Queensland University of Technology

Submission to the
Senate Education and Employment Legislation Committee
inquiry into the
Australian Research Council Amendment
(Ensuring Research Independence) Bill 2018

QUT welcomes the opportunity to provide the University's views to the Committee on the measures proposed in the *Australian Research Council Amendment (Ensuring Research Independence) Bill 2018* (the Bill).

At the outset QUT would like to make clear to the Committee that we endorse the submission of Universities Australia to the present inquiry, and we make the following remarks as a supplement to the views of our peak body. We would also like to explicitly articulate that we support the Australian Research Council (ARC), its officers and its many academic advisers, and we deeply appreciate the essential work the ARC does in the interests of all Australians.

QUT supports the broad objective of the Bill, to strengthen the freedom from political interference of Australian academic and scientific research funding. The achievement of this goal will improve the management of our public research funding system, boost the research sector's confidence in the operation of public policy, and elevate the standing of Australian university research in the eyes of the public, our sector's industry partners and our international peers.

QUT strongly supports the proposition that amendment of the *Australian Research Council Act 2001* (the Act) is required to embed the desired protections. However, we consider it unlikely that the Bill in its present form will pass the Parliament, and we are concerned that insistence on the current wording would thereby leave the sector unprotected from unwarranted and unaccountable political interference.

Accordingly we respectfully make several observations and suggestions for redrafting around four main themes: Parliamentary oversight; CEO appointment; Ministerial directions; and agency resourcing.

Parliamentary oversight

On our reading, the effect of the enactment of the present Bill would be to prevent the Minister from withholding funding for a recommended grant in any instance whatsoever. QUT finds it unlikely the Parliament would support the measure in this absolute form, since *in extremis* it could conflict with a Minister's obligation pursuant to their commission under the Crown to exercise due diligence in certain extraordinary circumstances that may be difficult to anticipate but not impossible to envisage.

For example, a Minister may legitimately intervene in the national interest:

- When they are in possession of serious, relevant and reliable adverse information regarding a recommended grant of which the ARC is unaware and therefore unable to take into account (such as particularly sensitive national security intelligence, or confidential information about criminal matters);
- When they become aware of serious, relevant and reliable adverse information after the recommendations were made by the CEO; or
- When they have lost confidence in the ARC CEO.

Furnishing an amended *ARC Act* with a list of permitted reasons for intervention would not adequately address this concern, since such a list could never be exhaustive of all possible legitimate reasons for intervention.

At the same time, the present situation is also unsatisfactory, as it in effect entrenches the opposite situation, providing no constraint whatsoever upon a Minister's entitlement to ignore the recommendations of the ARC CEO, notwithstanding the extensive and elaborate machinery informing that advice:

- a comprehensive and painstaking grant assessment process, which entails countless hours of expert consideration and advice from the nation's leading researchers;
- an intensely competitive process that eliminates even the very good, leaving only the excellent;
- apparently extensive due diligence consultations with security agencies and other sources; and
- the careful, dispassionate regard of the CEO and senior ARC staff through the lenses of value for money and the national interest.

Despite all this effort, expertise and expense, not only is a Minister able to act at whim, they are able to act with impunity, not being required to explain or even to divulge their departure from the CEO's advice when making funding decisions.

In recent debates about funding for particular projects being withheld contrary to the CEO's recommendation, it has been pointed out that the Minister, as the statutory funding authority, is lawfully entitled to disregard the CEO's advice (*ARC Act* §52(4)). This argument calls to mind, by analogy, the fact that the Governor-General is constitutionally entitled to withhold Vice-Regal assent to legislation that has passed the Parliament, should they so choose:

> Royal assent to Bills
> When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, **according to his discretion**, but subject to this Constitution, that he assents in the Queen's name, **or that he withholds assent**, or that he reserves the law for the Queen's pleasure.
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> *Australian Constitution* §58, emphasis added

We hasten to note this is a structural analogy only: the weight of the ARC CEO's recommendations for research funding is obviously of far less gravity than the will of the Parliament, which comprises the elected representatives of the nation's citizens. It must be said, however, that the weight of the ARC CEO's advice is not slight, consisting as it does of the expert advice of the leading researchers in the land using a complex process refined over the two decades of the operation of the Act, building on half a century's experience under previous arrangements.

We raise this analogy to illustrate the principle that, where protections are afforded by convention rather than by statute, those conventions should only be departed from in the most extraordinary circumstances, and that the seriousness of any such a departure should compel a detailed and credible explanation in the event it is exercised. In brief, it is such an exceptional circumstance that a Minister would overturn such considered, expert and elaborately assembled advice that they must have extremely good reasons, and they should be willing to divulge them.

Accordingly, QUT recommends that the *ARC Act* be amended not to prevent a Minister from ever departing from the ARC CEO's advice, as the Bill under review proposes, but to make it difficult for them to do so without due reason, and impossible to do so without being accountable to the Parliament.

In order to dissuade a Minister from departing from advice for reasons of personal or political whim rather than responsible executive governance, QUT recommends that §52(4) of the Act be amended along the following lines:

> (4) In deciding what proposals to approve under subsection 51(1), the Minister ~~may (but is not required to)~~ **will** rely ~~solely~~ on recommendations made by the CEO under subsection (1) of this section, **and on such other information as the Minister deems relevant, if any**.
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> (deleted text is ~~struck out~~, added text is in **bold**)

The Explanatory Memorandum of the revised Amendment Bill should articulate that, in making funding decisions under §52(4) of the Act, departures on the part of the Minister from the CEO's recommendations under Division 1 of Part 7 of the Act will only be made under extraordinary circumstances.

Certainly, and at a minimum, the Minister should be no less accountable than the CEO for their respective decisions:

> Decisions by the CEO to make recommendations to the Minister are reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, and the CEO may be requested to give a statement of reasons under section 13 of that Act.
>
> Note to §52 of the Act, below sub-clause (4)

If the CEO can be required to give reasons for making particular recommendations, it seems sensible that the Minister be required to give reasons when ignoring them.

In order to provide a measure of accountability, then, QUT recommends that the Parliament assumes explicit oversight of the exercise of Ministerial discretion over research funding, and that the public be properly appraised of the decisions made in its name and its interests. QUT suggests the inclusion of wording along the following lines, which might be inserted as a new clause at §52(5) of the Act.

> (5) If any decision made by the Minister under subsection 51(1) varies in any particular from the recommendation made by the CEO under subsection (1) of this section:
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> (a) the Minister must cause a statement setting out the particulars of, and the reasons for, such variation to be tabled in each House of the Parliament within 15 sitting days of that House after the decisions being made;

(b) the statement must also include, for each proposal for expenditure for which a funding decision was made by the Minister under subsection 51(1) at variance from the recommendation made by the CEO under subsection (1) of this section, all the information specified in subsection (3) of this section; and
(c) the CEO must include the statement in the annual report, prepared by the CEO and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013*, for the period in which those decisions fall.

The Explanatory Memorandum of the revised Amendment Bill should articulate that the statement of particulars and reasons must set out not only the fact of having varied from the CEO's recommendation, but also details of the Minister's reasoning, the process by which the Minister arrived at their decision and the criteria used in any assessment on the part of the Minister to override the criteria applied by the ARC.

The amended Act – probably also within the Explanatory Memorandum – should provide that, where the Minister is obliged to afford confidentiality to certain details and withhold them from the statement (such as for national security, criminal justice or commercial reasons), a confidential briefing is to be afforded on the particulars and their pertinence to the decision to the Opposition Spokesperson, and to the relevant Parliamentary Committee (e.g. the Parliamentary Joint Committee on Intelligence and Security).

Although the current focus is on the withholding of funding to grants that have been recommended, it is prudent to take the opportunity to protect against the inverse form of intervention; of approving a grant against the CEO's recommendation.

The Minister is currently prevented by §33C(2)(a) of the Act from directing the CEO "to recommend that a particular proposal should, or should not, be approved as deserving financial assistance." As is the case for withholding approval despite a recommendation for funding, this clause does not prevent a Minister from making an approval despite the CEO's recommendation not to fund. However, the symmetry of this subsection is instructive.

Accordingly, QUT's recommended wording for the amendment of the Act addresses the Minister's departure from the CEO's recommendations for funding accounts for both scenarios: to wit, the awarding of funding for non-recommended projects as well as the withholding of funding for recommended projects. Tabling and annual reporting requirements as suggested above would apply to both kinds of departure from the CEO's advice.

CEO appointment

The confidence of the national and international research sector in the ARC and its operation is to a considerable degree a function of the regard in which the CEO is held by their peers across the research sector. That is why the Act currently obliges the Minister, when making an appointment, to take into account the preferred candidate's 'record in research and management':

(2) The Minister must not appoint a person as CEO unless the Minister has considered the person's record in research and management.

ARC Act §34

QUT recommends that this clause be strengthened, by specifying in the Act consideration must be taken of the candidate's international standing and national leadership in their research field, as well as their management experience.

The Explanatory Memorandum of the revised Amendment Bill should then provide guidance that to be regarded as suitable a candidate would typically have:

- a substantial and high quality research track record, including success at winning ARC grants or their equivalent in other fields or jurisdictions;
- demonstrated international standing in their research field;
- demonstrated research leadership nationally or internationally, in their own field or more broadly;
- been research active within the last 5 years, or the last 10 years if they have been engaged full-time over the last 5 years in management at a university or an equivalent research institute or agency; and
- management experience at senior executive level of an enterprise, agency or organisation comparable to the ARC.

Ministerial directions

The Minister has powers under §33C of the Act to issue directions to the CEO about the performance of the CEO's functions. This does not go to the funding of particular proposals (§33C(2)(a) prohibits the Minister from directing the CEO to make a particular recommendation either to fund or not to fund a particular grant) but it is an aspect of the Act pertinent to the present discussion that would benefit from being strengthened at this time.

At present the Minister is obliged under the Act to table in each House of the Parliament the particulars of any direction given to the CEO under §33C(1) (and these particulars must also be included in the annual report):

> (3) Particulars of any directions given by the Minister under subsection (1) must be:
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> (a) tabled in each House of the Parliament within 15 sitting days of that House after the direction is given; and
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> (b) included in the annual report, prepared by the CEO and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013*, for the period in which the direction is given.
>
> *ARC Act* §33C

By contrast, the comparable *National Health and Medical Research Council Act 1992* (*NHMRC Act*) provides that the Minister must also table the reasons for the direction:

> (4) If the Minister gives a direction under subsection (1), the Minister must cause a statement setting out particulars of, **and of the reasons for**, the direction to be laid before each House of the Parliament within 15 sitting days of that House after giving the direction.
>
> *NHMRC Act* §5E(4), emphasis added

QUT recommends that the *ARC Act* be amended to align more closely with the *NHMRC Act*, to provide that the reasons for any Ministerial direction under §33C(1)

be tabled along with the particulars; and that the reasons be included along with the particulars in the annual report.

§33C(3) of the Act could be further strengthened by replacing the current passive wording with a form of words similar to §5E(4) of the *NHMRC Act*, specifying that it is the Minister who must cause the particulars and reasons to be tabled; and specifying that the CEO must include the particulars and reasons in the annual report.

Agency resourcing

QUT notes that practically all of the ARC's recent travails are exacerbated – if not caused entirely – by significant and counter-productive resource constraints. Even at its most generously funded, the ARC was the most economic research council of any scale in the world, delivering deeply impressive research funding at an efficiency an order of magnitude better than many of its international peers. The one disadvantage of such a lean operation is that it has little tolerance for further reductions of any duration. Constant reductions of its funding base (coinciding with additional administrative impositions, that are perhaps more consequential than their architects might realise) have eroded the ARC's capacity to satisfy its charter, deliver on its mission, and meet the expectations of government. Ironically but inevitably, the ARC's efficiency has been undermined by a drive for economy.

QUT therefore takes this opportunity to call for the restoration of ARC departmental funding to enable it to meet the expectations of the community that sustains it. If this can only be done within portfolio by finding an offset, we propose that the proposed rounds of Excellence in Research for Australia (ERA) and the Engagement and Impact Assessment (EI) be suspended indefinitely. As we remarked in the ERA/EI review, there is no clear benefit to be had in continuing to run those schemes, and the time and money could be put to far better use within the ARC.