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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SCREEN AUSTRALIA AND THE NATIONAL FILM AND SOUND ARCHIVE
(CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment, Heritage and the Arts,
the Hon. Peter Garrett AM MP)

**SCREEN AUSTRALIA AND THE NATIONAL FILM AND SOUND ARCHIVE
(CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2008**

OUTLINE

The Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008 (the Bill) contains transitional provisions and consequential amendments related to the proposed establishment of Screen Australia (SA) by the Screen Australia Bill 2008 (the SA Bill) and the establishment of the National Film and Sound Archive (NFSA) by the National Film and Sound Archive Bill 2008 (the NFSA Bill).

As a result of the SA Bill, Schedule 1 to the Bill makes a number of consequential amendments to other Commonwealth Acts. Among other things, these amendments provide for the repeal of the *Australian Film Commission Act 1975*, amendments to the *Australian Film, Television and Radio School Act 1973* regarding long service leave and certain amendments to the *Income Tax Assessment Act 1997* in relation to the Producer Offset.

Schedule 2 to the Bill contains transitional provisions, including provisions dealing with the transfer of employees of the Australian Film Commission (AFC), Film Australia Limited (FAL) and Film Finance Corporation Australia Limited (FFC) to SA, the NFSA or the Australian Film, Radio and Television School (AFTRS) as appropriate and the transfer of assets and liabilities. Schedule 2 also contains provisions in relation to the appointment of the first CEOs of SA and NFSA. In addition, Schedule 2 contains provisions relating to the final annual report of the AFC and other final reports, returns or documents in relation to the AFC, FAL and FFC.

FINANCIAL IMPACT STATEMENT

The Screen Australia and National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008 is not expected to have a significant impact on Commonwealth expenditure.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

AFC	Australian Film Commission
AFC Act	<i>Australian Film Commission Act 1975</i>
AFTRS	Australian Film, Radio and Television School
AFTRS Act	<i>Australian Film, Television and Radio School Act 1973</i>
Bill	Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
FAL	Film Australia Limited
FFC	Film Finance Corporation Australia Limited
Minister	Minister for the Environment, Heritage and the Arts
NFSA	National Film and Sound Archive
NFSA Bill	<i>National Film and Sound Archive Bill 2008</i>
PS Act	<i>Public Service Act 1999</i>
SA	Screen Australia
SA Bill	<i>Screen Australia Bill 2008</i>
WR Act	<i>Workplace Relations Act 1996</i>

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the *Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Act 2008*.

Clause 2 – Commencement

Clause 2 provides that each provision of the Bill specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Item 1 of the table provides that clauses 1 to 3 of the Bill (containing the short title, the commencement provision and the provision explaining the operation of the Schedules to the Bill) would commence on the day on which the Bill receives the Royal Assent.

Item 2 of the table provides that Schedule 1 to the Bill (containing repeal and consequential amendments) would commence on the day on which subclause 5(1) of the SA Bill commences. Subclause 5(1) of the SA Bill provides for the establishment of SA and it is intended that it will commence on Proclamation.

Item 3 provides that Schedule 2 to the Bill (containing transitional provisions) commences on the day on which the Bill receives the Royal Assent.

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and that any other item in a Schedule has effect according to its terms.

Schedule 1 to the Bill provides for the repeal of the AFC Act. It also inserts a provision regarding long service leave in the AFTRS Act. Schedule 1 also inserts provisions in the *Income Tax Assessment Act 1997* to allow SA to administer, as the film authority, the Producer Offset tax incentive for producers of Australian films. Another amendment to the *Income Tax Assessment Act 1997* adds SA to the list of Australian Government film bodies whose development assistance, when provided to the maker of an Australian film, is not qualifying Australian production expenditure for the purposes of calculating the amount of the Producer Offset tax incentive under Division 376 of the *Income Tax Assessment Act 1997*.

Schedule 2 to the Bill contains transitional provisions.

Part 1 of Schedule 2 to the Bill contains the definitions for the Schedule.

Part 2 provides for the vesting of assets and liabilities of the AFC in SA, NFSA or AFTRS and the vesting of assets and liabilities of FAL and FFC in SA.

Part 3 provides for the Minister to make provision for the termination of the appointments of certain office holders of AFC, FAL and FFC.

Part 4 provides for transfer of the employees of the AFC, FAL and FFC to employment by SA or AFTRS under subclause 31(2) of the SA Bill or under section 34 of the AFTRS Act 1975 respectively. Some staff being transferred from the AFC to SA and all staff being transferred from the AFC to the NFSA are appointed subject to the *Public Service Act 1999* and will be transferred by a determination under section 72 of that Act. Part 4 also makes provision for certain other employment related matters including accrued entitlements, superannuation, maternity and long service leave.

Part 5 provides for things done, references in instruments, legal proceedings and records, including:

- that references to the AFC, FAL or FFC in instruments are to be deemed to be references to SA, the Commonwealth, NFSA or AFTRS;
- the substitution of SA for the AFC, FAL or FFC or the NFSA, AFTRS or the Commonwealth for the AFC in legal proceedings; and
- the transfer of custody of records from the AFC, FAL and FFC to SA, NFSA or AFTRS.

Part 6 provides for annual reports, returns and other documents in relation to the AFC, FAL or FFC.

Part 7 provides for the appointment of the first CEOs of SA and the NFSA.

Part 8 provides other transitional issues including:

- that the final annual report of the AFC is to be prepared by SA;
- the transfer of appropriated money to SA and the NFSA; and
- reasonable compensation to be paid for any acquisition of property under this Bill other than on just terms.

Clause 4 – Extended geographic application of this Act

The Bill will extend to every external territory.

Schedule 1 – Repeal and consequential amendments

Schedule 1 to the Bill provides for the repeal of the AFC Act. It also inserts a provision regarding long service leave in the AFTRS Act. Schedule 1 also inserts provisions in the *Income Tax Assessment Act 1997* to allow SA to administer, as the film authority, the Producer Offset tax incentive for producers of Australian films under the *Income Tax Assessment Act 1997*. Another amendment to the *Income Tax Assessment Act 1997* adds SA to the list of Australian Government film bodies whose development assistance, when

provided to the maker of an Australian film, is not qualifying Australian production expenditure for the purposes of Division 376 of the *Income Tax Assessment Act 1997*.

Part 1 – Repeal of the Australian Film Commission Act 1975

Australian Film Commission Act 1975

Item 1 – The whole of the Act

This item repeals the AFC Act, as the AFC is to cease to exist on 30 June 2008 on the establishment of SA under the SA Bill and the NFSA under the NFSA Bill.

Part 2 – Consequential amendments

Australian Film, Television and Radio School Act 1973

Item 2 – At the end of Part VI

It is intended that all staff of AFTRS will be covered by the *Long Service Leave (Commonwealth Employees) Act 1976* (LSL Act) and that staff transferring to AFTRS from the AFC will continue to be covered by that Act. AFTRS is to become a prescribed authority for the purposes of the LSL Act by virtue of the Bill. Therefore, item 2 inserts section 35A, which provides that the LSL Act applies to a person employed by AFTRS under section 34 of the AFTRS Act as if the person were a Commonwealth employee within the meaning of subsection 10(1) of the LSL Act.

AFTRS is already a prescribed authority under Item 47 of Schedule 1 of the *Maternity Leave (Commonwealth Employees) Regulations 1982*. Therefore, all staff transferring to AFTRS from the AFC will continue to be covered by that Act.

Income Tax Assessment Act 1997

Item 3 – Subsection 376-55(3)

Subsection 376-55(3) provides that the FFC is the film authority for the purposes of the administration of the Producer Offset tax incentive for producers of Australian films under Division 376 of the *Income Tax Assessment Act 1997*. Item 3 substitutes SA as the film authority and would allow SA to administer the Producer Offset. Previous certificates issued by the FFC will continue to have effect as a result of the transitional provision in item 26 of the Bill. That provision would ensure that the references to FFC in such certificates would be taken to be a reference to SA.

Item 4 – After Subparagraph 376-170(4)(a)(iv)

Item 4 adds SA to the list of Australian Government film bodies whose development assistance, when provided to the maker of an Australian film, is not qualifying Australian production expenditure for the purposes of calculating the amount of the Producer Offset tax incentive under Division 376 of the *Income Tax Assessment Act 1997*.

Schedule 2 – Transitional provisions

Part 1 – Introduction

Item 1 – Definitions

Item 1 contains definitions for the purposes of Schedule 2. In particular, ‘transition time’ is defined to mean the commencement of subclause 5(1) of the SA Bill. Subclause 5(1) of the SA Bill provides for the establishment of SA.

Part 2 – Assets and liabilities of AFC, FAL and FFC

Item 2 – Transfer of assets and liabilities of AFC

The effect of item 2 is that at the transition time, the assets and liabilities of the AFC in relation to the functions of SA would become the assets and liabilities of SA without the need for any conveyance, transfer or assignment. SA would become the AFC’s successor in law in relation to those assets and liabilities (subitem 2(2)).

Under subitem 2(3) before the transition time, the Minister may determine that assets or liabilities of the AFC are to become assets or liabilities of the NFSA or AFTRS. If the Minister makes such a determination, then at the transition time, the assets and liabilities become the assets and liabilities of the NFSA (subitem 2(4)) or AFTRS (subitem 2(5)), without the need for any conveyance, transfer or assignment. The NFSA or AFTRS would become the AFC’s successor in law in relation to those assets or liabilities. The ability to make such determinations is required because it is the most efficient mechanism to identify which assets and liabilities of the AFC belong to the NFSA functions and the functions being transferred to AFTRS and hence should be transferred to those bodies. The remainder of the AFC’s assets will then be transferred to SA (subitem 2(2)).

Subitems 2(2) and (3) do not transfer any Collective or Certified Agreements or Australian Workplace Agreements because the definition of “assets” would not extend to include contracts of employment. However, those subitems would transfer the rights and liabilities under those agreements, for example, unpaid wages at the transition time. For all non-public service employees, these agreements will transfer over under the transmission of business rules in Schedule 9 of the *Workplace Relations Act 1996*.

A determination under this item is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 2(6) confirms this and is included to assist readers.

An asset which immediately before the transition time was held by the AFC on trust and has become an asset of SA, NFSA or AFTRS under subitems 2(2), (4) or (5) is taken, after the transition time, to be held on trust by the body to which it is transferred. Such an asset is subject to the terms of the trust on which the asset was held by AFC (subitem 2(7)).

Item 3 – Transfer of assets and liabilities of FFC and FAL

The effect of item 3 is that at the transition time, the assets and liabilities of FAL and FFC (as are covered by the definitions of ‘asset’ and ‘liability’ in item 1), would become the assets and liabilities of SA without the need for any conveyance, transfer or assignment. SA would become the FFC’s and FAL’s successor in law in relation to those assets and liabilities (subitem 3(2)).

An asset, which immediately before the transition time, was held by the FFC or FAL on trust and has become an asset of SA under subitem 3(2) is taken, after the transition time, to be held on trust by SA. Such an asset is subject to the terms of the trust on which the asset was held by the FFC or FAL (subitem 3(3)).

Item 4 – Certificates relating to vesting of land

Item 4 provides for a procedure for registrations of land which vests in SA, NFSA or AFTRS under items 2 or 3 of this Schedule.

The procedure is as follows:

- The Minister signs a certificate identifying the land and stating that the land has become vested in SA, NFSA or AFTRS under item 2 or 3.
- The certificate is lodged with a relevant official of a State or Territory responsible for the registration of the land (the ‘land registration official’ as defined in subitem 4(4)).
- The land registration official may deal with and give effect to the certificate, and may register the matter in a way that is the same as, or similar to, the way in which dealings in land of that kind are registered.

A certificate made under subitem 4(1) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 4(3) confirms this and is included to assist readers.

Item 5 – Certificates for vesting of assets other than land

Item 5 provides for a simplified procedure for the registration of assets other than land vested in SA, NFSA or AFTRS under item 2 or 3.

This procedure is as follows:

- The Minister signs a certificate identifying the asset and stating that the asset has become vested in SA, NFSA or AFTRS under item 2 or 3.
- The certificate is lodged with the person or authority (Commonwealth, State or Territory) who is responsible for keeping a register in relation to assets of the kind concerned (the ‘assets official’ as defined in subitem 5(4)).
- The assets official may deal with and give effect to the certificate as if it were a proper and appropriate instrument for transactions in relation to assets of that kind and make such entries in a register as are necessary having regard to the effect of Part 2 of Schedule 2 to this Bill.

A certificate made under subitem 5(1) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 5(3) confirms this and is included to assist readers.

Item 6 – Certificates taken to be authentic

Item 6 provides that a document that appears to be a certificate made or issued under a particular provision of the Bill is taken to be such a properly given certificate unless the contrary is established.

Item 7 – Exemption from stamp duty and other State or Territory taxes

Item 7 is required to ensure that State and Territory taxes such as stamp duty do not apply to the operations of Schedule 2 of the Bill. For example, no stamp duty will be payable on the transfer of land under Schedule 2.

This item provides that no stamp duty or other tax is payable under a law of a State or Territory in respect of an exempt matter or anything connected with an exempt matter (subitem 7(1)). ‘Exempt matter’ is defined in subitem 7(2) as the vesting of an asset or liability under Schedule 2 of the Bill, or any other operation of Schedule 2.

Under subitem 7(3) the Minister may certify in writing that a specified matter is an exempt matter or that a specified thing is connected with a specified exempt matter. If the Minister does so, the certificate is prima facie evidence in all courts and for all purposes (other than in criminal proceedings) of matters stated in the certificate.

A certification by the Minister under subitem 7(3) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 7(5) confirms this and is included to assist readers.

Part 3 – Office holders of AFC, FAL and FFC

Item 8 – Termination of office holders of FAL and FFC

Subitem 8(1) allows the Minister, before the transition time, to make provisions for, or in relation to, the termination of the appointment, or any associated instruments, of any of the following:

- (a) a director of FFC or FAL;
- (b) the Managing Director/Chief Executive of FAL; or
- (c) the Chief Executive of FFC.

An instrument of termination of appointment made under this item is not a legislative instrument as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 8(3) confirms this and is included to assist readers.

Subitem 8(2) provides that an instrument made under subitem 8(1) takes effect immediately before the transition time.

Item 9 – No transfer of appointment, engagement or employment etc. of office holders

Nothing in the Bill will cause the appointment, engagement or employment of an office holder to have effect, at or after the transition time, as if it were an appointment, engagement or employment of the office holder in relation to Screen Australia, the NFSA or AFTRS (subitem 9(1)). Subitem 9(2) provides that nothing in the Bill will cause a contract, agreement or other instrument relating to the employment, engagement or appointment of a person in paragraphs 9(3) (a) to (e) to continue in effect after the transition time as if it had been made by or in relation to SA, the NFSA or AFTRS.

These provisions ensure that the Bill does not provide for the employment, engagement or appointment of any of the above members, directors and officers to continue after the transition time or to transfer from their respective pre-transition time bodies to the SA. Board members, the CEOs of SA and the NFSA will be new appointments made in accordance with the proposed legislative arrangements for SA and the NFSA, respectively.

This item would qualify item 21, in that by virtue of this item a reference in an instrument relating to the employment, engagement or appointment of a person in paragraphs 9(3) (a) to (e) is not read as a reference to the new body.

Part 4 – Staff of AFC, FAL and FFC

The existing film agencies employ staff under a range of different arrangements, including as APS employees, under certified agreements or Australian Workplace Agreements, or under common law contracts. Under the SA Bill, SA will have the power to employ APS staff and to employ other staff under its own legislation. Under the NFSA Bill, the NFSA will employ APS staff.

Division 1 – Staff of AFC

Item 10 – Non-APS employees in AFC transferred to Screen Australia as non APS-employees

Item 10 provides for the transfer of people appointed or employed by the AFC under section 29 of the AFC Act immediately before the transition time to employment by SA under subclause 31(2) of the SA Bill. Such transfer is with continuity of service, this is confirmed by subitem 10(4). Subitem 10(3) also makes provision for such people to have accrued entitlement to benefits which applied to their employment by the AFC immediately before the transition time. Rather than paying out accrued leave under section 235 of the WR Act, this item means that staff can simply take their entitlements to SA and use them when required.

Clause 6 of Schedule 9 of the WR Act provides that any collective or certified agreements or Australian Workplace Agreements will transmit to a new employer and continue to apply for a period of 12 months after the transmission time. Therefore, the terms and conditions provided for in the AFC Certified Agreement and in any Australian Workplace Agreements will continue to apply for staff transferred under item 10.

Staff of the AFC employed under the PS Act will be transferred to SA, the NFSA or AFTRS by a determination made under section 72 of the PS Act by the Commissioner. Because such staff continue employment with the Commonwealth, collective or certified agreements or Australian Workplace Agreements do not transmit under the WR Act. Therefore, it is intended that the CEO of SA would make a section 24 determination under the PS Act to preserve the terms and conditions of such staff.

Item 11 – Non-APS employees in AFC transferred to NFSA as APS employees

Item 11 applies to people appointed or employed by the AFC under subsection 29(1) of the AFC Act immediately before the transition time who are transferred to employment at the NFSA under the PS Act, by a determination made under section 72 of the PS Act. Such transfer is with continuity of service, this is confirmed by subitem 11(3).

Subitem 11(2) also makes provision for such people to have accrued entitlement to benefits which applied to their employment by the AFC immediately before the transition time. Rather than paying out accrued leave under section 235 of the WR Act, this item

means that staff can simply take their entitlements to the NFSA and use them when required. This provision would not extend to benefits that are inconsistent with the Australian Public Service legislative framework.

Clause 6 of Schedule 9 of the WR Act provides that any collective or certified agreements or Australian Workplace Agreements will transmit to a new employer and continue to apply for a period of 12 months after the transmission time. Therefore, the terms and conditions provided for in the AFC Certified Agreement and in any Australian Workplace Agreements will continue to apply for staff transferred under item 11.

Item 12 – APS employees in AFC transferred to AFTRS as employees of AFTRS

Item 12 applies to members of staff of the AFC appointed under the PS Act who are transferred, by a determination made under section 72 of the PS Act, to employment by AFTRS under section 34 of the AFTRS Act, i.e. as non public servants. Subsection 72(3) of the PS Act provides that under such circumstances, an employee is entitled to remuneration and conditions no less favourable than the terms and conditions the employee was entitled to as an APS employee.

Clause 6 of Schedule 9 of the WR Act provides that any collective or certified agreements or Australian Workplace Agreements will transmit to a new employer and continue to apply for a period of 12 months after the transmission time. Therefore, the terms and conditions provided for in the AFC Certified Agreement and in any Australian Workplace Agreements will continue to apply to employees transferred to AFTRS under this item. It is intended that AFTRS and their employees would negotiate a new certified agreement in that timeframe in accordance with the WR Act.

Transfer under item 12 is with continuity of service, this is confirmed by subitem 12(3).

Subitem 12(2) makes provision for people transferred to AFTRS to retain entitlements to benefits which they had accrued as a member of staff of AFC engaged under the PS Act immediately before the transition time. Rather than paying out accrued leave under section 235 of the WR Act, this item means that staff can simply take their entitlements to AFTRS and use them when required. This provision would not extend to benefits available in the Australian Public Service legislative framework that are inconsistent with the non-public service arena.

Division 2 – Staff of FAL and FFC

Item 13 – Non-APS employees in FAL or FFC on contract of employment transferred to Screen Australia as non-APS employees

Item 13 provides for the transfer of people employed by FAL or FFC, on a contract of employment immediately before the transition time, to employment by SA under subclause 31(2) of the SA Bill.

Employees of FAL or FFC who are to be transferred to SA as staff under the PS Act will be transferred to SA by a determination made under section 72 of the PS Act. Item 13 does not apply to these people.

Subitem 13(3) provides that the contract of employment continues in force on and after the transition time as if it were a contract of employment between the person and SA.

Transfer under item 13 is with continuity of service, this is confirmed by subitem 13(5). Subitem 13(4) makes provision for people transferring under this item to have accrued entitlement to benefits which applied to their employment by FAL or FFC immediately before the transition time. Rather than paying out accrued leave under section 235 of the WR Act, this item means that staff can simply take their entitlements to SA and use them when required.

Item 13 does not prevent a contract of employment from being varied after the transition time in accordance with that contract or by or under a law, award, determination or agreement (subitem 13(6)). Under subitem 13(8), 'vary' is intended to have a broad meaning.

Subitem 13(7) confirms that this item does not apply to a director and the Managing Director/Chief Executive of FAL or FFC.

Item 14 – Non-APS employees in FAL not on contract of employment transferred to Screen Australia as non-APS employees

Item 14 provides for the transfer of people not covered by item 13 but employed by FAL immediately before the transition time to employment by SA under subclause 31(2) of the SA Bill. This item is intended to cover people employed under a FAL Collective Agreement or Australian Workplace Agreements.

People transferring under this item are to have accrued entitlement to benefits which applied to their employment by FAL immediately before the transition time (subitem 14(3)). Rather than paying out accrued leave under section 235 of the WR Act, this item means that staff can simply take their entitlements to SA and use them when required. Transfer under item 14 is with continuity of service, this is confirmed by subitem 14(4).

Subitem 14(5) confirms that this item does not apply to a director and the Managing Director/Chief Executive of FAL.

Item 15 – Non-APS employees in FAL or FFC, on a contract of employment or otherwise, transferred to Screen Australia as APS employees

Item 15 applies people who are employed by FAL or FFC immediately before the transition time and are to be transferred to SA as public servants. Such employees will be covered by a determination made under section 72 of the PS Act that causes them to become members of the staff of SA engaged under the PS Act.

Transfer under item 15 is with continuity of service, this is confirmed by subitem 15(3).

Subitem 15(2) makes provision for people becoming employees under the PS Act to retain entitlements to benefits which they had accrued as employees of FAL or FFC immediately before the transition time. Rather than paying out accrued leave under section 235 of the WR Act, this item means that staff can simply take their entitlements to SA and use them when required. This provision would not extend to benefits that are inconsistent with the Australian Public Service legislative framework.

Clause 6 of Schedule 9 of the WR Act provides that any collective or certified agreements or Australian Workplace Agreements will transmit to a new employer and continue to apply for a period of 12 months after the transmission time. Therefore, the terms and conditions provided for in the FAL Certified Agreement and in any Australian Workplace Agreements will continue to apply for staff transferred under item 15.

The employment contracts of FFC staff do not transmit under the WR Act. Therefore, it is intended that the CEO of SA would make a section 24 determination under the PS Act to preserve the terms and conditions of such staff.

Division 3 – Other matters relating to staff

Item 16 – Limited transfer of appointment, engagement or employment etc of staff

Subitem 16(1) provides that nothing in the Bill (except items 10, 13 and 14) cause the appointment, engagement or employment of a person by AFC, FAL or FFC to have effect, at or after the transition time, as if it were an appointment, engagement or employment by Screen Australia, the NFSA or AFTRS. Staff not covered by items 10, 13 and 14 will be transferred by a section 72 determination under the PS Act.

Subitem 16(2) clarifies the position that the Bill is not intended to override the operation of the WR Act. For non-public servant staff employed under Collective or Certified Agreements and Australian Workplace Agreements, these agreements will transfer over to SA, NFSA or AFTRS under the transmission of business rules in Schedule 9 of the WR Act, not under this Bill. See item 10 in relation to public servants.

Item 17 – No payments as a result of transfer

Item 17 ensures that employees of the AFC, FAL or FFC will not be entitled to receive benefits or payments merely because they stop being employees of the respective entity by the operation of Part 4 of the Bill. It is intended that the employment of these people

be continuous regardless of any transfer and will in fact be continuous, so payments such as redundancy payments are not appropriate. This item is included for the avoidance of doubt.

Item 18 – Long service leave for staff of SA and NFSA

It is intended that all staff of SA and the NFSA will be covered by the *Long Service Leave (Commonwealth Employees) Act 1976* (LSL Act). SA is to become a prescribed authority for the purposes of the LSL Act by virtue of clause 33 of the SA Bill. As all staff transferring to the NFSA are public servants and will remain so they are covered by the LSL Act.

Staff transferring to AFTRS will continue to be covered by that Act (see item 2 of Schedule 1).

In addition, it is intended that the service of staff at AFC, FAL and FFC should be considered service for the purposes of the LSL Act. Therefore, subitem 18(2) provides that, for the purposes of the LSL Act, at and after the transition time, a person's service as a non public servant at AFC, FAL or FFC before the transition time is deemed to have been Government Service.

Section 22 of the LSL Act provides that where a person is employed, for the purposes of the LSL Act, in Government Service, the person is not able to access long service leave benefits under a different long service leave scheme that provided for in terms and conditions of employment. For example, the FAL Collective Agreement provides for long service leave for employees, however, when Item 18 commences, staff will be able to access long service level benefits under the LSL Act only.

Public servant staff at AFC transferring to SA as public servants will continue to be covered by the LSL Act as the Commonwealth remains the employer.

Item 19 – Maternity leave for staff of Screen Australia

It is intended that all staff of SA will be covered by *Maternity Leave (Commonwealth Employees) Act 1973* (ML Act). SA is to become a prescribed authority for the purposes of the ML Act by virtue of clause 32 of the SA Bill.

As all staff transferring to the NFSA are public servants and will remain so they are covered by the ML Act.

Item 19 provides that, for the purposes of the ML Act, at and after the transition time, a person's service as a non public servant at FAL or FFC before the transition time is deemed to have been service under the PS Act.

AFTRS is already a prescribed authority under Item 47 of Schedule 1 of the *Maternity Leave (Commonwealth Employees) Regulations 1982*. Therefore, the ML Act will still

cover APS employees in AFC transferred, under item 12 above, to AFTRS as employees of AFTRS.

Part 5 – Things done by, references in instruments to, legal proceedings of and records of AFC, FAL and FFC

Division 1 – AFC

Item 20 – Things done by, or in relation to, AFC

Before or after the transition time, the Minister may make a written determination that a specified thing done by, or in relation to, the AFC before the transition time, is taken to have been done by, or in relation to, SA, the NFSA, AFTRS or the Commonwealth (subitem 20(1)).

A determination made under subitem 20(1) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 20(5) confirms this and is included to assist readers.

Item 21 – References in instruments to AFC

Item 21 applies to instruments (as defined in subitem 21(9)) referring to AFC which are in force immediately before the transition time (subitem 21(1)).

Such instruments that relate to:

- (a) an asset or liability of AFC that, as a result of the operation of item 2, become an asset or liability of SA at transition time; or
- (b) a thing done by, or in relation to, AFC that, as a result of the operation of item 20, is taken to be done by, or in relation to, SA at the transition time;

have effect from the transition time as if the reference in the instrument to the AFC referred to SA (subitem 21(2)).

Such instruments that relate to:

- (a) an asset or liability of AFC that, as a result of the operation of item 2, become an asset or liability of the NFSA at transition time; or
- (b) a thing done by, or in relation to, AFC that, as a result of the operation of item 20, is taken to be done by, or in relation to, the NFSA at the transition time;

have effect from the transition time as if the reference in the instrument to the AFC referred to the NFSA (subitem 21(3)).

Such instruments that relate to:

- (a) an asset or liability of AFC that, as a result of the operation of item 2, become an asset or liability of AFTRS at transition time; or

(b) a thing done by, or in relation to, AFC that, as a result of the operation of item 20, is taken to be done by, or in relation to, AFTRS at the transition time; have effect from the transition time as if the reference in the instrument to the AFC referred to AFTRS (subitem 21(4)).

Item 21 is not intended to apply to international treaties or agreements.

This item does not operate to transfer the instruments themselves, it just amends the references within the instruments.

Where subitem 21(2), (3) or (4) does not apply to an instrument, the Minister may determine that the reference in the instrument has effect as if the reference to AFC were to SA, the NFSA, AFTRS or the Commonwealth (subitem 21(5)). The Minister may make a determination under subitem 21(5) before or after the transition time (subitem 21(7)).

A determination made under subitem 21(5) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 21(8) confirms this and is included to assist readers.

Item 22 – Legal Proceedings of AFC

Item 22 applies to any proceedings to which AFC was a party were pending in any court or tribunal immediately before the transition time.

If the proceedings related, in whole or in part, to an asset or liability that:

- (a) SA has become the successor in law of AFC, as a result of the operation of item 2, at transition time, then at and after transition time SA is taken to be substituted as a party to the proceedings (subitem 22(2));
- (b) the NFSA has become the successor in law of AFC, as a result of the operation of item 2, at transition time, then at and after transition time the NFSA is taken to be substituted as a party to the proceedings (subitem 22(3));
- (c) AFTRS has become the successor in law of AFC, as a result of the operation of item 2, at transition time, then at and after transition time AFTRS is taken to be substituted as a party to the proceedings (subitem 22(4)).

Where subitem 22(2), (3) or (4) does not apply to the proceedings, the Minister may determine that the AFC is to be substituted as a party to the proceedings by either SA, the NFSA, AFTRS or the Commonwealth (subitem 22(5)). The Minister may make a determination under subitem 21(5) before or after the transition time (subitem 22(7)).

A determination made under subitem 22(5) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 22(8) confirms this and is included to assist readers.

Item 23 – Transfer of custody of records of AFC

Item 23 applies to a record or document that is, immediately before the transition time, in the custody of AFC.

If the record or document relates to either:

- (a) an asset or liability of AFC that, as a result of the operation of item 2, become an asset or liability of SA at transition time; or
- (b) a thing done by, or in relation to, AFC that, as a result of the operation of item 20, is taken to be done by, or in relation to, SA at the transition time;

the record or document is to be transferred into the custody of SA (subitem 23(2)).

If the record or document relates to either:

- (a) an asset or liability of AFC that, as a result of the operation of item 2, become an asset or liability of the NFSA at transition time; or
- (b) a thing done by, or in relation to, AFC that, as a result of the operation of item 20, is taken to be done by, or in relation to, the NFSA at the transition time;

the record or document is to be transferred into the custody of the NFSA (subitem 23(3)).

If the record or document relates to either:

- (a) an asset or liability of AFC that, as a result of the operation of item 2, become an asset or liability of AFTRS at transition time; or
- (b) a thing done by, or in relation to, AFC that, as a result of the operation of item 20, is taken to be done by, or in relation to, AFTRS at the transition time;

the record or document is to be transferred into the custody of AFTRS (subitem 23(4)).

Where subitem 23(2), (3) or (4) does not apply to a record or document, the Minister may determine that at or after the transition time, the record or document is to be transferred into the custody of either SA, the NFSA, AFTRS or the Commonwealth (subitem 23(5)). The Minister may make a determination under subitem 23(5) before or after the transition time (subitem 23(7)).

A determination made under subitem 23(5) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 23(8) confirms this and is included to assist readers.

Section 20 of the CAC Act imposes on Commonwealth authorities various requirements relating to the keeping of accounting records. It requires a Commonwealth authority to, among other things, retain accounting records for 7 years after the completion of the transactions to which they relate (subsection 20(2) of the CAC Act) and imposes penalties on officers who contravene it (subsection 20(4)). Subitem 23(9) applies Section 20 of the CAC Act to a body to which accounting records are transferred under item 23 as if the records were records of that body.

Item 24 – Variation of the operation of this Division

Item 24 provides that the Minister may determine in writing that a provision in item 21, 22 or 23 does not apply to the instruments, proceedings, records or documents specified in the determination. A determination under subitem 24(1) can be specified to take effect retrospectively but not at a time earlier than the transition time (paragraph 24(2)(a)).

A determination made under subitem 24(1) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the *Legislative Instruments Act 2003*. Subitem 24(3) confirms this and is included to assist readers.

Division 2 – FAL and FFC

Item 25 – Things done by, or in relation to FAL or FFC

Item 25 provides that any thing done by, or in relation to, FAL or FFC before the transition time is taken, at or after the transition time, to have been done by, or in relation to, SA.

Item 26 – References in instruments to FAL or FFC

Item 26 provides that instruments referring to FAL or FFC which are in force immediately before the transition time have effect from the transition time as if the reference to FAL or FFC referred to SA (subitem 26(1)).

Subitem 26(2) defines ‘instrument’ as including a range of documents, and excluding Acts, instruments made under the Bill, and the constitutions of FAL and FFC.

This item does not operate to transfer the instruments themselves, it just amends the references within the instruments.

Item 27 – Legal proceedings of FAL and FFC

Item 27 provides that if, immediately before the transition time, either the FFC or FAL were parties to proceedings pending in any court or tribunal, then at and after the transition time, SA is substituted for FFC or FAL as a party to the proceedings.

Item 28 – Transfer of custody of records of FAL or FFC

Item 28 provides that any records or documents which immediately before the transition time are in the custody of FAL or FFC are to be transferred into the custody of SA at or after the transition time.

Section 20 of the CAC Act imposes on Commonwealth authorities various requirements relating to the keeping of accounting records. It requires a Commonwealth authority to, among other things, retain accounting records for 7 years after the completion of the transactions to which they relate (subsection 20(2) of the CAC Act) and imposes penalties on officers who contravene it (subsection 20(4)). Subitem 28(2) applies Section 20 of the CAC Act to a body to which accounting records are transferred under item 28 as if the records were records of that body.

Part 6 – Annual reports, returns etc. of AFC, FAL and FFC

Item 29 – Final annual report of AFC

As the AFC will no longer exist as of 1 July 2008, it will be unable to prepare the annual report required by section 9 (Directors must prepare annual report) of the CAC Act. Therefore, the members of the SA Board will be required to prepare on behalf of the AFC (subitem 29(1)) a report in accordance with Schedule 1 of the CAC Act for the transitional reporting period. ‘Transitional reporting period’ is defined in subitem 29(7) as the period beginning at the start of the financial year before the financial year in which the transition time occurs and ending immediately before the transition time. The report does not however need to cover a period which is part of the transitional reporting period but which has already been covered by a report given to the Minister by the directors of the AFC under section 9 of the CAC Act (subitem 29(2)).

Subitem 29(3) provides that the report must include the matters described in subsections 6(4) to (6) of the AFC Act as in force immediately before the transition time. These things are:

- any guarantees given by the AFC under paragraph 6(1)(a) of the AFC Act during the financial year. Paragraph 6(1)(a) gives the AFC the power to guarantee the payment of, and the payment of interest on, loans, when this is done for or in connection with the performance of its functions as set out in Section 5 of the AFC Act (paragraph 6(4)(a));
- any limits imposed under paragraph 6(2) by the Finance Minister on the AFC’s ability to give guarantees (paragraph 6(4)(b));
- the total amount of guarantees referred to by paragraph 6(1)(a);
- particulars of all disposals of items in the national collection which the AFC considers were significant items in the national collection during the relevant financial year (subsection 6(5) of the AFC Act); and
- a report, in respect of the financial year, of the operations relating to the national collection (subsection 6(6) of the AFC Act).

Subitem 29(4) sets out how Schedule 1 of the CAC Act and the Finance Minister’s Orders referred to in that Schedule, which together specify how the report must be prepared, apply to the report required by item 29.

The deadline for the submission of this report is the 15th day of the fourth month after the end of the transitional reporting period, unless the Minister grants an extension of time due to special circumstances (subitem 29(5)).

Item 30 – Contravention of final annual reporting requirement

Schedule 2 of the CAC Act sets out civil consequences of contravening civil penalty provisions. Item 30 item provides that a member of the Board of SA who caused a contravention of the final annual reporting requirement or failed to take reasonable steps to comply with the requirement is subject to the penalty provision in item 1 of Schedule 2 of the CAC Act.

Item 31 – Other reports, returns etc. of AFC, FAL and FFC

Item 31 applies to a report, return or other document that is immediately before, at or after the transition time required to be prepared or lodged by AFC, FAL or FFC or if any of the persons listed in subparagraphs 31(1)(b)(i) to (vii) is required to prepare or lodge such a report, return or document. For example, this provision could apply if an annual report for FAL or FFC was required to be completed or tax returns were required to be lodged. Because it is intended to immediately proceed to de-register FAL and FFC following the transition time, it would be appropriate that SA become responsible for any such reports, returns or documents.

Therefore, the Minister may determine that SA instead of the AFC, FAL or FFC is required to prepare or lodge the report, return or document (subitem 31(2)). A determination made by the Minister is not a legislative instrument because it is not legislative in character, which is confirmed by subitem 31(4).

Part 7 – Appointment of the first CEO of Screen Australia and NFSA

Item 32 – Appointment of first CEO of Screen Australia

Subclause 22(1) of the SA Bill provides that the CEO of SA is to be appointed by the Board of SA after consultation with the Minister. However, as it will not be practicable for this process to take place for the appointment of the first CEO of SA, because the CEO needs to be appointed from 1 July 2008, the Minister will be able to make this appointment. A CEO appointed under item 32 is treated by the SA Bill in exactly the same way as a CEO appointed under clause 22 of the SA Bill, except that subclause 22(1) does not apply to him or her.

An instrument of appointment made under item 32 would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Item 33 – Appointment of first CEO of NFSA

Subclause 22(1) of the NFSA Bill provides that the CEO of the NFSA is to be appointed by the Board of the NFSA after consultation with the Minister. However, as it will not be practicable for this process to take place for the appointment of the first CEO of the NFSA, because the CEO needs to be appointed from 1 July 2008, the Minister will be able to make this appointment. A CEO appointed under item 33 is treated by the NFSA Bill in exactly the same way as a CEO appointed under clause 22 of the NFSA Bill, except that subclause 22(1) does not apply to him or her.

An instrument of appointment made under item 33 would not be a legislative instrument by virtue of the existing exemption in item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Part 8 – Other transitional matters

Item 34 – National Film and Sound Archive

The collection that, immediately before the transition time, was known as the National Film and Sound Archive will continue to exist as part of the national collection referred to by subclause 6(1)(a) of the NFSA Bill. Item 34 ensures that any programs and related materials which formed part of the Archive immediately before the transition time continue to be part of the Archive at the transition time. However, item 34 does not ensure that such programs and related materials will continue to be part of the Archive past the transition time, as disposal of material in accordance with a deaccessioning policy is part of the NFSA's management of its collection.

Item 35 – Director's obligations – FAL and FFC

Subsection 601AD(5) of the *Corporations Act 2001* requires former directors of a deregistered company to keep the company's books for three years after the deregistration. It is intended that FAL and FFC will be deregistered at some time after the transition time, but it is not intended that the former directors of FAL or FFC should be required to keep the books of either company. Item 35 requires SA to keep the books of FAL and FFC for three years after the deregistration of FAL and FFC, and relieves the directors of FAL and FFC of this duty.

Item 36 – Transfer of appropriated money

For the purposes of the operation of Appropriation Acts ('Appropriation Act' is defined in subitem 36(4) as an Act appropriating money for expenditure out of the Consolidated Revenue Fund), the Finance Minister may determine that one part of the amount referred to in that Act, which relates to AFC, is to be read as the amount that relates to SA or the NFSA instead (subitem 36(1)).

A determination made by the Finance Minister under subitem 36(1) is a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. However, such determinations are to be exempt from the disallowance and sunset provisions (section

42 and Part 6 of the *Legislative Instruments Act 2003*, respectively). The instrument that would be made under this item is intended to cover a once only transitional arrangement to split the 2008/2009 appropriation for AFC between SA and the NFSA. There would be no change to the overall appropriation amount. The split cannot be made in the Appropriation Act itself due to timing considerations. The sunseting exemption is to ensure that the instrument is enduring and will be permanently available through publication on the Federal Register of Legislative Instruments. The disallowance exemption is required so that the operations of SA and NFSA will not be disrupted.

Item 37 – Compensation for acquisition of property

This item is intended to ensure that any acquisitions of property under the Bill are made in accordance with paragraph 51(xxxi) of the Constitution, which requires that they be on just terms.

The operation of the Bill may result in the acquisition of property by the Commonwealth. If it would do so on otherwise than just terms, the Commonwealth must pay a reasonable amount of compensation to the person (subitem 37(1)). In the absence of agreement, the person may institute proceedings in the Federal Court of Australia for the recovery of reasonable compensation (subitem 37(2)).

In item 36, ‘acquisition of property’ and ‘just terms’ each have their respective meanings under paragraph 51(xxxi) of the Constitution (subitem 37(3)).

Item 38 – Delegation by Minister

Under this item, the Minister may delegate in writing all or any of his or her powers under this Bill to the Secretary of the Department, or an Senior Executive Service employee or acting Senior Executive Service employee of the Department. A delegate under this item must, in exercising powers or functions under a delegation, comply with any directions of the Minister (subitem 38(2)).

Such a delegation is not a legislative instrument under the exemption in item 1 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Item 39 – Regulations

The Governor General may make regulations prescribing matters required or permitted by this Bill to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Bill. It is expected that regulations may need to be made providing for:

- (a) amendments or repeals made by the Bill;
- (b) the enactment of the Bill, the SA Act or the NFSA Act;
- (c) termination of office holders;
- (d) termination of a contract, agreement or other instrument relating to appointment, engagement or employment of office holders;

- (e) the employment of a person appointed, engaged or employed by AFC, FAL or FFC, immediately before the transition time, to employment by SA the NFSA or AFTRS; or
- (f) leave of employees of AFC, FFC or FAL which has been approved before the transition time.

Any such regulations are legislative instruments under section 6(a) of the *Legislative Instruments Act 2003*.