- accept gifts, devises, bequests and assignments, such as donations made to fund an activity that the Council supports, for example, an arts event or project;
- act as a trustee of money or other property vested in the Council on trust;
- provide financial assistance, including providing a loan, grant, investment, award, or other form of financial assistance to an artist or arts organisation that will fulfil a function of the Council, for example, to support Australian arts practice that is recognised for excellence;
- provide guarantees, whereby the Council would act as a guarantor, for example, for a loan provided to an artist or arts organisation to create a new work or pursue an artistic project;
- commission or sponsor arts projects or other activities, for example, activities undertaken by artists or arts organisations that will fulfil a function of the Council, for example, the promotion, appreciation, knowledge and understanding of the arts through community engagement;
- provide or administer services, facilities, programs or equipment, for example, administering an Australian Government program that is relevant to a function of the Council;
- do anything incidental to any of the above, or anything incidental to other powers connected to the performance of the Council’s functions.

Subclause ^10(3) is intended to make it clear that regardless of any other provision of the Bill, if the Council holds money or other property on trust, the Council must deal with the money or property in accordance with the obligations of being a trustee of the trust. This subclause also provides that if the Council accepts money or other property subject to a
condition, the Council must deal with this money or property in accordance with the condition.

Clause ^11: Matters to be taken into account by Council

Subclause ^11 outlines the matters that the Council must consider in the performance of its functions and the exercise of its powers, including policies that the Australian Government may develop in relation to the arts.

The inclusion of paragraph ^11(b) is intended to maintain subclause 5(vi) of the AC Act, to ensure that the Council will consider the impact of the performance of its functions or exercise of its powers on the right of persons to freedom in the practice of the arts.

Subclause ^11(c) enables the Minister to specify, by Ministerial Direction under clause ^12 of the Bill, other matters that must be taken into account by the Council.

Clause ^12: Ministerial directions

The Minister is not able to give direction to the Council in relation to decisions made by the Council on the provision of financial assistance or a guarantee (subclause ^12(2)), which includes grants, loans, awards or investments as prescribed in paragraph ^10(2)(g). This was included to ensure the maintenance of the arms-length principle of decision making established in the AC Act, ensuring that the Council will continue to make decisions regarding the provision of funding independent of the Australian Government and free of political interference.

While the Minister cannot give directions relating to the provision of financial assistance and guarantees as set out above, the Minister is able to give directions to the Board in relation to the remaining functions and powers of the Council (subclause ^12(1)). The same subclause also provides that the Minister can request the Council to provide a report or advice on matters relating to the Council’s functions or powers. Any directions provided by the Minister under this clause are legislative instruments within the meaning of the Legislative Instruments Act 2003 and must be tabled in Parliament.

The Board is responsible for ensuring Ministerial directions to the Council are complied with under subclause ^12(3).

Subclause ^12(4) is intended to make it clear that this section of the Bill does not limit the operation of section 16 of the CAC Act, which relates to keeping the responsible Minister and Finance Minister informed of the operations of a Commonwealth statutory authority, as well as the provision of reports, documents and information relating to those operations in a timely manner as required by the responsible Minister or Finance Minister.
Clause ^13: Council does not have privileges and immunities of the Crown

Clause ^13 is intended to make it clear that the Council does not have the privileges and immunities of the Crown in right of the Commonwealth, other than those provided by legislation or the Constitution. The inclusion of this provision reflects the Australian Government’s response to the Review’s recommendation that the Council’s enabling legislation be updated in a manner consistent with the enabling legislation of other Commonwealth statutory authorities.

Part 3 – The Board of the Australia Council

Division 1 – The Board

Clause ^14: Establishment

This clause establishes the Board of the Council.

Clause ^15: Role

Clause ^15 sets out the role of the Board. The Board of the Council is responsible for the proper and efficient performance of the Council’s functions (subclause ^15(1)), and has the power to do all things necessary or convenient to be done for or in connection with the performance of its duties (subclause ^15(2)).

Subclause ^15(3) provides that activities undertaken by the Board in the name of, or on behalf of the Council, are to be taken to have been done by the Council. The subclause also provides the Board with the capacity to authorise the CEO or other Council staff to undertake activities in the name of, or on behalf of, the Council.

It is intended that the Council acts under the direction of the Board, which includes supporting Australian arts practice recognised for excellence through peer assessment. It is envisaged that this could involve the Board of the Council authorising peers to assess grants, which would later be endorsed by either the Board or the CEO. A formal delegated power is not necessary, as it is the fundamental role of the Board to be responsible for ensuring that the Council performs its functions properly and efficiently.

Subclause ^15(4) allows all things done in the name of, or on behalf of, the Council by the Board, or with the authority of the Board, to be done on the basis of the subjective opinion, belief or state of mind of the person or body doing them. This allows for artist peers to use their knowledge and expertise in assessing and making recommendations to the Board or the CEO of the Council on grants applications.
Clause ^16: Membership

Subclause ^16(1) provides that the Board of the Council will consist of the Chair, the Deputy Chair, the CEO, and between five and nine other members. The effect of paragraph ^16(1)(c) is that the CEO is as an ex-officio member of the Board, that is, by virtue of holding the office of CEO. This maintains the CEO’s ex-officio status on the Board of the Council, which was suggested in the Review and provided for in subsection 9(4B) of the AC Act if the Chair of the Council were a part-time member. This arrangement therefore remains important as all appointed Board members are now part-time under subclause ^17(5) of the Bill.

This clause addresses the Australian Government response to the Review’s recommendation that the size of the Board be reduced to reflect best practice arrangements for governing boards of statutory authorities.

Subclause ^16(2) of the Bill is intended to make it clear that if the number of Board members were to fall below 8 for a period of up to 6 months (including the Chair, Deputy Chair and CEO), this would not be a reason in itself that would affect the performance of the Board’s functions or the exercise of its powers. This subclause is intended to allow for the continued functioning of the Board in unforeseen circumstances where appointments to the Board may be delayed. This clause also provides that if the number of Board members were to fall below 6 (including the Chair, Deputy Chair and the CEO), the Board would not be able to perform its functions or exercise its powers as this is the minimum number considered necessary for appropriate decision making processes. This subclause is in line with the Australian Government response to the Review’s recommendation that the Council’s enabling legislation be updated to reflect the enabling legislation of other Commonwealth statutory authorities. While the CEO is an ex-officio member of the Board as described above, the CEO is included in the number of members provided in this clause as it is considered necessary for a CEO to be in place for the Council to continue to operate.

Division 2 – Terms and conditions of appointed Board members

Clause ^17: Appointment of Board members

Subclause ^17(1) enables the Minister to appoint Board members by written instrument, including the Chair and Deputy Chair. The note in this clause is intended to assist readers by making it clear that the CEO is an ex-officio member of the Board by virtue of having been appointed to the office of CEO, rather than having been appointed to the Board. Any clause that refers to an “appointed Board member” therefore refers to all Board members other than the CEO.

Subclause ^17(2) requires the Minister to consult the Chair of the Board (who has been appointed by the Minister) before appointing other Board members, including the Deputy Chair. This implements the Australian Government response to the Review’s recommendation that the Chair should be consulted regarding the appointment of other
Board members. The intended effect of this measure is to ensure that the skills mix of the Board is discussed by the Minister and Chair, in line with the requirement for a skills-based Board included in subclause ^17(3).

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.

Appointed Board members hold office on a part-time basis (subclause ^17(5)), and may be appointed for up to three years at a time (subclause ^17(6)). However, the total period of a member’s appointments cannot exceed nine years (subclause ^17(7)). This provision is included in line with the Australian Government response to the Review’s recommendation that the Council’s enabling legislation be updated to reflect the enabling legislation of other Commonwealth statutory authorities, including SA.

Clause ^18: Acting Board members

Subclause ^18(1) enables the Deputy Chair of the Board to act as the Chair when there is no Chair, or when the Chair is absent from duty. The subclause does not specify that the Deputy Chair will act as Chair when the Chair is overseas, as it is possible and preferable for the Chair to continue to fulfil their duties whilst abroad, due to developments in technology and increasing international engagement in the arts.

With regard to the office of Deputy Chair, subclause ^18(2) specifies that if there is no Deputy Chair, the Deputy Chair is unavailable, or the Deputy Chair is acting as Chair, the Minister can appoint another appointed Board member to act as the Deputy Chair by means of written instrument. The reference to “appointed Board member” indicates that the CEO cannot be appointed to act as the Deputy Chair.

Subclause ^18(3) provides that the Minister can appoint a person to act as a Board member by means of written instrument when there is a vacancy in the office of a Board member, if a member is acting as the Deputy Chair, or if a member is either absent from duty or unable to perform their duties.

Subclause ^18(4) clarifies that subclauses ^17(3) and ^17(4) regarding the skills and expertise required for Board members also applies to acting Board members.
The notes in this clause refer readers to sections 33A and 33AB of the *Acts Interpretation Act 1901* for further information on the rules that apply to acting appointments.

These clauses are intended to enable, so far as possible, the continuing and effective functioning of the Board in the absence of the Chair or Deputy Chair.

**Clause ^19: Remuneration**

Clause ^19 provides that appointed Board members are to be paid remuneration as determined by the Remuneration Tribunal, or if there is no determination of that remuneration in operation, the member is to be paid remuneration as prescribed in the rules made by the Minister under clause ^52. Allowances to be paid to an appointed Board member are to be prescribed in the rules made by the Minister under clause ^52. This clause is effective subject to the *Remuneration Tribunal Act 1973*.

**Clause ^20: Leave**

Subclause ^20(1) provides that the Minister may determine the terms and conditions on which the Chair may be granted a leave of absence, while subclause ^20(2) provides that the Chair is able to grant other appointed Board members a leave of absence on terms and conditions determined by the Chair. Subclause ^20(3) provides that the Chair must notify the Minister if the Chair grants an appointed Board member a leave of absence for a period exceeding 6 months.

**Clause ^21: Resignation**

Subclause ^21(1) provides that an appointed Board member may resign from office by providing the Minister with a written resignation. Subclause ^21(2) provides that the resignation would take effect on the day the Minister receives it, or would alternatively take effect on a later day if specified in the resignation.

**Clause ^22: Termination**

Subclause ^22(1) provides that the Minister may terminate the appointment of a Board member for reasons of misbehaviour, or if a Board member is unable to perform the duties of their office due to physical or mental incapacity.

Subclause ^22(2) provides that the Minister must terminate the appointment of a Board member if the Board member were to:

- become bankrupt;
- apply to take the benefit of any law in order to relieve bankruptcy or insolvent debtors;
- compound with their creditors;
- assign their remuneration to benefit their creditors;
• fail to comply with the obligations of section 27F and 27J of the CAC Act, that is, without reasonable excuse, failing to comply with the duty of a director of a Commonwealth statutory authority (defined as members of a governing body) to disclose material personal interest, or being present at a meeting when a director has a material personal interest in the matter being considered; or
• be absent from three consecutive Board meetings, without having been granted a leave of absence.

These provisions are modelled on similar provisions of other contemporary statutory authorities, for example, provisions in the SA Act, and are included as per the Australian Government response to the Review.

Clause 23: Other terms and conditions

Unless otherwise provided for in the Bill, this provision requires that the terms and conditions on which an appointed Board member may hold office are to be determined by the Minister.

Division 3 – Procedures of the Board

Clause 24: Convening of meetings

This clause provides that the Chair must convene meetings of the Board:
• which they deem are necessary for the efficient conduct of the Board’s affairs;
• a minimum of four times a year, meaning that more than four meetings a year may be convened;
• if the Minister directs the Chair to do so; and
• if a majority of appointed Board members sign a written request for a meeting and provide it to the Chair.

The inclusion of subclause 24(5) is intended to assist readers by making it clear that directions or requests provided in writing under subclauses 24(3) and 24(4) are administrative and not legislative in character, and are therefore not legislative instruments within the meaning of section 5 of the Legislative Instruments Act 2003.

Clause 25: Quorum

This clause provides that a quorum for a meeting of the Board is a majority of the current appointed Board members. This clause also refers to section 27J of the CAC Act, which requires that directors of a Commonwealth authority (defined as members of a governing body) cannot be present when a matter which they have material personal interest in is being considered, and cannot vote on the matter. Subclause 25(2) is intended to make it clear that if an appointed Board member is required under section 27J of the CAC Act to leave a meeting during deliberations, or when a decision is to be made regarding a particular matter, that the remaining appointed Board members would constitute a quorum for the purposes of deliberation or decision regarding that particular matter.
Clause ^26: Presiding at meetings

This clause provides:
- that the Chair must preside at all meetings of the Board that they attend;
- if the Chair is not present at a meeting of the Board, the Deputy Chair must instead preside at the meeting; and
- if both the Chair and Deputy Chair are not present at a meeting, the appointed Board members must elect a member amongst themselves to preside at the meeting.

Clause ^27: Voting at meetings

Clause ^27 provides that questions at a meeting of the Board are decided by a majority of votes of appointed Board members that are present and voting, and that the presiding appointed Board member at the meeting has a deliberative vote, as well as the ability to make a casting vote if the votes are tied. The effect of this clause through the reference to “appointed Board members” is that the CEO will have deliberative, but not voting rights on the Board of the Council. This will address the potential for a conflict of interest to arise when the CEO has referred a decision to the Board, particularly in relation to the provision of financial assistance or otherwise. The CEO will be available at Board meetings to provide information or advice, for example, on the Council’s operations.

Clause ^28: Minutes

This clause requires the Board to keep minutes of its meetings.

Clause ^29: Conduct of meetings

This clause provides that, subject to the Bill and the CAC Act, the Board of the Council is able to regulate the conduct of its meetings as it sees fit. The note in this clause also refers readers to section 33B of the Acts Interpretation Act 1901 for further information about how Board members may participate in meetings.

Clause ^30: Decisions without meetings

Subclause ^30(1) provides for a number of instances where the Board of the Council is taken to have made a decision at a meeting. These are:
- if a majority of the current appointed Board members entitled to vote on a proposed decision have indicated agreement with a decision without having met;
- if appointed Board members have indicated agreement to a proposed decision by a method determined by the Board under paragraph ^30(2)(b); and
- if all the current appointed Board members have been informed of the proposed decision, or reasonable effort has been made to inform all the current appointed Board members of the proposed decision.
Subclause ^30(1) is subject to subclause ^30(2) of the Bill, which specifies that these arrangements may only apply if the Board of the Council has previously determined that it may make decisions of a particular kind without holding a meeting, and has also determined a method by which appointed Board members can indicate their agreement with proposed decisions.

Subclause ^30(3) clarifies that paragraph ^30(1)(a) does not apply if an appointed Board member would not have been entitled to vote on a proposed decision if the matter had been considered at a meeting of the Board.

Subclause ^30(4) confirms that the Board of the Council must keep a record of decisions made in accordance with this section.

**Part 4 – Committees**

**Clause ^31: Committees**

Subclause ^31(1) provides the Board of the Council with the flexibility and discretion to establish committees or panels that can provide it with advice or assist in the performance of the Council’s functions or the Board’s responsibilities.

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 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.

Subclause ^31(2) provides that committees or panels may be comprised of Board members or other persons, including peers, or members with arts knowledge or expertise.

Subclause ^31(3) provides for the Board of the Council to determine the terms of reference of a committee, the terms and conditions regarding the appointment of members of a committee, as well as the procedures a committee will follow. It is intended that this subclause will provide the framework for communication between the Board and its committees and it will ensure that the Board has the necessary flexibility to establish committees or panels to provide advice or to make recommendations on a specified matter including, for example, the consideration of applications for a particular funding program, or the recommendation of funding recipients for a particular project or initiative.
Subclause 31(4) allows for the Board of the Council to give directions to a committee that the committee must comply with regarding the advice or assistance that the committee is to provide to the Board.

Subclause 31(5) is intended to assist readers by making it clear that a direction under subclause 31(4) is administrative and not legislative in character, and is therefore not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

Clause 32: Remuneration and allowances

Clause 32 provides that members of committees established under clause 31 are to be paid remuneration as determined by the Remuneration Tribunal, or if there is no determination of that remuneration in operation, the member is to be paid remuneration as prescribed in the rules made by the Minister under clause 52. Allowances to be paid to a committee member are to be prescribed in the rules made by the Minister under clause 52. This clause is effective subject to the Remuneration Tribunal Act 1973.

Part 5 – CEO, staff and consultants

Division 1 – Chief Executive Officer

Clause 33: Establishment

Clause 33 confirms that there will be a CEO of the Council, which will replace the role of General Manager provided for in the AC Act.

Clause 34: Role

Subclause 34(1) confirms that the role of CEO is to be responsible for the day-to-day administration of the Council, meaning this is a full-time position.

The note in this subclause is intended to make it clear that the CEO is also an ex-officio member of the Board, and as such is a member of the Board only by virtue of being appointed to the office of CEO, and has deliberative, but not voting rights on the Board.

Subclause 34(2) provides the CEO with the power to do all that may be necessary or convenient in performing, or in relation to performing, their duties in the context of their role as CEO.

Subclause 34(3) confirms that the CEO is to act in a way consistent with the policies and any directions given by the Board of the Council.

Subclause 34(4) provides that activities undertaken by the CEO in the name of, or on behalf of the Council, are taken to have been done by the Council, and also provides the CEO with the capacity to authorise other Council staff to undertake activities in the name
of, or on behalf of, the Council. This capacity is similar to the Board’s capacity to authorise others to undertake activities in the name of, or on behalf of the Council under subclause \(^{15}(3)\).

Subclause \(^{34}(5)\) allows for all things done in the name of, or on behalf of, the Council by the CEO, or with the authority of the CEO, under subclause \(^{34}(4)\), to be done on the basis of the subjective opinion, belief or state of mind of the person or body doing them.

Subclause \(^{34}(6)\) is intended to assist readers by making it clear that any policy or direction given under subclause \(^{34}(3)\) is administrative, not legislative in character, and therefore not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

**Clause \(^{35}\): Appointment**

Subclause \(^{35}(1)\) provides that the Board will appoint the CEO in consultation with the Minister, which reflects the arrangements of other similar Commonwealth statutory authorities, such as SA.

Subclause \(^{35}(2)\) specifies that any appointment will be made by written instrument.

The CEO will hold office on a full-time basis (subclause \(^{35}(3)\)), for a period specified in the instrument of appointment, which cannot exceed five years (subclause \(^{35}(4)\)).

The note in this clause refers readers to section 33AA of the *Acts Interpretation Act 1901*, which provides that a person or body empowered with the ability to make an appointment, is also empowered with the ability to make a re-appointment.

**Clause \(^{36}\): Acting CEO**

Clause \(^{36}\) provides that the Board is able to appoint a person to act as the CEO, following consultation with the Minister, when there is a vacancy in the office of the CEO, when the CEO is absent from duty, or the CEO is unable to perform the duties of the office. The note in this clause refers readers to sections 33AB and 33A of the *Acts Interpretation Act 1901* for further information on the rules that apply to acting appointments.

**Clause \(^{37}\): Other employment**

Clause \(^{37}\) provides that the CEO must receive approval from the Chair if they are to engage in paid employment outside the duties of the CEO’s office. This is in recognition of the full-time nature of the CEO’s role as well as the potential for conflicts of interest to arise and the need to manage any such conflict.
Clause ^38: Remuneration

Clause ^38 provides that the CEO is to be paid remuneration as determined by the Remuneration Tribunal, or if there is no determination of that remuneration in operation, the member is to be paid remuneration as prescribed in the rules made by the Minister under clause ^52. Allowances to be paid to the CEO are to be prescribed in the rules made by the Minister under clause ^52. This clause is effective subject to the Remuneration Tribunal Act 1973.

Clause ^39: Leave

Clause ^39 provides that recreation leave for the CEO will be determined by the Remuneration Tribunal, and a leave of absence may be granted by the Chair, on the terms and conditions regarding remuneration or otherwise as determined by the Chair. The Chair must notify the Minister if they grant the CEO more than one month’s leave.

Clause ^40: Resignation

Subclause ^40(1) provides that the CEO may resign from that position by providing the Chair with a written resignation. Subclause ^40(2) provides that the CEO’s resignation will take effect on the day the Chair receives it, or alternatively, on a later day if a later day is specified in the resignation. Subclause ^40(3) requires the Chair to notify the Minister of the CEO’s resignation.

Clause ^41: Termination

This clause provides the Board with the discretion to terminate the appointment of the CEO for reasons of:

- misbehaviour;
- being unable to perform the duties of the office of CEO due to physical or mental incapacity;
- the Board being satisfied that the CEO’s performance of their duties has been unsatisfactory for a significant period of time;
- bankruptcy;
- applying to take the benefit of any law in order to relieve bankruptcy or insolvent debtors;
- compounding with their creditors;
- assigning their remuneration to benefit their creditors;
- being absent for 14 consecutive days, or for 28 days in any 12 months, for reasons other than being on leave of absence;
- failure to comply with the obligations of section 27F and 27J of the CAC Act, that is, without reasonable excuse, failing to comply with the duty of a director of a Commonwealth statutory authority (defined as members of a governing body) to disclose material personal interest, or being present at a meeting when a director has a material personal interest in the matter being considered;
• engaging in paid employment outside the duties of their office without the approval of the Chair.

These provisions are included in line with the Australian Government response to the Review’s recommendation that the Council’s enabling legislation should be updated to model and reflect the enabling legislation of other Commonwealth statutory authorities relating to the termination of the appointment of the CEO.

Subclause ^41(1) provides that the Board may terminate the CEO for the above reasons. This is different from the position in respect of Board members set out in subclause ^22(2) which provides that the Minister must terminate the appointment of an appointed Board member for the reasons listed under that subclause. There is a difference in the wording of the two subclauses as the Minister is responsible for appointing Board members, whereas the Board is responsible for appointing the CEO. The Board should therefore be provided with the ability to make its own decisions regarding the appointment of the CEO, as well as the recruitment and potential termination of the CEO where relevant.

Consistently with provisions in the enabling legislation of other Commonwealth statutory authorities and in line with the Australian Government response to the Review’s recommendation that the Council’s enabling legislation be updated to reflect those other statutory authorities, subclause ^41(2) has been included. This provision requires the Board to notify the Minister if the Board terminates the appointment of the CEO, similar to an equivalent provision in the SA Act.

**Clause ^42: Other terms and conditions**

Unless provided for in the Bill elsewhere, this clause provides that the terms and conditions on which the CEO may hold office are to be determined by the Board of the Council, as it is the Board that is responsible for appointing the CEO, in consultation with the Minister.

**Division 2 – Staff and consultants**

**Clause ^43: Staff**

Clause ^43 enables the Council to employ staff necessary to perform the functions and exercise the powers of the Council, under terms and conditions that the Council determines and provides in writing.

**Clause ^44: Consultants**

Clause ^44 enables the Council to engage contractors, such as consultants, to assist in the performance of its functions. This is intended to avoid doubt and is not intended to affect the operation of clause ^10 (Powers), for example, the power to enter into contracts.
Part 6 – Planning

Clause ^45: Corporate plan

This clause requires the Council to prepare a corporate plan each year, as per the Australian Government response to the Review, updating the Council’s strategic planning obligations in line with the enabling legislation of other Commonwealth statutory authorities.

The Board must prepare a corporate plan for the Council at least once a year (subclause ^45(1)), which will cover a period of at least 3 years (subclause ^45(2)).

Subclause ^45(3) provides that the corporate plan must include details of:
- the objectives that the Council will pursue, for example, objectives for the Council to successfully and effectively perform its functions;
- the strategies and policies that the Council will adopt to achieve its objectives;
- performance indicators that will allow for the assessment of the Council’s performance of its functions;
- the investment and financing programs of the Council, including strategies for managing financial risk;
- the financial targets and projections for the Council;
- an analysis of factors likely to affect achievement of targets or create significant financial risk for the Council or for the Commonwealth;
- a review of performance since the start of the year previous to the year when the plan has been prepared, measured against the most recent plan created during that period; and
- other matters as directed by the Minister, if applicable.

The plan may include other matters as determined by the Minister or by the Council.

Subclause ^45(4) is intended to assist readers by making it clear that if a direction is provided by the Minister in writing under paragraph ^45(3)(h), the direction is administrative, not legislative in character, and is therefore not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

Subclause ^45(5) provides for variation of the corporate plan by the Board of the Council.

Subclause ^45(6) requires the Minister to endorse the corporate plan, as well as any variation of the plan. It is intended that the Minister’s endorsement, or agreement of the corporate plan, will be provided in writing to the Board. The corporate plan will not take effect unless it has been endorsed by the Minister. This provides the Minister with an opportunity to discuss with the Board the contents of the corporate plan, including the strategic direction of the Council that the plan underpins.
The inclusion of subclause ^45(7) is intended to assist readers by making it clear that if the Minister’s endorsement of the corporate plan under subclause ^45(6) is in writing, this endorsement is administrative, not legislative in character, and the endorsement is therefore not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

The Minister may also provide a Ministerial direction relating to the corporate plan under section ^12.

Part 7 - Finance

Clause ^46: Money payable to the Council

Subclause ^46(1) makes it clear that money appropriated by the Parliament from the Consolidated Revenue Fund for the purposes of the Council is payable to the Council. Subclause ^46(2) enables the Finance Minister, or the Minister administering the FMA Act, to give directions about the amount and timing of payments made to the Council under this clause. Subclause ^46(3) is intended to assist readers by making it clear that if a direction provided by the Finance Minister under subclause ^46(2) is in writing, this would be administrative, not legislative in character, and therefore not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

Clause ^47: Application of money by the Council

Subclause ^47 provides that the money of the Council, including all money that is appropriated to the Council under clause ^46 and other money, is to be applied only in payment or discharge of the direct or indirect costs, expenses and other obligations incurred or undertaken by the Council in the performance of its functions and the exercise of its powers, and in payment of any remuneration or allowances payable under this Bill. The note in this subclause indicates that subclause ^47(1) is subject to subclause ^10(3) of the Bill regarding property held on trust by the Council, or accepted by the Council subject to a condition.

Subclause ^47(2) is intended to assist readers by making it clear that subclause ^47(1) does not prevent investment of surplus money of the Council under section 18 of the CAC Act. Surplus money is defined as money of the authority that is not immediately required for the purposes of the authority, for example, investment of surplus money on deposit with a bank, investment in securities of the Commonwealth or of a State or Territory, investment in securities guaranteed by the Commonwealth or of a State or Territory, or in any other manner approved by the Finance Minister.

Clause ^48: Restrictions on financial transactions

Subclause ^48(1) provides that the Council must not, without the written approval of the Minister:
• acquire any property, right or privilege for a consideration exceeding in amount or value the amount prescribed in the rules made by the Minister under clause 48 for the purposes of this paragraph;
• dispose of any property, right or privilege if the amount or value of the consideration for the disposal, or the value of the property, right or privilege, exceeds the amount prescribed in the rules made by the Minister under clause 48 for the purposes of this paragraph;
• enter into a contract for the construction of a building for the Council, being a contract under which the Council is to pay an amount exceeding the amount prescribed in the rules made by the Minister under clause 48 for the purposes of this paragraph; or
• enter into a lease of land for a period exceeding 10 years.

These provisions are modelled on provisions of the enabling legislation of other Commonwealth statutory authorities in line with the Australian Government response to the Review’s recommendation that the Council’s enabling legislation be updated in this manner.

Subclause 48(2) clarifies that paragraphs 48(1)(a) and 48(1)(b) do not apply to transactions in the course of the exercise of the Council’s powers under paragraphs 10(2)(g) or 10(2)(h), that is, the provision of financial assistance or guarantees in the performance of the Council’s functions (paragraph 48(2)(a)), as well as investment of surplus moneys under section 18 of the CAC Act (paragraph 48(2)(b)). This subclause is intended to maintain the principle of arms-length decision making by the Council, for example, in the provision of financial assistance to artists and arts organisations.

The Council must not borrow money from any person (subclause 48(3)), subject to the Council’s ability to obtain goods or services on credit in accordance with section 28A of the CAC Act relating to credit cards and credit vouchers (subclause 48(4)).

Subclause 48(5) is intended to assist readers by making it clear that a written approval under subclause 48(1) is administrative, not legislative in character, and therefore not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

Clause 49: Investment

This clause refers to the Council’s power to invest money in the course of the direct performance of its functions under paragraph 10(2)(g). The note in this clause is intended to make it clear that the Council’s ability to invest under paragraph 10(2)(g) is only as a means of providing financial assistance. The Council does not have a general power to make investments.

In order to assist readers, this clause also clarifies that the Council may invest surplus money under section 18 of the CAC Act, as noted under clause 47. This clause is intended to maintain the Council’s ability to invest, in line with section 36A of the
AC Act, for example, to support Australian arts practice that is recognised for excellence through investment where appropriate.

Clause ^50: Taxation

In line with the AC Act and the arrangements of other Commonwealth statutory authorities, the Council is not subject to taxation under any law of the Commonwealth or of a State or Territory. As the note in this clause indicates, the Council may be subject to taxation under certain laws, such as *A New Tax System (Goods and Service Tax) Act 1999* or the *Fringe Benefits Tax Assessment Act 1986*.

Part 8 – Other matters

Clause ^51: Extra reporting requirements

Under section 9 of the CAC Act, the Council must prepare an annual report for each financial year to be tabled in Parliament by the Minister.

Subclause ^51(1) requires that the text of any Ministerial directions made or given during the year to which the annual report relates be included in the annual report, and refers to the subclauses in the Bill that the Minister may give directions under. These are:

- subclause ^12(1);
- subclause ^24(3); and
- paragraph ^45(3)(h).

Under this subclause, the Council’s annual report must also include details of any guarantees given by the Council during the year to which the report relates, as this assists in indicating the level of financial risk that the Council may be subject to through the provision of guarantees.

Subclause ^51(2) requires the Minister to table any report or financial statements that the Board of the Council provides the Minister under paragraph 16(1)(b) of the CAC Act in Parliament as soon as practicable.

Clause ^52: Rules

This clause enables the Minister to make rules by legislative instrument prescribing matters required or permitted by the Bill to be prescribed, or matters necessary or convenient to be prescribed for carrying out or giving effect to the Bill. For example, as noted under clause ^48 on restrictions on financial transactions, the rules will determine the amount above which the Minister will be required to approve financial transactions undertaken by the Council. Rules under this clause are legislative instruments that are to be tabled in Parliament.