



## Film Licensed Investment Company Bill Film Licensed Investment Company (Consequential Provisions) Bill 2005

Thomas John  
Law and Bills Digest Section

John Gardiner-Garden  
Social Policy Section

### Contents

Purpose.....	3
Background.....	3
Film production in Australia—some figures.....	3
Film financing—a general comparative overview of film incentives.....	4
Film financing in Australia.....	6
Subsidising the production of Australian films.....	6
Providing tax incentives for the production of Australian films.....	6
Incentives based on Division 10BA of the <i>Income Tax Assessment Act 1936</i> .....	7
Incentives based on Division 10B of the <i>Income Tax Assessment Act 1936</i> .....	7
Refundable tax offsets under Division 376 of the <i>Income Tax Assessment Act 1997</i> .....	8
The piloting of Film Licensed Investment Company scheme.....	8
Basis of policy commitment.....	9
Scope of the proposed scheme: the meaning of ‘qualifying Australian film’.....	10
Eligible films.....	11
Australian film.....	11

Main Provisions of the <i>Film Licensed Investment Company Film Bill 2005</i> .....	11
Part 1 of the FLIC Bill —preliminary provisions.....	11
Part 2 of the FLIC Bill—the scheme .....	11
Divisions 2 to 4: application and grant of a concessional capital license .....	12
Division 7—conditions of the scheme .....	13
Statutory conditions: clauses 22 to 28 of the Film Licensed Investment Company Bill 2005 .....	13
Fundraising conditions (clause 22).....	14
Investment conditions (clause 23).....	14
Returns to shareholders (clause 24).....	14
Conditions with respect to films (clause 25) .....	14
Certain conditions on the grant of the CPL and conditions contained in legislative instruments made under section 21 (clause 26) .....	15
Ownership conditions (clause 27) .....	15
Other conditions (clause 28).....	15
Conditions made by legislative instrument: clause 21 of the Film Licensed Investment Company Bill 2005.....	15
Division 8—breach of the conditions .....	16
Part 3 of the Bill—offences concerning ownership restrictions.....	16
Schedule 1 of the Bill—Ownership definitions.....	17
Main Provisions of the <i>Film Licensed Investment Company (Consequential Provisions) Bill 2005</i> .....	17
Concluding Comments.....	18
Endnotes.....	19

## Film Licensed Investment Company Bill 2005

### Film Licensed Investment Company (Consequential Provisions) Bill 2005

**Date Introduced:** 26 May 2005

**House:** House of Representatives

**Portfolio:** Minister for Communications, Information Technology and the Arts

**Commencement:** The Film Licensed Investment Company Bill 2005 will commence on the day the Act receives Royal Assent. Schedule 1 of the Film Licensed Investment Company (Consequential Provisions) Bill 2005 will commence at the same time as the Film Licensed Investment Company Bill 2005.

### Purpose

The purpose of the Film Licensed Investment Company Bill 2005 (FLIC Bill) and the Film Licensed Investment Company (Consequential Provisions) Bill 2005 (FLIC (CP) Bill) will be to extend a pilot scheme to promote the production of certain Australian films by allowing a 100% tax deduction for taxpayers investing funds in a company licensed to raise capital under the scheme. In addition, the scheme also aims at making the Commonwealth's assistance to the Australian film industry accountable, transparent and quantifiable.

### Background

We need Australian films and Australian television programs to interpret an Australian identity to us and project this to the world with flow-on benefits to tourism and business.<sup>1</sup>

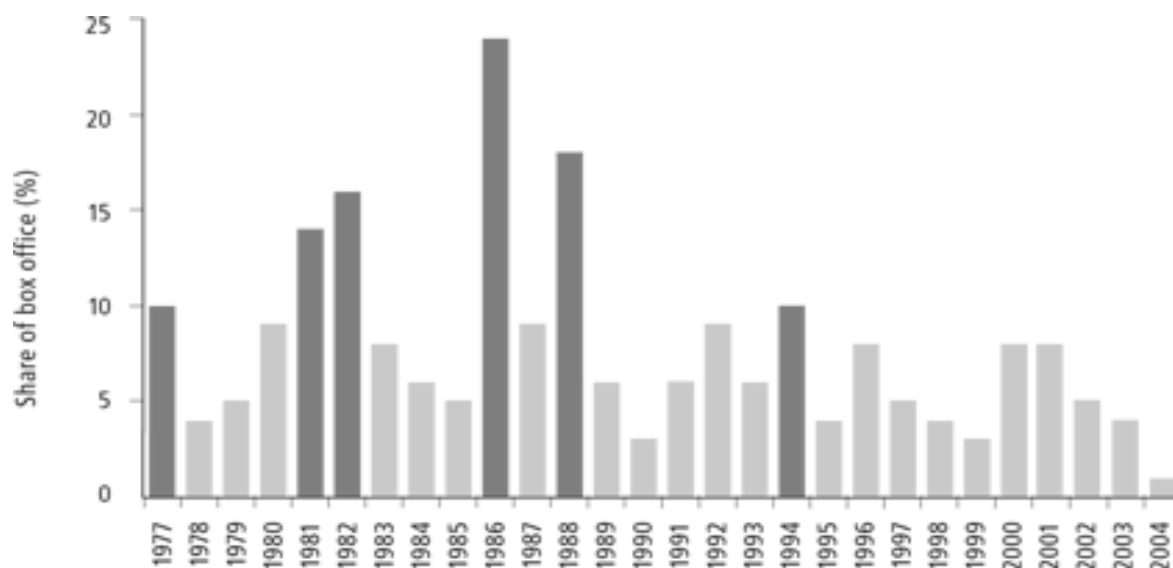
### Film production in Australia—some figures

In recent years, Australian film productions, as opposed to international blockbuster productions produced in Australia, had problems in reaching domestic, let alone international audiences. In 2004, Australian films accounted for only 1 per cent of the Australian box office results, the lowest figure since records started to be kept in 1977.<sup>2</sup> The following graph illustrates this:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



According to the Australian Film Commission (AFC), the years where Australian films gained at least 10 per cent of the local box office (and the films responsible) were:<sup>3</sup>

1977	Caddie, The Last Wave, Eliza Frazer, The Mango Tree
1981	Gallipoli, Mad Max 2, Puberty Blues
1982	The Man from Snowy River, The Year of Living Dangerously
1986	Crocodile Dundee
1988	Crocodile Dundee II, The Man from Snowy River II
1994	The Adventures of Priscilla, Queen of the Desert; Muriel's Wedding

## Film financing—a general comparative overview of film incentives

Film production is an expensive and relatively 'foot-loose' business.<sup>4</sup> Countries around the world have realised that by attracting film and TV productions to their territory, offering incentives for them to stay on their territory or nurturing them within their territory, they can reap many benefits. These include a spending multiplier effect, improved infrastructure and training, and tourism and national image spin-offs.<sup>5</sup> Accordingly, countries are increasingly willing to tailor packages to make film production in their territory attractive and to forgo short term revenue to reap longer term rewards. Referring to the funds coming from these mechanisms as 'soft money',<sup>6</sup> Patrick Frater summarises several funding mechanisms, including:

**Tax credits:** a system whereby a state offers a producer a rebate on film production costs spent in that country. The two most established systems of this type exist in

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Luxembourg and Canada. Both Australia and Iceland offer 'tax offsets' which also fit this category and appear to have taken their countries' attractions to a new level. Malta also uses it. The system can be likened to going shopping abroad and claiming back the value-added tax (VAT) at the airport. The producer needs to be able to pay out the full cost of production before claiming a refund. This hurdle can be circumvented by use of specialist banks that are willing to discount the value of the future claim. Some countries are also much quicker than others in reimbursing tax already paid.

**Tax allowances:** the most widespread and potentially biggest source of soft money for film-making. It works by giving a tax incentive either to private individuals or to companies that invest in production companies or one-off film productions, sometimes through acquisition. The German system famously works this way by creating film funds. The Netherlands' CV system of limited-liability partnerships also fits this mould, as do France's Soficas. As no film at the project stage and few film companies have sufficient income to use the tax allowances, the trick is to turn the allowance into something with which producers can use to make their films. The UK's sale-and-leaseback scheme works by selling the entire copyright of the film to an outside investor who claims the tax rebate. The film is then leased back to the producer, allowing the investor to cover their acquisition costs and the producer to get the film distributed. Alternatively these can be looked at as tax deferral schemes or simply as interest-free loans from the tax authorities. There will usually be some kind of criteria determining which films qualify for tax allowances. Germany, unusually, does not disqualify foreign productions, but the German tax advantages are only at their most efficient if all the 'losses' incurred at the production stage are attributed to the country. The fund also needs to be able to have some considerable influence on the production.<sup>7</sup>

In addition to these tax based funding incentives, Frater also refers to and summarises other funding mechanisms and incentives such as:

- Loan support—this incentive is based on 'loans made by government institutions on generous interest or repayment terms which would not normally be available on the open market.' According to Frater, this kind of incentive is offered to producers in the UK and Italy.
- Government underwritings and guarantees—this kind of incentive is based on a Government's promise to covers all or some of the potential losses of productions. These incentives are available in France. Guarantees have also been issued by the European Investment Bank.
- Box-office rebates—countries offering this incentive have systems in place which return a proportion of the box-office proceeds to producers. These incentives are available in France, Spain and some of the Nordic countries.
- Subsidies—an incentive available in form of some kind of Governmental cash injection into the production of films.<sup>8</sup>

Finally, some incentives come in the form of cheap or free facilities, such as entire studios or locations, in return for, for example, a co-production position in a film. Co-production

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

may also be achieved under international treaties and conventions such as [European Convention on Cinematographic Co-production](#).<sup>9</sup> The aim of such treaties and conventions is the creation of multinational film-production environments in which countries provide financial assistance and become co-producers.

## Film financing in Australia

Australia has historically used two of the above mechanisms to support the production of 'indigenous' Australian film; subsidies and tax incentives.

### Subsidising the production of Australian films

The Commonwealth funds a number of agencies that support the production of new work:

- Most notable is the Australian Film Finance Corporation (AFFC), a wholly owned Commonwealth company which provides support for feature films, telemovies, mini-series and documentaries. It supports a diverse range of culturally relevant material through equity investment, undertaken in partnership with participants in the film and television marketplace, including distributors, sales agents, broadcasters and private investors.<sup>10</sup>
- The Australian Film Commission (AFC), a Federal Government agency, provides resources, mainly in the form of finance and information, to people, projects, organisations and events.<sup>11</sup>
- Film Australia, a Federal Government-owned company, produces and distributes television documentaries and educational programs.<sup>12</sup>
- The Special Broadcasting Service Independent, which was established in 1994, commissions Australian drama and documentaries from the independent sector for screening on SBS Television.<sup>13</sup>
- The Commercial Television Production Fund (which no longer exists) and the Australian Children's Television Foundation.<sup>14</sup> Both have a role in the creation of television content. Commonwealth funding in the last 15 years has totalled slightly in excess of \$100 million.<sup>15</sup>

### Providing tax incentives for the production of Australian films

The second film production funding incentives are tax based. The Australian Government's support in this area currently rests on the following four pillars:

- incentives based on Division 10BA of the *Income Tax Assessment Act 1936*
- incentives based on Division 10B of the *Income Tax Assessment Act 1936*
- refundable tax offsets under Division 376 of the *Income Tax Assessment Act 1997*

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- the Film Licensed Investment Company scheme

Each of the pillars will be discussed in some detail below.

#### **Incentives based on Division 10BA of the *Income Tax Assessment Act 1936***

Division 10BA of the *Income Tax Assessment Act 1936* (ITAA 1936) aims to encourage private investment in culturally relevant, high-quality Australian film and television productions (10BA projects). Investors in 10BA projects can claim an accelerated tax deduction of 100 per cent in the year the investment is made. Under section 124ZAG ITAA 1936, the deductible amount is the capital expenditure incurred by the investor directly on, or as a contribution towards, the production of the film.<sup>16</sup> If the amount was contributed towards the production, the deduction is available only once the money is expended for the production. To be eligible as a 10BA project, a film must be:

- made wholly or substantially in Australia or be an official co-production, and have ‘significant Australian content’
- a project eligible for deductions, which includes features, documentaries, mini-series or telemovies, and
- certified by the Department of Communications, Information Technology and the Arts (DCITA) as a ‘qualifying Australian film’. However, producers have the option of applying for a *provisional* certificate early in the production process.

If they choose to apply for a provisional certificate, the producers must apply for a *final* certificate within six months of completing the project to secure the investors’ deductions. Programs certified under Division 10BA of the ITAA 1936 are also eligible for direct investment from the Australian Film Finance Corporation.

#### **Incentives based on Division 10B of the *Income Tax Assessment Act 1936***

Where the Division 10BA deduction does not apply, or where a taxpayer elects the Division not to apply, a two-year write off concession under Division 10B of the ITAA 1936 remains available.

Similar to the deductions available under Division 10BA, investors expending capital on the production or acquisition of copyright in qualifying Australian films, as certified by DCITA,<sup>17</sup> are entitled to a tax deduction if the taxpayer uses the ownership in the copyright for income producing purposes. It follows that the deduction will be available only once the film is completed and is generating income, whilst the deduction under Division 10BA ITAA 1936 is available as soon as the film is certified by DCITA. Division 10B tax incentives apply to a greater number of categories than Division 10BA and include feature films, documentaries, mini-series, series, short dramas, multimedia formats such as CD-ROMs, plus promotional, variety, educational and training material as well as large-format programs.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

### Refundable tax offsets under Division 376 of the *Income Tax Assessment Act 1997*

To attract to Australia's shores large budget 'foot-loose' foreign films, the Australian Government introduced in 2002 a refundable tax offset for certain Australian film productions. This offset is available to 'film production companies' within the meaning of section 376-5 of the ITAA 1997. However, the availability of this offset is linked to the following financial thresholds:

- the production film company must expend a minimum of \$15 million on the production, and
- if the production film company expends between \$15 million and \$50 million dollars—it must spend a minimum of 70 per cent of the film's total budget in Australia.

Where the total budget for a film is more than \$50 million, no minimum percentage applies and the tax offset is available regardless. Film production companies claiming this refundable tax offset will not be able to access any of the other film related tax incentives, including the incentives provided under Divisions 10B or 10BA ITAA 1936, or seek funding from the Film Finance Corporation.<sup>18</sup>

### The piloting of Film Licensed Investment Company scheme

In 1997, David Gonski recommended in his *Review of Commonwealth Assistance to the Film Industry* the establishment of so called FLICs.<sup>19</sup> These FLICs combine elements from the existing schemes accordingly, they would be a mid-way form of investment incentive in that it would have the hallmarks of both existing schemes:

- like the subsidising body, a FLIC would pick projects to invest in, but rather than depending upon direct government subsidies, it would rely on tax concessions offered to investors in the FLIC, and
- like the tax incentives provided for by Divisions 10BA and 10B of the ITAA 1936, the FLIC would provide tax concessions for investors, but instead of providing the incentives in relation to the investment into a single projects, an investor in a FLIC would be spreading their risk by effectively investing in several film projects.

The FLIC scheme was introduced in 1998 as the *Film Licensed Investment Company Bill 1998*.<sup>20</sup> It permitted a 100 per cent tax concession over the financial years 1998/99 and 1999/2000. Investors received deductions for buying shares in a FLIC which, in turn, invested in qualifying Australian programs. Two successful FLIC licensees were appointed in April 1999—Content Capital Ltd and Macquarie Film Corporation Ltd. Each could raise up to \$20 million concessional capital over two financial years ending June 2000. Only \$22.4 million out of the possible \$40 million was secured by that date; \$16.26 million for Macquarie and \$6.14 million for Content Capital. Concessions ended in June 2000, but non-concessional investment in the FLICs continued to 30 June 2002. While the FLICs could continue to raise non-concessional capital until June 2002, projects

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



had to be completed by 30 April 2003. The pilot scheme ended in June 2003. In October 2003, a review reported to the Government that ‘the scheme had broadened the base of investment in Australian films’.<sup>21</sup>

### Basis of policy commitment

As part of its 2004 Election policy, the Coalition promised:

A re-elected Coalition Government will work in partnership with the film industry to extend the FLIC scheme. This will help gear up much needed private sector investment in the industry and provide alternative avenues for co-production. This measure will cost \$4 million in each of 2006-07 and 2007-08.<sup>22</sup>

This promise was manifested in a package of measures to ‘facilitate greater private investment in the film sector and continue to encourage a more entrepreneurial approach to secure the long-term viability of our film industry.’<sup>23</sup> Some of these measures were introduced with the 2004 Budget and others promised in the 2004 election campaign for 2004.

Among the former were measures extending the refundable tax offset for large budget film production to television series and serials, and boosting funding for the Film Finance Corporation (FFC) to \$60.5 million in 2004-05 and supporting their review of investment policies and guidelines for 2004-05.<sup>24</sup>

Among the latter were measures extending funding for AusFILM, Australia's film and location marketing organisation. AusFILM was to provide offshore producers with ‘a one-stop shop’ for all aspects of film-making in Australia. Another measure promised to further boost funding to the Film Finance Corporation (FFC), Australian Film Commission (AFC), ScreenSound and Australian Film, Television and Radio School.<sup>25</sup>

The Government also pledged continuing support and funding for SBS Independent (SBSi), the independent commissioning arm of SBS, and for Film Australia's National Interest Program.<sup>26</sup>

On the tax concession front, the Coalition promised to undertake a review of key provisions of Divisions 10B and 10BA of the ITAA 1936. The review was to develop proposals for improving certainty and ensuring that the provisions operate effectively. The Government also proposed the amendment of section 79D of the Act to ensure that it operates consistent with the original intent.<sup>27</sup>

After having been re-elected, the Government announced on 10 May 2005 that it would extend the (FLIC) scheme for two years. In their joint announcement the Minister for the Arts and Sport, Rod Kemp, and the Minister for Revenue and Assistant Treasurer, Mal Brough, said that:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

This extension fulfils the Government's commitment to help gear up much needed private sector investment in the film industry and provides alternative avenues for co-production, [...] The FLIC structure itself allows investors to spread risk by investing in a slate of film projects whilst receiving a 100 per cent income tax deduction on the funds invested. The extension will allow one licensee to raise concessional capital which will be capped at \$10 million in each of the two years. The concessional capital raising will begin from the date of issue of the licence and will conclude on 30 June 2007. This new measure fulfils the Government's 2004 election commitment to extend the pilot FLIC scheme over two years at a cost of \$8 million, as announced in *Strengthening Australian Arts, A World Class Australian Film Industry*.<sup>28</sup>

In relation to the existing tax concessions for the film industry, they further announced:

In another positive step for the Australian film industry, section 79D of the *Income Tax Assessment Act 1936* will be amended to allow taxpayers to deduct foreign losses from domestic income. This broad measure fulfils the Government's election commitment to amend the law in regard to the interaction of the foreign loss quarantining rules and the Australian film tax deduction concessions contained in Divisions 10BA and 10B. The measure removes the quarantining rule altogether, thus fulfilling the promise. For further information on this measure please see the Treasurer's press release *International Tax Reforms*, particularly attachment C released on 10 May 2005. A review of the key provisions of Divisions 10BA and 10B was also announced as part of the 2004 election policy. A discussion paper calling for submissions to the review will be issued shortly.<sup>29</sup>

The package of measures taken or promised by the Government in 2004 and 2005 were widely supported by different sectors of the industry as were, for the similar reasons, Labor's package of measures proposed in the context of the 2004 election campaign. Without referring expressly to FLICs, Labor's Shadow Minister for the Arts, Senator Kate Lundy, announced that:

Labor understands the importance of encouraging private sector investment in Australian films, as well as attracting overseas investment, to provide funding for the development and production of film and television series in Australia. Labor is committed to maintaining existing concessional tax arrangements and will explore new incentives and initiatives to encourage support from the private sector, as well as investigate any administrative issues that could be providing a disincentive to investors in film and television production.<sup>30</sup>

## Scope of the proposed scheme: the meaning of 'qualifying Australian film'

Under the proposed FLIC scheme, companies will be able to raise funds for investment in so called 'qualifying Australian films'. This term is defined in **clause 6** of the proposed FLIC Bill, referring to the definition contained in Part III, Division 10BA of the *Income Tax Assessment Act 1936* (ITAA 1936) under which a 'qualifying Australian film' a so called 'eligible Australian film'.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Eligible films

A film is considered to be an ‘eligible film’ within the meaning of the ITAA 1936 if the film was produced wholly or principally for exhibition to the public in cinemas or by way of television broadcasting, being a feature film or a film of a like nature produced for exhibition by way of television broadcasting, a documentary or a mini-series of television drama.<sup>31</sup> However, this does not include a reference to a film which is:

- a film for exhibition as an advertising program or a commercial
- a film for exhibition as a discussion program, a quiz program a panel program, a variety program or a program of a like nature
- a film of a public event
- a film forming part of a drama program series that is, or is intended to be, of a continuing nature, or
- a training film.

## Australian film

A film is considered to be an Australian film within the meaning of the ITAA 1936 if it:

- has been made wholly or substantially in Australia or in an external Territory and has a significant Australian content; or
- has been made in pursuance of an agreement or arrangement entered into between the Government of Australia or an authority of the Government of Australia and the Government of another country or an authority of the Government of another country.

Only films which can fulfil the above criteria, amongst others, will be able to be financed by FLICs.

## Main Provisions of the *Film Licensed Investment Company Film Bill 2005*

### Part 1 of the FLIC Bill —preliminary provisions

**Part 1** of the FLIC Bill sets out the objects of the legislation (**clause 4**), stipulates that several provisions operate outside the Australia’s jurisdiction (**clause 5**) and contains a definition section which contains the key definition for the proposed legislation.

### Part 2 of the FLIC Bill—the scheme

**Part 2** of the FLIC Bill is subdivided into 10 Divisions which will devise the FLIC scheme.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Divisions 2 to 4: application and grant of a concessional capital license

Proposed **Division 2 to 4** are concerned with the application for, and grant of, a concessional capital license (CPL).

Under Division 2, the Minister has the authority to stipulate the rules applicable to application process (application rules). **Clause 8** of the FLIC Bill contains a non-exhaustive list of matters which may be stipulated by the Minister. These matters include:

- the method of calling for applications
- the closing date for a round of applications
- the form of the application and the documentation that must accompany an application
- the establishing of a Selection Advisory Panel (SAP) to advise the Minister in respect of the applications including the membership of the panel and tenure of panel members
- the rules governing the operation of the SAP, and
- any other matter relevant to the application process under the scheme.

In addition, under proposed **clause 9** of the FLIC Bill, the Minister must determine:

- the criteria which must be applied by the Minister
- the weight which is given to each of these criteria, and
- the procedures the Minister must adhere to

in deciding to whom a license may be granted.

The stipulation of the application rules, as well as the criteria and procedures referred to above, must be made by virtue of legislative instruments. Accordingly, the determinations are subject to the *Legislative Instruments Act 2003* (LIA) and

- must be registered with the Federal Register of Legislative Instruments (FRLI)
- must be tabled in both Houses of Parliament within six sitting days after their registration, and
- are subject to disallowance by either House.

**Division 3** of the FLIC Bill sets out the application process to obtain a CPL. Under **clause 10** of the FLIC Bill, the Minister may call for a round of applications for a license, but may also call for further applications if the initial round fails to result in the issuing of that license. **Clause 11** specifies the procedural aspects for the applicants, which includes that they have to provide the information as required by the application rules. If this information is insufficient to make a decision whether or not to grant the license, the Minister has the power to request further information under **clause 12** of the FLIC Bill.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Division 4** is concerned with the grant of the license. Once a licence was granted to an applying company, this company becomes a film licensed investment company (FLIC). Under **clause 14** of the FLIC Bill, the Minister is given a discretionary power to grant a license, but only if all the conditions and requirements set out in Part 2 of the FLIC Bill have been met by the applicant. Apart from these other conditions contained in Part 2 (which are referred to below), **clause 13** contains a set of mandatory conditions on the grant of a CPL. These conditions are that:

- the company is registered under the *Corporations Act 2001*
- the company has not started business or exercised any borrowing power
- the company's central management and control is ordinarily exercised in Australia
- the chair of the company and all of the company's directors are Australian citizens, and
- the company's constitution provides that all of the shares in the company are to be fully paid and of the same class.

Further, the Minister must take into account the recommendations made by the SAP (**clause 16**). Should the Minister decide not to grant a license, then **clause 17** will provide that the applicant must be informed of this decision, including the reasons for this decision, in writing.

The minimum formal requirements of a license granted under this scheme are set out in **clause 15** of the FLIC Bill.

**Divisions 5** and **6** specify further details of the CPL that may be granted to an applying company. Under Divisions 5, a FLIC may raise up to \$10 million for the financial years starting on 1 July 2005 and 1 July 2006 (**clause 18**). Division 6, **clause 19** stipulates the license period which spans from the day on which the CPL was granted to the

- day the revocation of the CPL as made by the Minister may take effect, or
- otherwise, on 30 June 2007.

Division 7—conditions of the scheme

**Division 7** of the FLIC Bill sets out the conditions which apply to FLICs under the scheme. Broadly speaking, the FLIC Bill contemplates two types of conditions: conditions expressly stipulated in the Bill (statutory conditions) and those prescribed by virtue of a determination made by the Minister in form of a legislative instrument (**subclauses 20(1)** and **(2)** of the FLIC Bill).

Statutory conditions: clauses 22 to 28 of the Film Licensed Investment Company Bill 2005

The statutory conditions applicable to FLICs will be grouped into 7 categories. All conditions set out in these categories are mandatory. The categories are:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Fundraising conditions (clause 22)

**Clause 22** of the FLIC Bill contains specific conditions in relation to the FLICs fund raising efforts. In particular, the clause provides that a FLIC must:

- raise a minimum of \$5 million capital in the first 12 months of the licence period
- not raise than \$10 million in each of the two financial years starting 1 July 2005
- not issue debentures or convertible notes for the purpose of raising capital, and
- not borrow any monies (except during the financial year starting on 1 July 2005 for the purpose of meeting administrative costs).

Investment conditions (clause 23)

**Clause 23** of the FLIC Bill contains specific conditions relating to the FLICs' ability to invest monies raised under the scheme. This includes that a FLIC must:

- before 30 June 2008, invest its concessional capital raised under this scheme into two or more films which have been provisionally certified
- not start its investment before the FLIC has either raised \$5 million of concessional capital or, a period of 12 months has lapsed since the grant of the CPL, and
- not invest more than half as much of its capital (whether concession or non-concessional capital) as a contribution to marketing and distributing a film as it spends as a contribution to the production costs of the film.

Returns to shareholders (clause 24)

Under **clause 24** of the FLIC Bill, the FLIC must comply with several conditions in relation to the distribution of returns to its shareholders. These include that the FLIC must:

- distribute to its shareholders returns attributable to capital invested by the FLIC in a provisionally certified film, and
- distribute these returns in equal proportion to the number of shares held by the shareholders.

Conditions with respect to films (clause 25)

Under **section 25**, a FLIC must not invest in films developed or produced by:

- the holder of a licence allocated by the Australian Communications and Media Authority under the *Broadcasting Services Act 1992* or an associate of such a person
- the provider of a broadcasting service in accordance with a class licence determined by the Australian Communications and Media Authority under section 117 of the *Broadcasting Services* or an associate of such a person;

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- the Australian Broadcasting Corporation, or
- the Special Broadcasting Service.

**Subclause 25(b)** provides that the film must receive a final certificate under section 124ZAC of the ITAA 1936 prior to 30 June 2009. In receiving this certificate, the Minister confirms that for the production of the film, a claim has not been made for a tax offset under Division 376 of the *Income Tax Assessment Act 1997*.

Certain conditions on the grant of the CPL and conditions contained in legislative instruments made under section 21 (clause 26)

**Clause 26** provides that the FLIC must continue to comply with any precondition set out in subclauses 13(a), (c) (d) and (e) of the Bill.<sup>32</sup> Further, the FLIC must comply with any condition contained in a determination made by the Minister under clause 21 of the Bill (see discussion below).

Ownership conditions (clause 27)

**Subclause 27(1)** of the Bill stipulates the general principle that a FLIC must not have an unacceptable level of foreign or individual ownership. Under **subclause 27(2)**, an unacceptable level of foreign ownership will be reached if a group of foreign persons hold a particular *stake* of more than 33 per cent in the FLIC. Similarly, an unacceptable level of individual ownership is reached if a particular person holds a *stake* of more than 33 per cent in the FLIC. The term *stake*, for the purposes of this scheme, is defined in **clause 11 of Schedule 1** to the Bill and includes the aggregate of direct control interests in the FLIC that a person and his or her associates may hold at a particular point in time (Schedule 1, subclause 11(1) of the FLIC Bill). Schedule 1 of the FLIC Bill contains further details in relation to the ownership rules which are discussed in more detail below.<sup>33</sup>

Other conditions (clause 28)

**Clause 28** of the FLIC Bill stipulates further conditions, including for example that a FLIC must:

- not purport to transfer the CPL to another person. Any such purported transfer will be deemed to be void under **clause 38** of the Bill
- comply with certain reporting requirements contained in **Division 9** of the FLIC Bill, and
- comply with certain accounting standards.

Conditions made by legislative instrument: clause 21 of the Film Licensed Investment Company Bill 2005

Under **clause 21** of the FLIC Bill, the Minister may determine conditions which apply to a FLIC under the scheme. Such determinations must be made in the form of a legislative

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

instrument which must be registered on the FRLI. The legislative instrument will be subject to the provisions contained in the LIA, which means that it must be tabled in Parliament and will be subject to disallowance.

### Division 8—breach of the conditions

**Division 8** of the FLIC Bill includes provisions which set out the powers, rights and obligations of the Minister in relation to suspected and proven breaches of the conditions discussed above.

To maintain procedural fairness, the Minister will be required to notify a FLIC that he or she is of the opinion that the FLIC is in breach of a condition of the scheme (**clause 29**). This notification must be in writing and must invite the FLIC to make written submissions within 28 days. In addition, the Minister may request further information from the FLIC under **clause 30** of the FLIC Bill. Finally, under **clause 31**, the Minister will be obliged to consider any submission made, or further information provided, by the FLIC before making a decision as to which action to take in response to the breach. Under **clause 32** of the FLIC Bill, such action may include:

- not to take any action with respect to the breach (**paragraph 32(1)(a)**)
- to issue a notice to remedy the breach within a certain period of time (**paragraph 32(2)(a)**). Should the FLIC to remedy the breach, the Minister may choose from any of the actions listed in this paragraph
- to revoke the licence (**paragraph 32(2)(b)**), or
- to remove the concessional status of the of the shares that were issued by the FLIC to investors (**paragraph 32(2)(c)**).

In order to strip the tax concessional status of a FLIC for its investors under this scheme, the Minister must inform the Commissioner for Taxation of any CLP revocation or removal of concessional status within 28 days. The Commissioner must also be informed if the Minister decides not to take any action under clause 32(1)(a) (**subclause 32(4)**).

Importantly, decisions made by the Minister can be appealed to the Administrative Appeals Tribunal under **section 42** of the FLIC Bill.

Should the Minister decide to revoke a CPL without removing the concessional status of the investor's shares, the FLIC must invest the funds into a provisionally certified film within 6 months from the day on which the revocation took effect (**clause 34**).

## Part 3 of the Bill—offences concerning ownership restrictions

The Bill contains two offence provisions dealing with offences committed in relation to the acquisition of shares and the avoidance of the ownership restrictions.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



Under **clause 40** of the FLIC Bill, persons will commit an offence if the person, or persons in some kind of arrangement, acquire shares in a FLIC which result in

- an unacceptable level of foreign or individual ownership in the FLIC (**paragraphs 40(a)(i) and (iii)**), or
- where such a level already exists—the increase in an unacceptable level of foreign or individual ownership in the FLIC (**paragraphs 40(a)(ii) and (iv)**).

Under **clause 41** of the FLIC Bill, a person, or persons, who take steps with the sole or dominant purpose of avoiding the ownership restriction rules set out in clause 27 of the Bill, may be committing an offence, if:

- the Minister gives them a direction to cease holding their stake
- the persons engage in conduct, and
- this conduct breaches the Minister's direction (**paragraphs 41(3)(a) to (c)** of the Bill).

The offences set out in Part 3 of the FLIC Bill are subject to the definitions contained in Schedule 1 of the Bill.

### **Schedule 1 of the Bill—Ownership definitions**

**Schedule 1** defines the terms used in the conditions of scheme, especially in relation to certain provisions restricting film making, ownership in a FLIC and the offence provisions.

**Clause 2** of Schedule 1 contains a variety of definitions, some of which are further defined in the provisions following this clause. These more detailed statutory definitions include, for example:

- when are foreign citizens deemed to be ordinarily resident in Australia? (**clause 3 of Schedule 1**)
- what constitutes entering into an agreement or arrangement within the meaning of the Bill? (**clause 4 of Schedule 1**)
- who are associates? (**clause 5 of Schedule 1**), and
- what constitutes a direct control interest in a FLIC? (**clause 12 of Schedule 1**).

### **Main Provisions of the *Film Licensed Investment Company (Consequential Provisions) Bill 2005***

The FLIC (CP) Bill makes consequential changes to the ITAA 1997 (**Schedule 1, Part 1** of the FLIC (CP) Bill) and repeals the old scheme contained in the *Film Licensed Investment Company Act 1998* (**Schedule 1, Part 2** of the FLIC (CP) Scheme). However,

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

the applicability of any provision relevant to a FLIC established under the old scheme is saved by virtue of **Schedule 1, Part 3** of the FLIC (CP) Bill.

## Concluding Comments

Kim Dalton, Chief Executive of the Australian Film Commission has noted that:

Australian governments of all persuasions have accepted that without government intervention it is extremely difficult for small nations like ours to produce cultural goods that give full expression to our stories, ideas and images.<sup>34</sup>

The FLIC scheme devised in this Bill will be one pillar of government intervention by providing tax concessions for investors who choose to provide funds for the production of Australian films. The Bill raises the following general issues:

- Cultural bias—the tax concessions are available only in relation to investments which help to produce qualifying Australian films. Whilst this culturally motivated bias towards providing preferential treatment for Australian film productions may appear on its face to violate the Australia-US Free Trade Agreement (AUSFTA), the provision of tax concessions limited to the Australian film industry is permitted under Annex II of the AUSFTA.<sup>35</sup>
- Limitation of licenses to one—whilst under the piloting FLIC scheme two licences were issued by the Government (as noted above, two successful FLIC licensees were appointed in April 1999—Content Capital Ltd and Macquarie Film Corporation Ltd.), the new scheme proposed in this Bill will support only one license. In the Second Reading Speech, the Minister pointed out that the:
 

Issuing a single license will minimise the duplication of administrative costs that may result from the issuing of multiple licenses.<sup>36</sup>
- Effectiveness of the incentives—whether the measure will boost the international recognition of Australian films has to be seen. Commentators have pointed out that:
 

Polarised release strategies and reduced screening periods have serious ramifications for smaller films like Australian features with limited marketing budgets.<sup>37</sup>

Boosting the production of films by providing tax incentives to investors is only one side of the medal, but it does not address the possibly damaging distribution and exhibition patterns in the film industry.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Endnotes

---

- 1 K. Dalton, Chief Executive, Australian Film Commission, ‘Opportunities and Implications for Australia’s Film, Television and New Media Sectors’, *speech*, Film Victoria Free Trade Agreement Seminar, 28 October 2004, p. 5.
- 2 Australian Film Commission, ‘Australian films’ share of the Australian box office, 1977-2004’, available at <http://www.afc.gov.au/GTP/wcboshare.html>, accessed on 1 June 2005.
- 3 Australian Film Commission, ‘Australian films’ share of the Australian box office, 1977-2004’, available at <http://www.afc.gov.au/GTP/wcboshare.html>, accessed on 1 June 2005.
- 4 *Foot-loose businesses* are businesses which are not tied down to a particular location.
- 5 R. Miller, ‘The Joy of Tax – Tax Incentives: Europe, Australasia and South Africa’, *Screen International*, 1 April 2005. One example for economic success is the production of the *Lord of the Rings* Trilogy in New Zealand. NZ Institute of Economic Research, Scoping the Lasting Effects of the Lord of the Rings, Report to the New Zealand Film Commission, April 2002, available at [http://www.nzier.org.nz/SITE\\_Default/SITE\\_Publications/x-files/181.pdf](http://www.nzier.org.nz/SITE_Default/SITE_Publications/x-files/181.pdf), accessed on 31 May 2005.
- 6 The term ‘soft money’ was coined in the article P. Frater, ‘The hard facts about soft money’, *Screen daily.com*, 6 January 2003 to describe production funds raised in form of tax incentives or box-office rebates.
- 7 P. Frater, *ibid.*.
- 8 *ibid.*
- 9 For details of incentives offered by various countries and, within North America, states and provinces, see Miller, *op. cit.*, pp. 16-19.
- 10 Further details can be found at the AFFC’s webpage at <http://www.ffc.gov.au>.
- 11 The Australian Film Commission (AFC) is the Federal Government’s agency for supporting the development of film, television and interactive digital media projects and their creators, particularly in the independent sector. Further details can be found at the AFC’s webpage at <http://www.afc.gov.au>.
- 12 Film Australia is a Federal Government-owned production and distribution company; it is one of the nation’s largest producers and distributors of television documentaries and educational programs. Through the National Interest Program it receives finance to devise, produce and distribute programs which deal with matters of national interest to Australia or illustrate and interpret aspects of Australian life. Further details can be found at Film Australia’s webpage at <http://www.filmaust.com.au>.
- 13 Special Broadcasting Service Independent (SBSI) receives funding from SBS through its annual appropriation, but the greater part of SBSI finance comes directly from the Federal Government through the Special Production Fund. Further details can be found at SBSI’s webpage at <http://www.sbs.com.au/sbsi/>.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 14 The Australian Children's Television Foundation (ACTF) is a national non-profit organisation created to encourage development, production and dissemination of television programs, films and other audiovisual media for children and to promote these programs in the community. Further details can be found at ACTF's webpage at <http://www.actf.com.au>.
- 15 For a breakdown by year and body, the reader is referred to the AFC's webpage at <http://www.afc.gov.au/GTP/ogovtfundbudget.html>. To complete this list, the reader's attention is drawn to the Australian Film Television and Radio School (AFTRS) and the National Screen and Sound Archive (ScreenSound Australia) The AFTRS is the national centre for professional education and advanced training in film, broadcasting and interactive media for Australian citizens and permanent residents. Further information about the AFTRS can be found at <http://www.aftrs.edu.au>. ScreenSound Australia plays a leading role in preserving and collecting Australia's film, television and sound heritage. Total revenues from the Federal Government have increased in recent years to allow for loan payments on the new headquarters building and to maintain the capital value of the collection. Further information about Screensound Australia can be found at <http://www.screensound.gov.au>.
- 16 CCH, Australian Master Tax Guide, CCH Australia Limited, Sydney, 2005, p. 1095.
- 17 This includes equitable rights in the copyright. See generally: See generally R. L. Deutsch, M. L. Friezer, I. G. Fullerton, M. M. Gibson, P. J. Hanley, T. J. Snape, *Australian Tax Handbook*, Thomson ATP, Sydney, 2005, p. 736.
- 18 CCH, Australian Master Tax Guide, op. cit., p. 1103.
- 19 D. Gonski, *Review of Commonwealth Assistance to the Film Industry*, Report prepared for the Department of Communication and the Arts, Canberra, 1997.
- 20 C. Field, 'Film Licensed Investment Company Bill 1998', [Bills Digest](#), No. 221, Information and Research Services, Canberra, 1997—98. C. Field and M. A. Nielsen, 'Film Licensed Investment Company Bill 1998', [Bills Digest](#), No. 31, Information and Research Services, Canberra, 1998—99.
- 21 Australian Liberal Party, Coalition Election 2004: *Strengthening Australian Arts*, [Policy Document](#), Canberra, 2004.
- 22 *ibid.*
- 23 *ibid.*
- 24 *ibid.*
- 25 *ibid.*
- 26 *ibid.*
- 27 *ibid.*
- 28 The Hon. M. Brough, Assistant Treasurer and Minister for Revenue, and the The Hon. R. Kemp, Minister for the Arts and Sport, 'New measures to support the film industry — Film Licensed Investment Company Scheme Extension', [Joint media release](#), No. 36, Canberra, 2005.
- 29 *ibid.*

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 30 K. Lundy, Shadow Minister for the Arts, 'Creative Opportunity: Australian Stories – Investing in Australian film and television', [Policy Document](#), Canberra, 2004.
- 31 The term 'film' is also defined in the ITAA 1936 and means 'an aggregate of images, or of images and sounds, embodied in any material'.
- 32 See this Digest above, p 12.
- 33 See this Digest above, pp. 16.
- 34 Dalton, op. cit., p. 5.
- 35 Annex II to the Australia-US Free Trade Agreement, which contains a list of permitted non-conforming measures, is available at [http://www.dfat.gov.au/trade/negotiations/us\\_fta/final-text/non-conforming\\_measures/Annex\\_II\\_combined.pdf](http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/non-conforming_measures/Annex_II_combined.pdf), accessed on 1 June 2005.
- 36 The Hon. P. Mc Gauran, Minister for Citizenship and Multicultural Affairs, 'Second reading Speech: Film Licensed Investment Company Bill 2005', Bills, House of Representatives, 26 May 2005, p. 6.
- 37 S. Maher, 'Internationalisation of Australian Film and Television', [paper](#), Communications Law Centre, Melbourne, 2001, p. 61-71.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

© Copyright Commonwealth of Australia 2005

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

---

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2699.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*