

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SCREEN AUSTRALIA (TRANSFER OF ASSETS) BILL 2010**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for the Arts, the Hon Simon Crean MP)

## **SCREEN AUSTRALIA (TRANSFER OF ASSETS) BILL 2010**

### **OUTLINE**

The Screen Australia (Transfer of Assets) Bill 2010 (the Bill) provides for the change of name of the National Film and Sound Archive (NFSA) and will facilitate the legal transfer of certain assets and liabilities associated with Screen Australia's (SA) film library and related sales and digital learning functions from SA to the NFSA.

Schedules 1 to the Bill operate to change the name of the NFSA to the National Film and Sound Archive of Australia (NFSAA). As a result of this name change, Schedule 1 also makes a number of consequential amendments to other Commonwealth Acts including the *Freedom of Information Act 1982*, *National Film and Sound Archive Act 2008* and the *Screen Australia and National Film and Sound Archive (Consequential and Transitional Provisions) Act 2008*.

Schedule 2 to the Bill contains provisions to legally transfer part of SA's film library and associated assets and liabilities to the NFSAA. In addition, Schedule 2 contains provisions relating to the transfer of staff from SA to the NFSAA and other transitional matters.

### **FINANCIAL IMPACT STATEMENT**

The Screen Australia (Transfer of Assets) Bill 2010 will have minimal impact on Commonwealth expenditure.

**ABBREVIATIONS**

The following abbreviations are used in this explanatory memorandum:

APS	Australian Public Service
Bill	Screen Australia (Transfer of Assets) Bill 2010
C&T Act	<i>Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Act 2008</i>
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
FOI Act	<i>Freedom of Information Act 1982</i>
FW Act	<i>Fair Work Act 2009</i>
LI Act	<i>Legislative Instruments Act 2003</i>
LSL Act	<i>Long Service Leave (Commonwealth Employees) Act 1976</i>
Minister	Minister for the Arts
NFSA	National Film and Sound Archive
NFSAA	National Film and Sound Archive of Australia
NFSA Act	<i>National Film and Sound Archive Act 2008</i>
PS Act	<i>Public Service Act 1999</i>
SA	Screen Australia
SA Act	<i>Screen Australia Act 2008</i>

## NOTES ON CLAUSES

### Clause 1 – Short title

1. Clause 1 provides that the Bill, when enacted, may be cited as the *Screen Australia (Transfer of Assets) Act 2010*.

### Clause 2 – Commencement

2. 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.
3. Item 1 of the table provides that clauses 1 to 4 of the Bill (containing the short title, the commencement provision and the provision explaining the operation of the Schedules to the Bill), as well as anything in the Bill not covered by the table, would commence on the day after the Bill receives the Royal Assent.
4. Item 2 of the table provides that items 1, 2 and 3 of Schedule 1 to the Bill (containing amendments to the *Freedom of Information Act 1982* (the FOI Act) and bulk amendments to the *National Film and Sound Archive Act 2008* (the NFSA Act)) would commence on 1 July 2011.
5. Item 3 of the table provides that items 4, 5, 6 and 7 of Schedule 1 to the Bill (which contain further technical amendments to the NFSA Act including amendments to titles and headings) would commence immediately after the commencement of the provisions covered by table item 2.
6. Item 4 of the table provides that item 8 of Schedule 1 to the Bill (which contains bulk amendments to the *Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Act 2008* (the C&T Act)) would commence on 1 July 2011.
7. Item 5 of the table provides that items 9, 10, 11 and 12 of Schedule 1 to the Bill (which contain further technical amendments to the C&T Act) would commence immediately after the commencement of the provisions covered by table item 4.
8. The commencement provisions for Schedule 1 to the Bill have been specified in this way to ensure that the bulk amendments to the NFSA Act and C&T Act are made in the appropriate order and no conflicts arise in determining precisely what amendments need to be made to these Acts.
9. Item 6 of the table provides that Schedule 2 to the Bill (which contains provisions relating to the transfer of film library assets and film library liabilities and the transfer of employees) would commence on the day after the Bill receives the Royal Assent.

### **Clause 3 – Schedule**

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

### **Clause 4 – Extended geographic application of this Act**

11. The Bill will extend to every external territory and applies within and outside Australia.

### **Schedule 1 – Name change**

12. Schedule 1 to the Bill provides for bulk amendments (as well as specific amendments to titles, headings and a definition) to the NFSA Act and the C&T Act to substitute the new name of the National Film and Sound Archive. Schedule 1 also makes a number of specific amendments to the FOI Act to allow for this name change.
13. The change from NFSA to NFSAA is to allow the agency's name to be consistent with the majority of the Australian Government collecting institutions such as the National Gallery of Australia and the National Museum of Australia. The change will enable the NFSAA to be identified internationally as being an Australian collecting institution.

### ***Freedom of Information Act 1982***

#### **Item 1 Paragraph 13(1)(e)**

14. This item amends the name of the NFSA to the NFSAA in the FOI Act. Paragraph 13(1)(e) of the FOI Act relates to access to program or related material in the collection of the National Film and Sound Archive.

#### **Item 2 Paragraph 13(1)(e)**

15. This item also amends the name of the NFSA to the NFSAA in paragraph 13(1)(e) of the FOI Act.

### ***National Film and Sound Archive Act 2008***

#### **Item 3 Bulk amendments**

16. This item makes bulk amendments to the NFSA Act to change the name of the NFSA to the NFSAA.

**Item 4 Title**

17. This item amends the title of the NFSA Act to change the name of the NFSA to the NFSAA.

**Item 5 Section 1**

18. This item amends the short title of the NFSA Act to change the name of the NFSA to the NFSAA.

**Item 6 Part 2 (heading)**

19. This item amends the heading for Part 2 of the NFSA Act to change the name of the NFSA to the NFSAA.

**Item 7 Part 3 (heading)**

20. This item amends the heading for Part 3 of the NFSA Act to change the name of the NFSA to the NFSAA.

***Screen Australia and National Film and Sound Archive (Consequential and Transitional Provisions) Act 2008***

**Item 8 Bulk Amendments**

21. This item provides for bulk amendments to the C&T Act by omitting any references to the NFSA and substituting with the NFSAA. The C&T Act provides for transitional and consequential matters in connection with the establishment of SA and the NFSA.

**Item 9 Title**

22. This item amends the title of the C&T Act to change the name of the NFSA to the NFSAA.

**Item 10 Item 1 of Schedule 2 (definition of NFSA)**

23. This item repeals the definition of NFSA in the C&T Act

**Item 11 Item 1 of Schedule 2**

24. This item inserts a new definition of the NFSAA into the C&T Act.

### **Item 12 Part 7 of Schedule 2 (heading)**

25. This item amends the heading for Part 7 of Schedule 2 of the C&T Act to change the name of the NFSA to the NFSAA.

## **Schedule 2 – Screen Australia**

### **Part 1 – Certain assets and liabilities of Screen Australia transferred to the NFSAA**

26. Part 1 of Schedule 2 to the Bill provides for the vesting of certain assets and liabilities of the SA's film library in the NFSAA.
27. SA and the NFSA were established as separate statutory authorities on 1 July 2008. The agencies have completed over two years of operations as separate statutory authorities. In that time it has become clear that certain functions associated with Screen Australia's film library, and related sales and digital learning functions, are best placed with the NFSA. The film library contains a substantial archival resource and the NFSA, as Australia's premier collecting institution for audio-visual material, is the agency that should be responsible for preserving and supporting the development and exploitation of this resource. For the avoidance of doubt, the film library, sales and digital learning functions fall within the statutory functions set out in subsection 6(1) of the NFSAA Act.
28. Part of SA's film library consists of a collection of approximately 5,000 films (and associated materials) produced by the former Film Australia Ltd and its predecessor agencies or acquired from third party producers. Since the establishment of SA, the library has been supplemented by documentary films produced with funds made available by SA's National Documentary Program. The sales function relates to the commercial use of films comprised within SA's library collection and certain other films, the relevant rights to which were acquired by Film Australia Ltd. The digital learning function is a collection of primarily on-line educational resources which uses audio-visual material and stills within the library and associated teaching material.

### **Item 1 – Definitions**

29. This item sets out the definitions to be used for the purposes of Schedule 2. The most significant definition is 'film library' which is intended to encompass the functions to be transferred from SA to the NFSAA and includes a part of SA's film library (that is, the library of films and associated materials that were previously owned by Film Australia Limited and that were transferred to Screen Australia under the C & T Act) as well as the associated sales and digital learning functions. For the avoidance of doubt, any material which is currently held by SA in regards to its sales and digital learning functions is considered part of the film library, as defined, for the purposes of this Bill. In addition, the 'transition time' for the transfer of film library assets and liabilities from SA to NFSAA is defined in the Bill as 1 July 2011.

30. The Bill only deals with the transfer of the library as it existed under the management of Film Australia Limited as at 30 June 2008, immediately prior to the transfer of that library to SA under the C&T Act. It is intended that the ownership of assets and liabilities arising on and after 1 July 2008 (for example SA's rights in films produced under the National Documentary Program) not be transferred to NFSAA and instead be retained by SA. However, it is intended that arrangements to confer certain commercial use rights on NFSAA in relation to such retained assets will be put in place.

**Item 2 – Film library assets and film library liabilities of Screen Australia become assets and liabilities of NFSAA**

31. Subitem 2(1) provides that item 2 applies to assets and liabilities of SA immediately before the transition time (that is, 1 July 2011).

32. Sub item 2(2) provides that at the transition time all film library assets and film library liabilities cease to be assets and liabilities of SA and become assets and liabilities of the NFSAA without the need for any conveyance, transfer or assignment. The NFSAA will be the successors in law in relation to these assets and liabilities.

33. Subitem 2(3) provides that before the transition time the Minister may determine in writing that specified assets and liabilities, other than those associated with the film library but which are related or connected to the film library, become assets and liabilities of the NFSAA. This subitem is to ensure that any assets or liabilities that are not directly part of the film library but are necessary to the functioning of the film library are transferred to the NFSAA.

34. For the avoidance of doubt, item 2 only operates to transfer rights held by SA, including intellectual property rights, to the NFSAA. Third party rights in any of the material transferred under subitems 2(2) and 2(3) will not be affected.

35. Subitem 2(4) provides that any assets and liabilities specified by the Minister in a determination under subitem 2(3) at the transition time cease to be assets and liabilities of SA and become assets and liabilities of the NFSAA. The NFSAA will be the successor in law in relation to those assets and liabilities.

36. Subitem 2(5) provides that before the transition time, despite subitem 2(2), the Minister may determine in writing that specified film library assets or liabilities of SA continue to be assets or liabilities of SA and do not become assets or liabilities of NFSAA. This subitem is to ensure that if, by reason of the operation of the Bill, there would be a vesting in NFSAA of assets or liabilities which, although having some connection with the film library, are intended to remain with SA on account of their more substantial connection to SA's retained assets and business, those assets and liabilities will remain with SA.

37. A determination by the Minister under subitems 2(3) or 2(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* (LI Act). Subitem 2(6) confirms this and is included to assist readers.



38. An asset which immediately before the transition time was held by SA on trust and has become an asset of NFSAA under item 2 is taken, after the transition time, to be held on trust by NFSAA. Such an asset is subject to the terms of the trust on which the asset was held by SA (subitem 2(7)).

### **Item 3 - Certificates for vesting of assets**

39. Item 3 provides for a simplified procedure for the registration of assets vested in NFSAA under item 2. This procedure is as follows:

- (a) The Minister signs a certificate identifying the asset and stating that the asset has become vested in NFSAA under item 2.
- (b) 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 3(4)).
- (c) 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 1 of Schedule 2 to this Bill.

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

### **Item 4 - Certificates taken to be authentic**

41. Item 4 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 5 - Exemption from stamp duty and other State or Territory taxes**

42. Item 5 is required to ensure that State and Territory taxes such as stamp duty do not apply to the operation of Schedule 2 of the Bill. The item provides that no stamp duty or other tax is payable under the law of a State or Territory in respect of an exempt matter (subitem 5(1)). 'Exempt matter' is defined in subitem 5(2) as the vesting of a film library asset or film library liability under item 2 of the Bill, or any other operation of Schedule 2.

43. Under subitem 5(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 for all purposes (other than in criminal proceedings) of matters stated in the certificate (subitem 5(4)).

44. A certificate made by the Minister under subitem 5(3) is not a legislative instrument within the meaning of section 5 of the LI Act. Subitem 5(5) confirms this and is included to assist readers.

## **Part 2—Staff of Screen Australia**

45. Part 2 of Schedule 2 to the Bill provides for matters relating to the transfer of relevant SA employees currently working in connection with the film library to the NFSAA. The SA staff are non-APS employees engaged under subsection 31(2) of the *Screen Australia Act 2008* (SA Act) and will be transferred to the NFSAA subject to the *Public Service Act 1999* and by a determination under section 72 of that Act.

### **Item 6 - Non-APS employees of Screen Australia transferred to NFSAA as APS employees**

46. Item 6 applies to people appointed or employed by SA under subsection 31(2) of the SA Act immediately before the transition time who are transferred to employment at the NFSAA under the PS Act.

47. Subitem 6(2) makes provision for such people to have accrued entitlement to annual leave, personal leave and carer's leave which applied to their employment by SA immediately before the transition time. Rather than paying out accrued annual leave to employees or employees losing their entitlement to personal leave and carer's leave, this subitem 6(2) means that staff can simply take their entitlements to annual leave, personal leave and carer's leave to the NFSAA and use them when required.

48. Such transfer is with continuity of service, this is confirmed by subitem 6(4)). For the purposes of the unpaid parental leave provisions in Division 5 of Part 2-2 of the *Fair Work Act 2009* (the FW Act), a transferring employee's service at NFSAA is also taken to be continuous with his or her service as an officer or employee of SA (subitem 6(3)).

### **Item 7 – No transfer of business**

49. For the avoidance of doubt, item 7 makes clear that nothing in Schedule 2 to the Bill results in a transfer of business for the purposes of the FW Act.

## **Part 3—Things done by, references in instruments to, legal proceedings of and records or documents of Screen Australia**

### **Item 8 - Things done by, or in relation to, Screen Australia**

50. Before or after the transition time, the Minister may make a written determination that a specified thing done by, or in relation to, SA before the transition time in respect of a film library asset or a film library liability (or any other assets or liabilities) as result of the operation of item 2, is taken to have been done by, or in relation to, SA (subitem 8(1) and 8(4)).

51. A determination made under subitem 8(1) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the LI Act. Subitem 8(5) confirms this and is included to assist readers.

**Item 9 - References in instruments to Screen Australia**

52. Item 9 applies to instruments (as defined in subitem 9(2)) referring to SA which are in force immediately before the transition time (subitem 9(1)). Such instruments that relate to:
- (a) a film library asset or film library liability (or any other asset or liability) of SA that, as a result of the operation of item 2, become an asset or liability of NFSAA at the transition time; or
  - (b) a thing done by, or in relation to, SA, that, as a result of the operation of item 8 is taken to be done by, or in relation to, the NFSAA at the transition time
- have effect from the transition time as if the reference in the instrument to SA referred to the NFSAA (subitem 9(2)).
53. Item 9 is not intended to apply to international treaties or agreements.
54. This item does not operate to transfer the instruments themselves, it just amends the references within the instruments.
55. Where subitem 9(2) does not apply to an instrument, the Minister may determine that the reference in the instrument has effect as if the reference to SA were to NFSAA, (subitem 9(3)). The Minister may make a determination under subitem 9(3) before or after the transition time (subitem 9(5)).
56. A determination made under subitem 9(3) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the LIA Act. Subitem 9(6) confirms this and is included to assist readers.

**Item 10 - Legal Proceedings of Screen Australia**

57. Item 10 applies to any proceedings to which SA was a party that were pending in any court or tribunal immediately before the transition time. If the proceedings related to a film library asset or film library liability (or any other asset or liability) where the NFSAA has become the successor in law of SA as result of the operation of item 2, then at and after transition time NFSAA is taken to be substituted as a party to the proceedings (subitem 10(2)).
58. Where subitem 10(2) does not apply to the proceedings (but the proceedings relate to the operation of Schedule 2 to the Bill), the Minister may determine in writing that NFSAA is to be substituted as a party to the proceedings in respect to that film library asset and film library liability (or other asset or liability) (subitem 10(3)). The Minister may make a determination under subitem 10(3) before or after the transition time (subitem 10(5)).
59. A determination made under subitem 10(3) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the LI Act. Subitem 10(6) confirms this and is included to assist readers.

### **Item 11 - Transfer of custody of records or documents of Screen Australia**

60. Item 11 applies to a record or document that is, immediately before the transition time, in the custody of SA. If the record or document relates to either:
- (a) a film library asset or a film library liability (or any other asset or liability) as a result of the operation of item 2, becomes an asset or liability of SA at the transition time; or
  - (b) a thing done by or in relation to, SA, that as a result of the operation of item 8, is taken to be done by, or in relation to, NFSAA;
- then after the transition time, the record or document is to be transferred into the custody of NFSAA (subitem 11(2)).
61. Where subitem 11(2) does not apply to a record or document (but the record or document relates to the operation of Schedule to the Bill), the Minister may determine that at or after the transition time, the record or document is to be transferred into the custody of the NFSAA (subitem 11(3)). The Minister may make a determination under subitem 11(3) before or after the transition time (subitem 11(5)).
62. A determination made under subitem 11(3) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the LI Act. Subitem 11(6) confirms this and is included to assist readers.
63. 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 11(7) applies section 20 of the CAC Act to a body to which accounting records are transferred under item 11 as if the records were records of that body.

### **Item 12 - Variation of the operation of this Part**

64. Item 12 provides that the Minister may determine in writing that a provision in item 9, 10 or 11 does not apply to the instruments, proceedings, records or documents specified in the determination. A determination under subitem 12(1) can be specified to take effect retrospectively but not at a time earlier than the transition time (paragraph 12(2)(a)).
65. A determination made under subitem 12(1) is not a legislative instrument, as it is not legislative in character and therefore not within the meaning of section 5 of the LI Act. Subitem 12(3) confirms this and is included to assist readers.

## **Part 4—Other matters**

### **Item 13 - Transfer of appropriated money**

66. For the purposes of the operation of Appropriation Acts ('Appropriation Act' is defined in subitem 13(5) 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 SA, is to be read as the amount that relates to NFSAA instead (subitem 13(1)). A determination made by the Finance Minister under item 13 must be related to transfer of the film library functions under Schedule 2 of the Bill.

67. Subitem 13(3) ensures that a determination made under subitem 13(1) cannot result in a change in the total amount appropriated.
68. A determination made under subitem 13(1) is a legislative instrument under section 5 of the LI Act. However, such determinations are to be exempt from the disallowance and sunset provisions (section 42 and Part 6 of the LI Act, respectively). The instrument that would be made under this item is intended to cover an arrangement whereby a portion of SA's annual appropriation from 2011-12 onwards would be appropriated to the NFSAA. The sunset 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 NFSAA will not be disrupted.

#### **Item 14 - Compensation for acquisition of property**

69. 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.
70. 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 14(1)). In the absence of agreement, the person may institute proceedings in a court of competent jurisdiction for the recovery of reasonable compensation (subitem 14(2)).
71. In item 18, 'acquisition of property' and 'just terms' each have their respective meanings under paragraph 51(xxxi) of the Constitution (subitem 14(3)).

#### **Item 15 - Delegation by Minister**

72. Under this item, the Minister may delegate in writing all or any of his or her powers under this Bill to the Secretary, or a 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 15(2)).
73. 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 16 – Regulations**

74. 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 employment, at or after the transition time, by the NFSAA, of a person appointed, engaged or employed, immediately before transition time, by SA; and
  - (c) leave of employees of SA approved before the transition time.

75. Any such regulations are legislative instruments under section 6(a) of the LI Act.

**Item 17 – References in this Schedule**

76. This item has been included for the avoidance of doubt to clarify that references to the NFSAA in Schedule 2 to the Bill are to be read as references to the NFSAA prior to the 1 July 2011. The name change for the NFSAA will not take effect until 1 July 2011 but Schedule 2 to the Bill, which contains numerous references to the NFSAA, will commence from the day after the Royal Assent (which is likely to be a date prior to 1 July 2011). This item ensures that there is no confusion as to the meaning and effect of those items in Schedule 2 to the Bill which refer to the NFSAA.