



National Film and Sound Archive Bill 2008

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National Film and Sound Archive Bill 2008

Date introduced: 20 February 2008

House: House of Representatives

Portfolio: Environment, Heritage and the Arts

Commencement: Sections 3 to 43 at the same time as subsection 5(1) of the *Screen Australia Act 2008* commences; for all other sections, on the date of Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to establish the National Film and Sound Archive (NFSA) and separating its functions from the Australian Film Commission (AFC).

Background

In 1935, the Government decided to establish the National Film and Speaking Record Library as part of the then Commonwealth National Library.

The Hawke Government announced, in April 1984, its decision to establish the National Film and Sound Archive as a separate institution based upon the National Film Archive and the Sound Recording Collection in the National Library. The new institution, together with a Council to guide its operation, was created that same year. The transfer of National Library assets was concluded in 1988.

In 1997 David Gonski's report entitled, *Review of Commonwealth Assistance to the Film Industry*¹, found significant functional duplication between the Commonwealth-funded Film agencies, but considered that the National Film and Sound Archive's activities were consistent with its function.

The organisation changed its name to 'ScreenSound Australia' in 1999. It functioned as an operational group within, and derived its funding from, the Department of

1. D. Gonski, 'Review of Commonwealth Assistance to the Film Industry,' Canberra, Department of Communications and the Arts, 1997.

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Communications, Information Technology and the Arts (DoCITA). In 2000 its name was adjusted to 'ScreenSound Australia, the National Screen and Sound Archive' (to be referred to ScreenSound Australia for the remainder of this digest).

In 2003 the Commonwealth *Review of Cultural Agencies* report [recommended](#), among other things, the integration of the ScreenSound Australia and the Australian Film Commission (AFC).² In a joint media release of 13 May 2003, Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts and Senator the Hon Rod Kemp, Minister for the Arts and Sport stated:

The synergies created by combining the resources of the AFC and ScreenSound Australia will improve their current educational and exhibition activities. It will also provide national leadership in enhancing access to, and understanding of, audiovisual culture.

Legislation will be introduced to facilitate the integration and, for the first time, give clear recognition in Commonwealth statute to the important work of collecting and preserving the nation's sound and visual heritage.³

In response, the Shadow Treasurer and Shadow Minister for the Arts, Mr Bob McMullan, MP said:

More information is needed about the effects of this amalgamation on the functions of both bodies.

It is difficult to see how the amalgamation of two different bodies with fundamentally different roles will improve services to the film industry and the public. The AFC produces films and ScreenSound preserves and provides access to them. We will be watching closely to ensure that none of these functions is neglected.⁴

To facilitate the amalgamation, the Australian Film Commission Amendment Bill 2003 was introduced to the House of Representatives on 29 May 2003. The relevant [bills digest](#) provides some useful information about the integration of the two organisations.

The *Australian Film Commission Amendment Act 2003* came into force on 1 July 2003. Although the amalgamation occurred, many expressions of public concern followed,

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2. The Australian Film Finance Commission had been established as a statutory authority in 1975 and had been helping to develop the screen production sector in Australia.
 3. Senator the Hon R. Alston, Minister for Communications, Information Technology and the Arts and Senator the Hon R. Kemp, Minister for the Arts and Sport, '*New arrangements for the Australian Film Commission and ScreenSound Australia*', Media release, Parliament House, Canberra, 13 May 2003.
 4. Mr B. McMullan MP, '*Job Losses to Follow Cultural Review*', Media release, Parliament House, Canberra, 16 May 2003.

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especially with respect to possible job losses, functional break ups and program relocations. These concerns were not alleviated by the release by the AFC on 12 December 2003 of a *'Review of Programs – Stage 2 Directions Paper'*.

On 17 December 2003 the AFC issued a media release entitled *'ScreenSound jobs to stay'* in which it was stated that:

Following a meeting with ACT Senator Gary Humphries last night to discuss proposals for change at ScreenSound Australia, Chief Executive of the Australian Film Commission (AFC) Kim Dalton has agreed there will be no job losses from ScreenSound.

Mr Dalton says that as a result of concerns expressed by Senator Humphries and by staff, unions and stakeholders, the AFC has made a commitment that no jobs will be lost, including senior management, and no existing functions will be moved out of Canberra as a result of the review of ScreenSound programs. In addition no senior management positions will be moved out of Canberra.

"This commitment to ScreenSound staff and management is made unconditionally. I hope this will now provide the opportunity for an open and constructive discussion to take place around the Directions Paper," Mr Dalton said.

The AFC welcomes discussion on the various proposals in the paper which include an expanded Canberra-based school visitor program, touring exhibitions to regional Australia, and the establishment of the Centre for Scholarship and Archival Research in Canberra.

Mr Dalton said the deadline for responses to the Directions Paper has been extended from 23 January to 16 February 2004 to further accommodate concerns and a series of forums will be held around the country, including in Canberra, before that date to assist the process of consultation.

More than 100 submissions on the Directions Paper were received, many advocating changing the archive's name back to its original one to better reflect its national significance, and giving the institution its own statutory base, (the institution's continued existence not being guaranteed either as a branch of the Department of Arts or under the proposed amendments to the Australian Film Commission Act). Although the new structural arrangement remained unchanged, in 2004 the name was changed back to the 'National Film and Sound Archive'.

The former Government's election 2004 election policy paper [Strengthening Australia's Arts](#) still supported the integrated arrangement:

The integration has already generated benefits, such as the transfer of the National Film and Video Lending Service from the National Library to ScreenSound, and the tour of *The Sentimental Bloke*. Through integration, ScreenSound has received a statutory mandate for its audiovisual archiving functions, offering greater protection

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to its collection. The Coalition Government also provided \$20 million to refurbish ScreenSound with state-of-the-art facilities and technology.⁵

However, as early as 12 February 2004 the then, Opposition Leader, Mark Latham, promised that an Australian Labor Party (ALP) Government would establish the National Film and Sound Archive as a Statutory Authority under the *Commonwealth Authorities and Companies (CAC) Act 1997* with consequent transfer of resources and functions from the Australian Film Commission.⁶

This Bill is part of a raft of legislation which includes:

- Screen Australia Bill 2008 and
- Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008.

Together the Bills will also allow the AFC to merge with the existing Film Finance Corporation Australia Limited and Film Australia Limited into a new agency, to be known as Screen Australia.

Financial implications

According to the Explanatory Memorandum, the Bill is not expected to have a significant impact on Commonwealth expenditure.⁷

However, as the Bill does provide for the establishment of a new organisation and that organisation will be tasked with developing, preserving, maintaining, promoting and providing access to a national collection of programs and related material the effect of the Bill may not be cost neutral.

Main provisions

Part 1 of the Bill relates to preliminary matters. In particular **item 3** contains relevant definitions including:

- **‘program’**, being

5. ‘A Stronger Economy a Stronger Australia: The Coalition Government 2004 Election policy Strengthening Australian Arts’, Canberra, 2004, p. 13.

6. Mark Latham, MP, Federal Labour’s Plan to establish ScreenSound Australia as a Statutory Authority’, [Media release](#), Parliament House, Canberra, 12 February 2004.

7. Explanatory Memorandum, p. 1.

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- a screen production
- an aggregate of sounds embodied in any material⁸ or
- an aggregate of images or sounds, or of images and sounds that is or is intended to be distributed without first having been embodied in any material and
- ‘**screen production**’ which means an aggregate of images or of images and sounds, embodied in any material that can be viewed on a screen, including for example, a film.⁹

Item 4 provides that, when it is enacted, the Bill will apply both within and outside Australia. This will allow the National Film and Sound Archive (NFSA) to engage in activities overseas, such as providing access to parts of the national collection at an overseas film festival.¹⁰

Part 2 provides for the establishment of the NFSA.

Clause 5 proposes to establish the NFSA as a body corporate in accordance with the *Commonwealth Authorities and Companies Act 1997*. This means it will have a seal, may deal in property and may sue and be sued. From a financial standpoint, this clause should be read in conjunction with **clause 7** which sets out the powers of the NFSA. These include but are not limited to, accepting gifts and bequests and acting as a trustee of money, programs and other property. In this respect the NFSA will have the necessary legal framework to receive philanthropic donations which may be used to augment its budget.

The functions of the NFSA are set out in **subclause 6(1)** as follows:

- develop, preserve, maintain, promote and provide access to a national collection of programs and related material¹¹
- support and promote the collection by others of programs and related material in Australia
- support and promote
 - preservation and maintenance of programs that are not in the national collection

8. This includes radio recordings and historical recordings such as speeches.

9. This includes audiovisual films and television productions as well as audiovisual productions for the internet and other digital media.

10. Explanatory Memorandum, p. 3.

11. A collection of material including films, television programs, audio and video recordings, broadcasting and oral histories is currently held by the Australian Film Corporation and will be transferred to the NFSA once it is established.

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- provision of access to programs that are not in the national collection
- understanding and awareness of programs in Australia

Subclause 6(2) sets out the way in which the ‘support’ for functions which are contained in subclause 6(1) may be provided. It allows for:

- providing financial assistance by loan, grant or investment, on commercial terms or otherwise, but not by guarantee
- commissioning or sponsoring programs
- providing services, facilities, programs or equipment.

This clause is not prescriptive so that the NFSA is not limited to doing only those things which are listed in carrying out its support functions.

However, **subclause 6(3)** requires that, in performing its functions, the NFSA must as far practical:

- place an emphasis on the historical and cultural significance of programs: **paragraph 6(3)(a)**,
- use every endeavour to make the most advantageous use of the national collection in the national interest: **paragraph 6(3)(b)**,
- apply the highest curatorial standards in carrying out its functions: **paragraph 6(3)(c)**. [according to the Explanatory Memorandum this will ensure that high standards will apply not only to the NFSA but also to others who are collecting and dealing in programs].
- promote the efficient, effective and ethical use of public resources: **paragraph 6(3)(d)**.

Subclause 6(4) provides that the NFSA may charge fees for things done in performing its functions. An example is admission to public exhibitions of programs.

In addition to providing some useful financial framework, **clause 7** also allows the NFSA to receive gifts on trust or otherwise which will supplement the national collection. In those cases where programs or other material are given on trust, **paragraph 7(2)(b)** provides that the NFSA is to act as trustee of that property.

Part 3 relates to the Board of the NFSA.

Clause 8 establishes the Board. Its role of the Board is to ensure the proper and efficient performance of the NFSA’s functions: **clause 9**.

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Clause 10 provides that the membership of the Board will be no less than five and no more than nine persons including the Chair and Deputy Chair of the Board. **Subclause 11(1)** provides that members are to be appointed by the Minister by written instrument.¹² The instrument of appointment is not a legislative instrument under existing item 9 of Part 1 of Schedule 1 of the *Legislative Instruments Regulations 2004* and so will not be put before the Parliament.¹³ Appointments are for three years (**subclause 11(3)**), and a person must not be appointed for an accumulated period exceeding nine years (**subclause 11(4)**).

The Bill does not contain any eligibility requirements for membership of the Board, for example, that the Minister should have regard to whether potential members of the Board have relevant qualifications.

Clause 16 sets out a standard set of circumstances in which the Minister may or must terminate the appointment of a member.¹⁴ Just as the instrument of appointment is not a legislative instrument, so the instrument of terminating an appointment is not a legislative instrument and would not be put before the Parliament.

Clause 18 sets out the rules about meetings. **Subclause 18(2)** provides that the quorum of a meeting is a majority of the current members.

As already stated, the NFSA is to be established as a body corporate under the *Commonwealth Authorities and Companies Act 1997*. Under section 27J of that Act a director of a Commonwealth authority who has a material personal interest in a matter that is being considered at a director's meeting must not be present while the matter is being considered and must not vote on the matter. That provision applies to members of the NFSA Board. Where a member or members must leave a Board meeting in those circumstances, the remaining members constitute a quorum for the purposes of any deliberation or decision at that meeting with respect to that matter: **subclause 18(3)**.

Clause 19 provides that decisions can be made without meetings. In order for this to occur the Board must first determine what type of decisions can be made without a meeting and the manner in which those decisions are to be made: **subclause 19(2)**. The Board must keep a record of decisions that are made in this way: **subclause 19(4)**.

Part 4 relates to the Chief Executive Officer (CEO) and staff of the NFSA and the use of consultants.

12. In accordance with the terms of section 19A of the *Acts Interpretation Act 1901*, the Minister will be the Minister for Environment, Heritage and the Arts.

13. As noted by the Explanatory Memorandum at p. 7.

14. Section 17 of the *National Gallery Act 1975* and section 17 of the *National Museum Act 1980* set out similar provisions for the termination of Board appointments to those bodies.

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Clause 20 provides that there is to be a CEO of the NFSA. The role of the CEO is to be responsible for the day to day administration of the NFSA: **subclause 21(1)**. The CEO is required to act in accordance with any policies determined and any directions given by the Board: **subclause 21(3)**.

According to **clause 22** the CEO is appointed by the Board after consultation with the Minister for a period not exceeding five years. **Clause 29** sets out the circumstances in which the Board may terminate the appointment of the CEO and those in which it must terminate the appointment.

Part 5 relates to planning. In particular, **clause 33** requires the Board to prepare a corporate plan for the NFSA at least once a year, covering a period of three years.

Under **subclause 33(3)** the Minister may give the Board written instructions with which the Board must comply in preparing the plan and any variations to the plan. Although the Explanatory Memorandum indicates that the subclause contemplates the Minister instructing the Board as to the time when a plan must be submitted for approval¹⁵ the scope of the instructions which the Minister could potentially give is broad and could extend to the contents of the corporate plan itself. This is supported by the provisions of **clause 35** which requires the Board to comply with any request by the Minister to revise the plan and then have the revised plan approved by the Minister before the start of the period to which the corporate plan relates.

Subclauses 33(4) and 35(5) provide that instructions by the Minister about the contents of the corporate plan or a revision of the corporate plan respectively are not legislative instruments under the *Legislative Instruments Act 2003* and so would not be put before the Parliament.

Clause 34 requires that the corporate plan must include the following:

- a statement of the objectives that the NFSA will pursue
- the strategies and policies that the NFSA will adopt to achieve its objectives
- performance indicators for the assessment of the performance by the NFSA of its functions
- financial targets and projections
- an analysis of factors likely to affect achievement of targets or create significant financial risk either for the NFSA or the Commonwealth
- a review of performance compared to the previous year and
- any other matter which the Minister has directed.

15. Explanatory Memorandum, p. 15.

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Part 6 relates to financial matters.

The NFSA is funded by an appropriation by the Parliament: **subclause 37(1)**. **Clause 38** limits the application of that money to payment of costs incurred in the performance of the NFSA's functions and the exercise of its powers; and payment of relevant remuneration and allowances.

Clause 39 provides that the NFSA must not, without the consent of the Minister, do the following:

- acquire rights or property in excess of an amount that is specified in regulations
- dispose of rights or property in excess of an amount that is specified in regulations
- enter into a contract for the construction of a building for the NFSA which is for an amount exceeding an amount prescribed by regulation.

Subclause 39(3) provides that, where the Minister's approval is given for expenditure of monies exceeding the amounts prescribed by the regulations, that approval is not a legislative instrument. This means that the details of the approval will not be put before the Parliament.

Part 7 relates to other matters. In particular, **clause 41** requires that the NFSA must declare, in its Annual Report particulars of the disposal of any items from the national collection which were considered to be significant to the national collection. Of note is that clause 41 does not require the annual report to detail the clause 33 and 25 Ministerial instructions which have been given in the relevant financial year. As that the Bill has specifically excluded these instructions from the terms of the *Legislative Instruments Act 2003* this is would add transparency to the interaction between the Minister and the Board.

Given that the contents of the NFSA will be precious and rare, the disposal of any part of the national collection, significant or otherwise would seem to be anomalous. However, **paragraph 5(2)(c)** does allow the NFSA to acquire, hold and dispose of real and personal property. It is conceivable that **clause 41** would come into effect where an item has been damaged.

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